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THE

ENGLISH AND EMPIRE DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS.

VOLUME XXXIV.

THE
ENGLISH AND EMPIRE
DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXXIV.

MASTER AND SERVANT.

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MEDICINE AND PHARMACY.

METROPOLIS.

MINES, MINERALS AND QUARRIES.

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MISPRISION OF TREASON.

See CRIMINAL LAW AND PROCEDURE.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.*, [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (*e.g.*, [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R. ...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ...	Eng.
Bar. & Arn.	Barron and Arnold's Election Cases, 1 vol., 1843—1846 ...	Eng.
Bar. & Aust.	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch.	Barnardiston's Reports, Chancery, fol , 1 vol., 1740—1741 ...	Eng.
Barn. K. B.	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 ...	Ir.
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw.	Beawes's Lex Mercatoria	Eng.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess. ...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol. ...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec. ...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol. ...	Eng.
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben.	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579 ...	Eng.
Benl.	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber.	New Brunswick Reports (Berton)	Can.
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ...	Eng.
Bing. N. C.	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ...	Eng.
Biss. & Sm.	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas. ...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch. ...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com.	Blackstone's Commentaries	Eng.
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S.	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
Bluett	Bluett's Isle of Man Cases	I. of M.
Bom.	Bombay High Court Reports	Ind.
Bom. A. C.	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca.	Bombay Reports, Crown Cases	Ind.
Bom. O. C.	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R. ...	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bott.	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827 ...	Eng.
Bourke	Bourke's Reports	Ind.
Br. & Col. Pr. Cas. ...	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract.	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr.	Sir R. Brooke's Abridgement	Eng.
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C.	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800 ...	Eng.
Bro. Supp. to Mor. ...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F.	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 ...	Scot.
Brown. & Lush. ...	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715 ...	Scot.

Buch.	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.
Buch. A. C.	Buchanan's Reports of Appeal Court (Cape)	S. Af.
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull. N. P.	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	Eng.
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772	Eng.
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A.	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B.	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S.	Common Bench Reports, New Series, 20 vols., 1856—1865	Eng.
C. B. R.	Canadian Bankruptcy Reports Annotated, 1920—(current)	Can.
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—1913	Eng.
C. L. Ch.	Common Law Chambers	Can.
C. L. J.	Cape Law Journal	S. Af.
C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
C. L. R.	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R.	Commonwealth Law Reports	Aus.
C. L. R.	Calcutta Law Reporter	Ind.
C. L. T.	Canadian Law Times	Can.
C. L. T. Occ. N.	Canadian Law Times, Occasional Notes	Can.
C. P.	Upper Canada Common Pleas	Can.
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880	Eng.
C. P. D.	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C.	Canadian Reports, Appeal Cases	Can.
C. T. R.	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N.	Calcutta Weekly Notes	Ind.
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	Eng.
Cald. Mag. Cas.	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	Eng.
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas.	Cameron's Supreme Court Cases	Can.
Cam. Prac.	Cameron's Supreme Court Practice	Can.
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas.	Commercial Law Reports of Canada, 4 vols., 1901—1905	Can.
Can. Crim. Cas.	Canadian Criminal Cases, Annotated, 1898—(current)	Can.
Can. Gaz.	Canadian Gazette	Can.
Can. Ry. Cas.	Canadian Railway Cases	Can.
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	Eng.
Car. C. L.	Carrington's Treatise on Criminal Law	Can.
Card. Doc. Ann.	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	Eng.
Carl.	New Brunswick Reports (Carleton)	Can.
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842	Eng.
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	Eng.
Cart.	Cases on British North America Act (Cartwright)	Can.
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	Eng.
Cary	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1685—1727	Eng.
Cas. *temp.* Finch	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. *temp.* King	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733	Eng.
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig.	Cassells' Digest	Can.
Ch. (preceded by date)	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)	Eng.
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Cas. in Ch.	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch.	Upper Canada Chancery Chambers Reports	Can.
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas.	Charley's Chamber Cases, 2 vols., 1875—1876	Eng.
Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chip.	New Brunswick Reports (Chipman)	Can.

Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822 ...	Eng.
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas. ...	Clark and Scully's Drainage Cases	Can.
Clay.	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A.	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ent.	Coke's Entries	Eng.
Co. Inst.	Coke's Institutes	Eng
Co. L. J.	Colonial Law Journal	N.Z
Co. Litt.	Coke on Littleton (1 Inst.)	Eng.
Co. Rep.	Coke's Reports, 13 parts, 1572—1616	Eng.
Coch.	Nova Scotia Reports (Cochran)	Can.
Cockb. & Rowe ...	Cockburn and Rowe's Election Cases, 1 vol., 1833	Eng.
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols.	Eng.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713	Eng.
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	Eng.
Com. Cas.	Commercial Cases, 1895—(current)	Eng.
Com. Dig.	Comyns' Digest	Eng.
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	Ir.
Cong. Dig.	Congdon's Digest	Can.
Const	Const's edition of Bott's Poor Laws, 3 vols., 1807	Eng.
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	Ir.
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg. ..	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	Eng.
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	Eng.
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. *temp.* Brough. ...	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834	Eng.
Coop. *temp.* Cott. ...	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	Eng.
Cor.	Coryton's Reports	Ind.
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819	Eng.
Correspondances Jud. ...	Correspondances Judiciaires	Can.
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ...	Scot.
Cout.	Coutlees' Unreported Cases	Can.
Cout. Dig.	Coutlees' Digest	Can.
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778	Eng.
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)	Eng.
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797	Eng.
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Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ...	Eng.
Cr. App. Rep.	Cohen's Criminal Appeal Reports, 1908—(current)	Eng.
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	Eng.
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
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Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.	Eng.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
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D. [illegible]	Duxbury's Reports of the High Court of the South African Republic	S. Af.
D. C. A.	Dorion's Queen's Bench Reports	Can.
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Dal.	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574 ...	Eng.
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	Scot.
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
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unning	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
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. D. L.	South African Law Reports, Eastern Districts Local Division	S. Af.
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Jebb, C. C.	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840 ...	Ir.
Jebb, Cr. & Pr. Cas. ...	Jebb's Crown and Presentment Cases	Ir.
Jenk.	Jenkins' Reports, 1 vol., 1220—1623	Eng.
Jo. & Car.	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	Eng.
Jo. & Lat.	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	Ir.
Jo. Ex. Ir.	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838 ...	Ir.
John.	Johnson's Reports, Chancery, 1 vol., 1858—1860	Eng.
John. & H.	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	Eng.
Jur.	Jurist Reports, 18 vols., 1837—1854	Eng.
Jur. N. S.	Jurist Reports, New Series, 12 vols., 1855—1867	Eng.
K.	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	S. Af.
K. & G.	Keane and Grant's Registration Cases, 1 vol., 1854—1862 ...	Eng.
K. & J.	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858 ...	Eng.
K. B. (preceded by date)	Law Reports, King's Bench Division, since 1900 (*e.g.*, [1901] 2 K. B.)	Eng.
Kames, Dict. Dec. ...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec. ...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec. ...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	Scot.
Kay	Kay's Reports, Chancery, 1 vol., 1853—1854	Eng.
Keb.	Keble's Reports, fol., 3 vols., 1661—1677	Eng.
Keen	Keen's Reports, Rolls Court, 2 vols., 1836—1838	Eng.
Keil.	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578 ...	Eng.
Kel.	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
Kel. W.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734...	Eng.
Keny.	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759 ...	Eng.
Keny. Ch.	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr	New Brunswick Reports (Kerr)	Can.

Kilkerran	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	Knapp and Ombler's Election Cases, 1 vol., 1834—1835 ...	Eng.
Knapp	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Eng.
Knox	Knox's Reports	Aus.
Konst. & W. Rat. App.	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Eng.
Konst. Rat. App. ...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908 ...	Eng.
L. & G. *temp.* Plunk. ...	Lloyd and Goold's Reports *temp.* Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. *temp.* Sugd. ...	Lloyd and Goold's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Eng.
L. C. & M. Gaz. ...	Local Courts and Municipal Gazette	Can.
L. C. J.	Lower Canada Jurist	Can.
L. C. L. J.	Lower Canada Law Journal	Can.
L. C. R.	Lower Canada Reports	Can.
L. G. R.	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy.	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	Law Journal (County Courts Reporter), 1912—(current) ...	Eng.
L. J. C. P.	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B. ...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C.	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A. ...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	Leader Law Reports	S. Af.
L. M. & P.	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	Legal News	Can.
L. R. A. & E.	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R.	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875 ...	Eng.
L. R. C. P.	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	Law Reports, Exchequer, 10 vols., 1865—1875...	Eng.
L. R. H. L.	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App. ...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	Law Reports, Probate and Divorce, 3 vols., 1865—1875 ...	Eng.
L. R. P. C.	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div. ...	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	Eng.
L. T.	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	La Themis	Can.
Lane	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628 ...	Eng.
Laws. Reg. Cas. ...	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
e. & Ca.	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865 ...	Eng.
Leach	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758 ...	Eng.
Lee *temp.* Hard. ...	T. Lee's Cases *temp.* Hardwicke, King's Bench, 1 vol., 1733—1792	Eng.

Leg. Rep.	Legal Reporter	Ir.
Legge	Legge's Reports	Aus.
Leon.	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	Eng.
Lev.	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	Eng.
Lew. C. C.	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	Eng.
Ley	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	Eng.
Lib. Ass.	Liber Assisarum, Year Books, 1—51 Edw. III.	Eng.
Lilly	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	Eng.
Litt.	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Lloyd, L. R.	Lloyd's List Law Reports, 1919—(current)	Eng.
Lloyd, Pr. Cas.	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	Eng.
Lofft	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	Eng.
Long. & T.	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	Ir.
Lords Journals	Journals of the House of Lords	Eng.
Lud. E. C.	Luder's Election Cases, 3 vols., 1784—1787	Eng.
Lumley, P. L. C.	Lumley's Poor Law Cases, 2 vols., 1834—1842	Eng.
Lush.	Lushington's Reports, Admiralty, 1 vol., 1859—1862	Eng.
Lut.	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	Eng.
Lut. Reg. Cas.	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	Eng.
Lynd.	Lyndwood, Provinciale, fol., 1 vol.	Eng.
M.	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
M. & S.	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	Eng.
M. & W.	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	Eng.
M. C. C.	Mining Commissioner's Cases	Can.
M. C. R.	Montreal Condensed Reports	Can.
M. H. C. R.	Madras High Court Reports	Ind.
M. L. R. (Vol.) K. B. or Q. B.	Montreal Law Reports, King's Bench or Queen's Bench	Can.
M. L. R. (Vol.) S. C.	Montreal Law Reports, Superior Court	Can.
M. M. Cas.	Martin's Reports of Mining Cases	Can.
Mac.	Macassey's New Zealand Reports	N.Z.
Mac. & G.	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	Eng.
Mac. & H.	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	Eng.
M'Cle.	M'Cleland's Reports, Exchequer, 1 vol., 1824	Eng.
M'Cle. & Yo.	M'Cleland and Younge's Reports, Exchequer, 1 vol., 1824—1825	Eng.
Macfarlane	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	Scot.
Macl. & Rob.	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	Scot.
Macph. (Ct. of Sess.)	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	Scot.
Macq.	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	Scot.
Macr.	Macrory's Patent Cases, 2 parts, 1847—1856	Eng.
Mad.	Madras High Court Reports	Ind.
Madd.	Maddock's Reports, Chancery, 6 vols., 1815—1822	Eng.
Madd. & G.	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	Eng.
Madox	Madox's Formulare Anglicanum	Eng.
Madox, Exch.	Madox's History and Antiquities of the Exchequer, 2 vols.	Eng.
Mag.	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	Eng.
Man. & G.	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	Eng.
Man. & Ry. K. B.	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	Eng.
Man. & Ry. M. C.	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	Eng.
Man. L. J.	Manitoba Law Journal	Can.
Man. L. R.	Manitoba Law Reports	Can.
Man. R. *temp.* Wood	Manitoba Reports *temp.* Wood	Can.
Mans.	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	Eng.
Mar. L. C.	Maritime Law Reports (Crockford), 3 vols., 1860—1871	Eng.
March	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	Eng.
Marr.	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Marsh.	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	Eng.
Marsh.	Marshall's Reports	Ind.
Mayn.	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	Eng.
Meg.	Megone's Companies Acts Cases, 2 vols., 1889—1891	Eng.

Men.	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
Mer.	Merivale's Reports, Chancery, 3 vols., 1815—1817	Eng.
Milw.	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	Ir.
Mod. Rep.	Modern Reports, 12 vols., 1669—1755	Eng.
Mol.	Molloy's Report's, Chancery (Ireland), 3 vols., 1808—1831	Ir.
Mont.	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	Eng.
Mont. & A.	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	Eng.
Mont. & B.	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch.	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M.	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G.	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P.	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S.	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App.	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C.	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S.	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M.	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R.	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C.	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P.	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B.	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict.	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr.	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos.	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep.	Municipal Reports	Can.
Murd. Epit.	Murdoch's Epitome	Can.
Murp. & H.	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr.	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr.	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K.	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. (preceded by date)	Northern Ireland Law Reports, 1925—(current) (*e.g.*, [1925] N.)	Ir.
N. A. C.	Native Appeal Cases	S. Af.
N. & S.	Nichols and Stop's Reports (Tasmania)	Tasmania
N. B. Dig.	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep.	New Brunswick Equity Reports	Can.
N. B. R.	New Brunswick Reports	Can.
N. B. R. (All.)	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.)	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.)	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.)	New Brunswick Reports (Chipman)	Can
N. B. R. (Han.)	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr)	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.)	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.)	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.)	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.)	New Brunswick Reports (Trueman)	Can.
N. L. R.	Natal Law Reports	S. Af.
N. P. D.	South African Law Reports, Natal Provincial Division	S. Af.
N. S. R.	Nova Scotia Reports	Can.
N. S. R. (Coch.)	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & O.)	Nova Scotia Reports (Geldert and Oxley)	Can.
N. S. R. (G. & R.)	Nova Scotia Reports (Geldert and Russell)	Can.
N. S. R. (James)	Nova Scotia Reports (James)	Can.
N. S. R. (Old.)	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.)	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.)	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.)	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad.	New South Wales Reports, Admiralty	Aus.
N. S. W. B.	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas.	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq.	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtn. Cas.	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R.	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts.	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.)	New South Wales Supreme Court Reports (Equity)	Aus.
N. S. W. S. C. R. (L.)	New South Wales Supreme Court Reports (Law)	Aus.
N. S. W. S. C. R. N. S.	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N.	New South Wales Weekly Notes	Aus.
N. W.	North-Western Provinces High Court Reports	Ind.
N. W. T. R.	North-West Territories Reports	Can.
N. Z. Jur.	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law	New Zealand Jurist Mining Law	N.Z.

Russ. & Ry.	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R.	Russell's Election Reports...	Can.
Ry. & Can. Cas. ...	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & Can. Tr. Cas. ...	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde & K. Rat. App. ...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App. ...	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.
S.	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.
S. A. L. R.	South Australian Law Reports	Aus.
S. A. L. R.	South African Law Reports	S. Af.
S. A. R.	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. A. S. R.	South Australian State Reports, since 1921 (*e.g.*, [1921] S. A. S. R.)	Aus.
S. C.	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (*e.g.*, [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 (*e.g.*, [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 (*e.g.*, [1906] S. C. (J.))	Scot.
S. C. R.	Canada, Supreme Court Reports	Can.
S. L. T.	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	Queensland State Reports	Aus.
S. R.	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	New South Wales, State Reports	Aus.
S. R. Q.	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	Stuart's Vice-Admiralty Reports	Can.
S. W. A.	South-West Africa Law Reports	S.-W. Af.
Saint	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ...	Eng.
Salk.	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	Saskatchewan Law Reports	Can.
Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ...	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ...	Eng.
Say.	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ...	Eng.
Sc. Jur.	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R.	Scottish Law Reporter, 1865—1924	Scot.
Sc. R. R.	Scots Revised Reports	Scot.
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R.	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Sea. & Sm.	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	Eng.
Sel. Cas. Ch.	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N. P.	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B. ...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem.	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742	Eng.
Sh. (Ct. of Sess.) ...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & Macl.	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig.	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just.	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App.	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct.	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	Sheppard's Touchstone of Common Assurances	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas. ...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699... ...	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.

Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	Ir.
Sm. & G.	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	Eng.
Smith, K. B.	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	Eng.
Smith, L. C.	Smith's Leading Cases, 2 vols.	Eng.
Smith, Reg. Cas. ...	C. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo.	Solicitors' Journal, 1856—(current)	Eng.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
St. R. Qd. (preceded by date)	Queensland State Reports, since 1902 (*e.g.*, [1902] St. R. Qd.)	Aus.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart ...	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton...	Stockton's Vice-Admiralty Report and Digest	Can.
Story ...	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm.	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S. ...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Stuart, K. B.	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
Sty.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw.	Swabey's Report, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swan.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Swin.	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M.	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. H.	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L.	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P.	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D.	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
T. S.	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay.	Taylor's King's Bench Reports	Can.
Temp. Wood	Manitoba Reports *temp.* Wood	Can.
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom.	Nova Scotia Reports (Thomson)	Can.
Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town St. Tr.	Townsend, Modern State Trials	Eng.
Trem. P. C.	Tremaine Pleas of the Crown, 1 vol., 1667	Eng.
Trist.	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tru.	New Brunswick Reports (Trueman)	Can.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. L. J. N. S. ...	Canada Law Journal, New Series, 1865—(current)	Can.

U. C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
U. C. R.	Upper Canada Reports, Queen's Bench	Can.
Udal	Fiji Law Reports (Udal)	Fiji.
V. L. R.	Victorian Law Reports	Aus.
V. R.	Victorian Reports	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
V. R. (Eq.)	Victorian Reports (Equity)	Aus.
V. R. (Law)	Victorian Reports (Law)	Aus.
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	Eng.
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.
Vern.	Vernon's Reports, Chancery, 2 vols., 1680—1719	Eng.
Vern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	Ir.
Ves.	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	Eng.
Ves. & B.	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	Eng.
Ves. Sen.	Vesey Sen.'s Reports, 2 vols., 1747—1756	Eng.
Vin. Abr.	Viner's Abridgment of Law and Equity, fol., 22 vols.	Eng.
Vin. Supp.	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
W.	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	S. Af.
W. A. L. R.	West Australian Law Reports	Aus.
W. A'B. & W.	Webb, A'Beckett and Williams' Victorian Reports	Aus.
W. & W.	Wyatt and Webb	Aus.
W. C. C.	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	Eng.
W. H. C.	South African Law Reports, Witwatersrand High Court	S. Af.
W. Jo.	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	Eng.
W. L. D.	South African Law Reports, Witwatersrand Local Division	S. Af.
W. L. R.	Western Law Reporter	Can.
W. L. T.	Western Law Times	Can.
W. N. (preceded by date)	Law Reports, Weekly Notes, 1866—(current) (*e.g.*, [1866] W. N.)	Eng.
W. N.	Calcutta Weekly Notes	Ind.
W. R.	Weekly Reporter, 54 vols., 1852—1906	Eng.
W. Rt.	Sutherland's Weekly Reporter	Ind.
W. R.	Weekly Reporter, reporting cases in the Cape Provincial Division	S. Af.
W. W. & A'B.	Wyatt, Webb and A'Beckett	Aus.
W. W. R.	Western Weekly Reports	Can.
Wallis by Lyne	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	Ir.
Web. Pat. Cas.	Webster's Patent Cases, 2 vols., 1602—1855	Eng.
Welsh, Reg. Cas.	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	Ir.
Went. Off. Ex.	Wentworth's Office and Duty of Executors	Eng.
West	West's Reports, House of Lords, 1 vol., 1839—1841	Eng.
West *temp.* Hard.	West's Reports *temp.* Hardwicke, Chancery, 1 vol., 1736—1740	Eng.
West. Tithe Cas.	Western's London Tithe Cases, 1 vol., 1592—1822	Eng.
White	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	Scot.
White & Tud. L. C.	White and Tudor's Leading Cases in Equity, 2 vols.	Eng.
Wight	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	Eng.
Will. Woll. & Dav.	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	Eng.
Will. Woll. & H.	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	Eng.
Willes	Willes' Reports, Common Pleas, 1 vol., 1737—1758	Eng.
Wilm.	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	Eng.
Wils.	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	Eng.
Wils. & S.	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	Scot.
Wils. Ch.	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	Eng.
Wils. Ex.	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	Eng.
Win.	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	Eng.
Wm. Bl.	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	Eng.
Wm. Rob.	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	Eng.
Wms. Saund.	Williams' Notes to Saunders' Reports, 2 vols.	Eng.
Wolf. & B.	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	Eng.
Wolf. & D.	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	Eng.
Woll.	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	Eng.
Wood	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	Eng.
Y. A. D.	Young's Vice-Admiralty Reports	Can.

Y. & C. Ch. Cas.	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	Eng.
Y. & C. Ex.	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	Eng.
Y. & J.	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830 ...	Eng.
Y. B.	Year Books	Eng.
Y. B. (Rolls Series)	Year Books (Rolls Series)	Eng.
Y. B. (Sel. Soc.)	Year Books (Selden Society)	Eng.
Yelv.	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ...	Eng.
You.	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ...	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, see pp. xv—xxxi, *ante*.)

A.-G.	for Attorney-General.
Act.	„ Actiengesellschaft.
Admlty.	„ Admiralty.
Affd.	„ Affirmed.
Affg.	„ Affirming.
Akt.	„ Aktiengesellschaft; Aktiebolaget; Aktieselskabet.
Alta.	„ Alberta.
Anon.	„ Anonymous.
Apld.	„ Applied.
Appct.	„ Applicant.
Appln.	„ Application.
Appln.	„ Application to Register a Trade Mark.
Applt.	„ Appellant.
Apprvd.	„ Approved.
Arbn.	„ Arbitration.
Archbp.	„ Archbishop.
Art.	„ Article.
Ass. Tax Case	„ Assessed Tax Case.
Assce.	„ Assurance.
Assocn.	„ Association.
B. C.	„ Borough Council.
B. C.	„ British Columbia.
Bkpcy.	„ Bankruptcy.
Bkpt.	„ Bankrupt.
Bldg. Soc.	„ Building Society.
Bp.	„ Bishop.
C. A.	„ Court of Appeal.
C. & S. L. Ry. Co.	„ City & South London Railway Co.
C. C. A.	„ Court of Criminal Appeal.
C. C. R.	„ County Court Rules.
C. C. R.	„ Court of Crown Cases Reserved.
C. L. P. Act.	„ Common Law Procedure Act.
C. L. Ry. Co.	„ Central London Railway Co.
C. O. R.	„ Crown Office Rules.
C. S. U. C.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	„ *Capias ad satisfaciandum.*
Cale. Ry. Co.	„ Caledonian Railway Co.
Ch.	„ Chancery.
Ch. Div.	„ Chancery Division.
Co.	„ Company.
Co-op. Assocn.	„ Co-operative Supply Association.
Comrs.	„ Commissioners.
Consd.	„ Considered.
Corpn.	„ Corporation.
Ct.	„ Court.
Ct. of Ch.	„ Court of Chancery.
Ct. of Eq.	„ Court of Equity.
Ct. of R.	„ Court of Review.
D. C.	„ Divisional Court.
Dbtd.	„ Doubted.

Deft.	for Defendant.
Distd.	„ Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	„ Ecclesiastical Commissioners.
Eccl. Ct.	„ Ecclesiastical Court.
Ex. Ch.	„ Exchequer Chamber.
Ex p.	„ *Ex parte.*
Exch.	„ Exchequer.
Exor.	„ Executor.
Exorship.	„ Executorship.
Expld.	„ Explained.
Extd.	„ Extended.
Extrix.	„ Executrix.
Fi. fa.	„ *Fieri facias.*
Folld.	„ Followed.
G. & S. W. Ry. Co.	„ Glasgow & South Western Railway Co.
G. C. Ry. Co.	„ Great Central Railway Co.
G. E. Ry. Co.	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	„ Great Western Railway Co.
Govt.	„ Government.
Grdns.	„ Guardians or Guardians of the Poor.
H. C. of A.	„ High Court of Australia.
H. L.	„ House of Lords.
I. R. Comrs.	„ Inland Revenue Commissioners.
Insco.	„ Insurance.
JJ.	„ Justices.
Jud. Act	„ Judicature Act.
K. B. Div.	„ King's Bench Division.
L. & B. Ry. Co.	„ London & Brighton Railway Co.
L. & N. E. Ry. Co.	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	„ London & South Western Railway Co.
L. & Y. Ry. Co.	„ Lancashire & Yorkshire Railway Co.
L. B.	„ Local Board.
L. B. & S. C. Ry. Co.	„ London, Brighton & South Coast Railway Co.
L. C.	„ Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. C. C.	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board	„ Local Government Board.
L.J.	„ Lord Justice.
L.JJ.	„ Lords Justices.
L. M. & S. Ry. Co.	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	„ Magistrates.
Man.	„ Manitoba.
Mentd.	„ Mentioned.
Met. Dist. Ry. Co.	„ Metropolitan District Railway Co.
Met. Ry. Co.	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	„ Midland Great Western Railway Co.
Mid. Ry. Co.	„ Midland Railway Co.
Mtge.	„ Mortgage.
Mtgee.	„ Mortgagee.
Mtgor.	„ Mortgagor.
N. B.	„ New Brunswick.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed.
N. P.	„ Nisi Prius.

N. S.	for Nova Scotia.
N. W. P.	,, North-West Provinces.
N. W. T.	,, North-West Territories.
Ont.	,, Ontario.
Ord.	,, Order.
Overd.	,, Overruled.
P. C.	,, Privy Council.
P. E. I.	,, Prince Edward Island.
Petn.	,, Petition or Election Petition.
Pltf.	,, Plaintiff.
Q. B. Div.	,, Queen's Bench Division.
Qu.	,, *Quære.*
Qve.	,, Quebec.
R. C.	,, Rural Council.
R. D. C.	,, Rural District Council.
R. S. A.	,, Rural Sanitary Authority.
R. S. C.	,, Revised Statutes of Canada.
R. S. C.	,, Rules of the Supreme Court, 1883.
Refd.	,, Referred.
Regn. of Trade Mk.	,, Registration of Trade Mark.
Regr. of Trade Mks.	,, Registrar of Trade Marks.
Resp.	,, Respondent.
Restg.	,, Restoring.
Revsd.	,, Reversed.
Revsg.	,, Reversing.
Ry. Co.	,, Rail. Co. or Railway Co.
S. C.	,, Same Case.
S. C. (name of colony following)	,, Supreme Court of a Colony.
S. E.	,, Settled Estates.
S. E. & C. Ry. Co.	,, South Eastern & Chatham Railway Co.
S. E. Ry. Co.	,, South Eastern Railway Co.
S. P.	,, Same Point.
S.S.	,, Steamship.
Sask.	,, Saskatchewan.
Sched.	,, Schedule.
Sci. fa.	,, *Scire facias.*
Sect.	,, Section.
Set. Land Act	,, Settled Land Act.
Settlmt.	,, Settlement.
Soc.	,, Society.
Soc. Anon.	,, Société Anonyme, etc.
Solr.	,, Solicitor.
Trade Mk.	,, Trade Mark.
Tram. Co.	,, Tramways Company.
U. C.	,, Urban Council.
U. D. C.	,, Urban District Council.
U. S. A.	,, United States of America.
Union Assmt. Com.	,, Union Assessment Committee.
Urban S. A.	,, Urban Sanitary Authority.
V.-C.	,, Vice-Chancellor.
Workmen's Comp. Act	,, Workmen's Compensation Act.
Y. T.	,, Yukon Territory.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

"APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.

"APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.

"CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.

"DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.

"DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.

"EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.

"EXTENDED" (Extd.).—Compare "APPLIED," *supra*.

"FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.

"NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.

"OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.

"REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.

"MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

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Agricultural Labour	,, AGRICULTURE.	*Local Authorities*	,, LOCAL GOVERNMENT; METROPOLIS; PUBLIC HEALTH.
Architects	,, BUILDING CONTRACTS.	*Magistrates*	,, COURTS; MAGISTRATES.
Bailment, Principles of	,, BAILMENT.	*Male Servant, Licence for*	,, REVENUE.
Building Contracts	,, BUILDING CONTRACTS.	*Markets*	,, MARKETS.
Carriers	,, CARRIERS.	*Medical Register*	,, MEDICINE AND PHARMACY.
Companies	,, COMPANIES.	*National Health Insurance*	,, WORK AND LABOUR.
Corporations	,, CORPORATIONS.	*Negligence*	,, NEGLIGENCE.
Criminal Offences, generally	,, CRIMINAL LAW.	*Nuisance*	,, NUISANCE.
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Licensed Premises	,, INNS AND INNKEEPERS; INTOXICATING LIQUORS.	*Workmen's Dwellings*	,, PUBLIC HEALTH.
		Workmen's Trains	,, CARRIERS; RAILWAYS.

Part I.—The Relationship.

SECT. 1.—IN GENERAL.

1. Whether relationship created - Question of fact.]—In an action for damage done through negligent driving of a carriage & horses let to hire & driven by the servants of the owner, it is a question for the jury whether the servants were acting as the servants of the person hiring, or of the owner.—BRADY *v.* GILES (1835), 1 Mood. & R. 494, N. P.

Annotations:—**Consd.** Jones *v.* Scullard, [1898] 2 Q. B. 565. **Refd.** Dewar *v.* Tasker (1906), 95 L. T. 87.

2. —— ——.]—A director of a limited co., who is also employed as a servant to collect moneys for them, is liable to be convicted of embezzlement as a "clerk or servant" of the co. under Larceny Act, 1861 (c. 96), s. 68.—R. *v.* STUART, [1894] 1 Q. B. 310; 63 L. J. M. C. 63; 70 L. T. 44; 58 J. P. 299; 42 W. R. 303; 10 T. L. R. 166; 38 Sol. Jo. 131; 17 Cox, C. C. 723; 10 R. 124, C. C. R.

Annotation:—**Refd.** Moriarty *v.* Regent's Garage & Engineering Co., [1921] 1. K. B. 423.

3. —— **Particular direction as to particular matter.**]—On the trial, in an action for assault, pltf. proved that he was present in the gallery of a large hall where there was a meeting convened by members of an assocn., & that deft. acted as chairman. There was an interruption in the gallery near to the place where pltf. was standing, upon which deft. said, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." Pltf. was making no disturbance, but according to his statement he was seized by a man with a white ribbon in his coat & two policemen, & dragged over some benches to the front part of the gallery, & thereby injured. There was nothing to show the position or duty of those who seized him, or whether any instructions as to keeping order had been given them by deft., before the act complained of:—*Held:* there was no evidence to go to the jury of any liability on the part of deft., as there was not the ordinary relation of master & servant between him & those who assaulted pltf.; but only a particular direction as to a particular matter, & the words used by

PART I. SECT. 1.

1 i. *Whether relationship created—Question of fact.*]—HEBB *v.* LAWRENCE (1890), 7 Man. L. R. 222.—**CAN.**

1 ii. —— ——.]—FLEUTY *v.* ORR (1906), 13 O. L. R. 59; 8 O. W. R. 793.—**CAN.**

1 iii. —— ——.]—ALLISON *v.* STANDARD LUMBER CO. (B. C.), [1924] 4 D. L. R. 465; [1924] 3 W. W. R. 481; 34 B. C. R. 257.—**CAN.**

deft. did not authorise the officers to act upon their judgment as to who were the persons making the disturbance.—LUCAS *v.* MASON (1875), L. R. 10 Exch. 251; 44 L. J. Ex. 145; 33 L. T. 13; 39 J. P. 663; 23 W. R. 924.

4. —— Person employed to exercise skill.]—SIMMONS *v.* HEATH LAUNDRY CO., No. 15, *post.*

5. —— Control of mode of doing work.]—RUTH *v.* SURREY COMMERCIAL DOCK CO. (1891), 8 T. L. R. 116, C. A.

Annotation :—**Refd.** Marrow *v.* Flimby & Broughton Moor Coal & Fire Brick Co., [1898] 2 Q. B. 588.

6. Relationship may exist at will.]—The son of a man who kept an office & held various appointments, amongst which was that of clerk to a local board, which son living at home assisted his father in his office, conducting the business of the board, but without being paid any salary, may be convicted of embezzling moneys received by him on business of the local board as the clerk or servant, or as being employed in the capacity of a clerk or servant of his father, & the moneys may be alleged in the indictment to be the moneys of the father.

The relationship of an employer & employed may exist at will & need not necessarily be for a greater length of time (COCKBURN, C.J.).—R. *v.* FOULKES (1875), L. R. 2 C. C. R. 150; 44 L. J. M. C. 65; 32 L. T. 407; 39 J. P. 501; 23 W. R. 696; 13 Cox, C. C. 63, C. C. R.

7. Personal performance of work — Whether conclusive as to relation.]—UNDERWOOD *v.* PERRY & SON, LTD., No. 8, *post.*

Servants of carriers.]—*See* CARRIERS, Vol. VIII., pp. 53, 54, 56, Nos. 352–355, 370.

Servants within Larceny Acts.]—*See* CRIMINAL LAW, Vol. XV., pp. 921 *et seq.*

Servants within Bankruptcy Acts.]—*See* BANKRUPTCY, Vol. IV., pp. 475–477, Nos. 4289–4314.

Servants for the purposes of winding up under Companies Acts.]—*See* COMPANIES, Vol. X., pp. 945, 946, Nos. 6474–6477.

SECT. 2.—FACTORS GOVERNING RELATIONSHIP.

SUB-SECT. 1.—EXERCISE OF CONTROL OVER SERVANT.

A. By Immediate Employer.

(*a*) *In General.*

8. Meaning of control.]—(1) A workman was engaged by a firm to break up old metal by means of blasting. He had no regular hours of work; his time of arrival depended on the kind of morning & the work to be done; he could leave when he liked; he pleased himself & did not go to work every day as there was not always work. Having suffered an injury while at work, which resulted in total incapacity, he made an application for compensation, & the county ct. judge found that he was a "workman" within Workmen's Compensation Act, 1906 (c. 58), s. 13, on the ground that as the contract was, on the facts of the case, one in which it was impossible for him to delegate the work, it was a contract of service:—*Held:* whether there was power to delegate the work or not was not the correct test; the case must go back for a rehearing for the county ct. judge to consider more fully the question of control of the work & workman by the alleged employers.

By control I do not mean the actual control that in practice was exercised every day, because with a skilled workman the employer or the foreman is not always exercising control as to how to do his work. It is not necessary that it should be so, because he knows how to do it; but the question whether there is in the background, in the last resort, the power of control over, not only what the man has to do, but how he has to do it, is of great importance indeed. It is not necessary to say that you could not have a contract of service without this control, but if there was not that power of control as to the way in which the work is to be done in details, it would be very hard to establish a contract of master & servant (LORD STERNDALE, M.R.).

(2) The question of whether the man must do the work himself is not conclusive as to whether he is a servant or not (LORD STERNDALE, M.R.).—UNDERWOOD *v.* PERRY & SON, LTD. (1922), 15 B. W. C. C. 131, C. A.; *subsequent proceedings*, 15 B. W. C. C. 257, C. A.

9. Obligation on servant to obey orders.]—The mate of a vessel hired by the master, who was also one of the owners, at certain wages, is a servant within 6 Geo. 4, c. 16, s. 48, & is consequently entitled to six months' wages upon the bkpcy. of the master of the vessel.

I do not know of any actual case of a seaman being held to be a servant within the meaning of the Act of Parliament; but as he is hired to render his services for certain wages, & is bound to obey the orders of the master of the vessel who hired him, I think he is as much a servant as the clerk or shopman of any merchant or tradesman (SIR JOHN CROSS).—*Re* HUDSON, *Ex p.* HOMBORG

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5 i. —— *Control of mode of doing work.*]—FLETCHER MOORE *v.* IRISH INSURANCE COMRS., [1916] 2 I. R. 70, n.—**IR.**

5 ii. —— ——.]—A well-sinker entered into an agreement to sink a well. The evidence showed that all the tackle used by the well-sinker was supplied by himself, & that he was not, in the course of the work, subject to any control:—*Held:* the man was working under no contract of service.—HUGHES *v.* QUINN (1917), 52 I. L. T. 21; 11 B. W. C. C. 420.—**IR.**

5 iii. —— ——.]—*Held:* persons appointed to act in an infirmary (*a*) as resident physicians & resident surgeons; (*b*) as non-resident house physicians, non-resident house surgeons, & clinical assistants; & (*c*) as supervisors of the administration of anæsthetics, were not persons employed within National Insurance Act, 1911, in respect that, as the managers of the infirmary had no control over the manner in which these members of the staff carried out their treatment of the patients no contract of service existed between them.—SCOTTISH INSURANCE COMRS. *v.* EDINBURGH ROYAL INFIRMARY, [1913] S. C. 751.—**SCOT.**

5 iv. —— ——.]—Lay missionaries, who hold no ecclesiastical status, & are appointed by, & subject to the control of, a minister or a kirk-session or a committee, are employed persons within National Insurance Act, 1911.—SCOTTISH INSURANCE COMRS. *v.* CHURCH OF SCOTLAND, [1914] S. C. 16.—**SCOT.**

5 v. —— ——.]—Where an employer retains the power of controlling the work which his employee is doing & of directing such employee as to the manner in which the work is to be done, the employee is usually called a servant.—ADDIS *v.* SCHILLER LIGHTING & PLUMBING CO., [1906] T. H. 210.—**S. AF.**

7 i. *Personal performance of work —Whether conclusive as to relation.*]—A. agreed with B. to do certain work for B. to paint some trucks according to specification. B. accepted this offer:—*Held:* this was a contract whereby A. was not bound to do any of the work personally but might get it done by deputy; therefore he was not an employee.—MCELROY *v.* AUSTRALIAN FORGE & ENGINEERING CO., PROPRIETARY, LTD. (1899), 24 V. L. R. 953.—**AUS.**

8. *Hospital commissioners & physicians.*]—The relation of master & servant exists between the comrs. of the hospital & the physicians & nurses, etc., employed by them in the hospital.—DONALDSON *v.* ST. JOHN COMRS. GENERAL PUBLIC HOSPITAL (1890), 30 N. B. R. 279.—**CAN.**

PART I. SECT. 2, SUB-SECT. 1.—A. (a).

8 i. *Meaning of control.*]—*Held:* M. was to be subject to the control & direction of his employer in respect to the manner in which the work was to be done & that would constitute him a servant.—DONALD *v.* ST. JOHN, [1925] 3 D. L. R. 815.—**CAN.**

(1842), 2 Mont. D. & De G. 642; 4 L. J. Bcy. 24; 6 Jur. 898.

10. ——.]—SIMMONS *v.* HEATH LAUNDRY CO., No. 15, *post*.

11. ——.]—There is no better working rule for the purpose of determining such a question [the relationship of master & servant] that whether the alleged servant is under the orders of & bound to obey the alleged master; if he is then the relationship of master & servant exists (AVORY, J.).—HILL *v.* BECKETT, [1915] 1 K. B. 578; 84 L. J. K. B. 458; 112 L. T. 505; 79 J. P. 190; 13 L. G. R. 530, D. C.

12. Power of employer to direct manner of work—Tugs under direction of harbour-master.]—CUTHBERTSON *v.* PARSONS, No. 40, *post*.

13. —— **Employment for special purpose.**]—Deft. employed P. to clean out a drain which was on deft.'s land. P. was not in deft.'s service, but was a common labourer, selected by deft. on account of his having dug the drain originally. P. cleaned out the drain without assistance from any other person, & without the further direction or inspection of deft. He received five shillings for the job, from deft. In the course of cleaning out the drain, P. took up part of an adjoining highway, & replaced the same in an improper manner & with insufficient materials, in consequence of which pltf.'s horse, passing along the highway, was injured:—*Held:* under these circumstances P. was not an independent contractor, but was acting as the servant & under the control of deft. & consequently deft. was responsible to pltf. for the injury.

The question is whether deft. & P. stood to each other in the relation of master & servant. The test here is whether deft. retained the power of controlling the work. No distinction can be drawn from the circumstance of the man being employed at so much a day or by the job. I think that here the relation was that of master & servant, not of contractor & contractee (CROMPTON, J.).—SADLER *v.* HENLOCK (1855), 4 E. & B. 570; 3 C. L. R. 760; 24 L. J. Q. B. 138; 24 L. T. O. S. 233; 1 Jur. N. S. 677; 3 W. R. 181; 119 E. R. 209.

Annotations:—**Consd.** Turner *v.* G. E. Ry. (1875), 33 L. T. 431. **Refd.** Wiggett *v.* Fox (1856), 11 Exch. 832; Abraham *v.* Reynolds (1860), 5 H. & N. 143; Johnson *v.* Lindsay (1889), 23 Q. B. D. 508; Donovan, *v.* Laing, Wharton & Down Construction Syndicate, [1893] 1 Q. B. 629; Bargewell *v.* Daniel (1907), 98 L. T. 257; Simmons *v.* Heath Laundry Co., [1910] 1 K. B. 543; Soc. Maritime Francaise *v.* Shanghai Dock & Engineering Co. (1921), 90 L. J. P. C. 85; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762. **Mentd.** Arthy *v.* Coleman (1857), 6 W. R. 34.

14. —— **Caretaker.**]—Resp. was a hop merchant, & was possessed of certain houses having an internal communication throughout, & used for the purposes of his trade. K. lived in the houses in order to take care of them, but he was a clerk in resp.'s employ at a salary of £150 a year, & he resided in the houses together with his wife, children, & servant:—*Held:* K. was not "a servant or other person" within Revenue Act, 1868 (c. 14), s. 11.

A servant is a person subject to the command of his master as to the manner in which he shall do his work (BRAMWELL, L.J.).—YEWENS *v.* NOAKES (1880), 6 Q. B. D. 530; 50 L. J. Q. B. 132; 44 L. T. 128; 45 J. P. 8, 468; 28 W. R. 562; 1 Tax Cas. 260, C. A.

Annotations:—**Consd.** Rolfe *v.* Hyde (1881), 6 Q. B. D. 673; City Bank *v.* Last (1882), 47 L. T. 254. **Refd.** Wootten *v.* Rolfe (1881), 47 L. T. 252; Simmons *v.* Heath Laundry Co., [1910] 1 K. B. 543; Bobbey *v.* Crosbie (1915), 84 L. J. K. B. 856; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762. **Mentd.** L. C. C. *v.* South Metropolitan Gas Co., [1904] 1 Ch. 76; L. C. C. *v.* Perry (1915), 79 J. P. 312.

15. —— **Skilled music teacher.**]—*Semble:* a skilled music teacher, who gives lessons to a pupil, either in his own house or in the pupil's house, cannot be regarded for the purposes of Workmen's Compensation Act, 1906 (c. 58), as the workman & the pupil as the employer.

Sir Frederick Pollock in his book on torts says: "The relation of master & servant exists only between persons of whom the one has the order & control over the work done by the other." This definition, I think requires some qualification. . . . The driver [of a motor car] may be the servant of the owner although the owner cannot control his work in the particulars in which the driver is controlled by the regulations. But broadly stated a contract of service does import that there exists in the person serving under the contract an obligation to obey the orders of the person served. A person employed to exercise his skill may or may not be a servant (BUCKLEY, L.J.).—SIMMONS *v.* HEATH LAUNDRY CO., [1910] 1 K. B. 543; 79 L. J. K. B. 395; 102 L. T. 210; 26 T. L. R. 326; 54 Sol. Jo. 392; 3 B. W. C. C. 200, C. A.

Annotations:—**Expld.** Brandy *v.* S.S. Raphael (1910), 80 L. J. K. B. 217. **Consd.** *Re* Morison (1912), 106 L. T. 731; University of London Press *v.* University Tutorial Press, [1916] 2 Ch. 601. **Refd.** Doggett *v.* Waterloo Taxi-Cab Co., [1910] 2 K. B. 336; Scottish Insce. Comrs. *v.* Royal Infirmary of Edinburgh (1913), 6 B. W. C. C. N. 120; Wray *v.* Taylor (1913), 109 L. T. 120; Hughes *v.* Quinn (1917), 11 B. W. C. C. 420. **Mentd.** Wilmerson *v.* Lynn & Hamburg S.S. Co. (1913), 82 L. J. K. B. 1064.

16. —— **Driver of motor car.**]—SIMMONS *v.* HEATH LAUNDRY CO., No. 15, *ante*.

17. —— **Master of ship.**]—Pltfs. chartered a barge, *The Myrtle*, for the carriage of a cargo of cement, which was lost through the sinking of the barge consequent upon her unseaworthiness. The barge was being worked on the system of "thirds," under which the master, C., took two-thirds of the gross freights, paying thereout the mate, crew, cost of provisions, & the expenses of the voyage, & handing over one-third of the gross-freights, less harbour & towage dues & brokerage, to deft., the owner, who provided the barge & paid for her upkeep. Neither the charterparty nor the bill of lading contained any reference to the owner. C. described only as "of the good ship *The Myrtle*," signed the charterparty, but not as "master" or "for the owner," & in the bill of lading, which he signed he was referred to as "the master of the said ship." In an action by pltfs. against deft. to recover the amount of the lost cargo, deft. denied liability on the ground that the contract was with the master, & that there was nothing to show that he was agent of, or servant for, an undisclosed principal. It appeared from the evidence that C. usually arranged the chartering; that he was appointed by deft. to work & sail the ship; & that he was not dismissible during the continuance of the voyage except for grave

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13 i. *Power of employer to direct manner of work—Employment for special purpose.*]—JOHNSTON *v.* HASTIE (1870), 30 U. C. R. 232.—**CAN.**

13 ii. —— ——.]—The relationship of master & servant does not exist between a municipal corpn. & a teamster hired by them by the hour to remove street sweepings with a horse & cart owned by him, the only control exercised over him being the designation of the places from which & to which the sweepings are to be taken.—SAUNDERS *v.* CITY OF TORONTO (1899), 26 A. R. 265.—**CAN.**

13 iii. —— ——.]—Where a contractor who, through his men, did certain shoring, not upon any plan or method of his own, nor because any term of his contract obliged him, but in conformity with the directions of an agent of his employer:—*Held:* he did not do the work as an independent contractor.—MCKEEGAN *v.* CAPE BRETON COAL, ETC. CO. (1906), 40 N. S. R. 566.—**CAN.**

13 iv. —— ——.]—CLEMENT *v.* NORTHERN NAVIGATION CO., LTD. (1918), 43 O. L. R. 127; 43 D. L. R. 433.—**CAN.**

Sect. 2.—Factors governing relationship: Sub-sect. 1, A. (a) & (b), & B. (a).]

misconduct:—*Held:* upon the true inference to be drawn from the facts as proved, there was no demise or bailment of the ship to the master; & he managed & sailed the ship for the joint benefit of himself & the owner whose servant or agent he was.

The critical test in all such cases is: Where does the real control rest? By retaining control over the master the owner retains control also over the ship, & in that event it is immaterial whether he receives a share of the gross freights or the net profit.—ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LTD. *v.* ASHTON, [1915] 2 K. B. 1; 84 L. J. K. B. 519; 112 L. T. 486; 13 Asp. M. L. C. 40; 20 Com. Cas. 165, C. A.

18. —— Seaman.]—*Re* HUDSON, *Ex p.* HOMBORG, No. 9, *ante*.

19. —— Person not employed exclusively—Work done away from place of business—Contributor to newspaper.]—Where a person is doing work for another away from the latter's place of business, & is not exclusively employed by the latter, & is only bound to do a particular class of work & is not working under the control or subject to the commands of the latter, these four circumstances, & possibly the last one alone, will prevent the person employed from being a "clerk or servant" within Cos. Act, 1908 (c. 69).

This ruling applies so as to exclude outside contributors to a newspaper from the right to preferential payment in the winding up of a co. & in proceedings to realise debentures secured by a floating charge.—*Re* ASHLEY & SMITH, ASHLEY *v.* ASHLEY & SMITH, [1918] 2 Ch. 378; 88 L. J. Ch. 7; 119 L. T. 674; 34 T. L. R. 585.

20. —— Expert carrying out statutory duties.]—A miner was employed during part of his time as delegate of his branch of a miners' trade union, & also as an inspector under Coal Mines Act, 1911 (c. 50), s. 16, & an inspector of abnormal working places for all of which services he received payment:—*Held:* in carrying out statutory duties the miner acted as a skilled expert, was subject to no control & was therefore also under no contract of service.—WILD *v.* BROWN (JOHN) & Co., [1919] 1 K. B. 134; 88 L. J. K. B. 119; 120 L. T. 143; 35 T. L. R. 51; 63 Sol. Jo. 67; 11 B. W. C. C. 237, C. A.

(b) Right to Dismiss.

Dismissal without notice.]—*See* Part IV., Sect. 2, sub-sect. 6, *post*.

Remedies for wrongful dismissal.]—*See* Part VI., Sect. 2, sub-sect. 2, B., *post*.

21. Whether conclusive as to relation.]—REEDIE *v.* LONDON & NORTH WESTERN RY. Co., HOBBIT *v.* LONDON & NORTH WESTERN RY. Co., No. 56, *post*.

22. ——.]—*Re* BYROM, *Ex p.* BALL, No. 58, *post*.

B. By More than One Employer.

(a) Right to give Directions as to Work.

23. General rule.]—The usual tests as to whose servant N. was are, who had the power of selecting, controlling & dismissing him (BOWEN, L.J.).—MOORE *v.* PALMER, No. 47, *post*.

24. Servant may have two masters.]—The general servant of A. may for a time or on a particular occasion be the servant of B., & a person who is not under any paid contract of service may nevertheless have put himself under the control of an employer to act in the capacity of servant, so as to be regarded as such (LORD HERSCHELL).—JOHNSON *v.* LINDSAY & Co., [1891] A. C. 371; 61 L. J. Q. B. 90; 65 L. T. 97; 55 J. P. 644; 40 W. R. 405; 7 T. L. R. 715, H. L.

Annotations:—**Apld.** Donovan *v.* Laing, Wharton & Down Construction Syndicate, [1893] 1 Q. B. 629. **Consd.** Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899. **Reld.** Cameron *v.* Nystrom, [1893] A. C. 308; Hedley *v.* Pinkney S.S. Co., [1894] A. C. 222; Stamp *v.* Williams (1896), 12 T. L. R. 516; Cooper & Crane *v.* Wright, [1902] A. C. 302; Kay *v.* British Westinghouse Electric & Manufacturing Co. (No. 1) (1905), 49 Sol. Jo. 296; Burr *v.* Theatre Royal, Drury Lane, [1907] 1 K. B. 544; Cribb *v.* Kynoch, [1907] 2 K. B. 548; Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13; Williams *v.* Linotype & Machinery (1914), 84 L. J. K. B. 1620; Heasmer *v.* Pickfords (1920), 36 T. L. R. 818.

25. ——.]—Deft. was the owner of a brougham, horses, & harness which he kept at a livery stable. The keeper of the livery stable was in the habit of supplying deft. with one of his own servants to drive the brougham. One day, whilst the brougham was being driven with one of deft.'s horses, the driver, owing to his negligence, as the jury found, lost control of the horse, which dashed through the window of pltf.'s shop & did damage. The man who was driving the brougham at the time of the accident had continuously driven deft. for the preceding six weeks, & at the time of the accident was wearing a suit of livery which had been supplied to him by deft.:—*Held:* upon these facts there was evidence on which a jury might find that the driver at the time of the accident was acting as the servant of deft., so as to render deft. responsible for the consequences of his negligence.

It is clear upon the authorities that it is not at all impossible for a man to be in the practical relation of servant to two different employers. . . . The case of *Rourke* v. *White Moss Colliery Co.*, No. 46, *post*, makes it quite clear that a man may be the general servant of one person & yet at the same time be the servant of another in relation to a particular matter & it also shows that the important element, whereby to determine whether he is the servant of the one person or of the other in relation to the particular business in which he is engaged, is which of the two persons

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PART I. SECT. 2, SUB-SECT. 1.—A. (b).

21 i. *Whether conclusive as to relation.*]—SOCIETE MARITIME FRANCAISE *v.* SHANGHAI DOCK & ENGINEERING CO., LTD., [1921] 2 W. W. R. 800.—**CAN.**

21 ii. ——.]—A man who is subject to the control of the mineowners, & to dismissal by them for just cause, is a servant of the mine-owners.—MCKENNA *v.* CRAIG (1899), 18 N. Z. L. R. 529.—**N.Z.**

21 iii. ——.]—LITTLEJOHN *v.* BROWN, [1909] S. C. 169.—**SCOT.**

PART I. SECT. 2, SUB-SECT. 1.—B. (a).

24 i. *Servant may have two masters.*]—PATTISON *v.* CANADIAN PACIFIC RY. Co. & CANADIAN NORTHERN RY. Co. (1912), 22 O. W. R. 131; 3 O. W. N. 1245; 26 O. L. R. 410; 5 D. L. R. 582.—**CAN.**

24 ii. ——.]—DONLEY *v.* EDMONTON, DUNVEGAN & BRITISH COLUMBIA RY. Co., ALBERTA & GREAT WATERWAYS RY. Co., & J. D. MCARTHUR CONSTRUCTION Co., [1920] 2 W. W. R. 664.—**CAN.**

24 iii. ——.]—The master in whose general service a man is, is not responsible for the tortious act of the man if the control of the master has been for the time being displaced by the power of control of another to whose temporary service the man has passed by being lent or sub-contracted.—BAIN *v.* CENTRAL VERMONT RY. Co., [1921] 3 W. W. R. 44; 59 D. L. R. 445.—**CAN.**

24 iv. ——.]—DOWN COUNTY COUNCIL *v.* IRISH INSURANCE COMRS., [1914] 2 I. R. 110.—**IR.**

24 v. ——.]—If a servant, who is in the employ of two masters, causes an injury to the plaintiff, that master, under whose personal control the servant was at the time he did the act which caused the damage, will be liable in an action for damages.—CHATWIN *v.* CENTRAL SOUTH AFRICAN RYS., [1909] T. H. 23 S. C. 23

had the control of him in the conduct of that business (LORD RUSSELL OF KILLOWEN, C.J.).—JONES *v.* SCULLARD, [1898] 2 Q. B. 565; 67 L. J. Q. B. 895; 79 L. T. 386; 47 W. R. 303; 14 T. L. R. 580; 42 Sol. Jo. 731.

Annotations :—**Distd.** Abrahams *v.* Bullock (1901), 85 L. T. 237; Dewar *v.* Tasker (1906), 95 L. T. 87. **Apld.** Perkins *v.* Stead (1907), 23 T. L. R. 433. **Distd.** Poulson *v.* Jarvis (1919), 89 L. J. K. B. 305.

Whether servant acting as servant of hirer or owner—Question of fact.]—*See* No. 1, *ante*.

26. Driver supplied by jobmaster.]—The owner of chaises & horses let out to hire is liable for accidents arising from misconduct or negligence of the drivers, not the person who hires the chaise.—DEAN *v.* BRANTHWAITE (1803), 5 Esp. 35, N. P.

Annotation :—**Consd.** Laugher *v.* Pointer (1826), 5 B. & C. 547.

27. ———.]—Where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, & the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person :—*Held :* the owner of the carriage was not liable to be sued for such injury.

This is not the case of a man employing his own immediate servants either domestic or others . . . for the jobman was a person carrying on a distinct employment . . . in which he furnished men, & let out horses to all such persons as chose to employ him. This coachman was not hired to deft. He had no power to dismiss him. He paid him no wages. The man was only to drive the horses of the jobman. It is true the master paid him no wages. . . . It is [often] the case with servants at inns & hotels. Where there is a great deal of business, they frequently receive no wages . . . & trust entirely to what they receive from the persons who resort to the inn or hotel & yet they are not the less the servants of the innkeeper (LITTLEDALE, J.).—LAUGHER *v.* POINTER (1826), 5 B. & C. 547; 8 Dow. & Ry. K. B. 556; 4 L. J. O. S. K. B. 309; 108 E. R. 204.

Annotations :—**Folld.** Smith *v.* Lawrence (1828), 2 Man. & Ry. K. B. 1; Quarman *v.* Burnett (1840), 6 M. & W. 499. **Apld.** Milligan *v.* Wedge (1840), 12 Ad. & El. 737. **Folld.** Jones *v.* Liverpool Corpn. (1885), 14 Q. B. D. 890. **Apld.** The Quickstep (1890), 15 P. D. 196. **Distd.** Jones *v.* Scullard, [1898] 2 Q. B. 565. **Reld.** Brady *v.* Giles (1835), 1 Mood. & R. 494; Fenton *v.* City of Dublin Steam Packet Co. (1838), 8 Ad. & El. 835; M'Laughlin *v.* Pryor (1842), 4 Man. & G. 48; Allen *v.* Hayward (1845), 7 Q. B. 960; Machu *v.* L. & S. W. Ry. (1848), 2 Exch. 415; Dalyell *v.* Tyrer (1858), E. B. & E. 899; Tobin *v.* R. (1864), 16 C. B. N. S. 310; Omoa Coal & Iron Co. *v.* Huntley (1877), 2 C. P. D. 464; Donovan *v.* Laing, Wharton & Down Construction Syndicate, [1893] 1 Q. B. 629; Dewar *v.* Tasker (1906), 95 L. T. 87; Pollard *v.* Goole & Hull Steam Towing Co. (1910), 3 B. W. C. C. 360. **Mentd.** Rapson *v.* Cubitt (1842), 9 M. & W. 710; Rich *v.* Basterfield (1847), 4 C. B. 783; Reedie *v.* L. & N. W. Ry., Hobbit *v.* Same (1849), 4 Exch. 244; Gayford *v.* Nicholls (1854), 2 C. L. R. 1066; White *v.* Jameson (1874), L. R. 18 Eq. 303; Chibnall *v.* Paul (1881), 29 W. R. 536; Hughes *v.* Percival (1883), 49 L. T. 189; Greenwell *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165.

28. ———.]—A., the owner of a carriage, hired four post horses & two postilions of B., a livery stable keeper, for the day, to take him from London to Epsom & back. In returning, the postilions damaged the carriage of C. :—*Held :* B., as owner of the horses, & master of the postilions, was liable to C. for such damage.—SMITH *v.* LAWRENCE (1828), 2 Man. & Ry. K. B. 1; *sub nom.* SMITH *v.* ROBERTS, 6 L. J. O. S. K. B. 208.

Annotation :—**Reld.** Fenton *v.* City of Dublin Steam Packet Co. (1838), 2 Jur. 1087.

29. ———.]—Where the owners of a carriage were in the habit of hiring horses from the same person, to draw it for a day or drive, & the owner of the horses provided a driver through whose negligence an injury was done to a third party :—*Held :* the owners of the carriage were not liable to be sued for such injury; it made no difference, that the owners of the carriage had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses; or that they had always paid him a fixed sum for each drive; or that they had provided him with a livery, which he had left at their house at the end of each drive, & that the injury in question was occasioned by his leaving the horses while so depositing the livery in their house.

If deft. had insisted on the horses being driven, not by one of the regular servants but by a stranger to the job master it would have made all the difference. . . . The master is responsible for the acts of his servant & that person is undoubtedly liable who stood in the relation of master to the wrongdoer. But the liability . . . must cease where the relation itself ceases to exist; & no other person than the master can be liable. Consequently a third person entering into a contract with the master, which does not raise the relation of master & servant, is not rendered liable (PARKE, B.).—QUARMAN *v.* BURNETT (1840), 6 M. & W. 499; 9 L. J. Ex. 308; 4 Jur. 969; 151 E. R. 509.

Annotations :—**Apld.** Milligan *v.* Wedge (1840), 12 Ad. & El. 737. **Consd.** M'Laughlin *v.* Pryor (1842), 4 Man. & G. 48. **Distd.** Martin *v.* Temperley (1843), 4 Q. B. 298. **Apld.** Burgess *v.* Gray (1845), 1 C. B. 578. **Folld.** Jones *v.* Liverpool Corpn. (1885), 14 Q. B. D. 890. **Consd.** The Niobe (1888), 13 P. D. 55. **Apld.** The Quickstep (1890), 15 P. D. 196. **Distd.** Jones *v.* Scullard, [1898] 2 Q. B. 565. **Reld.** Allen *v.* Hayward (1845), 7 Q. B. 960; The Eden (1846), 4 Notes of Cases, 460; Machu *v.* L. & S. W. Ry. (1848), 2 Exch. 415; R. *v.* Hey (1849), 2 Car. & Kir. 983; Holmes *v.* Onion (1857), 2 C. B. N. S. 790; Dalyell *v.* Tyrer (1858), E. B. & E. 899; Blalkie *v.* Stembridge (1859), 6 C. B. N. S. 894; Tobin *v.* R. (1864), 16 C. B. N. S. 310; Williams *v.* Jones (1865), 3 H. & C. 602; Mersey Docks Trustees *v.* Gibbs (1866), L. R. 1 H. L. 93; Omoa Coal & Iron Co. *v.* Huntley (1877), 2 C. P. D. 464; Spaight *v.* Tedcastle (1881), 6 App. Cas. 217; The Flying Serpent, The Niobe (1888), 57 L. J. P. 33; Mills *v.* Armstrong, The Bernina (1888), 13 App. Cas. 1; Donovan *v.* Laing, Wharton & Down Construction Syndicate, [1893] 1 Q. B. 629; Dewar *v.* Tasker (1906), 95 L. T. 87; S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634; Poulson *v.* Jarvis (1919), 89 L. J. K. B. 305; Jefferson *v.* Derbyshire Farmers, [1921] 2 K. B. 281. **Mentd.** Rapson *v.* Cubitt (1842), 9 M. & W. 710; Rich *v.* Basterfield (1847), 4 C. B. 783; Reedie *v.* L. & N. W. Ry., Hobbit *v.* Same (1849), 4 Exch. 244; Gayford *v.* Nicholls (1854), 2 C. L. R. 1066; Thomas *v.* Rhymney Ry. (1870), L. R. 5 Q. B. 226; White *v.* Jameson (1874), L. R. 18 Eq. 303; River Wear Comrs. *v.* Adamson (1877), 2 App. Cas. 743; Dalton *v.* Angus (1881), 6 App. Cas. 740; Hughes *v.* Percival (1883), 8 App. Cas. 443; The European (1885), 10 P. D. 99; The Tasmania (1888), 13 P. D. 110; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; Robinson *v.* Beaconsfield R. C., [1911] 2 Ch. 188; Padbury *v.* Holliday & Greenwood (1912), 28 T. L. R. 494; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539; Ilford U. C. *v.* Beal, [1925] 1 K. B. 671; Parker *v.* Miller (1926), 42 T. L. R. 408.

30. ———.]—A party, consisting of deft. & others, hired for a day's excursion a carriage & post horses, driven by postilions, who were the servants of the owner of the horses. Deft. rode upon the box. The postilions, in endeavouring to force their way into a line of carriages, overturned a gig, & seriously injured pltf., who was in the gig. Deft., at the time & afterwards, held himself out as responsible for the accident, & used expressions showing that he had a control over the postilions at the time it happened :—*Held :* he was liable in trespass.—M'LAUGHLIN *v.* PRYOR (1842), 4 Man. & G. 48; Car. & M. 354; 4 Scott, N. R. 655; 11 L. J. C. P. 169; 6 Jur. 372; 134 E. R. 21.

Annotations :—**Reld.** Burgess *v.* Gray (1845), 1 C. B. 578; Gordon *v.* Rolt (1849), 4 Exch. 365; Pidgeon *v.* Legge (1857), 21 J. P. 743; Holmes *v.* Mather (1875), L. R. 10 Exch. 261; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762: Falcon *v.* Famous Players Film Co., [1926] 1 K. B. 393.

Sect. 2.—*Factors governing relationship: Sub-sect.* 1, *B.* (*a*).]

31. ——.]—A jobmaster who regularly supplies a carriage, horses, & driver to a gentleman, under a contract, for the season or for half a year, is liable for the negligence of such driver, though he be treated in every respect by the hirer as his servant.

The relation of master & servant between S. [the driver] & deft. [contractor] was clearly established (TINDAL, C.J.).—SHUTTLEWORTH *v.* CURLEN (1843), 2 L. T. O. S. 266.

32. ——.]—JONES *v.* SCULLARD, No. 25, *ante*.

33. Driver supplied by contractor.]—Where a person was hired & paid by B. as a driver of a horse kept by its owner for the service of deft., but which the owner could use as he liked when deft. did not require it:—*Held:* the driver was not the servant of deft., & an accident having happened through the servant's negligence when he was not out on deft.'s service, deft. was not liable.

I think that W. was not the servant of deft. but, looking at his hire & employment, he seems to be the servant to B. [the contractor] & that B. is responsible for him when he is driving on his ordinary duty for deft. (ERLE, J.).—NICHOLSON *v.* HARRISON (1856), 27 L. T. O. S. 56; 4 W. R. 459.

34. ——.]—D. contracted with defts., an urban authority, to supply by the day a driver & horse to drive & draw a watering-cart belonging to defts. The driver was employed & paid by D. & was not under defts.' direction or control otherwise than that their inspector directed him what streets to water. In an action to recover damages for injuries caused by the negligent conduct of the driver whilst in charge of the cart:—*Held:* defts. were not liable.—JONES *v.* LIVERPOOL CORPN. (1885), 14 Q. B. D. 890; 54 L. J. Q. B. 345; 49 J. P. 311; 33 W. R. 551; 1 T. L. R. 389, D. C.

Annotations:—**Apprvd.** Donovan *v.* Laing, Wharton & Down Construction Syndicate, [1893] 1 Q. B. 629; Waldock *v.* Winfield, [1901] 2 K. B. 596. **Folld.** Mileham *v.* St. Marylebone Corpn. & Latter (1903), 67 J. P. 110. **Consd.** Poulson *v.* Jarvis (1919), 89 L. J. K. B. 305.

35. ——.]—A co., which carried on the business of ironfounders, entered into a written contract with deft. for the hire from him of a van, horse, & driver, for the purpose of delivering goods to their customers. The contract provided that deft. was to supply a capable man to drive & take charge of the van & horse, that the man in deft.'s employ, & all charges & claims whatsoever in reference to the van, horse & man were to be paid for by deft., who was to be responsible for the same, & that the co. were only to be responsible for the payment for the van, horse, & man at a certain rate *per annum* by monthly payments. The driver of a van supplied to the co. by deft. under the above-mentioned contract was guilty of negligence when delivering a girder at the premises of a customer of the co. by which pltf., a servant of the customer, was injured. There was no evidence that any one representing the co. exercised any control over the driver in respect of the delivery of goods for the co.:—*Held:* upon the true construction of the contract, the implication was that the control of the driver, when delivering goods for the co., remained in deft., & deft. was therefore liable for his negligence.—WALDOCK *v.* WINFIELD, [1901] 2 K. B. 596; 70 L. J. K. B. 925; 85 L. T. 202; 17 T. L. R. 661, C. A.

Annotations:—**Distd.** Dowar *v.* Tasker (1906), 95 L. T. 87. **Reld.** Poulson *v.* Jarvis (1919), 89 L. J. K. B. 305.

36. ——.]—In an action for damages for negligence against a metropolitan borough council, & against the person who had contracted to supply horses & drivers to work the council's water vans employed in watering streets, the jury, in giving their verdict for pltf., found that there had been negligence on the part of the driver of a water van, who, they found as a fact, was the contractor's servant, but who, at the time of the accident, was acting under the control of the council in his work.

The ct., upon this verdict, gave judgment against the contractor as master of the driver because, upon the construction the ct. placed on the contract between defts., the contractor had not parted with the control of his servant.—MILEHAM *v.* ST. MARYLEBONE CORPN. & LATTER (1903), 67 J. P. 110; 1 L. G. R. 412.

37. Driver provided for motor car.]—Deft. purchased & paid for a motor car in London, & the vendor agreed to provide a driver to drive the car to a certain place outside London & deliver it there, as deft.'s driver did not know the locality, & had no experience of the class of car purchased. While the car was being driven by the driver supplied by the vendor from London to the place named for delivery it collided with & damaged a motor bicycle owing to the negligence of the driver. At the time deft., his driver, & his son were in the car. In an action in the county ct. by the owner of the bicycle against deft. to recover for the damage to the bicycle, the judge held that the driver of the car, though he was the general servant of the vendor, was at the time under the control of deft., who had the property in & possession of the car, & therefore deft. was liable to pltf. for the negligence of the driver:—*Held:* the decision was right.—PERKINS *v.* STEAD (1907), 23 T. L. R. 433, D. C.

38. ——.]—The owner of an electric brougham contracted with defts. to garage the brougham, supply electric energy, & supply a chauffeur at so much a week inclusive. By the negligence of the chauffeur, the chauffeur, while driving the brougham for his own purposes, & contrary to the orders given him by its owner, injured pltf. In an action to recover damages from defts.:—*Held:* defts. were liable, the chauffeur being their servant.—NORRIS *v.* WOLSELEY TOOL & MOTOR CAB CO., LTD. (1907), 52 Sol. Jo. 116.

39. Man hired with horses—Under control of hirer.]—The Ministry of Munitions were engaged in discharging the cargo from a vessel in a dock into railway waggons standing on lines in one of the dock sheds. When the waggons were loaded they were taken from the dock shed on to the railway lines outside the shed & left there until they were taken away—usually by means of an engine or by man power, but sometimes by horses. On the occasion in question a horse was employed, which was in charge of a man who was lent by defts., who were team owners, under an agreement with the Minister of Munitions. The man took a waggon out of a door in the shed on the lines outside where there were other waggons standing in a position

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33 i. *Driver supplied by contractor.*]—CANADIAN NORTHERN TRANSFER CO. *v.* TORONTO STORAGE CO. (1924), 55 O. L. R. 352.—**CAN.**

33 ii. ——.]—ANDERSON *v.* GLASGOW TRAMWAY, ETC. CO. (1893), 31 Sc. L. R. 240.—**SCOT.**

37 i. *Driver provided for motor car.*]—HERON *v.* COLEMAN (1919), 46 O. L. R. 154; 17 O. W. N. 57.—**CAN.**

39 i. *Man hired with horses—Under control of hirer.*]—A plate glass co. hired by the day the general servant & horse & waggon of another co. for use in its business, & while so hired the servant in carrying a load of glass

which left a space or gangway between them opposite to another doorway which was wholly or partly open, & was being used by persons coming & going from other vessels in the dock. When the man had taken the waggon on to the outside lines he proceeded to move it up the lines against some of the waggons so as to set them in motion & close the space or gangway in front of the second doorway. He did this without giving any warning, because, as he said, he thought that door was not being used. Pltf., who had come out of the door & was crossing the lines, was caught between two waggons & was seriously injured. Pltf. was not guilty of negligence. An action was brought by pltf. against defts. to recover damages in respect of the personal injuries occasioned to him by the negligence of defts.' servants:—*Held:* the negligence which caused the accident was the act of the man in moving the waggons without giving warning of his being about to do so; he did this as the servant of defts. & not of the Minister of Munitions; & therefore pltf. was entitled to judgment.—POULSON *v.* JARVIS (JOHN) & SONS, LTD. (1919), 89 L. J. K. B. 305; 122 L. T. 471; 36 T. L. R. 160; 64 Sol. Jo. 223, C. A.

40. Crew hired with tug.]—By an Act for improving & maintaining a harbour, the comrs. were empowered to build or provide steam-tugs for towing vessels into or out of the harbour, & to receive for the use of such vessels such reasonable compensation as they should fix. The comrs. entered into an arrangement with the proprietors of certain steam vessels to perform this duty for them at certain specified rates of charge; the comrs. paying them in addition a certain sum annually, & the vessels being placed under the direction & control of the harbour-master. A vessel having sustained damage in consequence of the negligence & want of skill of the master & crew of a tug, whilst being towed into the harbour, the owner brought an action in the county ct. against the harbour comrs., &, under the direction of the judge, recovered a verdict. The ct., on appeal, set aside the verdict, holding that the decision of the judge could not, upon any inference which could legitimately be drawn from the facts before him, be correct in point of law.—CUTHBERTSON *v.* PARSONS (1852), 12 C. B. 304; 21 L. J. C. P. 165; 19 L. T. O. S. 297; 16 J. P. 474; 16 Jur. 860; 138 E. R. 921.

Annotation:—**Mentd.** G. W. Ry. *v.* Goodman (1852), 16 Jur. 862.

41. ——.]—H., the lessee of a ferry, hired of defts. a steamer with a crew, to ply to & fro. Pltf. purchased of H. a season ticket, &, while on board the vessel, was injured by the breaking of a rope, through the negligence of the crew:—*Held:* the crew remained the servants of defts., & defts. were therefore liable to pltf. in an action for negligence.—DALYELL *v.* TYRER (1858), E. B. & E. 899; 28 L. J. Q. B. 52; 31 L. T. O. S. 214; 5 Jur. N. S. 335; 6 W. R. 684; 120 E. R. 744.

Annotations:—**Reld.** Foulkes *v.* Met. Dist. Ry. (1880), 5 C. P. D. 157. **Mentd.** Farrant *v.* Barnes (1862), 11 C. B. N. S. 553.

42. ——.]—A Norwegian barque arrived at the mouth of the Ribble, intending to proceed up the river to Preston. Under order from the corpn. she was lightened & furnished with a tug by the harbour master & placed by him second in a string of vessels, each of which was in tow of a tug, & started in due time up the river for Preston. When near Preston the tug towing the vessel in front of the barque slackened speed for some reason which was not proved. This tug had been chartered to the corpn., & was expected to have towed the last five miles in thirty-five minutes, whereas in fact she occupied an hour in so doing. The barque could not pass the vessels ahead owing to the narrowness of the channel; the tide fell, & she grounded & sustained damage:—*Held:* notwithstanding that the tug was not the property of the corpn., but had only been hired by them, the crew of the tug were as much the servants of the corpn. as if the tug had belonged to the corpn., & therefore, supposing the crew to have been incompetent or negligent, the corpn. would be liable.

The crews of those tugs were as much the servants of defts. at the particular time during which the hiring held good, as if the tugs belonged to defts. themselves & the crews had been actually not only for the time but permanently in their employ (LOPES, L.J.).—THE RATATA, [1807] P. 118; 66 L. J. P. 39; 76 L. T. 221; 8 Asp. M. L. C. 236, C. A.; *affd. sub nom.* PRESTON CORPN. *v.* BIORNSTAD, THE RATATA, [1808] A. C. 513, H. L.

Annotations:—**Mentd.** Lohne, etc. (Owners of Barque Ydun) & Skibs Assce. Forening Protector *v.* Preston Corpn., The Ydun (1899), 81 L. T. 10; The Maréchal Suchet, [1911] P. 1; The West Cock, [1911] P. 208.

43. Crew lent to dock ship.]—THE LOUISE (1901), 18 T. L. R. 19, D. C.

44. Member of crew supplied to stevedore—Under control of stevedore.]—Deft. employed a stevedore to unload his vessel. The stevedore employed his own labourers, amongst whom was pltf., & also one of deft.'s crew, named D., whom he paid & over whom he had entire control, to assist them in unloading. Pltf., while engaged in the work, was injured through the negligence of D.:—*Held:* deft. was not responsible for the injury.

The stevedores are not the servants of the owner of the ship but they are persons having a special employment with entire control over the men employed in the work of loading & unloading (WILLES, J.).—MURRAY *v.* CURRIE (1870), L. R. 6 C. P. 24; 40 L. J. C. P. 26; 23 L. T. 557; 19 W. R. 104; 3 Mar. L. C. 497.

Annotations:—**Folld.** Rourke *v.* White Moss Colliery Co. (1876), 1 C. P. D. 556. **Apld.** Hall *v.* Lees, [1904] 2 K. B. 602; Walker *v.* Crabb (1916), 33 T. L. R. 119. **Reld.** Turner *v.* G. E. Ry. (1875), 33 L. T. 431; Jones *v.* Liverpool Corpn. (1885), 14 Q. B. D. 890; Moore *v.* Palmer (1886), 2 T. L. R. 781; Oldfield *v.* Furniss, Withy & Ronaldson (1893), 58 J. P. 102; Hillyer *v.* St. Bartholomew's Hospital (1909), 78 L. J. K. B. 958.

45. —— —— ——.]—Pltf., employed as foreman of a stevedore to unload a ship with the assistance of the crew, was injured by the negligence of one of the crew in the quasi-employment of the stevedore:—*Held:* the shipowners were not liable.—MANNING *v.* ADAMS BROTHERS (1883), 32 W. R. 130, D. C.

Annotation:—**Reld.** Moore *v.* Palmer (1886), 2 T. L. R. 781.

46. Engineer driver provided for engine.]—Defts., having begun sinking a shaft in their colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with W. to do the sinking & excavating at a certain price per yard, W. to find all labour, defts. to provide & place at the disposal of W. the necessary engine power, ropes, & hoppets, with an engineer to work the engine, who was employed & paid by defts., the engine & engineer to be under the control of W. Pltf., who was one of the men employed & paid by W., while working at the bottom of the shaft was injured by the negligence of the engineer:—*Held:* though the engineer remained the general servant of defts., yet being under the orders & control of

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mocked a man down & seriously injured him:—*Held:* the driver remained the general servant of the co. from which he was hired.—CONSOLIDATED PLATE GLASS CO. *v.* CASTON (1899), 29 S. C. R. 624.—**CAN.**

Sect. 2.—Factors governing relationship: Sub-sect. 1, B. (a) & (b), & C.]

W. at the time of the accident, he was acting as the servant of W., & not of defts., who were therefore not liable for his negligence.—ROURKE *v.* WHITE MOSS COLLIERY CO. (1877), 2 C. P. D. 205; 46 L. J. Q. B. 283; 36 L. T. 49; 41 J. P. 580; 25 W. R. 263, C. A.

Annotations:—**Distd.** Jones *v.* Liverpool Corpn. (1885), 14 Q. B. D. 890. **Apld.** Donovan *v.* Laing, Wharton & Down Construction Syndicate, [1893] 1 Q. B. 629; Jones *v.* Scullard, [1898] 2 Q. B. 565. **Distd.** Waldock *v.* Winfield, [1901] 2 K. B. 596. **Consd.** Dewar *v.* Tasker (1906), 95 L. T. 87. **Apld.** Perkins *v.* Stead (1907), 23 T. L. R. 433. **Reld.** Swainson *v.* N. E. Ry. (1878), 3 Ex. D. 341; Moore *v.* Palmer (1886), 51 J. P. 196; Roberts *v.* Tottenham Lager Beer Brewery & Ice Factory (1889), 6 T. L. R. 4; Johnson *v.* Lindsay, [1891] A. C. 371; Dewar *v.* Tasker (1907), 23 T. L. R. 259; Hill *v.* Beckett (1914), 84 L. J. K. B. 458; Poulson *v.* Jarvis (1919), 89 L. J. K. B. 305. **Mentd.** Harlock *v.* Ashberry (1881), 51 L. J. Ch. 96; Farrer *v.* Lacy, Hartland (1885), 28 Ch. D. 482; *Re* Briton Medical & General Life Assocn. (1886), 2 T. L. R. 409; Swain *v.* Follows (1887), 18 Q. B. D. 585.

47. ——.]—A stevedore contracted to load a ship, & hired an engine from P., who sent his servant, N., to work it. M., a servant of the stevedore, gave the signals to N., & by N.'s negligence a sack fell & killed M. The wages of N. were paid by P.:—*Held:* N. was the servant of P., & P. was liable to M.'s representatives for compensation.

The usual tests as to whose servant N. was are, who had the power of selecting, controlling & dismissing him (BOWEN, L.J.).—MOORE *v.* PALMER (1886), 51 J. P. 196; 2 T. L. R. 781, C. A.

Annotations:—**Reld.** Wilmerson *v.* Lynn & Hamburg S.S. Co. (1913), 109 L. T. 53; Poulson *v.* Jarvis (1919), 89 L. J. K. B. 305. **Mentd.** Andrews *v.* Barnes (1888), 53 J. P. 4.

48. ——.]—Defts. hired out an engine to another person, & they supplied a driver for the engine. They paid the driver, supplied the oil for the engine, & kept it in repair. The evidence showed that the person to whom the engine was hired could direct where the engine should go & what loads it should haul, & that defts. never knew where the engine was sent to or what it carried. While so hired, the engine, by the negligence of the driver, injured pltf.:—*Held:* on the facts, defts., who appointed & paid & who could dismiss the driver, had control over him at the time of the injury, & were therefore liable to pltf.—DEWAR *v.* TASKER & SONS, LTD. (1907), 23 T. L. R. 259, C. A.

Annotation:—**Consd.** Poulson *v.* Jarvis (1919), 89 L. J. K. B. 305.

49. Man hired with crane.]—Defts. contracted to lend to a firm who were engaged in loading a ship at their wharf a crane with a man in charge of it. The man in charge of the crane received directions from the firm or their servants as to the working of the crane, & defts. had no control in the matter. Pltf., who was a servant of the wharfingers & was employed by them to direct the working of the crane, sustained an injury through being struck by it by reason of the negligence of the man in charge, & sued defts. on the ground that the negligence was the act of their servant:—*Held:* though the man in charge of the crane remained the general servant of defts., yet, as they had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed.—DONOVAN *v.* LAING, WHARTON & DOWN CONSTRUCTION SYNDICATE, [1893] 1 Q. B. 629; 63 L. J. Q. B. 25; 68 L. T. 512; 57 J. P. 583; 41 W. R. 455; 9 T. L. R. 313; 37 Sol. Jo. 324; 4 R. 317, C. A.

Annotations:—**Distd.** Cahalane *v.* North Metropolitan Ry. & Canal Co. (1896), 12 T. L. R. 611. **Apld.** Jones *v.* Scullard, [1898] 2 Q. B. 565; The Louise (1901), 18 T. L. R. 19. **Distd.** Waldock *v.* Wingfield, [1901] 2 K. B. 596. **Apld.** Dewar *v.* Tasker (1907), 23 T. L. R. 259. **Consd.** Poulson *v.* Jarvis (1919), 89 L. J. K. B. 305. **Apprvd.** Bain *v.* Central Vermont Ry., [1921] 2 A. C. 412; Soc. Maritime Francaise *v.* Shanghai Dock & Engineering Co. (1921), 90 L. J. P. C. 85. **Reld.** Abrahams *v.* Bullock (1901), 85 L. T. 237; Wilmerson *v.* Lynn & Hamburg S.S. Co. (1913), 109 L. T. 53; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762; Falcon *v.* Famous Players Film Co., [1926] 1 K. B. 393.

50. ——.]—CAHALANE *v.* NORTH METROPOLITAN RAILWAY & CANAL CO. (1896), 12 T. L. R. 611, C. A.

51. Nurse supplied by association—Under control of doctor to whom supplied.]—Defts. were an assocn. whose object was to provide for the supply of duly qualified nurses to attend on the sick in a certain neighbourhood. The assocn. for that purpose appointed & paid salaries to nurses, for whose services they made charges to persons on whose application the nurses were supplied. The assocn. issued printed rules & regulations with regard to the duties of their nurses & other matters with a view as well to the protection of the nurses as to ensuring their efficiency while engaged in nursing. These regulations provided for the exercise of certain supervision over the nurses by a superintendent appointed by the assocn.; but, with regard to the work of a nurse while engaged in nursing a patient, it was provided, *inter alia*, that, while so engaged she should not absent herself from duty without the permission of the patient's friends & that she should implicitly follow the instructions of the patient's medical man. A form which was sent out by the assocn. upon supplying nurses, indicated to the person applying for the nurse that, while engaged in nursing the patient, the nurse was to be regarded as employed by that person. Two nurses were supplied by the assocn. for the purpose of nursing the female pltf. through an operation which was about to be performed upon her by a medical man in attendance upon her. An injury was occasioned to the female pltf. through the negligence of the nurses, or one of them, while engaged in nursing her:—*Held:* upon the true construction of the documents in relation to the supply of the nurses, the contract of the assocn. was, not to nurse the female pltf. through the agency of the nurse as their servants, but merely to procure for her duly qualified nurses, & the nurses were not, in nursing the female pltf., acting as the servants of the assocn.; & therefore defts. were not liable in respect of negligence of the nurses supplied by them.—HALL *v.* LEES, [1904] 2 K. B. 602; 73 L. J. K. B. 819; 91 L. T. 20; 53 W. R. 17; 20 T. L. R. 678; 48 Sol. Jo. 638, C. A.

Annotations:—**Distd.** Norris *v.* Wolseley Tool & Motor Cab. Co. (1907), 52 Sol. Jo. 116. **Consd.** Cox *v.* Coulson, [1916] 2 K. B. 177. **Reld.** Hillyer *v.* St. Bartholomew's Hospital, [1909] 2 K. B. 820; Wilmerson *v.* Lynn & Hamburg S.S. Co. (1913), 109 L. T. 53.

52. Hospital servants.]—An action for damages will not lie against hospital authorities in respect of injuries to a patient who has been admitted to their hospital, caused by negligence on the part of the surgeons or physicians engaged in the operation or examination to which the patient has submitted

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49 i. *Man hired with crane.*]—AINSLIE *v.* LEITH DOCK COMRS. (1919), 57 Sc. L. R. 5.—**SCOT.**

52 i. *Hospital servants.*]—LAVERE *v.* SMITH'S FALLS PUBLIC HOSPITAL (1915), 8 O. W. N. 548; 24 D. L. R. 866.—**CAN.**

b. Servant assisting contractor to remove machinery.]—M'FALL *v.* ADAMS & Co., [1907] S. C. 367; 44 Sc. L. R. 259; 14 S. L. T. 625.—**SCOT.**

c. Native labour supplied to military authorities.]—EYSSEN *v.* CALDER & Co. (1903), 20 S. C. 435.—**S. AF.**

himself, of whose professional competence the hospital authorities have taken reasonable care to assure themselves, they not being the servants of the hospital authorities but professional men employed by those authorities to exercise their profession to the best of their abilities according to their own discretion & in no way under the orders or bound to obey the directions of the authorities. Nurses & carriers, although they are servants of the hospital authorities for general purposes, are not so for the purposes of operations & examinations by the medical officers at which they assist, for they cease for the time being to be such servants, inasmuch as they take their orders during that period from the operating surgeon alone, & not from the hospital authorities, & even if nurses & carriers were persons for whose negligence the hospital authorities would be liable they are not liable for the negligence of the operating surgeon.—HILLYER *v.* ST. BARTHOLOMEW'S HOSPITAL (GOVERNORS), [1909] 2 K. B. 820; 78 L. J. K. B. 958; 25 T. L. R. 762; 53 Sol. Jo. 714, C. A.; *sub nom.* HILLYER *v.* LONDON CORPN. (ST. BARTHOLOMEW'S HOSPITAL, GOVERNORS), 101 L. T. 368; 73 J. P. 501.

Annotations :—**Distd.** Smith *v.* Martin & Kingston-upon-Hull Corpn., [1911] 2 K. B. 775. **Refd.** Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305; Scottish Insce. Comrs. *v.* Royal Infirmary of Edinburgh (1913), 6 B. W. C. C. N. 120.

53. Attendants hired with theatre.]—Defts., who were the governing body of a hospital, hired a cinematograph theatre on Sundays, one of the terms being that the hospital would pay the wages of the staff for the days on which the theatre was taken. Pltfs., with two others, took a box at the theatre on a Sunday, & during the performance one of the theatre attendants, who was sent to be box with a message, committed a technical assault on pltfs. In an action by pltfs. against defts. for damages :—*Held :* as on the true construction of the hiring agreement there was a separate employment of the servants at the theatre, so that on Sundays they were the servants of the hospital, defts. were responsible in damages.—SAMUELS *v.* TOWNSEND (1916), 32 T. L. R. 356.

54. Driver working over jointly operated railway system.]—Applt.'s husband was killed owing to the negligence of resp. co.'s engine driver in disregarding the signals of another co. upon whose line he was driving the engine under an agreement between the cos. for joint working; each co. paid the drivers employed in the joint service for the service on its own line. Applt. sued resps. for damages :—*Held :* the resp. co was not liable, since at the moment of the accident the engine driver was under the control of the other co.—BAIN *v.* CENTRAL VERMONT RY. CO., [1921] 2 A. C. 412; 90 L. J. P. C. 221, P. C.

Annotation :—**Refd.** Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762.

55. Workmen hired to repair ship—Working under supervision of ship's engineer.]—Resp. co. lent some of their servants to applts. to assist in repairing the engines in a wooden motor vessel which belonged to applts. They worked under the orders of the ship's engineer. Lighted candles by his instructions were used, & owing to the alleged negligence of resps.' servants a fire occurred on the vessel, & applts. brought an action claiming to recover damages from resps. :—*Held :* resps. were not liable as the workers were not under their control, & it made no difference whether they were paid for the men's services or not.—SOCIÉTÉ MARITIME FRANCAISE *v.* SHANGHAI DOCK & ENGINEERING CO., LTD., [1921] 2 A. C. 417, n.; 90 L. J. P. C. 85; 125 L. T. 134; 37 T. L. R. 379, P. C.

Annotation :—**Refd.** Bain *v.* Central Vermont Ry., [1921] 2 A. C. 412.

(b) Right to Dismiss.

56. Servant of contractor.]—Deft. had the power of insisting on the removal of careless or incompetent workmen, but this power of removal does not vary the case. The workman is still the servant of the contractor only, & the fact that defts. might have insisted on his removal, if they thought him careless or unskilful, did not make him their servant (ROLFE, B.).—REEDIE *v.* LONDON & NORTH WESTERN RY. CO., HOBBIT *v.* SAME (1849), 4 Exch. 244; 6 Ry. & Can. Cas. 184; 20 L. J. Ex. 65; 13 Jur. 659; 154 E. R. 1201.

Annotations :—**Refd.** Overton *v.* Freeman (1852), 11 C. B. 867; Ellis *v.* Sheffield Gas Consumers Co. (1853), 23 L. J. Q. B. 42; Peachey *v.* Rowland (1853), 13 C. B. 182; Gayford *v.* Nicholls (1854), 9 Exch. 702; Butler *v.* Hunter (1862), 7 H. & N. 826; The Bernina (2) (1887), 12 P. D. 58; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; Holliday *v.* National Telephone Co., [1899] 1 Q. B. 221. **Mentd.** Knight *v.* Fox (1850), 20 L. J. Ex. 9; MacCarthy *v.* Young (1861), 6 H. & N. 329; Tobin *v.* R. (1864), 16 C. B. N. S. 310; The Halley (1867), L. R. 2 A. & E. 3; Jones *v.* Liverpool Corpn. (1885), 14 Q. B. D. 890; Greenhill *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165; Maxwell *v.* British Thomson Houston Co. (1902), 18 T. L. R. 278; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762.

57. —— Sub-contractor.]—MOORE *v.* PALMER, No. 47, *ante*.

58. Servant engaged by servant.]—Coal proprietors employed colliers, to whom the work was let off at so much per score baskets, & each collier had a drawer attached to him, whom he brought when he was himself hired. The colliers were not hired unless the manager approved the drawers, or unless, in the case of disapproval, the colliers took drawers provided for them by the manager. The colliers paid the drawers out of their earnings, according to an agreement between them, in which the coal proprietors took no part, & discharged the drawers as they thought fit, without interference on the part of the proprietors, except that the latter might discharge the collier if he injustly discharged the drawer, & that both collier & drawer might be discharged for transgressing the rules of the mine. Upon the proprietors becoming bkpt., & the colliers' wages being in arrear :—*Held :* the drawers were not servants of the coal proprietors so as to be entitled to payment in full of half a year's wages.—*Re* BYROM, *Ex p.* BALL (1853), 3 De G. M. & G. 155; 20 L. T. O. S. 267; 43 E. R. 62; *sub nom. Re* BYROM, *Ex p.* ECKERSLEY, 22 L. J. Bcy. 27; 17 Jur. 198; 1 W. R. 187, L. JJ.

C. By Third Party.

59. Servant hired by bailiff.]—The employer of the servant is the master for whose service he is retained, & not the bailiff of the farm, who in fact hires the servant.—R. *v.* HOSEASON (1811), 14 East, 605; 104 E. R. 734.

60. Right to give directions—Thames watermen—Members of Watermen's Company.]—MARTIN *v.* TEMPERLEY (1843), 4 Q. B. 298; 3 Gal. & Dav. 497; 12 L. J. Q. B. 129; 11 L. T. 159; 7 J. P. 145; 7 Jur. 150; 114 E. R. 912.

Annotations :—**Mentd.** The Eden (1846), 2 Wm. Rob. 442; Willmerson *v.* Lynn & Hamburg S.S. Co. (1913), 109 L. T. 53; Turnbull *v.* Wieland (1916), 33 T. L. R. 143.

61. —— Servants of stevedore under control of ship's officers.]—Where a stevedore had contracted to discharge a vessel for a lump sum, the fact that the master of the vessel had control over the incidents of the discharge held not to make the

Sect. 2.—*Factors governing relationship: Sub-sect.* 1, *C.; sub-sects.* 2 *&* 3. *Sect.* 3: *Sub-sects.* 1, 2, 3, 4 *&* 5, *A.* (*a*) *&* (*b*).]

servants of the stevedore the servants of the shipowner so as to free the stevedore from liability for their negligence.—CAMERON *v.* NYSTROM, [1893] A. C. 308; 62 L. J. P. C. 85; 68 L. T. 772; 57 J. P. 550; 7 Asp. M. L. C. 320; 1 R. 362, P. C.

SUB-SECT. 2.—REMUNERATION.

See Part V., *post.*

SUB-SECT. 3.—EXCLUSIVE EMPLOYMENT.

62. Person hired for particular work—On employer's premises — Journeyman tailor.] — A journeyman tailor was employed to do a particular job on his employer's premises, & was obliged to work exclusively for his employer until the job was finished:—*Held:* the relation of master & servant existed between the employer & employed. —*Ex p.* GORDON (1855), 3 C. L. R. 1257; 25 L. J. M. C. 12; 25 L. T. O. S. 187; 1 Jur. N. S. 683; 3 W. R. 568.

Annotation:—**Mentd.** Lawrence *v.* Todd (1863), 14 C. B. N. S. 554.

63. —— Not on employer's premises — Newspaper contributor.]—*Re* ASHLEY & SMITH, ASHLEY *v.* ASHLEY & SMITH, No. 19, *ante.*

SECT. 3.—COMPARISON WITH OTHER RELATIONSHIPS.

SUB-SECT. 1.—AGENCY.

Agency generally.]—*See* AGENCY, Vol. I., pp. 267 *et seq.*

64. Master may direct how work to be done.]—Prisoner kept a refreshment house, & was employed by the prosecutors to get orders for their goods, to collect the money & pay it over. He was paid by commission. He was to go about among the farmers to get orders, but no definite time was to be spent in so doing. He was styled by them their agent for the particular district. Prosecutors had a store at B. under the controul of prisoner, who supplied customers from the stores pursuant to the orders he obtained. In order to obtain the security of a guarantee society for prisoner's conduct, & in compliance with their regulations, it was arranged that the prosecutors should pay prisoner a salary of £1 a year. Prisoner having got into arrear was treated by prosecutors as a debtor for the amount. Prisoner fraudulently appropriated money which he received from customers, & gave a false account:—*Held:* a conviction for embezzlement could not be sustained, as the above facts did not establish that prisoner was the servant of prosecutors.

It seems to me that the difference between the relations of master & servant & of principal & agent is this: A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done (BRAMWELL, B.).—R. *v.* WALKER (1858), Dears. & B. 600; 27 L. J. M. C. 207; 31 L. T. O. S. 137; 22 J. P. 338; 4 Jur. N. S. 465; 6 W. R. 505; 8 Cox, C. C. 1, C. C. R.

Annotation:—**Refd.** R. *v.* Bowers (1866), L. R. 1 C. C. R. 41.

—]—*See* AGENCY, Vol. I., p. 271, Nos. 30–32; CRIMINAL LAW, Vol. XV., pp. 922, 924, Nos. 10,157, 10,182, 10,184, 10,185.

65. Remuneration by commission — Whether conclusive of agency.]—In May, 1915, L. agreed to travel & obtain orders for S. for an indefinite period, & S. agreed in writing to pay L. by way of commission, half profits on receipt of orders, the same to apply to repeats on any accounts introduced by L. In Mar. 1916, S. wrote to L. determining the contract:—*Held:* the relationship between the parties was not that of master & servant, & therefore, L. was not entitled to notice determining the contract, & could not obtain damages for wrongful dismissal.—LEVY *v.* GOLDHILL, [1917] 2 Ch. 297; 86 L. J. Ch. 693; 117 L. T. 442; 33 T. L. R. 479; 61 Sol. Jo. 630.

Annotation:—**Mentd.** Cramb *v.* Goodwin (1919), 35 T. L. R. 477.

—— ——.]—*See, also,* CRIMINAL LAW, Vol. XV., pp. 922, 923, Nos. 10,160–10,166.

66. Distinguished from mercantile agent.]—Pltf., wishing to sell furniture together with certain tapestry known as the "Aubusson" tapestry, stored it in a house & engaged one P., an art dealer who had an antique shop near by, to sell it for him on commission. P. lived in the house & brought customers to see the tapestry. Customers dealt with P. only & knew nothing of pltf., but P. had no authority to complete a sale without pltf.'s sanction. P. falsely represented to pltf. that he had sold the tapestry to one W. for £525 & so obtained pltf.'s consent to the removal of the tapestry for sale & delivery to W. P. then sold it to deft. in fraud of pltf. for £250. Deft. acted in good faith in the usual course of business, & had no notice of pltf.'s title:—*Held:* P. was a mercantile agent & not a mere servant or shopman; a mercantile agency under Factors Act, 1889 (c. 45), may exist although the agent, as here, is acting for one principal only & has no general occupation as agent; P. was not in possession of the tapestry in virtue of his residence in the house, but he came into possession of it as mercantile agent, when he was allowed to take it away under colour of the alleged sale to W., even though pltf.'s sanction was obtained by fraud; the sale to deft. took place in the ordinary course of P.'s business as a mercantile agent within Factors Act, 1889 (c. 45), & deft. was therefore not liable for conversion.—LOWTHER *v.* HARRIS, [1927] 1 K. B. 393, C. A.

SUB-SECT. 2.—APPRENTICESHIP.

See Part XV., *post.*

SUB-SECT. 3.—BAILMENT.

See, generally, BAILMENT, Vol. III., pp. 53 *et seq.*; CRIMINAL LAW, Vol. XV., pp. 890–899, Nos. 9769–9858.

67. Master porter employed by merchant.]—A master porter employed by a merchant at Liverpool to hoist or lower goods, cannot be considered in the light of a bailee, but of a servant, & the party employing him is liable for any injury caused through his negligence or want of skill.

The case of a carrier is quite distinct. He has goods in his custody as a bailee (PATTESON, J.).—RANDLESON *v.* MURRAY (1838), 8 Ad. & El. 109; 3 Nev. & P. K. B. 239; 1 Will. Woll. & H. 149; 7 L. J. Q. B. 132; 2 Jur. 324; 112 E. R. 777.

Annotations:—**Refd.** Allen *v.* Hayward (1845), 7 Q. B. 960. **Mentd.** Quarman *v.* Burnett (1840), 6 M. & W. 499; Milligan *v.* Wedge (1841), 4 Per. & Dav. 714; Rapson *v.* Cubitt (1842), 9 M. & W. 710; Itich *v.* Basterfield (1847), 4 C. B. 783; Reedie *v.* N. W. Ry., Hobbit *v.* Same (1849), 13 Jur. 659; Peachey *v.* Rowland (1853), 13 C. B. 182; Sadler *v.* Henlock (1855), 4 E. & B. 570; Pickard *v.* Smith (1861), 10 C. B. N. S. 470; Murphy *v.* Caralli (1864), 3 H. & C. 462; Barker *v.* Herbert, [1911] 2 K. B. 633.

68. Carrier.]—RANDLESON *v.* MURRAY, No. 67, *ante.*

69. ——.]—Prisoner was a carrier, whose only employment was to carry unsewed gloves from a glove manufacturer at A., to glove sewers who resided at B., to carry back the gloves when sewed, & to receive the money for the work & pay it to the respective glove sewers, deducting his charge. On some occasions, instead of paying over the money received for certain of the glove sewers, he denied the receipt of it, & appropriated it to his own use :—*Held :* he could not be considered the servant of the persons defrauded, & therefore was not liable to be convicted of embezzlement, for his offence was a mere breach of trust, as he was a bailee of the money.—R. *v.* GIBBS (1855), Dears. C. C. 445 ; 24 L. J. M. C. 62 ; 24 L. T. O. S. 279 ; 19 J. P. 70 ; 1 Jur. N. S. 118 ; 3 W. R. 232 ; 6 Cox, C. C. 455, C. C. R.

Annotation :—**Mentd.** Hearn *v.* L. & S. W. Ry. (1853), 3 C. L. R. 597.

70. Master of ship — When remunerated by share of freight.]—ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LTD. *v.* ASHTON, No. 17, *ante.*

Driver of hackney carriage.]—*See* Part II., Sect 4, *post.*

SUB-SECT. 4.—BANKRUPT AND TRUSTEE.

71. Bankrupt carrying on own business — Subject to control & inspection of trustees.]—J. executed a deed of inspectorship under the Bkpcy. Act, 1861 (c. 134), by which he assigned all his property, but not his business, to trustees, upon trust for the benefit of his creditors. The deed contained a covenant by J. to carry on his business to the best of his ability under the inspection & control of the trustees to whom he was to pay all moneys received by him ; a provision that the trustees should be liable as against each other for his own defaults only, & an express declaration that the deed was intended to operate as a deed o inspectorship & composition under the Act. The trustees derived no benefit under the deed othe than that which they shared in common with th other creditors. After the deed was registered pltfs. supplied goods upon written orders expressed to be " for J." to the place where he had carried on his business previously to the execution of the deed, & where the business was still being carried on under his management. The trustees regularly supplied him with money for the current expenses weekly in advance, & they had no personal knowledge of the orders given to pltfs., who on the other hand, were not shown to have had any knowledge of the deed :—*Held :* the real intention of the parties as appearing by the deed was that J. should carry on the business as his own, subject to the inspection & control of the trustees ; & the relation of master & servant or of principal & agent did not exist between them & him, & consequently they were not liable to pltfs. for the price of the goods, supplied on his orders.—EASTERBROCK *v.* BARKER (1870), L. R. 6 C. P. 1 ; 40 L. J. C. P. 17 ; 23 L. T. 535 ; 19 W. R. 208.

Annotation :—**Consd.** Nicholls *v.* Knapman (1909), 101 L. T. 746.

SUB-SECT. 5.—EMPLOYER AND CONTRACTOR.

A. How Relationship Determined.

(a) In General.

72. Mixed question of law & fact — Effect of written contract between parties.]—Defts., who were the occupiers of a dancing hall, engaged on the terms of a written agreement, a band to provide music therein. The agreement provided that the band should not, in the music played, infringe any copyright, & should be liable for damages & costs caused by any infringement. There was also a notice posted in the hall that " only such music as may be played without fee or licence is allowed be played in this hall." On one occasion the played certain music the copyright of which belonged to pltfs., without pltfs.' licence ; but defts. did not know, & had no reasonable ground for suspecting, that this infringement would take place. In an action by pltfs. for damages & an injunction :—*Held :* (1) on its true construction, the agreement between defts. & the band constituted the latter the servants of defts., & not independent contractors, the band on the occasion in question were acting in the course of their employment.

(2) The question whether a man be a servant or an independent contractor is often a mixed question of law & fact. If, however, the relationship rests upon a written document only the question is primarily one of law. The contract is to be construed in the light of relevant circumstances. . . . It seems, however, reasonably clear that the final test, if there be a final test, & certainly the test to be generally applied lies in the nature & degree of detailed control over the person alleged to be a servant. . . . I conceive that a general manager, at a high salary, of a partnership, or the managing director of a limited co. at an even higher salary are usually servants & not independent contractors (MCCARDIE, J.).—PERFORMING RIGHT SOCIETY, LTD. *v.* MITCHELL & BOOKER (PALAIS DE DANSE), LTD., [1924] 1 K. B. 762 ; 93 L. J. K. B. 306 ; 131 L. T. 243 ; 40 T. L. R. 308 ; 68 Sol. Jo. 539.

Annotations :—Generally, **Mentd.** Evans *v.* Hulton (1924), 131 L. T. 534 ; Falcon *v.* Famous Players Film Co., [1926] 1 K. B. 393.

73. General test — Nature & degree of detailed control.]—PERFORMING RIGHT SOCIETY, LTD. *v.* MITCHELL & BOOKER (PALAIS DE DANSE), LTD., No. 72, *ante.*

74. General manager of partnership.]—PERFORMING RIGHT SOCIETY, LTD. *v.* MITCHELL & BOOKER (PALAIS DE DANSE), LTD., No. 72, *ante.*

75. Managing director of limited company.]—PERFORMING RIGHT SOCIETY, LTD. *v.* MITCHELL & BOOKER (PALAIS DE DANSE), LTD., No. 72, *ante.*

(b) Independent Business.

76. Cattle drover — Licenced.] Deft., a butcher, employed a licenced drover to drive home some bullocks for him from Smithfield Market. The drover employed a servant of his own for the purpose, through whose negligence a bullock got into pltf.'s premises, & injured his property. The drover was licenced to drive cattle from Smithfield within the City ; & it appeared that none but the purchasers themselves, or licenced drovers, were allowed to do so ; but the accident took place out of the City :—*Held :* deft. was not liable to be sued for the injury.

Here the butcher does not as a regular part of his business employ the drover. The case is like that of a man who sends a parcel by a person carrying on the business of carrier (LORD DENMAN, C.J.).—MILLIGAN *v.* WEDGE (1840), 12 Ad. & El. 737 ; Arn. & H. 73 ; 4 Per. & Dav. 714 ; 10 L. J. Q. B. 19 ; 5 J. P. 209 ; 113 E. R. 993.

Annotations :—**Consd.** Rapson *v.* Cubitt (1842), 9 M. & W. 710. **Distd.** Martin *v.* Temperley (1843), 4 Q. B. 298. **Consd.** Allen *v.* Hayward (1845), 7 Q. B. 960. **Distd.**

Sect. 3.—Comparison with other relationships: Subsect. 5, B. & C.; sub-sects. 6 & 7. Sect. 4.]

took place, by which a person on the premises was seriously injured:—*Held:* he could not maintain any action against the original contractor.—RAPSON *v.* CUBITT (1842), 9 M. & W. 710; 11 L. J. Ex. 271; 6 Jur. 606; 152 E. R. 301; *previous proceedings* (1841), Car. & M. 64, N. P.

Annotations:—**Reid.** Allen *v.* Hayward (1845), 7 Q. B. 960; Reedie *v.* L. & N. W. Ry., Hobbit *v.* L. & N. W. Ry. (1849), 4 Exch. 244; Parry *v.* Smith (1879), 4 C. P. D. 325; Padbury *v.* Holliday & Greenwood (1912), 28 T. L. R. 494; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762. **Mentd.** Machu *v.* L. & S. W. Ry. (1848), 2 Exch. 415; Overton *v.* Freeman (1852), 11 C. B. 867; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335.

93. ——.]—In the case of a servant, the employer by hiring him to a certain extent accredits & becomes responsible civilly for his acts. Thus, W. [the sub-contractor] might be liable for the consqeuences of the negligence of the labourers employed by him. But it by no means follows that defts., the original contractors, are responsible for the acts of W. I think the present case falls within the principle of those authorities which have decided that the sub-contractor, & not the person with whom he contracts, is liable civilly as well as criminally for any wrong done by himself or his servants in the execution of the work contracted for (MAULE, J.).—OVERTON *v.* FREEMAN (1852), 11 C. B. 867; 21 L. J. C. P. 52; 18 L. T. O. S. 224; 16 Jur. 65; 138 E. R. 7 7; *previous proceedings* (1851), 3 Car. & Kir. 49, N. P.

Annotations:—**Reid.** Peachey *v.* Rowland (1853), 13 C. B. 182; Sadler *v.* Henlock (1855), 3 C. L. R. 760. **Mentd.** Ellis *v.* Sheffield Gas Consumers Co. (1853), 2 E. & B. 767; Blake *v.* Thirst (1863), 2 H. & C. 20.

94. Servant may also be sub-contractor.] —A railway co. entered into a contract with A. to construct a branch line; who contracted with B. to erect a tubular bridge, parcel of the works. B. had a surveyor C. whom he paid by a salary of £250 a year to attend to his general business; & after obtaining the contract for the bridge contracted with C. to provide the necessary scaffolding, for which he was to receive £40 irrespective of his salary, B. to furnish the requisite materials, including lights. One of the poles of the scaffold rested on a highway, & owing to the want of sufficient light to warn the passers-by, D. stumbled over the pole & was injured; subsequently to which additional lights were placed on the spot, & B. paid for them:—*Held:* B. was not liable, & D.'s remedy lay against C.

The act complained of was not done by C. in the character of servant of defts. (PARKE, B.).—KNIGHT *v.* FOX (1850), 5 Exch. 721; 20 L. J. Ex. 9; 16 L. T. O. S. 128; 14 Jur. 963; 14 J. P. Jo. 721; 155 E. R. 316.

Annotations:—**Folld.** Overton *v.* Freeman (1852), 11 C. B. 867. **Reid.** Ellis *v.* Sheffield Gas Consumers Co. (1853), 2 E. & B. 767; Peachey *v.* Rowland (1853), 13 C. B. 182; Sadler *v.* Henlock (1855), 24 L. T. O. S. 233.

C. Liability of Master for Acts of Contractors and Their Servants.

See Part IX., Sect. 6, *post.*

SUB-SECT. 6.—PARTNERSHIP.

See PARTNERSHIP; Partnership Act, 1890 (c. 39), s. 2 (3) (*b*).

SUB-SECT. 7.—TENANCY.

95. Whether occupation as servant or tenant—Occupancy by way of privilege—Pauper tenant of overseers.]—One put by overseers of the poor into a house to live there is merely a servant, & his possession is theirs, & he may commit arson by burning it.—R. *v.* GOWEN (1786), 2 East, P. C. 1027.

Annotation:—**Mentd.** R. *v.* Wallis (1832), 1 Mood. C. C. 344.

96. ——.]—A schoolmaster was permitted, but not required, by his employers to live in a certain house so long as he continued to hold the appointment of schoolmaster:—*Held:* the schoolmaster did not occupy the house by virtue of his employment, &, therefore, was entitled to have his name inserted in division 1 of the list of voters.—DOVER *v.* PROSSER, [1904] 1 K. B. 84; 73 L. J. K. B. 13; 89 L. T. 724; 68 J. P. 37; 52 W. R. 140; 20 T. L. R. 49; 48 Sol. Jo. 51; 2 L. G. R. 156; 1 Smith, Reg. Cas. 313, D. C.

97. ——.]—The true principle for determining whether occupation by a person in the capacity of a servant is occupation as tenant, is this: If the occupation be as servant it is not a tenancy, if it be not as servant it is a tenancy; though the person be required to occupy.—BURY ST. EDMUNDS BOROUGH CASE, CLARK *v.* ST. MARY, BURY ST. EDMUNDS OVERSEERS (1856), 1 C. B. N. S. 23; K. & G. 90; 26 L. J. C. P. 12; 28 L. T. O. S. 102; 20 J. P. 759; 3 Jur. N. S. 645; 5 W. R. 21; 140 E. R. 9.

Annotations:—**Mentd.** Rogers *v.* Harvey (1858), 5 C. B. N. S. 3; Heartley *v.* Banks (1859), 28 L. J. C. P. 144; Bridgwater *v.* Durant (1861), 11 C. B. N. S. 7; Collier *v.* King (1862), 11 C. B. N. S. 478; Fox *v.* Dalby (1874), L. R. 10 C. P. 285; Smith *v.* Seghill Overseers (1875), L. R. 10 Q. B. 422; Bent *v.* Roberts (1877), 1 Tax Cas. 199; Hemmings *v.* Stoke Poges Golf Club (1919), 35 T. L. R. 549.

98. ——.]—R. *v.* SOUTH NEWTON, WILTS. (INHABITANTS), No. 303, *post.*

99. ——.]—LAKE *v.* CAMPBELL, No. 780, *post.*

100. ——.]—A steel-tester, engaged during the daytime at his employers' works, entered into an agreement with his employers, of which there was a written memorandum, to occupy a certain house attached to the office of the works. He agreed to be responsible for certain cleaning operations in the house & other duties, & in return he was to have the house rent & rates free, & also to have free coal & light, etc. The cleaning duties were carried out by his daughters during the four years he occupied the house. He was killed by gas escaping into his bedroom from a stove in the office where it had been lighted by the night watchman. The county ct. judge held that the workman was under a contract of service to perform the duties set out in the written memorandum & found that he was compelled to sleep on the premises to see that these duties were carried out. He held that death was due to an accident arising out of & in the course of the employment:—*Held:* the contract with regard to the cottage was merely a tenancy agreement & embodied no contract of service.—WRAY *v.* TAYLOR BROTHERS & CO. (1912), 109 L. T. 120; 6 B. W. C. C. 529, C. A.

101. —— **Co-existence of relationships of tenancy & service in same parties.**]—Bill to set aside the lease of a farm granted to a steward by his employer, dismissed, with costs; although the lease was for a term longer than was usual on the estates, & was granted at the solicitation of the steward, on an agreement made before the subsisting lease had expired, & at a rent lower than was offered to the steward on behalf of the occupying tenant; it appearing that the rent to be paid by the steward had been fixed by a surveyor named for that purpose by the employer, & on a valuation made in the manner usual with the

surveyor; & the offer of a higher rent being known to the employer before he executed the lease.

There is no rule of policy which prevents a steward from being a lessee. There is no rule of policy which prevents a steward receiving from the bounty of the employer a beneficial lease (LEACH, V.-C.).—SELSEY (LORD) *v.* RHOADES (1824), 2 Sim. & St. 41; 57 E. R. 260; *on appeal* (1827), 1 Bli. N. S. 1, H. L.

Annotations:—**Mentd.** Nicol *v.* Vaughan (1834), 7 Bli. N. S. 395; Trevelyan *v.* Charter (1835), 4 L. J. Ch. 209; Rudd *v.* Sewell (1840), 4 Jur. 882; Baker *v.* Read (1854), 18 Beav. 398; Waters *v.* Shaftesbury (1866), 14 L. T. 184; Dunne *v.* English (1874), L. R. 18 Eq. 524.

102. —— House not house of master—Rent paid by master.]—A servant occupying a house cannot be said to hold it as servant, if it be not the master's house.

R., a brewer, engaged L. as clerk, at a yearly salary, & agreed to permit him to occupy a certain house as his residence, free from rent, rates, & taxes, another clerk being also boarded & lodged in the same house if R. should require it, but paying for his board: & such salary & house accommodation were to be in full satisfaction to L. for all perquisites, & for his expenses in the service. Either party might give the other three months' notice of determining the service. L. occupied the house for some time, & then, his health being impaired, he removed to another. L. agreed with the landlord for this house, but the latter considered R. as his tenant. The furniture of the first house, belonging to R., was removed to the second. L. was assessed to the poor rates & window duty; & these, as well as the rent, were paid by R. at the brewery. L. once objected to being registered as a voter by reason of occupying the house, but afterwards acquiesced, & voted at the election of a borough member. Subsequently, L. appealed against a poor rate in which he was assessed as the occupier, alleging that he held as servant only, & R. appeared on the hearing of the appeal, & claimed to be the party ratable. The sessions confirmed the rate, but stated the above facts for the opinion of this ct.:—*Held*: L., the clerk, & not R., was the ratable occupier.—R. *v.* LYNN (1838), 8 Ad. & El. 379; 3 Nev. & P. K. B. 411; 1 Will. Woll. & H. 366; 7 L. J. M. C. 85; 2 J. P. 440; 2 Jur. 541; 112 E. R. 881.

103. — — ——.]—Pauper, whose children were engaged to work for three years at a mill, removed with his family to a cottage rented by the mill owner, C., for the convenience of families so employed. The bargain between him & C. was, that a stated weekly payment for the use of the cottage should be deducted from the children's wages. Pauper, who was not himself in the service of C., continued to occupy the cottage for sixteen years, during all which time, & after he quitted it, some one or more of his children continued to work at the mill. He quitted without regular notice, in consequence of the sale of the cottage:—*Held*: pauper's occupation was as tenant, & not as servant.—R. *v.* BISHOPTON (INHABITANTS) (1839), 9 Ad. & El. 824; 1 Per. & Dav. 598; 8 L. J. M. C. 25; 3 J. P. 273; 112 E. R. 1426.

——.]—*See, also*, ELECTIONS, vol. XX., p. 26, Nos. 138–140; LANDLORD & TENANT, Vol. ——, pp. 519 *et seq.*; Vol. XXXI., p. 49, No. 1968; RATES & RATING.

Description of premises occupied by servant—In indictment for burglary.]—*See* CRIMINAL LAW, Vol. XV., p. 956, Nos. 10,645–10,660.

SECT. 4.—DURATION OF RELATIONSHIP.

Termination of relationship.]—*See* Part IV., Sect. 2, *post*.

104. Yearly hiring—Relationship continuous throughout term.]—(1) Where a contract of hiring contains an express exception of any particular time, so that during that time the servant is free from the control of the master, that is not a hiring for a year, & service under it will not confer a settlement. . . . The law implies in every contract of hiring an undertaking by the servant to work at all reasonable hours when required. In factories, the ordinary hours of working are, generally speaking, twelve hours a day; but it by no means follows from thence that the master may not on extraordinary occasions require his servants to work at other hours: & whether he does so or not, the relation of master & servant will equally subsist during the whole of the day (BAYLEY, J.).

In order to constitute a yearly hiring the contract must be such that the relation of master & servant will subsist during the whole of the year, & during the whole of every day in the year (LITTLEDALE, J.).

(2) I have no doubt that what passed by parol between the pauper & the foreman was not admissible evidence to explain what the bargain was (PARKE, J.).—R. *v.* ST. JOHN, DEVIZES (INHABITANTS) (1829), 9 B. & C. 896; 4 Man. & Ry. K. B. 680; 2 Man. & Ry. M. C. 397; 8 L. J. O. S. M. C. 24; 109 E. R. 333.

Annotation:—*As to* (1) **Consd.** R. *v.* Frome Selwood (1830), 1 B. & Ad. 207.

105. Employment limited to certain hours daily—Relationship exists during those hours only.]—Where the pauper is hired for five years to stand in a certain relation to his master only during twelve hours in the day . . . as he was to work no longer, that was the only time in which he was to be under his master's control (LORD KENYON, C.J.).—R. *v.* NORTH NIBLEY (INHABITANTS) (1792), 5 Term Rep. 21; Nolan, 146; 101 E. R. 12.

Annotations:—**Consd.** R. *v.* Frome Selwood (1830), 1 B. & Ad. 207. **Refd.** R. *v.* Gateshead (1821), 3 Dow. & Ry. K. B. 333, n.

106. —— ——.]—R. *v.* ST. JOHN, DEVIZES (INHABITANTS), No. 101, *ante*.

107. —— ——.]—A pauper was "hired for a year, at 4*s.* 6*d.* a week, to work from six in the morning till seven in the evening, & to make as much overwork as he chose":—*Held*: an exceptive hiring.

The stipulations are that the servant shall receive fixed wages, that he shall work from six in the morning till seven in the evening, & that he may make as much overwork as he chooses. But he could not have been compelled to make any overwork; he had a right any & every evening to say to his master, "I have worked thirteen hours to-day, & I will work no more till to-morrow." This is clearly an exception in the contract, limiting the control of the master over the servant to thirteen hours a day; beyond that period the master had no right to compel work, nor was the servant under any obligation to perform it (BAYLEY, J.).—R. *v.* BIRMINGHAM (INHABITANTS) (1829), 9 B. & C. 925; 2 Man. & Ry. M. C. 402; 4 Man. & Ry. K. B. 691; 109 E. R. 344; *sub nom.* R. *v.* ATHENSTONE (INHABITANTS), 8 L. J. O. S. M. C. 44.

Annotations:—**Folld.** R. *v.* Frome Selwood (1830), 1 B. & Ad. 207. **Distd.** R. *v.* Ossett-cum-Gawthorpe (1832), 4 B. & Ad. 216. **Refd.** R. *v.* Norton Bavant (1835), 3 Ad. & El. 161.

Sect. 4.—Duration of relationship. Part II. Sects. 1, 2,

108. —— ——.]—If it be made part of the bargain that the person hired shall serve for specific hours only then the relation of master & servant does not subsist out of those hours (BAYLEY, J.).—R. *v.* FROME SELWOOD (INHABITANTS) (1830), 1 B. & Ad. 207; 9 L. J. O. S. M. C. 7; 109 E. R. 764.

Annotations:—**Distd.** R. *v.* Ossett-cum-Gawthorpe (1832), 4 B. & Ad. 216. **Refd.** R. *v.* Norton Bavant (1835), 3 Ad. & El. 161.

109. —— ——.]—A pauper was hired, with others, under a contract, to hew, work, fill, & drive coals, & to do such other work as they should be required & directed to do by the owners of the mine, at the respective prices, & on the following amongst other terms & conditions: that the parties hired should, except when prevented by sickness or other sufficient or unavoidable cause, do & perform a full day's work on each & every working day, except a single shift on the pay Saturdays, or such quantity of work as should be deemed fairly equal to a day's work, & should not leave their work until such day's quantity of work was fully performed or finished to the extent of each man's ability, & in default thereof, forfeit 2*s.* 6*d.*; & it was agreed, that every hewer, putter, or driver, or other workman, should be paid his respective earnings or wages every fourteen days, subject nevertheless to such deductions as were therein mentioned:—*Held*: the contract to hew, work, fill in, & drive coals, & to do such other work as should be necessary for the carrying on of the colliery, & as they should be required & directed to do by the owners, must be taken to mean, to do what should be deemed necessary under the terms subsequently set forth; it was therefore an exceptive contract of hiring. It was a contract to work for eleven out of the fourteen days, the Sundays & pay Saturdays, when single shift, being days on which the relation of master & servant did not exist between the parties.—R. *v.* COWPEN (INHABITANTS) (1836), 5 Ad. & El. 333; 6 Nev. & M. K. B. 559; 3 Nev. & M. M. C. 673; 5 L. J. M. C. 125; 111 E. R. 1191.

Annotation:—**Refd.** R. *v.* Walbottle (1846), 9 Q. B. 248.

Part II.—Particular Classes of Servants.

SECT. 1.—AGRICULTURAL LABOURERS.

110. Who is an agricultural labourer—General help.]—REYNOLDS *v.* WHELAN (1847), 16 L. J. Ch. 434; 9 L. T. O. S. 392.

Annotations:—**Mentd.** *Re* Feltham's Trust (1855), 1 K. & J. 528; *Re* Waller, White *v.* Scoles (1898), 68 L. J. Ch. 107.

Within Employers & Workmen Act, 1875 (c. 90).]—*See* Part VI., Sect. 8, sub-sect. 2, B. (*b*), *post*.

Within Employers' Liability Act, 1880 (c. 42).]—*See* Part XIII., Sect. 2, sub-sect. 2, *post*.

SECT. 2.—APPRENTICES.

See Part XV., *post*.

SECT. 3.—ARTIFICERS.

Within Employers & Workmen Act, 1875 (c. 90).]—*See* Part VI., Sect. 8, sub-sect. 2, B. (*b*), *post*.

Within Employers' Liability Act, 1880 (c. 42).]—*See* Part XIII., Sect. 2, sub-sect. 2, *post*.

SECT. 4.—DRIVERS OF HACKNEY CARRIAGES.

111. Whether servant of owner—As regards the public.]—The licenced driver of a cab licenced to deft. is a servant of deft. for whose trespass when driving the cab deft. is liable, although the driver hire the cab at a sum certain each day, by a bargain having reference to that day only; such an agreement being merely the mode of paying deft.'s wages.—MORLEY *v.* DUNSCOMBE (1848), 11 L. T. O. S. 199.

Annotations:—**Folld.** Powles *v.* Hider (1856), 6 E. & B. 207. **Refd.** Fowler *v.* Lock (1872), L. R. 7 C. P. 272.

112. —— ——.]—By arrangement between deft., the registered proprietor, & the licensed driver of a hackney cab, plying for hire under London Hackney Carriages Act, 1831 (c. 22), & London Hackney Carriages Act, 1843 (c. 86), the driver paid 14*s.* 6*d.* each morning for the uncontrolled use of the cab & two horses during the day, & the fares earned each day belonged to the driver. The horses were fed at the expense of deft., & his name appeared upon a plate on the cab, as required by London Hackney Carriages Act, 1831 (c. 22), s. 20:—*Held*: under the circumstances, & looking to the provisions of above statutes the driver was to be considered as the servant or agent of deft., with authority to enter into contracts for the employment of the cab, & deft. therefore was liable for a loss occasioned by the breach of a contract by the driver safely & securely to carry.—POWLES *v.* HIDER (1856), 6 E. & B. 207; 25 L. J. Q. B. 331; 27 L. T. O. S. 77; 21 J. P. 4; 2 Jur. N. S. 472; 4 W. R. 492; 119 E. R. 841.

Annotations:—**Consd.** Fowler *v.* Lock (1872), L. R. 7 C. P. 272. **Folld.** Venables *v.* Smith (1877), 2 Q. B. D. 279. **Distd.** King *v.* Spurr (1881), 8 Q. B. D. 104. **Apprvd.** Gates *v.* Bill, [1902] 2 K. B. 38. **Consd.** Kemp *v.* Elisha, [1918] 1 K. B. 228. **Refd.** Steel *v.* Lester (1877), 3 C. P. D. 121; King *v.* London Improved Cab Co. (1889), 23 Q. B. D. 281; Keen *v.* Henry, [1894] 1 Q. B. 292; Doggett *v.* Waterloo Taxicab Co. (1910), 79 L. J. K. B. 1085; Smith *v.* General Motor Cab Co. (1911), 105 L. T. 113; Bygraves *v.* Dicker, [1923] 2 K. B. 585.

113. —— ——.]—The relation of the proprietor & the driver of a cab *quoad* the public is that of master & servant; *inter se* that of bailor & bailee.

Where there is no wrongful user of the cab by the driver, the proprietor is responsible for his negligence. A driver, who had no specified time for starting from or leaving the proprietor's stables, made a short deviation for his own convenience at the close of his day's work & while returning to the stables. After such deviation he was again returning when he ran over & injured pltf.:—*Held*: the driver was not on an independent journey, & must be considered to be in the proprietor's employ at the time of the accident.—VENABLES *v.* SMITH (1877), 2 Q. B. D. 279; 46 L. J. Q. B. 470; 36 L. T. 509; 41 J. P. 551; 25 W. R. 584.

Annotations:—**Distd.** King *v.* Spurr (1881), 8 Q. B. D 104. **Apprvd.** King *v.* London Improved Cab Co. (1889), 23 Q. B. D. 281. **Refd.** Steel *v.* Lester (1877), 3 C. P. D. 121;

Keen *v.* Henry, [1894] 1 Q. B. 292; Gates *v.* Bill, [1902] 2 K. B. 38; Doggett *v.* Waterloo Taxi-Cab Co., [1910] 2 K. B. 336; Smith *v.* General Motor Cab Co., [1911] A. C. 188; Kemp *v.* Elisha, [1918] 1 K. B. 228; Bygraves *v.* Dicker, [1923] 2 K. B. 585.

position of the driver of a taxi-cab is in most respects identical with the position of the driver of a horse cab. It has been held by a series of authorities by which we are bound that the relation of a proprietor of a horse cab & a driver is not in ordinary circumstances one of master & servant, although as between a member of the public injured through the negligence of the driver the proprietor is liable. I think that the relation was that of bailment (COZENS-HARDY, M.R.).—DOGGETT *v.* WATERLOO TAXI-CAB CO., LTD., [1910] 2 K. B. 336; 79 L. J. K. B. 1085;

Annotations:—**Consd.** Wilmerson *v.* Lynn & Hamburg S.S. Co., [1913] 3 K. B. 931. **Refd.** Smith *v.* General Motor Cab Co., [1911] A. C. 188; Curtis *v.* Plumptre (1913), 6 B. W. C. C. 87; Kemp *v.* Elisha, [1918] 1 K. B. 228.

115. ——— ———.]—Applt. was a taxicab driver who, in driving a cab of resps., met with an accident. The county ct. judge found that the relation between resps. & applt. was that of bailor & bailee, & not that of master & servant, & dismissed the application:—*Held:* the finding of the county ct. judge could not be disturbed.

It may well be that though the relation between the taxicab owner & his driver *inter se* be that of bailor & bailee, the driver may still *quoad* third parties be treated as the agent of the proprietor authorised to ply for hire in the streets for reward to the latter; & the proprietor be thereby rendered liable for those acts of the driver which were within the scope of the latter's authority (LORD ATKINSON).

Quoad the public, the relation of the cab driver to the cab owner was, in my opinion, one of agency; so that, for negligence in the conduct of his business, both principal & agent might naturally be responsible to the public (LORD SHAW).—SMITH *v.* GENERAL MOTOR CAB CO., LTD., [1911] A. C. 188; 80 L. J. K. B. 839; 105 L. T. 113; 27 T. L. R. 370; 55 Sol. Jo. 439; 4 B. W. C. C. 249, H. L.

Annotations:—**Refd.** R. *v.* Messer (1911), 82 L. J. K. B. 913; Curtis *v.* Plumptre (1913), 6 B. W. C. C. 87; Kemp *v.* Elisha, [1918] 1 K. B. 228. **Mentd.** Wilmerson *v.* Lynn & Hamburg S.S. Co., [1913] 3 K. B. 931.

116. ——— ——— **London Hackney Carriages Act, 1843 (c. 86).**]—Above Act does not, under all circumstances, create the relation of master & servant between the cab proprietor & the driver.

Pltf. was injured through the negligent driving of a cab driver, & brought his action for damages against the cab proprietor. By the terms of arrangement between the proprietor of the cab & the driver the proprietor let the cab to the driver by the week, the driver providing the horse & harness, & paying 10*s.* a week for the hire of the cab:—*Held:* the proprietor was not liable for the negligent driving of the cab driver, for the relation between them was that of bailor & bailee, & the relation of master & servant was not created between them by above Act.—KING *v.* SPURR (1881), 8 Q. B. D. 104; 51 L. J. Q. B. 105; 45 L. T. 709; 46 J. P. 198; 30 W. R. 152, D. C.

Annotations:—**Distd.** King *v.* London Improved Cab Co. (1889), 23 Q. B. D. 281. **N.F.** Keen *v.* Henry, [1894] 1 Q. B. 292. **Refd.** Doggett *v.* Waterloo Taxi-Cab Co. 102 L. T. 874; Kemp *v.* Elisha, [1918] 1 K. B.

117. ——— ——— ———.]—The relationship between the cab proprietor & the driver is that of bailor & bailee. The question, however, turns on the true construction of above Act, & that, in my opinion, puts the driver so far as regards the public in the position of servant, & the proprietor in the position of master with the liabilities that attach to that position (LOPES, L.J.).—KING *v.* LONDON IMPROVED CAB CO. (1889), 23 Q. B. D. 281; 58 L. J. Q. B. 456; 61 L. T. 34; 53 J. P. 788; 37 W. R. 737; 5 T. L. R. 591, C. A.

Annotations:—**Folld.** Keen *v.* Henry, [1894] 1 Q. B. 292. **Refd.** Smith *v.* Bailey, [1891] 2 Q. B. 403; Gates *v.* Bill, [1902] 2 K. B. 38; Doggett *v.* Waterloo Taxi-Cab Co., [1910] 2 K. B. 336; Smith *v.* General Motor Cab Co., [1911] A. C. 188; Kemp *v.* Elisha, [1918] 1 K. B. 228.

118. ——— ——— ———.]—Deft., registered the proprietor of a hackney carriage under above Act let the carriage to his son upon a hiring agreement. The son had the sole charge & custody of the

an action against deft. to recover damages for injury sustained in consequence of the negligence of the driver of the carriage who was put to drive the carriage by deft.'s son:—*Held:* the effect of above Act was to render the registered proprietor of a hackney carriage in the metropolis responsible for the acts of the driver as if the driver were his servant, & consequently deft. was liable.—KEEN *v.* HENRY, [1894] 1 Q. B. 292; 63 L. J. Q. B. 211; 69 L. T. 671; 58 J. P. 262; 42 W. R. 214; 10 T. L. R. 96; 38 Sol. Jo. 77; 9 R. 102, C. A.

Annotations:—**Apld.** Bygraves *v.* Dicker, [1923] 2 K. B. 585. **Refd.** Gates *v.* Bill, [1902] 2 K. B. 38; Doggett *v.* Waterloo Taxi-Cab Co., [1910] 2 K. B. 336; Kemp *v.* Elisha, [1918] 1 K. B. 228.

119. ——— ——— ———.]—Deft. & her son were partners in the business of cab proprietors in London. A cab belonging to the partners, which was let in the ordinary way to a cabman, through his negligence came into collision with another vehicle, in which pltf. was riding, whereby injuries were occasioned to pltf. The licence for the cab was taken out in the name of deft.'s son, who appeared on the register of licences as the proprietor thereof. In an action by pltf. against deft. in respect of the injuries occasioned to pltf. as aforesaid:—*Held:* the action was maintainable on the ground that the liability imposed in such cases on cab proprietors, by virtue of the Acts relating to hackney carriages, is not confined to licenced proprietors, so that deft. must be considered as being a licenced proprietor in respect of the cab.

The relation between the cab proprietor & the cab driver in these cases, at common law, & independently of statute, would be, not that of master & servant, or principal & agent, but that of bailor & bailee (VAUGHAN WILLIAMS, L.J.).—GATES *v.* BILL (R.) & SON, [1902] 2 K. B. 38; 71 L. J. K. B. 702; 87 L. T. 288; 50 W. R. 546; 18 T. L. R. 592; 46 Sol. Jo. 498, C. A.

Annotations:—**Refd.** Doggett *v.* Waterloo Taxi-Cab Co., [1910] 2 K. B. 336; Smith *v.* General Motor Cab Co., [1911] A. C. 188; Kemp *v.* Elisha, [1918] 1 K. B. 228.

120. ——— ——— **Town Police Clauses Act, 1847 (c. 89).**]—Under above Act, the registered proprietor of a hackney carriage is responsible for the acts of the driver whilst plying for hire, as if the relationship of master & servant existed between them.—BYGRAVES *v.* DICKER, [1923] 2 K. B. 585; 92 L. J. K. B. 1021; 129 L. T. 688, D. C.

121. ——— **As regards the owner.**]—Where a cab driver hires from a cab proprietor a horse & cab at a certain sum per day, the relationship of master & servant does not exist between the proprietor & the driver so as to deprive the driver of his remedy by action for personal injuries sustained by him by reason of the proprietor hiring out to

Sect. 4.—Drivers of hackney carriages. Sects. 5 & 6: Sub-sects. 1 & 2, A.

him a horse not reasonably fit & safe to drive.—GIBBONS *v.* STANDON (1867), 16 L. T. 497.

122. —— —— Bailor & bailee.]—Pltf., a cab driver, obtained from deft., a cab proprietor, a horse & cab on the usual terms, which are that the driver shall at the end of the day hand over to the proprietor 18*s.*, retaining for himself all the day's earnings over that sum, the day's food for the horse being supplied by the owner, & the latter having no control over the driver after leaving the yard. The horse with which the driver was furnished, which was fresh from the country & had never before been harnessed to a cab, bolted & overturned the cab & injured the driver. The jury found that the horse was not reasonably fit to be driven in a cab:—*Held:* the relation between the parties was that of bailor & bailee, & consequently, upon this finding of the jury, the proprietor was responsible for the injury sustained by the driver.—FOWLER *v.* LOCK (1872), L. R. 7 C. P. 272; 41 L. J. C. P. 99; 26 L. T. 476; 20 W. R. 672; *on appeal*, L. R. 9 C. P. 751, n., Ex. Ch.; *subsequent proceedings* (1874), L. R. 10 C. P. 90.

Annotations:—**Consd.** Gates *v.* Bill, [1902] 2 K. B. 38. **Refd.** Steel *v.* Lester (1877), 3 C. P. D. 121; Venables *v.* Smith (1877), 2 Q. B. D. 279; King *v.* London Improved Cab Co. (1889), 23 Q. B. D. 281; Doggett *v.* Waterloo Taxi-Cab Co., [1910] 2 K. B. 336; Smith *v.* General Motor Cab Co., [1911] A. C. 188; Kemp *v.* Elkna, [1918] 1 K. B. 228. **Mentd.** Hyman *v.* Nye (1881), 6 Q. B. D. 685; Robertson *v.* Amazon Tug & Lighterage Co. (1881), 7 Q. B. D. 598.

123. —— —— ——.]—VENABLES *v.* SMITH, No. 113, *ante*.

124. —— —— ——.]—KING *v.* SPURR, No. 116, *ante*.

125. —— —— ——.]—KING *v.* LONDON IMPROVED CAB CO., No. 117, *ante*.

126. —— —— ——.]—GATES *v.* BILL (R.) & SON, No. 119, *ante*.

127. —— —— ——.]—DOGGETT *v.* WATERLOO TAXI-CAB CO., LTD., No. 114, *ante*.

128. —— —— ——.]—SMITH *v.* GENERAL MOTOR CAB CO., LTD., No. 115, *ante*.

129. —— —— Within Falsification of Accounts Act, 1875 (c. 24), s. 1.]—The driver of a taxicab owned by a co., who wears the uniform of the co. & is required to conform to various regulations issued by the co. on pain of dismissal, but who takes out his cab each day to ply for hire in London, paying to the company 75 per cent. of his daily receipts, may be a "servant" within above sect., & receives the money for his fares for & on behalf of the co. within Larceny Act, 1901 (c. 10).—R. *v.* SOLOMONS, [1909] 2 K. B. 980; 79 L. J. K. B. 8; 101 L. T. 496; 73 J. P. 467; 25 T. L. R. 747; 22 Cox, C. C. 178; 2 Cr. App. Rep. 288, C. C. A.

Annotations:—**Consd.** Doggett *v.* Waterloo Taxi-Cab Co., [1910] 2 K. B. 336. **Refd.** Smith *v.* General Motor Cab Co., [1911] A. C. 188; R. *v.* Messer, [1913] 2 K. B. 421.

130. Whether servant of manager of company—Manager registered as proprietor.]—A licence for a taxicab was applied for & issued to deft. as the managing director of a limited co., & his name & address were entered in the register of licences of hackney carriages, kept at Scotland Yard, under the headings "Name of Proprietor" & "Address," with the addition of the words "Managing Director," & the name & address of the co. Pltf., a member of the public, was injured by, as he alleged, the negligent driving of the cab, & he brought an action against deft. to recover damages. At the trial pltf. put in a certified copy of the entry in the register for the purpose of proving that deft., being registered as the proprietor of the cab, was liable for the acts of the driver. Deft. tendered evidence to show that he was not the owner or partowner of the cab, & was therefore not liable. The judge rejected the evidence upon the ground that the entry in the register was conclusive as to the liability of deft. as proprietor for the acts of the driver:—*Held:* the register was not conclusive, & the evidence was wrongly rejected.

No relation of master & servant, & indeed no relation at all, was created at common law between deft. as managing director & any individual driver. There is nothing in any of the Acts or regulations to create the relation of master & servant between deft. & the driver & render him liable for the driver's acts merely because he is on the register under the name proprietor (PICKFORD, L.J.).—KEMP *v.* ELISHA, [1918] 1 K. B. 228; 87 L. J. K. B. 428; 118 L. T. 246; 82 J. P. 81; 62 Sol. Jo. 174; 16 L. G. R. 17, C. A.

Liability of master for tortious act of driver.]—*See* Part IX., Sect. 3, sub-sect. 12, B. (*d*), *post*.

SECT. 5.—MANUAL LABOURERS.

Within Truck Acts.]—*See* FACTORIES, Vol. XXIV., pp. 934–937, Nos. 231–252.

Within Employers' Liability Act, 1880 (c. 42).]—*See* Part XIII., Sect. 2, sub-sect. 2, *post*.

Within Employers & Workmen Act, 1875 (c. 90).]—*See* Part VI., Sect. 8, sub-sect. 2, B. (*b*), *post*.

Within Workmen's Compensation Act, 1906 (c. 58).]—*See* Part XIV., Sect. 2, sub-sect. 1, Sect. 3, sub-sect. 1, *post*.

Within National Insurance Act, 1911 (c. 55).]—*See* WORK & LABOUR.

SECT. 6.—MENIAL AND DOMESTIC SERVANTS.

SUB-SECT. 1.—MENIAL SERVANTS.

131. Definition.]—Pltf. agreed to enter deft.'s service as head gardener, & to have the management & superintendence of deft.'s hot-houses, pineries, etc., at the wages of £100. Pltf. resided in a house belonging to deft., in his domain, but apart from deft.'s house. Pltf. had the privilege of taking in apprentices, & had taken in two, at £15 *per annum* premium. Pltf. remained with deft. in the capacity above mentioned about four years, when deft. gave him a month's warning. In an action brought by pltf. to recover a quarter's wages, as being a yearly servant:—*Held:* he was a menial servant only, & was only entitled to a month's warning.

A groom is a domestic servant (ALDERSON, B.). I should have been inclined to have told the jury, that pltf. was a menial servant; for, though he did not live in deft.'s house, or within the curtilage, *intra moenia*, he lived in the grounds within the domain (LORD ABINGER, C.B.).—NOWLAN *v.* ABLETT (1835), 2 Cr. M. & R. 54; 1 Gale, 72; 5 Tyr. 709; 4 L. J. Ex. 155; 150 E. R. 23.

Annotations:—**Apld.** Johnson *v.* Blenkensop (1841), 5 Jur. 870. **Expld.** Ogle *v.* Morgan (1852), 1 De G. M. & G. 359; Nicoll *v.* Greaves (1864), 17 C. B. N. S. 27. **Consd.** Pearce *v.* Lansdowne (1893), 62 L. J. Q. B. 441. **Refd.** L. C. C. *v.* Perry, [1915] 2 K. B. 193.

d. *Housekeeper.*]—The housekeeper of a large hotel is not a menial servant, & cannot be dismissed on a month's notice in the absence of express agreement.—LAWLER *v.* LINDEN (1876), I. R. 10 C. L. 188.—IR.

132. ——.]—The question whether a particular person is within the definition of "workman" so as to be able to claim the benefit of the Employer's Liability Act, 1880 (c. 90) is one of fact, even though there may be no dispute as to the nature of his duties & the circumstances under which they are performed.

The expression "domestic or menial servant" has reference not to the nature of the duties performed, but to the relation in which the person performing them stands towards his employer. The words "domestic" & "menial" are not meant to be opposed to one another in the definition; they mean the same thing, & were inserted to exclude from the operation of the Employers & Workmen Act, 1875 (c. 90) & the effect is therefore to exclude from the operation of the Employers' Liability Act, 1880 (c. 42), which incorporates the definition of the Employers and Workmen Act, persons whose personal relations in the household or retinue of their masters made it inconvenient that the disputes between them & their masters should be settled before magistrates under the summary procedure provided by the Employers & Workmen Act, 1875 (c. 90).

For the principle I am to apply I can find no better statement than that enumerated in Roberts & Wallace's book on Employers' Liability, viz. that menial servant denotes those persons whose main duty is to do actual bodily work as servants for the personal comfort, convenience, or luxury of the master, his family & his guests, & who for this purpose become part of the master's residential or quasi-residential establishment (COLLINS, J.).—PEARCE *v.* LANSDOWNE (1893), 62 L. J. Q. B. 441; 69 L. T. 316; 57 J. P. 760, D. C.

Annotations:—**Consd.** *Re* Junior Carlton Club, [1922] 1 K. B. 166. **Refd.** L. C. C. *v.* Perry (1915), 79 J. P. 312. **Mentd.** Blake *v.* Ramsay (1917), 10 B. W. C. C. 500.

133. Head gardener—Living in house rent free—Within master's domain.]—NOWLAN *v.* ABLETT, No. 131, *ante*.

134. General labourer—Contract for weekly wages & perquisites.]—By a written memorandum of agreement between deft. & pltf., pltf. was "to have 6*s*. a week, three bolls of wheat, to set potatoes for his family's use, to have a cow kept, house & firing, to keep the gardens & pleasure grounds in clean & good order, to assist in the stables & when required at hay & corn harvest, & to make himself generally useful. To enter May 12, 1838." Deft. had dismissed pltf. upon a month's warning. In an action brought by pltf. to recover a quarter's wages as being a yearly servant:—*Held*: he was a menial servant, & was, therefore, by the general rule of law, entitled to a month's notice only; & the memorandum of agreement contained nothing which showed an intention in the parties to exclude that rule.—JOHNSON *v.* BLENKENSOPP (1841), 5 Jur. 870.

Annotations:—**Expld.** Nicoll *v.* Greaves (1864), 17 C. B. N. S. 27. **Consd.** Pearce *v.* Lansdowne (1893), 62 L. J. Q. B. 441. **Refd.** R. *v.* Wortley (1851), 5 Cox, C. C. 382.

135. Farm bailiff—Contract for yearly wages & part of profits—Provision for three months' notice.]—W. entered into the following agreement with C.: "W. engages to take charge of the glebe lands of C., his wife undertaking the dairy & poultry at 15*s*. a week, till Michaelmas 1850, & afterwards at a salary of £25 a year, & a third of the clear annual profit, after all expenses of rent & rates, labour & interest on capital, etc., are paid on a fair valuation made from Michaelmas to Michaelmas. Three months' notice on either side to be given, at the expiration of which time the cottage to be vacated by W., who occupies it as bailiff, in addition to his salary":—*Held*: this agreement constituted the relation of master & servant between C. & W., & not that of partners; W. was not a menial servant, but a labourer; & the agreement was admissible in evidence, though unstamped, as it fell within the exemption in the Stamp Act as an agreement for the hire of a labourer.—R. *v.* WORTLEY (1851), 2 Den. 333; T. & M. 636; 21 L. J. M. C. 44; 18 L. T. O. S. 174; 15 J. P. 785; 15 Jur. 1137; 5 Cox, C. C. 382; 169 E. R. 527, C. C. R.

136. Governess.]—A governess is not a menial or domestic servant: she does not therefore fall within the rule by which such servants may, upon a general hiring, be discharged with a month's notice, or upon payment of a month's wages.—TODD *v.* KERRICH (1852), 8 Exch. 151; 22 L. J. Ex. 1; 20 L. T. O. S. 101; 17 J. P. 490; 17 Jur. 119; 155 E. R. 1298.

Annotation:—**Distd.** Nicoll *v.* Greaves (1864), 17 C. B. N. S. 27.

137. Huntsman—Contract for yearly wages & perquisites—Perquisites not receivable before end of year.]—A huntsman is a menial servant, & therefore, though he be hired at yearly wages & with the right to receive perquisites which cannot be fully received until the end of a year's service, the hiring is presumed to be subject to the condition that it may be determined by a month's notice at any time.

It seems to me that the reason of the general rule in these cases is that there are some contracts for services which bring the parties into close proximity with one another. . . . Where the duties of a servant are such that he is required to be frequently near his master, if any ill-feeling should arise between them, the presence of that servant would be a constant source of irritation to the master (ERLE, C.J.).—NICOLL *v.* GREAVES (1864), 17 C. B. N. S. 27; 4 New Rep. 246; 33 L. J. C. P. 259; 10 L. T. 531; 28 J. P. 599; 10 Jur. N. S. 919; 12 W. R. 961; 144 E. R. 11.

Annotations:—**Consd.** Pearce *v.* Lansdowne (1893), 62 L. J. Q. B. 441; L. C. C. *v.* Perry, [1915] 2 K. B. 193; *Re* Vellacott, [1922] 1 K. B. 466. **Refd.** Bridges *v.* Potts (1864), 17 C. B. N. S. 314.

Land-waiter at customs—Whether ambassador's menial servant.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 540, No. 433.

Construction of term in wills.]—*See* WILLS.

For purposes of excise licence.]—*See* REVENUE.

SUB-SECT. 2.—DOMESTIC SERVANTS.

A. In General.

138. Definition.]—*Semble*: domestic servants are servants whose main or general function it is to be about their employer's persons, or their establishments, residential or quasi-residential, for the purpose of ministering to their employer's needs or wants, or to the needs or wants of those who are members of their establishments, or of those resorting to such establishments, including guests.—*Re* JUNIOR CARLTON CLUB, [1922] 1 K. B. 166; 91 L. J. K. B. 85; 126 L. T. 216; 38 T. L. R. 11; 19 L. G. R. 748; *sub nom. Re* JUNIOR CARLTON CLUB, *Re* RUGBY SCHOOL, *Re* BRYANT (BRIGG SCHOOL), *Re* NORTH & INGRAM, 66 Sol. Jo. (W. R.) 1.

Annotations:—**Expld.** *Re* Vellacott, [1922] 1 K. B. 466; *Re* Newton-King (*de* Webber), [1923] 1 K. B. 210. **Refd.** *Ex p.* Woollands, [1921] W. N. 247; *Ex p.* Berkshire County Council, *Ex p.* Ffooks (1922), 38 T. L. R. 255; *Re* David, *Re* Bryant, [1922] 1 K. B. 172.

139. "Domestic" equivalent to "household."]—*Re* LAWSON, WARDLEY *v.* BRINGLOE, No. 149, *post*.

Sect. 6.—*Menial and domestic servants: Sub-sect.* 2, *A. & B. Sects.* 7, 8 & 9.]

140. Distinguished from other menial servants.]—The word menial is not explained by our law, domestic servant are the words of the Act, & it does not appear that deft. was such. A menial servant may be employed out of the house or household affairs, a domestic in or about the house only. A person hired as a clerk is no domestic servant (*per* CUR.).—TOMS *v.* HAMMOND (1733), Barnes, 370; 94 E. R. 959.

Annotation:—**Reid.** Carolino's Case (1744), 1 Wils. 78.

141. Not distinguishable under Employers & Workmen Act, 1875 (c. 90).]—PEARCE *v.* LANSDOWNE, No. 132, *ante*.

B. Who is a Domestic Servant.

142. Clerk.]—TOMS *v.* HAMMOND, No. 140, *ante*.

143. Head gardener—Residing in cottage belonging to master—Not dieted by master.]—Testator by his will gave to each person as a servant in his domestic establishment at the time of his decease a year's wages beyond what should be due to him or her for wages:—*Held:* a head gardener, who lived in one of testator's cottages & was not dieted by testator, was not entitled to a year's wages under the will.—OGLE *v.* MORGAN (1852), 1 De G. M. & G. 359; 18 L. T. O. S. 296; 16 Jur. 277; 42 E. R. 590, L. C.; *revsg.* (1850), 19 L. J. Ch. 531.

Annotations:—**Folld.** Vaughan *v.* Booth (1852), 16 Jur. 808; *Re* Drax, Savile *v.* Yeatman (1887), 57 L. T. 475. **Expld.** *Re* Jackson, Jackson *v.* Hamilton, [1923] 2 Ch. 365. **Reid.** Blackwell *v.* Pennant (1852), 9 Hare, 551; *Re* Ravensworth, Ravensworth *v.* Tindale, [1905] 2 Ch. 1; *Re* Sheffield, Ryan *v.* Bristow (1911), 104 L. T. 412.

144. —— —— Yearly wages.]—B., by his will, directed his exors. to pay to each of his domestic servants who should be with him or in his service at the time of his decease such sum of money as should be equivalent to two years of the then annual amount of their respective wages. A. was the gardener of B. at a mansion, where B. formerly resided, but which for a short time previously to & at the time of the decease of B. was let by B. to M. for a short time. A., however, had never ceased to be the servant of B., but had the charge & management of the gardens at the mansion, for which he received an annual sum from B., in addition to his yearly wages. A. was not resident in the mansion, but resided in a cottage in the garden, in the same manner as he did when the mansion was inhabited by B.:—*Held:* A. was not entitled to a legacy as coming within the description of "a domestic servant of testator living with him or in his service at the time of his death."—VAUGHAN *v.* BOOTH (1852), 16 Jur. 808.

145. Governess.] TODD *v.* KERRICH, No. 136, *ante*.

146. Groom.]—NOWLAN *v.* ABLETT, No. 131, *ante*.

147. Household servants—Residing on premises.]—Testator gave to each of his "household servants" who should have been in his service for one year previously to his death six months' wages, free of legacy duty, in addition to the wages which might be then due to him or her respectively.

The servants who were & had been in the service of testator for one year previously to his death were, in addition to maidservants resident on board wages in the mansion house, a coachman, who resided in a cottage adjoining the pleasure-grounds, a groom who occupied a room over stables in the park, & close to the mansion, & another groom who also occupied a room over the stables. All of them were on board wages.

The question was, what persons were entitled to participate in the bequest to testator's "household servants":—*Held:* household servants had the same meaning as domestic servants; &, on the authority of *Ogle* v. *Morgan*, No. 143, *ante*, the gift included only those of testator's servants who boarded in the house, & took their meals there, & the coachman & grooms were not included.—*Re* DRAX, SAVILE *v.* YEATMAN (1887), 57 L. T. 475.

148. Hotel page boy—Sleeping on premises—Where principally employed as messenger.]—A page boy in a hotel, who sleeps on the premises, & who is principally employed as a messenger, but partly also in assisting to dust the reception rooms, is not within the exemption in Shop Hours Act, 1892 (c. 62), s. 10, in favour of "any person wholly employed as a domestic servant."—SAVOY HOTEL CO. *v.* LONDON COUNTY COUNCIL, [1900] 1 Q. B. 665; 69 L. J. Q. B. 274; 82 L. T. 56; 64 J. P. 262; 48 W. R. 351; 16 T. L. R. 148; 44 Sol. Jo. 212; 19 Cox, C. C. 437, D. C.

Annotations:—**Mentd.** Gordon Hotels *v.* L. C. C., L. C. C. *v.* Gordon Hotels, [1916] 2 K. B. 27; Conron *v.* L. C. C., [1922] 2 Ch. 283; Rutherford *v.* Trust Houses, [1926] 1 K. B. 321.

149. Male nurse—Not sleeping on premises—Weekly wages.]—By his will testator, who died in Apr. 1912, bequeathed to each of his "domestic servants" who should have been in his service for two years prior to his decease the amount of one year's wages, free of duty. One of the claimants for this legacy was B., a certified male nurse & masseur, who was first engaged in 1907 by the receiver in lunacy of testator's estate as an assistant attendant on testator, at a weekly wage of a guinea. He did not sleep in the house, but took some of his meals there. From Nov. 1910, till testator's death, with one break, he was engaged on night duty, twelve hours at a time, & at a salary of two guineas a week paid every fourth week. Owing to the strain of this attendance, B. was obliged to take a holiday of four months in 1911 with the consent of the receiver, & received no salary during his absence. During his attendance he was free to undertake other work & did so to a limited extent. On a summons by the exors. of testator to determine whether B. was entitled to the legacy:—*Held:* (1) on the true construction of the will, B. was a domestic servant, the term "domestic" being equivalent to "household"; (2) although the service must be continuous for the period named, that did not involve service from day to day, & the suspension of the service with the consent of the master, did not disentitle B. to the legacy claimed.—*Re* LAWSON, WARDLEY *v.* BRINGLOE, [1914] 1 Ch. 682; 83 L. J. Ch. 519; 110 L. T. 573; 30 T. L. R. 335; 58 Sol. Jo. 320.

Annotations:—*As to* (1) **Consd.** *Re* King, Jackson *v.* A.-G., [1917] 2 Ch. 420. *As to* (2) **Reid.** *Re* Travers, Hurmson *v.* Carr (1916), 115 L. T. 604.

Construction of wills.]—*See, further*, WILLS.

Within Unemployment Insurance Act, 1920 (c. 30).]—*See* WORK & LABOUR.

SECT. 7.—OFFICERS OF PUBLIC COMPANIES.

See COMPANIES, Vol. IX., pp. 533–536, 539, Vol. X., pp. 944–946, Nos. 3517-3526, 3547–3549,

e. *Laundress—Residing in own house.*]—Plt'f. worked in a laundry in a yard adjoining testator's house, but supplied her own food, & slept in a house of her own some distance away: *Held:* not a domestic servant.—COCHRANE *v.* OGILBY, [1903] 1 I. R. 525.—IR.

6469–6477; CRIMINAL LAW, Vol. XV., p. 928, Nos. 10,224–10,227.

SECT. 8.—OFFICERS OF TRADE UNIONS AND OTHER SOCIETIES.

150. Secretary of friendly society.]—The course of business may be evidence to go to the jury of an employment of their secretary by the trustees of an enrolled building society, to receive money as their servant, notwithstanding that his duties, as defined by the rules of the society, do not comprise the receipt of money. Prisoner was secretary of an enrolled building society the object of which was to enable members to obtain loans by way of mtge. His duties as defined by the rules, did not include the receipt of money; but the course of business, as defined by the rules, had not been strictly adhered to. The management of the society was left almost entirely to him. Mtges. were made to the trustees; but when redeemed, the money was paid to him, In Feb. 1860, a mtge. was paid off, & the amount being paid to him, he embezzled it:—*Held:* the course of business was evidence from which the jury might infer that the money was received by him as servant, by virtue of his employment, for & on account of the trustees.—R. *v.* HASTIE (1863), Le. & Ca. 269; 1 New Rep. 335; 32 L. J. M. C. 63; 7 L. T. 695; 27 J. P. 85; 9 Jur. N. S. 235; 11 W. R. 293; 9 Cox, C. C. 264, C. C. R.

See, also, CRIMINAL LAW, Vol. XV., pp. 926, 927, Nos. 10,209–10,221.

151. Delegate of trade union.]—A delegate of a trade union is not the servant or agent of the members of the union so as to render them liable for wrongful acts done by him.—FLOOD *v.* JACKSON, [1895] 2 Q. B. 21; 64 L. J. Q. B. 665; 73 L. T. 161; 59 J. P. 388; 43 W. R. 453; 11 T. L. R. 335; 39 Sol. Jo. 396; 14 R. 397, C. A.; *revsd.* on other grounds *sub nom.* ALLEN *v.* FLOOD, [1898] A. C. 1, H. L.

Annotations:—**Refd.** Huttley *v.* Simmons, [1898] 1 Q. B. 181; Quinn *v.* Leathem, [1901] A. C. 495; Giblan *v.* National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; Hodges *v.* Webb, [1920] 2 Ch. 70; Sorrell *v.* Smith, [1925] A. C. 700. **Mentd.** Lyons *v.* Wilkins, [1896] 1 Ch. 811; Ajello *v.* Worsley, [1898] 1 Ch. 274; Taylor *v.* Cambridge Gazette Co. & Kilner (1898), 42 Sol. Jo. 832; Charnock *v.* Court (1899), 68 L. J. Ch. 550; Hubbuck *v.* Wilkinson, Heywood & Clark, [1899] 1 Q. B. 86; Lyons *v.* Wilkins, [1899] 1 Ch. 255; Boots *v.* Grundy (1900), 82 L. T. 769; Linaker *v.* Pilcher (1901), 70 L. J. K. B. 396; Read *v.* Friendly Soc. of Operative Stonemasons of England, Ireland & Wales, [1902] 2 K. B. 732; Brigg *v.* Thornton (1903), 73 L. J. Ch. 301; South Wales Miners' Federation *v.* Glamorgan Coal Co., [1905] A. C. 239; Denaby & Cadoby Main Collieries *v.* Yorkshire Miners' Assocn., [1906] A. C. 384; Conway *v.* Wade (1908), 78 L. J. K. B. 14; National Phonograph Co. *v.* Edison-Bell Consolidated Phonograph Co., [1908] 1 Ch. 335; Wilford *v.* West Riding of Yorkshire County Council, [1908] 1 K. B. 685; Santen *v.* Busnach (1913), 29 T. L. R. 214; *Re* Ainsworth, Finch *v.* Smith, [1915] 2 Ch. 96; Stott *v.* Gamble, [1916] 2 K. B. 504; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244; Valentine *v.* Hyde, [1919] 2 Ch. 129; Davies *v.* Thomas, [1920] 2 Ch. 189; Wolstenholme *v.* Ariss, [1920] 2 Ch. 403; Ware & De Freville *v.* Motor Trade Assocn., [1921] 3 K. B. 40; White *v.* Riley, [1921] 1 Ch. 1.

152. ——.]—WILD *v.* BROWN (JOHN) & CO., No. 20, *ante.*

See, further, TRADE & TRADE UNIONS.

SECT. 9.—PUBLIC OFFICIALS.

153. Treasurer of county.]—The treasurer is merely the servant of the magistrates (LITTLEDALE, J.).—R. *v.* JEYES (1835), 3 Ad. & El. 416; 1 Har. & W. 325; 5 Nev. & M. K. B. 101; 111 E. R. 471.

Annotations:—**Mentd.** R. *v.* Wiltshire & Berkshire Canal Navigation Co. (1835), 5 Nev. & M. K. B. 344; R. *v.* Payn (1837), 6 Ad. & El. 392; R. *v.* Purchase (1842), Car. & M. 617; R. *v.* Oswestry Treasurer (1848), 12 Jur. 744. *Ex p.* Bottom (1849), 13 Jur. 680; R. *v.* Wood Ditton Surveyor of Highways (1849), 3 New Mag. Cas. 166; Scott *v.* Scott, [1913] A. C. 417; R. *v.* Speyer, R. *v.* Cassel, [1916] 1 K. B. 595.

154. Collector of customs.]—A collector of customs, appointed by the comrs. under 3 & 4 Will. 4, c. 51, s. 6, to collect duties on articles coming into the kingdom, & on payment, sign bills of entry which, by sect. 18, are a warrant for delivery of such articles to the party paying, is not a mere servant of the comrs., but a substantive & immediate officer of the Crown; & his functions, as collector, are ministerial. Therefore, he is liable in an action for non-feasance in the exercise of his office; as for refusing to sign such bill of entry without payment of an excessive duty.—BARRY *v.* ARNAUD (1839), 10 Ad. & El. 646; 2 Per. & Dav. 633; 9 L. J. Q. B. 226; 113 E. R. 245.

Annotations:—**Mentd.** Legge *v.* Boyd (1845), 1 C. B. 92; Lichfield Corpn. *v.* Simpson (1845), 9 Jur. 989; R. *v.* Excise Comrs. (1845), 9 Jur. 618; Young *v.* Davis (1862), 7 H. & N. 760.

155. Superintendent of police.]—By County Police Act, 1839 (c. 93), for the establishment of police constables, power is given to the justices of a county or division to appoint a chief constable, who, subject to the approval of two justices, has the power to appoint constables & superintendent constables. It was the duty of the constables of the county of S., so appointed, to account for & pay weekly to the superintendent of their division all moneys received by them, & it was the duty of the superintendent to return weekly to the chief constable a statement of such moneys. It was also the duty of the superintendent to pay the constables their wages weekly. In practice, however, it was the custom of the superintendent, in balancing the accounts with his men, to set off the sums received by them in the course of their duty against their wages, the balance struck going over to the next account, & so on from week to week without any money actually passing from one to the other. A constable having in this way accounted to the superintendent for the sum of £2 3*s.* 6*d.* received by the former, the latter fraudulently omitted that sum in his account with the chief constable, & subsequently denied its receipt:—*Held:* the superintendent was the clerk & servant of the chief constable, & the money might be alleged to have been received for & on his account.—R. *v.* BAXTER (1851), 5 Cox, C. C. 302.

156. Inspector appointed under Diseases of Animals Acts.]—The duties imposed by Sheep Scab Order 1898, Art. 14, now replaced by Sheep Scab Order, 1905, Art. 12, on inspectors appointed by local authorities under above Acts are not duties of the local authority which they are required to perform through the inspector, but are duties attaching to the inspector himself, by virtue of his office. Consequently the relationship of master & servant does not obtain between the local authority & the inspector in regard to the discharge of those duties; & the local authority are not liable for injury resulting from the negligence of the inspector in the discharge of those duties.—STANBURY *v.* EXETER CORPN., [1905] 2 K. B. 838; 75 L. J. K. B. 28; 93 L. T. 795; 70 J. P. 11; 54 W. R. 247; 22 T. L. R. 8; 4 L. G. R. 57, D. C.

Sect. 9.—*Public officials. Sect.* 10. *Part III. Sect.* 1: *Sub-sects.* 1 & 2, *A.*, *B.* (*a*) & (*b*).]

157. District surveyor.]—Although a district surveyor is not strictly a servant of the London County Council, but an independent officer, very largely with judicial functions, the London County Council have power to terminate the tenure of his office at their pleasure.—NOTLEY *v.* LONDON COUNTY COUNCIL, [1915] 3 K. B. 580; 85 L. J. K. B. 113; 113 L. T. 1110; 80 J. P. 23; 13 L. G. R. 1346.

See, also, CRIMINAL LAW, Vol. XV., pp. 925, 926, Nos. 10,195–10,208.

SECT. 10.—OTHER CASES.

158. Receiver & manager appointed by the court — Whether servant of the court.]—*Re* FLOWERS & CO., [1897] 1 Q. B. 14; 65 L. J. Q. B. 679; 75 L. T. 306; 45 W. R. 118; *sub nom. Re* FLOWERS & CO., *Ex p.* WARE & SONS, LTD., 41 Sol. Jo. 30; *sub nom. Re* FLOWERS & CO., *Ex p.* PETITIONING CREDITORS, 13 T. L. R. 9; 3 Mans. 294, C. A.

159. Dock company — Whether servants of owners of vessel in dock.]—The master of the vessel *M.*, which was about to enter a dock, obeyed certain orders given negligently by a lock foreman, & in consequence *The M.* collided with another vessel, *The A.* Under a bye-law of the dock co. the lock foreman was a deputy or assistant of the harbour master of the dock. In an action for damages by the owners of *The A.* against the owners of *The M.* & the dock co.:—*Held:* the relationship of master & servant did not exist between the owners of *The M.* & the dock co.—THE MYSTERY, [1902] P. 115; 71 L. J. P. 39; 86 L. T. 359; 50 W. R. 414; 9 Asp. M. L. C. 281, D. C.

Annotations:—**Mentd.** The Hopper No. 21, [1903] W. N. 114; The Millwall (1904), 91 L. T. 695; The Esrom & The Hopper Wills No. 66, [1914] W. N. 81; The Penrith Castle, [1918] P. 142.

160. Hospital doctors.]—A local authority provided for the use of the inhabitants of the district, under Public Health Act, 1875 (c. 55), s. 131, a hospital for infectious diseases, & they appointed a competent medical man as visiting physician at a yearly salary who should be responsible for the medical treatment of the patients & for their freedom from infection when discharged, & who was to act under the general directions of the hospital committee. The visiting physician discharged a patient prematurely, whereby he spread the infection among his brothers & sisters. In an action by the father against the local authority to recover the expenses caused to him thereby, the jury found that there was a want of reasonable care & skill on the part of the visiting physician in discharging the patient, & that there was an undertaking by the local authority that their physician would act with reasonable care & skill in the discharge of the patient:—*Held:* the physician was not their servant for the purpose of discharging the patient; &, therefore, they were not liable.—EVANS *v.* LIVERPOOL CORPN. [1906] 1 K. B. 160; 74 L. J. K. B. 742; 69 J. P. 263; 21 T. L. R. 558; 3 L. G. R. 868.

Annotations:—**Distd.** Smith *v.* Martin & Kingston-upon Hull Corpn., [1911] 2 K. B. 775. **Mentd.** Hillyer *v* St. Bartholomew's Hospital, [1909] 2 K. B. 820; University of London Press *v.* University Tutorial Press, [1916] 2 Ch. 601.

161. —— Visiting physician.]—HILLYER *v.* ST. BARTHOLOMEW'S HOSPITAL (GOVERNORS), No. 52, *ante.*

162. Special constable of railway company.]—A special constable of a railway co. is the servant of the co., & if in the course of his employment he arrests a person on suspicion of felony without having any reasonable grounds for his suspicion, an action for false imprisonment will lie against the co.—LAMBERT *v.* GREAT EASTERN RY. CO., [1909] 2 K. B. 776; 79 L. J. K. B. 32; 101 L. T. 408; 73 J. P. 445; 25 T. L. R. 734; 53 Sol. Jo. 732; 22 Cox, C. C. 165, C. A.

163. Teacher of elementary school—Whether servant of local authority.]—Pltf., a girl aged about fourteen, attended a public elementary school provided by deft. corpn., who were the local education authority for the district. The teachers in the school were appointed & paid, & were liable to be dismissed by deft. corpn. A teacher, who was joined as deft. in the action, directed pltf. during school hours to poke the fire & draw out the damper of the stove in the teachers' common room, where the teacher proposed to have her lunch. While pltf. was carrying out the order her pinafore caught fire & she was seriously burned. At the trial the jury found that the act of the teacher was negligent, & the judge of the Ct. of Appeal held that there was evidence to support the finding. The judge, after argument, directed judgment to be entered for deft. corpn., & pltf. appealed:—*Held:* the relation of master & servant existed between the local education authority & the teachers employed by them.—SMITH *v.* MARTIN & KINGSTON-UPON-HULL CORPN., [1911] 2 K. B. 775; 80 L. J. K. B. 1256; 105 L. T. 281; 75 J. P. 433; 27 T. L. R. 468; 55 Sol. Jo. 535; *sub nom.* MARTIN *v.* SMITH, SMITH *v.* MARTIN & HULL CORPN., 9 L. G. R. 780, C. A.

Annotations:—**Mentd.** Gollow *v.* Durham County Council, [1911] 2 K. B. 1074; Smith *v.* Macnally, [1912] 1 Ch. 816.

164. Jobbing gardener.]—A jobbing gardener, employed under contract to work on certain days in the week in his employer's garden, with liberty to send a qualified substitute to do so when unable to attend in person, was found by justices not to have been a "male servant" within Customs & Inland Revenue Act, 1869 (c. 14), s. 14 (3), so as to render the employer liable to excise licence duty in respect of him:—*Held:* the justices were right in so finding, the personal relationship of master & servant not having existed between the employer & the gardener.

A jobbing gardener is a perfectly familiar personage & is a tradesman, however humble, & is not a servant. . . . The jobbing gardener in this case if he could not come on any date, was to send a substitute. A servant contracts to render personal service & if illness or other lawful excuse prevents his rendering personal service he commits no breach of contract by his absence & is not bound to find a substitute; whereas a tradesman who contracts that a certain result shall be obtained—namely, a garden kept in order—may break his contract unless somebody keeps it in order (HAMILTON, J.).—BRADDELL *v.* BAKER (1911), 104 L. T. 673; 75 J. P. 185; 27 T. L. R. 182; 9 L. G. R. 245, D. C.

Ministers of religion—Church of England.]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 428, Nos. 2644, 2645.

—— **Wesleyan church.**]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 535, Nos. 3954–3956.

Under-tenant of house.]—*See* LANDLORD & TENANT, Vol. XXXI., p. 108, No. 2438.

Nurse.]—*See* Nos. 51, 52, *ante.*

Owner & crew of tug & vessel in tow.]—*See* SHIPPING.

Part III.—The Contract of Service.

SECT. 1.—CAPACITY OF PARTIES.

SUB-SECT. 1.—IN GENERAL.

See, generally, CONTRACT, Vol. XII., pp. 22–50.

165. Party not sui juris not competent.]—A deserter from the King's marine service cannot gain a settlement under a hiring & service for a year; not being *sui juris*, nor competent lawfully to hire himself within Poor Relief Act, 1690 (c. 11), s. 7.—R. *v.* NORTON (INHABITANTS) (1808), 9 East, 206; 103 E. R. 552.

Annotations:—**Distd.** R. *v.* Beaulieu (1814), 3 M. & S. 229. **Apld.** R. *v.* Holsworthy (1827), 6 B. & C. 283. **Refd.** R. *v.* Taunton St. James (1829), 4 Man. & Ry. K. B. 695.

166. ——.]—A local militia man hired himself to serve for a year, without disclosing to his master the fact that he was in the militia:—*Held:* this was not a lawful hiring within Poor Relief Act, 1690 (c. 11), s. 7, the servant not being *sui juris*, or capable of so hiring himself.

With reference to the meaning of the phrase "legally hired," it has been long established that the party hiring himself must be *sui juris*—must be capable of rendering that service which he contracts to render. Upon this principle neither a deserter from the King's service, nor an invalided soldier having leave of absence, nor a militia-man, can lawfully hire himself for a year so as to acquire a settlement (BAYLEY, J.).

To constitute a lawful hiring, the party must have ability to contract for the period during which he agrees to serve. Where a party is under a disability, he may, by disclosing it to the person with whom he contracts, make a conditional hiring; but if he conceal it, he makes an absolute contract which he is incapable of making, & which is, therefore, not a lawful hiring (PARKE, J.).—R. *v.* TAUNTON ST. JAMES (INHABITANTS) (1829), 9 B. & C. 831; 4 Man. & Ry. K. B. 695; 2 Man. & Ry. M. C. 406; 8 L. J. O. S. M. C. 26; 109 E. R. 309.

Annotations:—**Refd.** R. *v.* Elmley Castle (1832), 3 B. & Ad. 826. **Mentd.** R. *v.* St. Mary-at-the-Walls, Colchester (1834), 5 B. & Ad. 1023.

167. ——.]—A person enrolled as a member of a volunteer corps is not *sui juris* so as to be able to make a valid contract of service for a year.—R. *v.* WITNESHAM (INHABITANTS) (1835), 2 Ad. & El. 648; 4 Nev. & M. K. B. 447; 3 Nev. & M. M. C. 22; 1 Har. & W. 43; 4 L. J. M. C. 84; 111 E. R. 249.

SUB-SECT. 2.—INFANTS.

A. In General.

See, generally, INFANTS, Vol. XXVIII., pp. 152–175.

168. Capacity to hire—Liability for wages.]—Infancy is no answer to a claim for wages accruing due after majority has been attained, although on a contract of hiring originally made under age.—THOMAS *v.* WALDO (1858), 1 F. & F. 173.

169. Capacity to enter into contract of service—With parent.]—TRINITY *v.* ST. PETER'S, DORCHESTER (1763), 1 Wm. Bl. 443; 96 E. R. 254; *sub nom.* R. *v.* ST. PETER'S, DORCHESTER, Burr. S. C. 513.

Annotation:—**Refd.** R. *v.* Chillesford, R. *v.* Winslow (1825), 4 B. & C. 94.

170. —— ——.]—An infant pauper may gain a settlement by hiring & service with his father.—R. *v.* CHILLESFORD (INHABITANTS), R. *v.* WINSLOW (INHABITANTS) (1825), 4 B. & C. 94; 6 Dow. & Ry. K. B. 161, 168; 3 Dow. & Ry. M. C. 155, 163; 3 L. J. O. S. K. B. 148; 107 E. R. 994.

B. Contracts Binding on Infants.

(a) In General.

See, generally, INFANTS, Vol. XXVIII., p. 153, 154, Nos. 131–140.

171. General rule—Contract for service binding.]—A deed of apprenticeship, whereby an infant apprentice is bound for a term not to accept employment except from the master or with his consent, & which contains no co-relative covenant by the master to provide employment for the apprentice, & which may be terminated by the master only, is invalid, as being unreasonable & not for the benefit of the infant.

A contract by an infant to learn a business or trade is *primâ facie* binding upon him. To this rule there are certain exceptions which are well defined & well known. Where the contract contains terms of an extraordinary & unusual character, which are not reasonable or for the benefit of the infant, the contract is void (FRY, L.J.).

It has been held at law from the time of Lord Coke & onwards, that an infant cannot bind himself to be liable to a penalty (FRY, L.J.).—DE FRANCESCO *v.* BARNUM (1890), 45 Ch. D. 430; 60 L. J. Ch. 63; 63 L. T. 438; 39 W. R. 5; 6 T. L. R. 463.

Annotations:—**Expld.** Corn *v.* Matthews, [1893] 1 Q. B. 310. **Consd.** Mackinlay *v.* Bathurst (1919), 36 T. L. R. 31. **Refd.** Clements *v.* L. & N. W. Ry., [1894] 2 Q. B. 482; Roberts *v.* Gray, [1913] 1 K. B. 520. **Mentd.** Whitwood Chemical Co. *v.* Hardman (1891), 39 W. R. 433.

172. —— —— **When beneficial to infant.**]—WOOD *v.* FENWICK, No. 179, *post.*

173. ——.]—REID *v.* FENWICK (1842), 6 J. P. 491.

174. ——.]—LESLIE *v.* FITZPATRICK, No. 184, *post.*

175. ——.]—FELLOWS *v.* WOOD, No. 185, *post.*

176. ——.]—EVANS *v.* WARE, No. 186, *post.*

177. ——.]—MERRIOTT *v.* MARTIN (1899), 43 Sol. Jo. 717.

178. ——.]—CLEMENTS *v.* LONDON & NORTH WESTERN RY. CO., No. 190, *post.*

Contracts of apprenticeship.]—*See* Part XV., Sect. 1, sub-sect. 3, *post.*

(b) What is a Beneficial Contract.

179. Contract of service primâ facie beneficial.]—*Semble:* a contract of hiring & service, for wages, is a contract beneficial to & binding upon an infant, though it contain clauses for referring disputes to arbn., & for the imposition of forfeitures in case of neglect of duty, to be deducted from the wages.

The ct. must see that on the whole he derives a benefit under the contract. Here he is hired & receives wages. It is clear he derives a benefit; he may also be subject to some inconveniences,

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169 i. *Capacity to enter into contract of service—With parent.*]—*Qu.:* whether, if an infant hire himself for wages to his parent, the contract is binding on the latter.—PERLET *v.* PERLET (1857), 15 U. C. R. 165.—CAN.

Sect. 1.—*Capacity of parties: Sub-sect.* 2, *B.* (*b*), *C. & D.*]

but that is not necessarily so (ALDERSON, B.).—WOOD *v.* FENWICK (1842), 10 M. & W. 195; 11 L. J. M. C. 127; 152 E. R. 439.

Annotations:—**Refd.** Roberts *v.* Gray, [1913] 1 K. B. 520. **Mentd.** *Re* Hammond (1846), 9 Q. B. 92.

180. ——.]—A contract of service is regarded as beneficial to an infant; & it is no objection that the contract contains stipulations & provisions usual in the particular trade, & such as a master may reasonably impose as a protection to himself (COZENS-HARDY, M.R.).—YOUNG *v.* HOFFMAN MANUFACTURING CO., LTD., [1907] 2 K. B. 646; 76 L. J. K. B. 993; 97 L. T. 230; 23 T. L. R. 671, C. A.

Annotations:—**Mentd.** Greenwood *v.* Greenwood (1907), 97 L. T. 771; Toronto Power Co. *v.* Paskwan, [1915] A. C. 734; Cole *v.* De Trafford, [1918] 2 K. B. 523; Heasmer *v.* Pickfords (1920), 36 T. L. R. 818.

181. Contract containing non-beneficial stipulations—Forfeiture of wages for neglect of duty.]—WOOD *v.* FENWICK, No. 179, *ante*.

182. —— **Reference of disputes to arbitration.**]—WOOD *v.* FENWICK, No. 179, *ante*.

183. —— **Power to master to retain week's wages in hand.**]—WALLS *v.* SCOTT, No. 233, *post*.

184. —— **Protection of trade—When usual & reasonable.**]—Under Employers & Workmen Act, 1875 (c. 90), which enables a dispute between an employer & workman to be heard & determined by a ct. of summary jurisdiction, an agreement, by which an infant undertakes to serve an iron shipbuilder & boilermaker as plater & rivetter for a term of five years at weekly wages, with a proviso that, should the employers cease to carry on their business, or find it necessary to reduce the operations of their works, either temporarily or permanently, from their being unable to obtain materials, or in consequence of any accident, or in consequence of strikes or combinations of work men, or from any cause over which they should not have any control, they shall have power to terminate the agreement, & discharge the infant upon giving him fourteen days' notice, is not void on the face of it so as to prevent it from being enforced against him according to the Act; the question, whether the provision is or is not inequitable as regards the infant, depending upon whether it was at the time of the agreement common to labour contracts, or was in the then condition of trade such as the master was reasonably justified in imposing as protection to himself, & also upon whether the wages were a fair compensation for the services of the infant.—LESLIE *v.* FITZPATRICK (1877), 3 Q. B. D. 229; 47 L. J. M. C. 22; 37 L. T. 461; 41 J. P. 822.

Annotations:—**Consd.** Meakin *v.* Morris (1884), 12 Q. B. D. 352. **Folld.** Fellows *v.* Wood (1888), 59 L. T. 513. **Distd.** Corn *v.* Matthews, [1893] 1 Q. B. 310. **Consd.** Clements *v.* L. & N. W. Ry., [1894] 2 Q. B. 482. **Apprvd.** Leng *v.* Andrews, [1909] 1 Ch. 763. **Refd.** Green *v.* Thompson (1899), 68 L. J. Q. B. 719; Young *v.* Hoffman Manufacturing Co., [1907] 2 K. B. 646; Roberts *v.* Gray, [1913] 1 K. B. 520.

185. —— —— ——.]—An infant contracted with a dairyman to enter his employment at a salary of £1 a week, & agreed that he would not serve for his own benefit any of his employer's customers during the time he remained in such employment, or for two years afterwards, & that two weeks' notice to leave was to be given on either side:—*Held*: this contract was beneficial to the infant, & could be enforced against him.—FELLOWS *v.* WOOD (1888), 59 L. T. 513; 52 J. P. 822; 4 T. L. R. 645, D. C.

Annotations:—**Consd.** Evans *v.* Ware, [1892] 3 Ch. 502. **Folld.** Morrison, Fleet *v.* Fletcher (1900), 17 T. L. R. 95. **Refd.** De Francesco *v.* Barnum (1889), 43 Ch. D. 165.

186. —— —— ——.]—(1) Deft., an infant, in consideration of being employed by pltfs. as a milk carrier, at a salary of 21*s.* per week, agreed not to carry on or serve in the business of a seller of milk within five miles of pltfs.' place of business for two years after leaving pltfs.' service. The agreement was terminable at a week's notice on either side. Deft. left pltfs.' service a few days after he came of age:—*Held*: the agreement, as a whole, was an agreement for the benefit of deft., & an injunction granted to restrain a breach it.

(2) We have had in this ct. lately a number of cases relating to the employment of a milk carrier, & I therefore know from experience that a week is a usual time for notice to leave in that business (NORTH, J.).—EVANS *v.* WARE, [1892] 3 Ch. 502; 62 L. J. Ch. 256; 67 L. T. 285; 36 Sol. Jo. 731; 3 R. 32.

Annotations:—*As to* (1) **Folld.** Merriott *v.* Martin (1899), 43 Sol. Jo. 717. **Refd.** Green *v.* Thompson (1899), 80 L. T. 691; Morrison, Fleet *v.* Fletcher (1900), 17 T. L. R. 95. *Generally*. **Mentd.** Farmers & Cleveland Dairies Co. *v.* Riley (1893), 9 T. L. R. 260.

187. —— —— ——.]—MERRIOTT *v.* MARTIN (1899), 43 Sol. Jo. 717.

188. —— —— ——.]—An infant entered into a contract with his employers, milk sellers, not to carry on a milkman's business within a distance of two miles nor to solicit his employers' customers, under a penalty of £200 to be recovered as & by way of liquidated damages & not by way of penalty. In an action for an injunction to restrain the infant from carrying on a milkman's business within the specified distance:—*Held*: the contract was binding on the infant, the clause as to the payment of the £200 only binding him to pay the damage actually caused by his breach of contract, & not being a penalty clause in the ordinary sense.—MORRISON, FLEET & CO., LTD. *v.* FLETCHER (1900), 17 T. L. R. 95.

189. —— —— ——.]—YOUNG *v.* HOFFMAN MANUFACTURING CO., LTD., No. 180, *ante*.

190. —— **Restriction of compensation for accident—Agreement with insurance company—When reasonable for protection of funds.**]—Pltf. entered the service of defts., a railway co., as a porter, when under age, & agreed to become a member, & to be bound by the rules, of an insurance society, formed among the employes of defts., towards the funds of which defts. contributed. He at the same time signed an agreement by which he accepted the contribution & the advantages to which he might be entitled under the rules of the society, in lieu of any claims against defts. under Employers' Liability Act, 1880 (c. 42). The rules of the society covered all accidents, except such as arose wilfully or by gross negligence on the part of the member, & were not restricted to accidents for which the employers would be liable. The rules contained provisions for the limitation of the amount of temporary or permanent relief, these being less than the limit that can be recovered under Employers' Liability Act, 1880 (c. 42); forfeiture of benefits in default of notice of an accident; forfeiture of claims for various breaches of the regulations, or in case of criminal misconduct; & reference of disputes to arbn. Pltf. sustained an injury by reason of an accident, & sued the railway co. At the time of the accident & of action brought pltf. was still an infant:—*Held*: (1) the agreement to become a member of the insurance society, & to be bound by its rules, was a part of a contract of service which it was competent for an infant to enter into; (2) the contract was an answer to the action, for the restrictive rules were such as an insurance society

might reasonably make for the protection of their funds, & the contract taken as a whole was for the benefit of pltf. & binding on him.—CLEMENTS *v.* LONDON & NORTH WESTERN RY. CO., [1894] 2 Q. B. 482; 63 L. J. Q. B. 837; 70 L. T. 896; 58 J. P. 818; 42 W. R. 663; 10 T. L. R. 539; 38 Sol. Jo. 562; 9 R. 641, C. A.

Annotations:—As to (2) **Refd.** Morton *v.* G. E. Ry. (1908), 2 B. W. C. C. 480; Roberts *v.* Gray, [1913] 1 K. B. 520. *Generally*, **Mentd.** Biggs *v.* Dagnall, [1895] 1 Q. B. 207.

191. When severable from rest of contract—Though unnecessary for protection of trade.]—An infant's contract of service is not necessarily invalid because it contains stipulations some of which are void as being in restraint of trade & unnecessary for the protection of the master's business. If the void stipulations are severable from the rest of the contract they may be disregarded, & the rest of the contract is binding on the infant if it is for his benefit.—BROMLEY *v.* SMITH, [1909] 2 K. B. 235; 78 L. J. K. B. 745; 100 L. T. 731.

Annotations:—**Apld.** Gadd *v.* Thompson, [1911] 1 K. B 304. **Mentd.** Attwood *v.* Lamont, [1920] 2 K. B. 146.

Contracts of apprenticeship.]—*See* Part XV., Sect. 1, sub-sect. 3, *post*.

C. Contracts Not Binding on Infants.

See, generally, INFANTS, Vol. XXVIII., pp. 154–159.

192. Contract with young child.]—The pauper was an infant only eight years of age, at the time of the hiring: Therefore he was not bound by the agreement. Indeed he might have affirmed it; for the contract of an infant is not absolutely void, but only voidable, at his own election (LORD MANSFIELD).—R. *v.* MACCLESFIELD (INHABITANTS) (1758), Burr. S. C. 458.

Annotations:—**Mentd.** R. *v.* Buckland Denham (1770), Burr. S. C. 694; R. *v.* St. Agnes (1770), Burr. S. C. 671; R. *v.* Birmingham (1780), Cald. Mag. Cas. 77; R. *v.* Kingswinford (1791), 4 Term Rep. 219; R. *v.* North Nibley (1792), 5 Term Rep. 21; R. *v.* Over, (1801), 1 East, 599.

193. Contract not beneficial to infant—Power to master to stop work & retain wages.]—A contract by an infant, binding him to serve during a certain time for wages, but enabling the master to stop the work whenever he chooses, & to retain the wages during stoppage, is wholly void, as not being beneficial to the infant; &, where a servant had been convicted under 4 Geo. 4, c. 34, s. 3, of absenting himself from service under such contract, this ct. quashed the conviction.—R. *v.* LORD (1848), 12 Q. B. 757; 3 New Mag. Cas. 87; 3 New Sess. Cas. 246; 17 L. J. M. C. 181; 12 L. T. O. S. 191; 12 J. P. 759; 12 Jur. 1001; 116 E. R. 1055.

Annotations:—**Distd.** Leslie *v.* Fitzpatrick (1877), 3 Q. B. D. 229. **Apld.** Meakin *v.* Morris (1884), 12 Q. B. D. 352. **Consd.** Corn *v.* Matthews, [1893] 1 Q. B. 310. **Refd.** Cooper *v.* Simmons (1862), 8 Jur. N. S. 81.

194. —— Contract for years—No ratification in writing.]—BIRKIN *v.* FORTH, No. 204, *post*.

195. —— Extraordinary or unusual stipulations.]—DE FRANCESCO *v.* BARNUM, No. 171, *ante*.

196. —— ——.]—Deft., being then an infant, entered the service of pltfs., the proprietors of a daily paper in Sheffield, as a junior reporter, under a written contract which made the service determinable by a month's notice on either side, & provided that after leaving pltf.'s service deft. would not, either on his own account or in partnership with any other person, be connected, as proprietor, employee, or otherwise, with any newspaper business carried on in Sheffield or within a radius of twenty miles from the town hall thereof. There was evidence that such a restriction was almost unique in contracts of this kind:—*Held:* the restriction was void as being against public policy.

Even if the restriction could have been enforced against an adult, still, having regard to its unusual character, the contract was not for the benefit of an infant, & invalid on that ground also (COZENS-HARDY, M.R.).—LENG (SIR W. C.) & Co., LTD. *v.* ANDREWS, [1909] 1 Ch. 763; 78 L. J. Ch. 80; 100 L. T. 7; 25 T. L. R. 93, C. A.

Annotations:—**Refd.** Mason *v.* Provident Clothing & Supply Co., [1913] A. C. 724; Easton *v.* Russ, [1914] 1 Ch. 468; Millers *v.* Steedman (1915), 84 L. J. K. B. 2057; Morris *v.* Saxelby, [1916] 1 A. C. 688; Ropeways *v.* Hoyle (1919), 120 L. T. 538; Attwood *v.* Lamont, [1920] 3 K. B. 571. **Mentd.** Russell *v.* Carpenters & Joiners Amalgamated Soc., [1910] 1 K. B. 506; Hepworth Manufacturing Co. *v.* Ryott, [1920] 1 Ch. 1; Bowler *v.* Lovegrove, [1921] 1 Ch. 642.

197. —— Contract imposing penalty for breach.]—DE FRANCESCO *v.* BARNUM, No. 171, *ante*.

198. —— ——.]—FARMERS & CLEVELAND DAIRIES CO. *v.* RILEY (1893), 9 T. L. R. 260, D. C.

Annotation:—**Refd.** Morrison, Fleet *v.* Fletcher (1900), 17 T. L. R. 95.

199. —— —— Not liquidated damages.]—MORRISON, FLEET & CO., LTD. *v.* FLETCHER, No. 188, *ante*.

200. —— Contract relieving master of liability for accident.]—Pltf., a boy between thirteen & fourteen years of age, who was employed at a colliery, entered into an agreement with a railway co. by which, in consideration of their permitting him to travel by their railway to & fro between the place where he lived & the colliery, under a certain special arrangement made between the colliery proprietor & the co., he agreed that neither he nor his exors. or administrators or relatives should have any claim against the co. by reason of any accident, injury, or loss, which might happen to him or his property while upon their railway, notwithstanding that such accident, injury, or loss was occasioned by the negligence of the co. or any of their officers or servants; & further, that he, his exors. & administrators, would indemnify the co. from & against all loss, costs, damages, & expenses which they might incur by reason of any such accident, injury, or loss to him or his property, or by reason of any claim or legal proceedings instituted or taken by him or them against the co. or any of their officers or servants in respect thereof:—*Held:* this agreement was so much to the detriment of pltf. as to be unfair to him as being an infant, &, therefore, it was not binding upon him.—FLOWER *v.* LONDON & NORTH WESTERN RY. CO., [1894] 2 Q. B. 65; 63 L. J. Q. B. 547; 70 L. T. 829; 58 J. P. 685; 42 W. R. 519; 10 T. L. R. 427; 9 R. 494, C. A.

Annotation:—**Consd.** Clements *v.* L. & N. W. Ry., [1894] 2 Q. B. 482.

Contracts of apprenticeship.]—*See* Part XV., Sect. 1, sub-sect. 3, *post*.

D. Ratification of Contract.

See, generally, INFANTS, Vol. XXVIII., pp. 160–162.

201. Power to ratify.]—R. *v.* MACCLESFIELD (INHABITANTS), No. 192, *ante*.

202. Continuation in service after majority—Whether sufficient ratification.]—Articles, under which A. had served his clerkship to an attorney, contained a proviso, that A. should not practice within a certain district; & also a covenant on the part of his father, that A. should, within a month after he came of age, execute a bond in a specified penalty to ensure his fulfilment of the proviso;

Sect. 1.—*Capacity of parties: Sub-sect.* 2, *D.; sub-sects.* 3 & 4. *Sects.* 2 & 3: *Sub-sect.* 1, *A.—B.; sub-sects.* 2 & 3.]

A., who was an infant at the time of the execution of the articles, served under them for three years after he attained his full age, but was never called on to execute any bond, &, with a knowledge of the purport of the articles, completed his clerkship, & afterwards began to practice as an attorney within the district from which the articles purported to exclude him. A motion for an injunction to restrain him from practising within that district was refused with costs.—CAPES *v.* HUTTON (1826), 2 Russ. 357; 38 E. R. 370, L. C.

Annotation:—**Distd.** Walton *v.* Everington (1885), 1 T. L. R. 396.

203. —— ——.]—An infant entered into the service of a milk seller & covenanted not to carry on the same trade, & after he came of age he continued in the same service for eighteen months without repudiating the contract:—*Held:* this conduct amounted to a ratification of the contract in equity, & an injunction to restrain a breach of the covenant was granted.—CORNWALL *v.* HAWKINS (1872), 41 L. J. Ch. 435; 26 L. T. 607; 20 W. R. 652.

Annotations:—**Apld.** Walton *v.* Everington (1885), 1 T. L. R. 396; Evans *v.* Ware, [1892] 3 Ch. 502. **Refd.** Brown *v.* Harper (1893), 68 L. T. 488.

204. —— —— **Written notice to quit sent shortly after majority—Statute of Frauds Amendment Act, 1828 (c. 14).**]—Deft., an infant, entered into a contract with pltfs. to serve them as a warehouseman for five years; he served for some time, but shortly after attaining his majority he gave them notice by letter of his intention to quit their service:—*Held:* it was not a beneficial contract for necessaries, so as to bind pltf. without any ratification in writing; &, continuing in such service after he became of age, & then sending a letter giving notice of his intention to quit the service, was not a sufficient ratification in writing, in accordance with above Act, sect. 5.—BIRKIN *v.* FORTH (1875), 33 L. T. 532.

Annotation:—**Distd.** Walton *v.* Everington (1885), 1 T. L. R. 396.

205. —— **Inference of new contract.**]—Deft., three months before attaining his majority, signed a contract with pltf. to act as his clerk for twelve months, covenanting (*inter alia*), that if he left his service & were concerned in any similar business, he would not, under a penalty, then solicit his employer's customers. He remained with pltf. for two years, & being subsequently interested in a business of the same character, proceeded to solicit certain customers of pltf., with the help of a book which he had taken away with him, & information which he had obtained from another book entrusted to him while he had been in pltfs.' service. In an action brought for an injunction to restrain him from continuing to do this:—*Held:* assuming the original contract to be void, under Infants' Relief Act, 1874 (c. 62), the ct. would infer that a new contract of service had been entered into by deft., &, in order to ascertain the terms of such fresh agreement, the ct. could look at those of the original contract.—WALTON *v.* EVERINGTON (1885), 1 T. L. R. 396.

206. —— ——.]—In Sept. 1880, deft. agreed to serve pltfs., a firm of law accountants, at a weekly salary of 30*s.*, or such other sum as might be agreed upon, & at the expiration of the agreement not to seek employment from or do work for persons who might at any time up to the expiration of the agreement have employed pltfs. At the time of the execution of the agreement deft. was a minor. After attaining twenty-one he continued in pltfs.' service for over four years, & his wages were raised from time to time. He left in Apr. 1892, & sought & obtained employment from persons who prior to that date were customers of pltfs.:—*Held:* it ought to be inferred from the conduct of the parties that a new contract between them, containing a stipulation by deft. in the terms of the agreement of Sept. 1886, not to seek employment or do work for former customers of pltfs., had been entered into after deft. attained twenty-one, & an injunction ought to be granted to restrain the breach of such stipulation.—BROWN *v.* HARPER (1893), 68 L. T. 488; 9 T. L. R. 429; 37 Sol. Jo. 495; 3 R. 585.

SUB-SECT. 3.—MARRIED WOMEN.

See, generally, HUSBAND & WIFE, Vol. XXVII., pp. 178–205.

207. Capacity to hire—Power to bind husband.]—Where a married woman contracts by deed, without any power of attorney from her husband for the hire of a servant, pltf. may consider the deed as void, & declare on the simple contract against the husband; & in such case the deed is evidence of the contract, & if another person joins in such deed, it does not take away the remedy against the husband to sue him in *assumpsit.*—WHITE *v.* CUYLER (1795), 6 Term Rep. 176; 1 Esp. 200; 101 E. R. 497.

Annotations:—**Mentd** Clifford *v.* Burton (1823), 8 Moore, C. P. 16; Weston *v.* Foster (1836), 3 Scott, 164; Hunter *v.* Parker (1840), 7 M. & W. 322; Fishmongers' Co. *v.* Robertson (1843), 5 Man. & G. 131; Hogan *v.* Hand (1861), 14 Moo. P. C. C. 310.

208. —— ——.]—She [the wife] may bind her husband by . . . hiring servants reasonably fit for her degree (BLACKBURN, J.).—BAZELEY *v.* FORDER (1868), L. R. 3 Q. B. 559; 9 B. & S. 599; *sub nom.* BASELEY *v.* FORDER, 37 L. J. Q. B. 237; 18 L. T. 756; 32 J. P. 550.

Annotation:—**Mentd** Coldingham Parish Council *v.* Smith, [1918] 2 K. B. 90.

SUB-SECT. 4.—OTHER PERSONS.

Partners.]—*See* PARTNERSHIP.

Counsel & client.]—*See* BARRISTERS, Vol. III., p. 331, No. 206.

Lunatics.]—*See* LUNATICS, Vol. XXXIII., pp. 128 *et seq.*

SECT. 2.—FORMATION OF CONTRACT.

Formation of contract.]—*See* CONTRACT, Vol. XII., pp. 51 *et seq.*

209. Communication of offer—Subsequent service by servant.]—In 1859 R. was owner of a mine which he proposed to sell to a projected joint stock co. On Feb. 12, 1859, there was a meeting of the promoters of the co., at which it was resolved that pltf. should be appointed captain of the mine at a certain salary "such salary to commence at the completion of the contract with R.," who was one of the promoters of the co. This resolution was communicated to pltf. On Mar. 9 the agreement for the sale of the mine to R. was executed. On Mar. 25 there was a meeting of the promoters of the co. at which the memorandum & arts. of assocn. were executed & a prospectus was approved of, which described pltf. as "captain & local manager" of the mine. On Mar. 25 the co. was registered under the Joint Stock Company's Acts, 1856, 1857. On Mar. 31 there was a meeting

of the co. at which three directors were present, when the minutes of the meeting of Mar. 25 were read & the prospectus approved at that meeting was "submitted & approved." Pltf. acted as manager of the mine, & in an action by him against the co. for his salary, the jury found that he acted for the co. & not for R. There was no conveyance of the mine to the co. :—*Held :* there was evidence of the appointment of pltf. by the co. as manager of the mine, & he was entitled to recover for his service in such capacity.—BROWNING *v.* GREAT CENTRAL MINING CO. (1860), 5 H. & N. 856 ; 29 L. J. Ex. 399 ; 157 E. R. 1423.

——.]—*See* CONTRACT, Vol. XII., p. 58, Nos. 325–327.

210. Communication of acceptance — Necessity for.]—The managers of a school passed a resolution appointing pltf., who had applied for the post, to the position of head master ; but the decision at which they had arrived was not communicated to pltf. :—*Held :* the passing of the resolution without communication to pltf. did not contitute a contract to appoint him to the post for the breach of which pltf. was entitled to sue.—POWELL *v.* LEE (1908), 99 L. T. 284 ; 72 J. P. 353 ; 24 T. L. R. 606 ; 6 L. G. R. 840, D. C.

-.]—*See* CONTRACT, Vol. XII., pp. 66 *et seq.*

SECT. 3.—FORM OF CONTRACT.

SUB-SECT. 1.—NECESSITY FOR WRITING.

A. In General.

See, generally, CONTRACT, Vol. XII., pp. 118 *et seq.*

211. Appointment of schoolmaster—By trustees of charity.]—An appointment to the situation of schoolmaster under a conveyance to charitable uses may be made without writing.—WILKINSON *v.* MALIN (1832), 2 Cr. & J. 636 ; 2 Tyr. 544 ; 1 L. J. Ex. 234 ; 149 E. R. 268.

Annotations :—**Mentd.** Smith *v.* Keating (1848), 6 C. B. 136 ; Perry *v.* Shipway (1859), 1 Giff. 1 ; *Re* Campden Charities (1881), 18 Ch. D. 310 ; *Re* Whiteley, London (Bp.) *v.* Whiteley, [1910] 1 Ch. 600.

——.]—*See* EDUCATION, Vol. XIX., p. 607, Nos. 318–323.

Appointment of steward of manor.]—*See* COPYHOLDS, Vol. XIII., p. 42, Nos. 492–495.

B. Statute of Frauds.

As to whether contracts of service within statute.]—*See* CONTRACT, Vol. XII., pp. 123–125, Nos. 806–824.

The memorandum or note.]—*See* CONTRACT, Vol. XII., pp. 132, 140, 150, 151, 154, 158, Nos. 891, 946, 1036, 1037, 1077, 1084, 1122.

Operation of statute.]—*See* CONTRACT, Vol. XII., pp. 161, 166, 169, 171, Nos. 1176, 1214, 1254, 1255.

SUB-SECT. 2.—CONTRACTS WITH CORPORATIONS.

Necessity for seal.]—*See* CORPORATIONS, Vol. XIII., pp. 284, 285, 380, 381, Nos. 164–173, 1104–1106.

SUB-SECT. 3.—EXEMPTIONS FROM STAMP DUTY.

See Stamp Act, 1891 (c. 39), s. 1, sched. I. ; REVENUE.

212. To whom exemption extends—Pauper.]—The pauper, in common with the other workmen of the establishment, signed a memorandum in a book, whereby he undertook to serve his masters from Nov. 11, 1815, to Nov. 11, 1817 ; to lose no time on his account, to do his work well, & behave himself in all respects as a good servant. This memorandum was not signed by the masters, but it was proved that they kept the book, & had accepted the services of the servants :—*Held :* it was an agreement between the masters & the servants, & did not require a stamp.—R. *v.* STOKE-UPON-TRENT (INHABITANTS) (1843), 5 Q. B. 303 ; Dav. & Mer. 357 ; 13 L. J. M. C. 41 ; 2 L. T. O. S. 148 ; 8 J. P. 197 ; 8 Jur. 34 ; 114 E. R. 1263.

Annotations :—**Mentd.** R. *v.* Kesteven JJ. (1844), 8 Jur. 445 ; Devonald *v.* Rosser, [1906] 2 K. B. 728 ; Meek *v.* Port of London Authority, [1918] 1 Ch. 415.

213. —— Clerk.]—R. *v.* WELCH (1846), 2 Car. & Kir. 296 ; 1 Den. 199 ; 8 L. T. O. S. 254 ; 11 J. P. 485 ; 2 Cox, C. C. 85 ; 169 E. R. 210, C. C. R.

Annotation :—**Expld.** R. *v.* Gompertz (1846), 9 Q. B. 824.

214. —— Fireman & stoker.]—Pltf. & deft. being resident in England, & P. at Havana, & deft. being a foreign agent, a written agreement was entered into by pltf. with deft. in behalf & representation of P. of Havana, that pltf. would proceed as fireman & stoker on board the *T.* steamer, then about to leave London for Havana, calling at intermediate ports, to be placed in the service of P., & would faithfully do the work of fireman or stoker on board the *T.* & obey the orders of the engineers. In consideration of the service, pltf. was to receive wages at £5 per month, payable monthly, & £2 per month for providing himself in provisions. During the outward passage, rations were to be served out to pltf. on account of P. The contract to be understood to be in force for one year certain from the date ; &, should pltf. be discharged before that time, three months' wages to be paid in advance, besides finding him a passage home ; P. being at liberty to confirm & continue the engagement on the terms stated, or to discharge pltf. & to find him his passage back to England ; the wages to be payable up to the day of pltf.'s arrival in England, unless he should be discharged for misconduct ; one month's pay to be advanced for pltf.'s outfit for the voyage : —*Held :* the agreement did not require a stamp, being within the exemption "memorandum or agreement for the hire of any labourer," in Stamp Act, 1815 (c. 184), Sched. Part I., title Agreement. —WILSON *v.* ZULUETA (1849), 14 Q. B. 405 ; 19 L. J. Q. B. 49 ; 14 L. T. O. S. 251 ; 14 J. P. 23 ; 14 Jur. 306 ; 117 E. R. 159.

Annotations :—**Mentd.** Mahony *v.* Kekulé (1854), 14 C. B. 390 ; Green *v.* Kopke (1856), 25 L. J. C. P. 297 ; Sharp *v.* Fields (1864), 10 L. T. 338.

215. —— Farm bailiff.]—R. *v.* WORTLEY, No. 135, *ante.*

216. —— Overseer in printing office.]—An overseer in a printing office is an artificer within the meaning of the Stamp Acts, & letters constituting an engagement of such an overseer do not

PART III. SECT. 2.

210 i. *Communication of acceptance—Necessity for.*]—OWEN *v.* TWINING (2) (1896), 3 Terr. L. R. 410.—**CAN.**

f. Condition precedent—Security for performance of duties.]—MACMATH *v.* CONFEDERATION LIFE ASSOCN. (1875), 36 U. C. R. 459.—**CAN.**

PART III. SECT 3, SUB-SECT. 1.—A.

g. Appointment of schoolmaster.]—Under the School Ordinance of Alberta it is required where a board of trustees of a school district employs a teacher that : (*a*) there be a formal contract in writing ; & (*b*) the particular person employed be decided upon by resolution of the board.—JOHNSON MCEWEN SCHOOL DISTRICT TRUSTEES (Alta.), [1923] 1 D. L. R. 175 ; [1922] 3 W. W. R. 1166 ; 19 Alta L. R. 44.—**CAN.**

PART III. SECT. 3, SUB-SECT. 3.

213 i. *To whom exemption extends—Clerk.*]—An agreement for the hire of a clerk does not come within the

Sect. 3.—*Form of contract: Sub-sect.* 3. *Sect.* 4: *Sub-sects.* 1 & 2. *Sect.* 5: *Sub-sects.* 1 & 2, *A. & B.*]

require a stamp.—BISHOP *v.* LETTS (1858), 1 F. & F. 401, N. P.

217. —— Workman employed to export dredging machine.]—First count upon an agreement, by which pltf. was to take out a dredging machine to a port in the Black Sea, & be paid £50. Pltf. was examined as to a written agreement, which he said he had lost. A duplicate original, but unstamped, was tendered & that & the other duplicate had not been stamped. Pltf. had actually worked on board the vessel which carried out the dredging machine:—*Held:* the agreement was within the exemption of the Stamp Act, as an agreement for the hire of a "labourer or artificer," & admitted in evidence.—CORNFORTH *v.* DANUBE & BLACK SEA RY. CO. (1860), 2 F. & F. 197, N. P.

SECT. 4.—IMPLIED CONTRACT.

SUB-SECT. 1.—IN GENERAL.

218. From service—Continuation of.]—If a servant after serving a year, part of which was under a retrospective hiring, so that no settlement could be gained by it, continue in service part of another year, the justices may presume a hiring for the second year.—R. *v.* HALES (INHABITANTS) (1794), 5 Term Rep. 668; 101 E. R. 372.

219. —— ——.]—R. *v.* RICKINGHALL INFERIOR (INHABITANTS), No. 712, *post.*

220. From finding of board & lodging.]—The examinations relating to a hiring & service were as follows:—"The pauper came to live with my father as a farm servant; he was not engaged for any particular time, but my father found him board, washing, lodging and clothes for so long a time as he stayed. He continued in my father's service, in that manner without leaving for two years, during all which time he lived and slept at my father's house":—*Held:* insufficient, as no hiring was stated in, or could be inferred from, the examinations.

There is no statement here that the pauper was hired, or contracted or agreed to stay with his master. It is a very different thing to infer a hiring for a year from a general hiring, & to infer a hiring from the fact of finding food & lodging (LORD DENMAN, C.J.).—R. *v.* CATTERAL (INHABITANTS) (1844), 5 Q. B. 901; Dav. & Mer. 702; 1 New Sess. Cas. 167; 3 L. T. O. S. 73; 114 E. R. 1488.

Annotation:—**Mentd.** R. *v.* Wye (1838), 2 Jur. 298.

Presumption of yearly hiring.]—*See* Part IV., Sect. 1, sub-sect. 2, *post.*

SUB-SECT. 2.—REBUTTAL OF IMPLICATION.

221. Service with relation—Girl serving grandmother.]—A. was born in P. in the year 1699, & being fourteen years old, she served her grandmother in G. for the space of four years, on an allowance of meat, drink, washing & lodging:—*Held:* this was no settlement at G.—GREGORY-STOKE PARISH *v.* PITMISTER (1726), Sess. Cas. K. B. 163; 93 E. R. 165.

Annotations:—**Expld. & Distd.** R. *v.* Chertsey (1787), 2 Term Rep. 37; R. *v.* Lyth (1793), 5 Term Rep. 327. **Refd.** R. *v.* Worfield (1794), 5 Term Rep. 506.

222. —— Boy serving uncle.]—A boy living several years with his uncle, & working at his trade for his board, lodging, & clothes, but without any contract does not gain a settlement.—R. *v.* ST. MARY, GUILDFORD (INHABITANTS) (1785), 2 Const, 187.

223. —— ——.]—The pauper having lived with his uncle upon charity was afterwards hired as a yearly servant by another person, whom he served accordingly, at the expiration of which he returned to his uncle upon an invitation from him, that if he would come & live with him as before he would make it better for him than a common service, & lived with him several years in the parish of A. performing the work of a servant in husbandry; during the time he so lived with his uncle, the latter promised that if he continued with him for his life he would leave him his farm & stock, but he received no wages:—*Held:* he gained no settlement in A.—R. *v.* STOKESLEY (INHABITANTS) (1796), 6 Term Rep. 757; 101 E. R. 811.

224. —— Child serving father—After termination of hiring.]—Where a female natural child was hired for a year by the wife of its reputed father, & continued doing the household work for three years, but after the first year no wages were paid, nor was there any new contract of hiring:—*Held:* the sessions were warranted in finding that after that time she did not continue on the terms of the original hiring.

Where the parties are not related, it may fairly be presumed from a continuance in the service that the terms on which they continue are the same as during the preceding year. But where the relation of father & child subsists the ground for that presumption fails (BAYLEY, J.).—R. *v.* SOW (INHABITANTS) (1817), 1 B. & Ald. 178; 106 E. R. 66.

225. Relationship on charitable footing.]—R. *v.* WEYHILL, HANTS (INHABITANTS) (1760), 1 Wm. Bl. 206; Burr. S. C. 491; 96 E. R. 113.

Annotation:—**Expld.** R. *v.* St. Matthew, Ipswich (1789), 3 Term Rep. 449.

226. Cohabitation.]—In *assumpsit* by pltf. for wages as a female servant, deft. pleaded *non*

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exception contained in 56 Geo. III., c. 56, Sched. Part I.—DAKIN *v.* WATSON (1841), 2 Craw. & D. 224.—**IR.**

PART III. SECT. 4, SUB-SECT. 1.

h. *General rule.*]—The ct. will not infer an agreement to employ where a contract to do so does not appear on the face of the agreement, although both parties may have contemplated an employment.—SENIOR *v.* SCAIFE (1884), 3 N. Z. L. R. 69 (S. C.).—**N.Z.**

k. *From service.*]—DRAKE *v.* DUNCAN (1906), 39 N. S. R. 49; 1 E. L. R. 17.—**CAN.**

l. ——.]—Pltf. sued for services rendered deft. as his housekeeper & for money alleged to have been expended by her on his behalf:—*Held:* she was entitled to wages for six years.—BRADLEY *v.* BRADLEY (1909), 14 O. W. R. 810; 1 O. W. N. 110; 19 O. L. R. 525.—**CAN.**

m. ——.]—DERRING *v.* KETTLES (Alta.), [1926] 3 W. W. R. 222.—**CAN.**

220 i. *From finding of board & lodging.*]—ADAM *v.* PETER (1842), 4 Dunl. (Ct. of Sess.) 599; 14 Sc. Jur. 240.—**SCOT.**

220 ii. ——.]—ANDERSON *v.* HALLEY (1847), 9 Dunl. (Ct. of Sess.) 1222; 19 Sc. Jur. 532.—**SCOT.**

n. *What terms implied.*]—MASTERTON FARMERS' IMPLEMENT CO. *v.* MERSON, [1920] N. Z. L. R. 148.—**N.Z.**

PART III. SECT. 4, SUB-SECT. 2.

o. *Service with relation—Sister serving brother.*]—Pltf. sued her brother for wages during several years that she had lived with him on his farm, keeping house for him while he was unmarried:—*Held:* from this alone the law would not, under the circumstances, imply a promise to pay.—REDMOND *v.* REDMOND (1868), 27 U. C. R. 220.—**CAN.**

p. —— *Brother serving brother.*]—The mere fact that one brother performs for several years work for another, will not raise the presumption of a promise to pay.—*Re* RITCHIE, SEWERY *v.* RITCHIE (1876), 23 Gr. 66.—**CAN.**

222 i. —— *Boy serving uncle.*]—MORRIS *v.* HOYLE (1878), 28 C. P. 598.—**CAN.**

222 ii. —— ——.]—HOGATE *v.* HOGATE (1915), 31 W. L. R. 843; 24 D. L. R. 900.—**CAN.**

q. —— *Boy serving grandfather.*]—MURDOCH *v.* WEST (1895), 24 S. C. R. 305.—**CAN.**

225 i. *Relationship on charitable footing.*]—SHERRY *v.* WADDELL (1894), 27 N. S. R. 312.—**CAN.**

225 ii. ——.]—MOIR (OR RITCHIE) *v.* FERGUSON (1849), 12 Dunl. (Ct. of Sess.) 119; 21 Sc. Jur. 610.—**SCOT.**

assumpsit, & pltf. gave evidence of acts of service. Deft. proposed to go into evidence to show that pltf. had co-habited with him:—*Held:* he might do so on the plea of *non assumpsit*, as this went to show that there was no contract between the parties, & not to invalidate any contract on the ground of illegality.

If an express contract had been proved, & deft. had attempted to set up that the contract was not only for service but for co-habitation, deft. could not have set that up without pleading it. Pltf. endeavours to show by acts of service that there was a contract. Deft. wishes the jury to infer that there was no contract of hiring & service; he is not seeking to discharge himself from any contract, but to show that there was no contract at all (CRESSWELL, J.).—BRADSHAW *v.* HAYWARD (1842), Car. & M. 591, N. P.

SECT. 5.—PROOF OF CONTRACT.

SUB-SECT. 1.—IN GENERAL.

Evidence generally.]—*See* EVIDENCE, Vol. XXII., pp. 19 *et seq.*

227. Proof of employment in particular capacity—Not inferred from description in address.]—An agreement to employ pltf. in a particular situation cannot be inferred from a direction upon a letter addressed by deft. to pltf. in that character, the letter itself relating to the *quantum* of salary only.—CHIODI *v.* WATERS (1816), 1 Stark. 335, N. P.

228. Right of defendant to inspect—Where memorandum in writing pleaded.]—Pltf. declared on an agreement to employ him at the end of a year. Deft. pleaded the general issue, & that there was no memorandum in writing of the agreement, as required by Stat. Frauds. Pltf. replied that there was such a writing:—*Held:* he was bound to permit an inspection of it by deft., although it consisted only of a letter from deft.'s agent.—BLOGG *v.* KENT (1830), 6 Bing. 614; 4 Moo. & P. 433; 8 L. J. O. S. C. P. 229; 130 E. R. 1418.

Annotations:—**Refd.** Bluck *v.* Gompertz (1851), 7 Exch. 67; Shadwell *v.* Shadwell (1859), 6 C. B. N. S. 679.

By subscribing witness.]—*See* EVIDENCE, Vol. XXII., p. 506, No. 5366.

By entry made by master.]—*See* EVIDENCE, Vol. XXII., p. 103, No. 729.

SUB-SECT. 2.—PAROL EVIDENCE AND WRITTEN CONTRACTS.

A. General Rule.

229. Parol evidence inadmissible—To explain written agreement.]—R. *v.* ST. JOHN, DEVIZES (INHABITANTS), No. 104, *ante*.

230. —— To vary or rescind written agreement.]—Deft., an actor, agreed with pltf., a theatrical manager, to act & to understudy as a member of pltf.'s co. for a certain time subject to certain rules by one of which he was prohibited from acting at any other theatre without permission. Deft. acted elsewhere without permission. Pltf. applied for an injunction to restrain deft. from acting at any theatre other than that where pltf.'s co. played. Deft., in an affidavit in opposition to the application alleged that pltf. had verbally promised that deft., should act in certain parts but had not kept the promise:—*Held:* the alleged verbal promise could not without evidence of bad faith on the part of pltf. be considered in construing the contract, & the allotting of parts to deft. was no part of the consideration of the contract.—GRIMSTON *v.* CUNINGHAM, [1894] 1 Q. B. 125; 10 T. L. R. 81; 38 Sol. Jo. 143, D. C.

—— —— ——.]—*See, also*, CONTRACT, Vol. XII., pp. 354, 355, Nos. 2946, 2956, 2957.

231. —— Conversations between parties—Before or when signing agreement.]—The sessions sent up a case to the Ct. of K. B., which found certain facts, & set out the following written agreement: "Memorandum, that the undersigned L. agrees on behalf of his son L., that he shall serve M., of etc., in his business of a wheelwright, from this time to May 27, 1830; M. paying, at the expiration of the said term, £5 to L. the younger; L. to find his son clothes, washing, & all other necessaries, & M. meat, drink, & lodging," & the case stated that resps. proposed to give evidence of conversations between the parties before & at the time of signing the agreement, & also of an indorsement on the paper on which the agreement was written, which evidence was rejected; & it concluded by submitting to the ct., as a distinct question, whether the agreement was an agreement of hiring & service, but did not submit any question as to the admissibility of the evidence:—*Held:* (1) this agreement was a contract of hiring and service; (2) the purport of the conversations not appearing, & no question being submitted thereon, the ct. could not say that the evidence was improperly rejected, nor would they send the case down to be re-stated.—R. *v.* BILLINGHAY (INHABITANTS) (1836), 5 Ad. & El. 676; 2 Har. & W. 419; 1 Nev. & P. K. B. 149; 1 Nev. & P. M. C. 29; 6 L. J. M. C. 38, 111 E. R. 1321.

Annotation:—**Refd.** R. *v.* Northowram (1846), 9 Q. B. 24.

—— —— ——.]—*See* DEEDS, Vol. XVII., p. 338, Nos. 1502, 1504.

232. —— To prove nature of service—Unless notice given to produce agreement.]—Where there has been a written agreement between master & servant, in which the nature of the service is defined:—*Held:* parol evidence of the service was inadmissible, unless notice had been given to produce the agreement.—*Re* CLAPTON (1848), 3 Cox, C. C. 126; *sub nom.* R. *v.* CLAPTON, 12 J. P. 536.

B. When Parol Evidence Admissible.

233. Where written contract incomplete.]—In convicting a handicraftsman under 4 Geo. 4, c. 34, s. 3, for absenting herself from work:—*Held:* (1) the justices rightly admitted parol

226 i. *Cohabitation.*]—The presumption against an implied right to remuneration for services rendered by near relations arises only when the persons rendering the services, & those to whom they are rendered, are in effect living together as members of the same household.—MOONEY *v.* GROUT (1903), 6 O. L. R. 521; 2 O. W. R. 978.—**CAN.**

226 ii. ——.]—A husband living with his wife on a farm of which she has the beneficial ownership, & exerting himself, by working the farm, to earn the common livelihood, is presumed to do so by virtue of the relationship & duties resulting from the marriage, & is not entitled to wages.—TOWNS *v.* TOWNS (1913), 23 W. L. R. 958; 10 D. L. R. 448, 4 W. W. R. 196.—**CAN.**

PART III. SECT. 5, SUB-SECT. 1.

r. *Implied contract—What evidence sufficient.*]—PICKERING *v.* ELLIS (1868), 28 U. C. R. 187.—**CAN.**

t. —— ——.]—HENRICKS *v.* HENRICKS (1868), 27 U. C. R. 447.—**CAN.**

u. *Terms of contract.*]—GRAY *v.* STEEL CO. OF CANADA (1877), 3 R. & C. 24.—**CAN.**

PART III. SECT. 5, SUB-SECT. 2.—A.

229 i. *Parol evidence inadmissible—To explain written agreement.*]—STRONG *v.* BENT (1898), 31 N. S. R. 1.—**CAN.**

PART III. SECT. 5, SUB-SECT. 2.—B.

a. *When written contract incomplete.*]—SOUTHAMPTON SCHOOL TRUSTEES OF

Sect. 5.—*Proof of contract: Sub-sect.* 2, *B. Sect.* 6: *Sub-sects.* 1, 2 & 3, *A.*]

evidence of stipulations of the contract, though part of the contract was in writing; (2) that they rightly held the contract to be beneficial to the infant, though there was a stipulation that the master was to retain a week's wages in hand, for such wages could be recovered after the termination of the contract.—WALLS *v.* SCOTT (1861), 25 J. P. 215.

234. ——.]—When letters contain certain terms which may form the basis of a contract, it is necessary to ascertain from the letters whether the terms are finally arrived at, & if they are not, verbal evidence is admissible to show that a different contract had been entered into.

Pltf. proposed by letter to enter into deft.'s service as salesman; the term of service was to be for one year, & a list of customers was to be drawn up. Deft. replied by letter stating that the terms of pltf.'s letter required further definition, but requesting him to come on an appointed day. Pltf. entered upon deft.'s service, but was dismissed before the expiration of the year with a month's notice. Pltf. having sued for a wrongful dismissal, at the trial, evidence was tendered of a custom to dismiss salesmen at a month's notice; the judge rejected the evidence, on the ground that the letters contained a complete contract in writing:—*Held:* the evidence was admissible, as the contract in the letters was incomplete.—APPLEBY *v.* JOHNSON (1874), L. R. 9 C. P. 158; *sub nom.* JOHNSON *v.* APPLEBY, 43 L. J. C. P. 146; 30 L. T. 261; 22 W. R. 515.

235. To prove supplementary terms—Agreed to prior to commencement of service.]—APPLEBY *v.* JOHNSON, No. 234, *ante*.

236. To prove arrangement to supply workman with goods—In part payment of wages.]—A workman was engaged under an agreement in writing at a fixed rate of wages per week. There was also a verbal arrangement entered into at the same time under which, as the justices found, the workman was to be supplied with a certain quantity of cider each day in part payment of wages. On an information for an offence under the Truck Act, 1831 (c. 37), ss. 1, 25:—*Held:* the justices were entitled to receive evidence of the verbal arrangement, & to find that an offence had been committed.—JONES *v.* WASLEY (1902), 18 T. L. R. 418; 46 Sol. Jo. 339, D. C.

237. To prove usage—Where usage universal.]—I have always understood that a custom cannot be read into a written contract unless it is so universal that no workman could be supposed to have entered into the service without looking to it as part of the contract (LORD ALVERSTONE, C.J.).—DEVONALD *v.* ROSSER & SONS, [1906] 2 K. B. 728; 75 L. J. K. B. 688; 95 L. T. 232; 22 T. L. R. 682; 50 Sol. Jo. 616, C. A.

Annotations:—**Consd.** Meek *v.* Port of London Authority, [1918] 1 Ch. 415. **Mentd** Hulme *v.* Ferranti, [1918] 2 K. B. 426; Turpin *v.* Victoria Palace, [1918] 2 K. B. 539; Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522.

——.]—*See* CUSTOM & USAGES, Vol. XVII., pp. 35–38, 41, 55, Nos. 398–427, 455, 457, 602.

238. To prove verbal agreement—In substitution of original contract.]—By a contract in writing which was not to be performed within a year from the making thereof pltf. was engaged by defts. to perform at their theatres on certain terms including the payment of salary at a specified rate. During the currency of the contract & within less than a year of its termination the parties verbally agreed to a variation of pltf.'s salary for a part of the remainder of the engagement. Subsequently pltf. sued defts. to recover salary earned since the verbal agreement, at the rate specified in the original contract:—*Held:* the verbal agreement, being one which was to be performed within a year, &, therefore, not within Stat. Frauds, was admissible in evidence to prove that the parties had substituted for the original contract a new contract embodying the variation as to salary & the unaltered terms of the original contract.—WILLIAMS *v.* MOSS' EMPIRES, LTD., [1915] 3 K. B. 242; 84 L. J. K. B. 1767; 113 L. T. 560; 31 T. L. R. 463, D. C.

Annotation:—**Dbtd.** Morris *v.* Baron, [1918] A. C. 1. Consideration has satisfied me that *Williams* v. *Moss' Empires, Ltd.* was a more than doubtful decision (VISCOUNT HALDANE).

To explain particular words & phrases.]—*See* DEEDS, Vol. XVII., pp. 325, 327, Nos. 1364, 1382.

To prove nature of employment.]—*See* DEEDS, Vol. XVII., p. 320, Nos. 1317, 1318.

To indentify documents.]—*See* CONTRACT, Vol. XII., p. 161, No. 1166.

Where document not essential to party's case.]—*See* EVIDENCE, Vol. XXII., p. 210, No. 1830.

To prove consideration.]—*See* EVIDENCE, Vol. XXII., p. 251, No. 2331.

SECT. 6.—CONSIDERATION.

SUB-SECT. 1.—IN GENERAL.

See, generally, CONTRACT, Vol. XXII., pp. 172 *et seq.*

239. Necessity for consideration.]—A workman agreed, in writing, to work for S., & for no other person, until the expiration of twelve months, & so on from twelve months to twelve months until he should give twelve months' notice in writing. The master did not execute the agreement:—*Held:* no consideration appearing for the former binding himself to this exclusive service, the contract was void.—SYKES *v.* DIXON (1839), 9 Ad. & El. 693; 1 Per. & Dav. 463; 2 Will. Woll. & H. 120; 8 L. J. Q. B. 102; 112 E. R. 1374.

Annotations:—**Consd.** Hartley *v.* Cummings (1847), 5 C. B. 247. **Distd.** Whittle *v.* Frankland (1862), 2 B. & S. 49. **Refd.** Emmens *v.* Elderton (1853), 4 H. L Cas. 624; Firth *v.* Ridley (1864), 33 Beav. 516. **Mentd.** Lumley *v.* Gye (1853), 2 E. & B. 216; Payne *v.* New South Wales Coal & Intercolonial Steam Navigation Co. (1854), 10 Exch. 283; Cox *v.* Muncey (1859), 6 C. B. N. S. 375; Bealey *v.* Stuart (1862), 7 H. & N. 753; Evans *v.* Walton (1867), L. R. 2 C. P. 615.

——.]—*See* CONTRACT, Vol. XII., pp. 173–176, Nos. 1275–1300.

240. Consideration moving from employer—Necessity for.]—A written agreement, "to remain with A. two years for the purpose of learning a trade," is not binding, for want of an engagement in the same instrument by A. to teach.

There is no consideration expressed in the agreement for deft.'s undertaking & . . . that is indispensable (BURROUGH, J.).—LEES *v.* WHITCOMB (1828), 5 Bing. 34; 3 C. & P. 289; 2 Moo. & P. 86; 6 L. J. O. S. C. P. 213; 130 E. R. 972.

Annotations:—**Distd.** Whittle *v.* Frankland (1862), 2 B. & S. 49. **Mentd** Newbery *v.* Armstrong (1829), 4 C. & P. 59; Wood *v.* Benson (1831), 2 Cr. & J. 94; Laythoarp *v.* Bryant (1836), 2 Bing. N. C. 735.

.]—*See, also,* CONTRACT, Vol. XII., pp. 207, 208, Nos. 1659–1669.

DISTRICT NO. 9 *v.* HAINES (1904), 36 N. B. R. 617.—**CAN.**

b. ——.]—In an action for wages over & above the amount allowed by deft., the ct. admitted as evidence the parol admission of the co.'s agent to show what had been contemplated at the time of making the agreement.—WHELAN *v.* NEW YORK, NEWFOUNDLAND & LONDON TELEGRAPH CO. (1857), 4 Nfld. L. R. 118.—**NFLD.**

241. —— What amounts to.]—*Re* BAILEY, *Re* COLLIER, No. 258, *post*.

242. Effect of illegal consideration.]—A printer cannot recover against a publisher for printing a work which contains the life of a prostitute, & the history of her amours with various persons; & it is no answer that the parties are in *pari delicto*.

No one who assists in putting forth this work . . . is entitled to recover in any ct. of justice. He, who lends himself to that which is contrary to the laws of this country, cannot complain of not being paid. . . . Every servant to the lowest engaged in such a transaction is prevented from receiving compensation (BEST, C.J.).—POPLETT *v.* STOCKDALE (1825), 2 C. & P. 198; Ry. & M. 337, N. P.

243. ——.]—Apothecaries Act, 1815 (c. 194), prohibiting medical practice by unqualified persons is not repealed by implication by the Medical Act, 1858 (c. 90).

Deft., a duly qualified medical practitioner, agreed with pltf., a medical practitioner not duly qualified, but who was described in the agreement as "medical practitioner" to serve pltf. as assistant in his profession as a medical practitioner, & not to practice at R. within five years after the close of the engagement. Pltf. applied for an injunction to prevent deft. from practising at R. in breach of this agreement.

Deft. showed that pltf. had given various certificates of cause of death, which showed that pltf. had attended the deceased persons during their last illness, & from which it was to be inferred that he attended patients in the way in which a medical practitioner ordinarily attended, & in fact personally acted as an apothecary:—*Held*: his doing so was made illegal by Apothecaries Act, 1815 (c. 194), s. 14, the agreement therefore was to assist pltf. in carrying on a business which he could not lawfully carry on, & the agreement was illegal & could not be enforced.—DAVIES *v.* MAKUNA (1885), 29 Ch. D. 596; 54 L. J. Ch. 1148; 53 L. T. 514; 50 J. P. 5; 33 W. R. 668; 1 T. L. R. 420, C. A.

Annotation:—**Mentd.** Bellerby *v.* Heyworth, [1909] 2 Ch. 23.

244. —— Illegality as to part—Promises severable.]—By Coal Mines Regulation Act, 1887 (c. 58), s. 12, where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, provided that nothing in this sect. shall preclude the owner of the mine from agreeing with the persons employed that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, such deductions being determined in such special mode as may be agreed upon between the owner & the persons employed.

Applt. was employed by resps. at their colliery upon the terms that he should be paid wages according to the weight of coal gotten by him; that he should not leave his employment without giving fourteen days' notice, & that deductions should be made in respect of dirt sent up to the surface with the coal; & the following special mode of determining those deductions was agreed upon between resps. & the persons employed by them:—About one tub in twenty sent up to the surface was selected at random for testing. The dirt in that tub was separated from the coal & weighed, & if the tub contained more than a certain weight of dirt, the man who sent it up was not paid anything in respect of the coal therein. The men sending up the other nineteen tubs were paid on the total weight of the contents of each tub as though it contained coal only:—*Held*: the proviso in Coal Mines Regulation Act, 1887 (c. 58), s. 12, was controlled by the first part of that sect., & did not authorise any agreement by which a person employed was not to be paid on the weight of the coal in a particular tub; the agreement with respect to the special mode of making deductions for dirt was therefore illegal, but the illegality in that respect did not vitiate the whole contract of employment so as to justify applt. in leaving without giving fourteen days' notice.

The rule is that if the consideration is tainted with illegality, either in whole or in part, all the promises depending on that consideration must fail; but if the consideration be not tainted with illegality, either wholly or in part, then if one of the several promises depending upon it be illegal in itself & the others legal, the legal promises stand & may be enforced (A. L. SMITH, L.J.).—KEARNEY *v.* WHITEHAVEN COLLIERY CO., [1893] 1 Q. B. 700; 62 L. J. M. C. 129; 68 L. T. 690; 57 J. P. 645; 41 W. R. 594; 9 T. L. R. 402; 4 R. 388, C. A.

Annotations:—**Distd.** Chell *v.* Hall & Boardman (1896), 12 T. L. R. 408. **Refd.** Humble *v.* Humphreys (1901), 85 L. T. 563; Coltness Iron Co. *v.* Dobbie, [1920] A. C. 916.

——.]—*See* CONTRACT, Vol. XII., pp. 234 *et seq.*

Necessity to express consideration in writing—Statute of Frauds, s. 4.]—*See* CONTRACT, Vol. XII., pp. 151, 152, Nos. 1039–1045.

What amounts to good consideration—Past consideration.]—*See* CONTRACT, Vol. XII., pp. 213–219, Nos. 1719–1789.

—— Change in employee's position.]—*See* CONTRACT, Vol. XII., pp. 188, 209, Nos. 1437, 1684.

—— Enlistment.]—*See* CONTRACT, Vol. XII., p. 188, Nos. 1438, 1439.

—— Employment terminable at employer's option.]—*See* CONTRACT, Vol. XII., p. 179, No. 1340.

Adequacy of consideration.]—*See* CONTRACT, Vol. XII., pp. 204–206, Nos. 1640–1658.

Admissibility of extrinsic evidence of consideration.]—*See* EVIDENCE, Vol. XXII., p. 251, No. 2331; &, *generally*, DEEDS, Vol. XVII., pp. 302 *et seq.*

SUB-SECT. 2.—REMUNERATION.

See Part V.

SUB-SECT. 3.—PROVISION OF WORK.

A. In General.

245. Obligation of master to provide work—Existence of—Question of fact.]—W., by written agreement, in consideration of £3 advanced to him by G. at the time of execution, & the wages agreed to be paid to him by G., agreed to work for & serve G. as a tinplate worker, & to serve no one else without G.'s consent in writing for twelve months, & also until the expiration of three months after notice by W. to G. of his desire to determine the service; & W. agreed to fulfil his service, & not to absent himself during customary hours of work; & G., in consideration

Sect. 6.—*Consideration: Sub-sect.* 3, *A. & B. Sect.* 7: *Sub-sects.* 1, 2 & 3.]

of W.'s services, agreed to pay W. on Saturday in every week during term such wages as articles made by W. should amount to at their usual workmen's prices:—*Held:* the agreement showed liability on the part of G. to provide W. with work so long as the service continued, & was not void for want of mutuality, & might be enforced under stat. 4 Geo. 4, c. 34, s. 3.

Every case of this sort depends on circumstances of its own (COLERIDGE, J.).—R. *v.* WELCH (1853), 2 E. & B. 357; 1 C. L. R. 319; 22 L. J. M. C. 145; 21 L. T. O. S. 127; 17 J. P. 553; 17 Jur. 1007; 118 E. R. 800; *sub nom.* R. *v.* BIRMINGHAM JJ., 1 W. R. 368.

Annotations:—**Consd.** Devonald *v.* Rosser, [1906] 2 K. B. 728. **Reld.** *Re* Bailey, *Re* Collier (1854), 3 E. & B. 607; Worthington *v.* Sudlow (1862), 31 L. J. Q. B. 131.

246. —— Good consideration for promise to serve.]—Pltfs. agreed in writing with L., that he should serve them for seven years as a Crown-glass maker; that he should not during that term work for any other person without their licence; that they might deduct from his wages any fine he might incur for breach of their rules; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick or lame, pltfs. should be at liberty to employ any other person in his stead, without paying him any wages; that pltfs. should pay him, so long as he should be employed & work as a crown-glass maker, certain wages by the piece, & £8 a year, in lieu of house rent & firing; & that pltfs. should have the option of dismissing him from their service on giving him a month's notice or a month's wages:—*Held:* this agreement bound pltfs. to employ L. during the seven years, subject to the above power of dismissal; there was, therefore, a good consideration for L.'s contract to serve for the seven years.—PILKINGTON *v.* SCOTT (1846), 15 M. & W. 657; 15 L. J. Ex. 329; 7 L. T. O. S. 340; 153 E. R. 1014.

Annotations:—**Folld.** Hartley *v.* Cummings (1847), 5 C. B. 247; R. *v.* Welch (1853), 2 E. & B. 357. **Apld.** Boston Deep Sea Fishing & Ice Co. *v.* Ansell (1888), 59 L. T. 345. **Reld.** G. N. Ry. *v.* Harrison (1852), 12 C. B. 576; Emmens *v.* Elderton (1853), 13 C. B. 495; *Re* Bailey, *Re* Collier (1854), 3 E. & B. 607; Whittle *v.* Frankland (1862), 2 B. & S. 49; Worthington *v.* Sudlow (1862), 31 L. J. Q. B. 131: Eyre & Spottiswoode *v.* R. (1886), 3 T. L. R. 5; Devonald *v.* Rosser, [1906] 2 K. B. 728. **Mentd.** Lumley *v.* Gye (1853), 2 E. & B. 216; Maxim Nordenfelt Guns & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 630; Robinson *v.* Heuer, [1898] 2 Ch. 451.

247. —— ——.]—A. contracted to serve B. & his partner or partners for the time being, for seven years, in his business of a glass & alkali manufacturer, & at all times during the term to do his best endeavours, & use his utmost care & diligence in the works; &, further, that he would not, at any time during the term, neglect or absent himself from the said service, without the consent in writing of B. or his partner or partners for the time being, or either or such of them as should carry on the business; nor would work for or serve any other person or persons, without such consent; in consideration of which service, B. agreed to pay A. 24*s.* per week for a certain amount of work, & to find him some other description of work, provided he should not require that quantity of the specified work, so that A.'s wages should not be less than 24*s.* per week, except when a furnace should be out, when A. agreed to work for 21*s.* per week; & it was agreed, that, if A. should be sick or otherwise incapacitated from performing the service, or in case of misconduct, or if B., or his partner or partners for the time being, or either or such of them as should carry on the trade, should discontinue the trade during the term, in either of such cases, B. or his partners should be at liberty to retain or employ any other person in the room or stead of A., without being obliged to pay him any wages or satisfaction:—*Held:* this agreement was not void for want of mutuality, or as being in unreasonable restraint of trade.—HARTLEY *v.* CUMMINGS (1847), 5 C. B. 247; 17 L. J. C. P. 84; 10 L. T. O. S. 247; 12 Jur. 57; 136 E. R. 871.

Annotations:—**Consd.** Evans *v.* Walton (1867), L. R. 2 C. P. 615. **Reld.** Wood *v.* Copper Miners' Co. (1849), 7 C. B. 906; Lumley *v.* Gye (1853), 2 E. & B. 216; Boston Deep Sea Fishing & Ice Co. *v.* Ansell (1888), 59 L. T. 345; Robinson *v.* Heuer, [1898] 2 Ch. 451.

248. —— ——.]—*Re* BAILEY, *Re* COLLIER, No. 258, *post.*

249. —— ——.]—T. contracted to serve V. for a year, but if V. should cease to carry on the works from being unable to obtain ore, or for any other cause, then V. was to be at liberty to terminate the contract. T. absented himself, & was summoned before justices:—*Held:* the contract was not bad for want of mutuality; & the burden of proof was on T. to show that his absence was justifiable.

The master obliges himself to find work for applt. unless from some unforeseen accident. That is surely mutuality enough (COCKBURN, C.J.).—THOMAS *v.* VIVIAN (1872), 37 J. P. 228.

250. —— Good consideration for condition in restraint of trade.] GRAVELY *v.* BARNARD, No. 256, *post.*

B. When Obligation will be Implied.

See, generally, AGENCY, Vol. I., p. 540, Nos. 1944 *et seq.*; CONTRACT, Vol. XII., pp. 619–623, Nos. 5113–5132.

251. Contract for fixed period.] — COOK *v.* SHERWOOD, No. 737, *post.*

252. —— Theatrical engagement.]—Pltf. the manager of a London theatre, engaged deft., a provincial actor desirous of appearing on the London stage, for two years. Though there was nothing expressed on the subject, the ct. inferred an engagement on the part of pltf. to employ deft. for a reasonable time, & on the part of deft. not to perform elsewhere. Pltf. having, under these circumstances, delayed deft.'s appearance for five months, deft. broke his engagement & went to another theatre:—*Held:* he had a right so to do, & pltf. was not entitled to an interlocutory injunction to prevent his performing there.—FECHTER *v.* MONTGOMERY (1863), 33 Beav. 22; 55 E. R. 274.

Annotations:—**Apld.** Montague *v.* Flockton (1873), L. R. 16 Eq. 189. **Distd.** Grinston *v.* Cuningham, [1894] 1 Q. B. 125. **Reld.** Turner *v.* Sawdon, [1901] 2 K. B. 653; Turpin *v.* Victoria Palace, [1918] 2 K. B. 539.

253. —— Buying agent.]—Where there is a contract to employ another as an agent merely, but with no service or subordination, there is no implied undertaking that the agent is to be supplied with the means of earning his commission. But if the contract is one of service, then the commission is merely intended to be in the place of salary, & the contract cannot be determined without compensation to the servant. Deft., who carried on business in India, appointed pltf. to be his sole buying agent in Great Britain for ten years, deft. to send all orders to pltf., who

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PART III. SECT. 6, SUB-SECT. 3.—B.

251 i. *Contract for fixed period.*]—By an agreement signed by both parties, pltf. agreed & bound himself to deft. to act as his bookkeeper, etc., for five years, for a specified sum in each year: —*Held:* there was no obligation, either express or implied, on deft. to continue his business or retain pltf. in his employment during the five years.—ROCHE *v.* WALSH (1877), 27 C. P. 555.—**CAN.**

was to receive 3½ per cent. on all goods bought by or for deft. whatever their destination in India might happen to be, the commission to be paid quarterly. Pltf. was to keep proper books of account of all incidental expenses, which were to be paid by deft. together with the commission every quarter, & in case any firms should refuse to supply goods unless invoiced direct to pltf., he was to be under no obligation to place such orders unless he was fully satisfied that the bank would hand him cash covering such purchases immediately these goods were ready for shipment:—*Held:* there was no implied contract that deft. would continue to carry on business for the term of ten years so as to supply pltf. with orders.—NORTHEY *v.* TREVILLION (1902), 18 T. L. R. 648; 7 Com. Cas. 201.

Annotations:—**Refd.** Lazarus *v.* Cairn Line of Steamships (1912), 106 L. T. 378; Reigate *v.* Union Manufacturing Co. (Ramsbottom), [1918] 1 K. B. 592; Warren *v.* Agdeshman (1922), 38 T. L. R. 588.

254. Contract for one year—& then terminable by notice.]—R. *v.* WELCH, No. 245, *ante*.

255. Contract terminable on notice—Wages payable at stated periods.]—A workman entered into an agreement with a coal co. to serve them as a collier, in consideration of wages to be paid to him fortnightly; & the co., in consideration of such service, agreed that he should not be discharged without twenty-eight days' notice in writing, unless in the case of misconduct:—*Held:* this contract necessarily implied an obligation on the part of the master to find work for the servant, & to pay him wages every fortnight; &, consequently, was not bad for want of mutuality.—WHITTLE *v.* FRANKLAND (1862), 2 B. & S. 49; 31 L. J. M. C. 81; 5 L. T. 639; 26 J. P. 372; 8 Jur. N. S. 382; 121 E. R. 992.

Annotation:—**Consd.** Devonald *v.* Rosser, [1906] 2 K. B. 728.

256. Contract terminable at will—Subsequent execution of bond in restraint of trade.]—Pltf., a surgeon, engaged deft., who was not qualified to practice, but was studying with a view to pass the necessary examination, to assist him in his practice, the engagement being terminable at the will of either party. Subsequently deft., previously to going up to pass his examination, executed, at the request of pltf., a bond, which was conditioned to be void if deft. should not practice within certain limits, but which contained no express agreement on the part of pltf. to continue deft.'s employment. Deft. remained in pltf.'s employment for about three months afterwards, & was then dismissed. He subsequently commenced practising within the prescribed limits, & a suit was instituted to restrain him from so doing:—*Held:* an agreement by pltf. to continue deft.'s employment on the old terms could be inferred; there was consideration to support the bond; & pltf. was entitled to an injunction.—GRAVELY *v.* BARNARD (1874), L. R. 18 Eq. 518; 43 L. J. Ch. 659; 30 L. T. 863; 39 J. P. 20; 22 W. R. 891.

Annotations:—**Consd.** London & Yorkshire Bank *v.* Pritt (1887), 56 L. J. Ch. 987; Hood & Moore's Stores *v.* Jones (1899), 81 L. T. 169. **Refd.** Davies *v.* Davies (1887), 36 Ch. D. 359; *Re* Weston, Davies *v.* Tagart, [1900] 2 Ch. 164.

257. Remuneration by salary.]—HARTLEY *v.* CUMMINGS, No. 247, *ante*.

——.]—*See* CONTRACT, Vol. XII., pp. 620, 621, Nos. 5114–5122.

Remuneration by commission.]—*See* CONTRACT, Vol. XII., p. 622, Nos. 5123–5127.

258. Remuneration by piece work.]—There was an obligation on the part of the employers not merely to pay for the work done, but also to employ the men; not, I think, necessarily to find them work day by day, but an obligation to continue the relation of master & servant; so that if the master causelessly refused to give the servant work, whilst the colliery was open, he would have broken his contract. That obligation on the part of the master would be ample consideration for the servant's promise (LORD CAMPBELL, C.J.).—*Re* BAILEY, *Re* COLLIER (1854), 3 E. & B. 607; 2 C. L. R. 1645; 18 Jur. 930; 118 E. R. 1269; *sub nom. Ex p.* BAILEY, *Ex p.* COLLIER, 23 L. J. M. C. 161; *sub nom.* R. *v.* BAILEY, 2 W. R. 422; *sub nom.* R. *v.* COLLIER & BAYLEY, 23 L. T. O. S. 111; 18 J. P. 630.

Annotations:—**Mentd.** R. *v.* Nunneley (1858), E. B. & E. 852; Buccleuch *v.* Metropolitan Board of Works (1870), L. R. 5 Exch. 221; *Re* Authers (1889), 22 Q. B. D. 345; Mid. Ry. *v.* Edmonton Union Grdns., [1895] 1 Q. B. 357.

259. ——Munitions of War Acts, 1915, 1916.]—Pltf. was employed by defts. at a controlled establishment as a piece worker, the custom being that, if no work was provided, no pay could be demanded, & no notice determining the contract of employment was necessary. On May 3, 1917, some of deft.'s workmen, not including pltf., went out on strike & defts. closed their works until May 11, 1917, when pltf. returned to work. He was thus prevented from earning his wages as a piece worker during the aforesaid period, & he applied to a munitions tribunal for compensation, but the tribunal decided that he had not been dismissed from his employment, & refused to award compensation:—*Held:* pltf. was not entitled to either a contractual or statutory notice, & consequently could not demand that a reasonable amount of work should be provided for him by deft.—HULME *v.* FERRANTI, [1918] 2 K. B. 426; 87 L. J. K. B. 938; 118 L. T. 719; 34 T. L. R. 500; 62 Sol. Jo. 668; 16 L. G. R. 813, D. C.

——.]—*See* CONTRACT, Vol. XII., pp. 622, 623, Nos. 5128–5132.

Continuance of business.] *See* CONTRACT, Vol. XII., p. 382, No. 3157.

SECT. 7.—RESTRICTIONS ON FREEDOM OF CONTRACT.

SUB-SECT. 1.—COVENANTS IN RESTRAINT OF TRADE.

See TRADE & TRADE UNIONS.

SUB-SECT. 2.—SUNDAY OBSERVANCE.

See, generally, TIME.

260. Validity of contract made on Sunday.]—Sunday Observance Act, 1677 (c. 7), s. 5, enacts, that no tradesman, artificer, workman, labourer, or any person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's Day, & subjects parties offending to a penalty:—*Held:* this statute only prohibits labour, business, or work done in the course of a man's ordinary calling, &, therefore, a contract of hiring made on a Sunday between a farmer & a labourer for a year, was valid.—R. *v.* WHITNASH (INHABITANTS) (1827), 7 B. & C. 596; 1 Man. & Ry. K. B. 452; 1 Man. & Ry. M. C. 177; 6 L. J. O. S. M. C. 26; 108 E. R. 845.

Annotations:—**Apld.** Peate *v.* Dickens (1834), 3 Dowl. 171. **Refd.** Begbie *v.* Levi (1830), 1 Cr. & J. 180; Wolton *v.* Gavin (1850), 20 L. J. Q. B. 73.

SUB-SECT. 3.—DEDUCTIONS FROM AND FORFEITURE OF WAGES.

See Part V., Sect. 2, sub-sects. 4, 5, *post*.

Part IV.—Duration and Termination of Contract.

SECT. 1.—DURATION.

SUB-SECT. 1.—IN GENERAL.

261. Contract to serve for five years.]—A. agreed to become the hired servant of B. for five years, to do such work as belonged to the finishing of cloth, & B. promised to pay to A. 10*s.* a week for the first two years, 11*s.* for the third, 12*s.* for the fourth, & 13*s.* for the fifth, the hours of working to be from six in the morning till seven in the evening, to be paid for all overtime, & a deduction to be made for all short:—*Held:* this was not an exceptive hiring, but a hiring for five years absolutely.—R. *v.* OSSETT-CUM-GAWTHORPE (INHABITANTS) (1832), 4 B. & Ad. 216; 1 Nev. & M. K. B. 21; 1 Nev. & M. M. C. 10; 2 L. J. M. C. 31; 110 E. R. 437.

Annotations:—**Distd.** R. *v.* Norton Bavant (1835), 3 Ad. & El. 161. **Refd.** R. *v.* Holbeck (1843), 4 Q. B. 590.

262. Contract to serve for life—Validity.]—Pltf., by deed, sold to defts. his trade & business, as a carrier between London & Wisbech, &, in consideration of the covenants therein contained on defts.' part, covenanted with them that he would not thenceforth during his life exercise the trade of a carrier, except as thereinafter mentioned; & that he would thenceforth during his life, faithfully serve defts. as an assistant in the trade of a carrier: & defts., in consideration of the before mentioned covenants, & of pltf.'s faithful service as aforesaid, covenanted to pay him a certain weekly sum for his life. In an action against defts. on this covenant:—*Held:* pltf.'s covenant to serve during his life was good in law, & the covenant in restraint of his trade was not void, inasmuch as he was not absolutely restrained from carrying on the trade, but only from carrying it on in any other way than as an assistant to the defts.

Qu.: whether, supposing this covenant were void, as being in general restraint of trade, pltf. could nevertheless have sued on defts.' covenant to pay.—WALLIS *v.* DAY (1837), 2 M. & W. 273; Murp. & H. 22; 6 L. J. Ex. 92; 1 Jur. 73; 150 E. R. 759.

Annotations:—**Refd.** Phillips *v.* Stevens (1899), 15 T. L. R. 325. **Mentd.** Allsopp *v.* Wheatcroft (1872), L. R. 15 Eq. 59; Rousillon *v.* Rousillon (1880), 14 Ch. D. 351; Davies *v.* Davies (1887), 36 Ch. D. 359; Maxim Nordenfelt Guns & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 630; McEllistrim *v.* Ballymacelligott Co-op. Agricultural & Dairy Soc., [1919] A. C. 548.

SUB-SECT. 2.—PRESUMPTION OF YEARLY HIRING.

A. Hiring for Indefinite Period.

263. General rule—Annual hiring presumed.]—A general retainer without mentioning any time, is for a year.—WANSWORTH PARISH *v.* PUTNEY PARISH (1739), 2 Sess. Cas. K. B. 329; 93 E. R. 221.

264. —— ——.]—R. *v.* BERWICK ST. JOHN (1760), Burr. S. C. 502.

Annotation:—**Mentd.** R. *v.* All Saints, Stamford (1837), 1 J. P. 71.

265. —— ——.]—Where there is not a hiring in express words, but the nature of the service implies a precedent hiring, the ct. will go far to presume one. But this is exactly the case of every workman paid by the piece; & it is very clear, that there is no hiring for a year, either express or implied (LORD MANSFIELD, C.J.).—TRINITY *v.* ST. PETER'S, DORCHESTER (1763), 1 Wm. Bl. 443; 96 E. R. 254; *sub nom.* R. *v.* ST. PETER'S, DORCHESTER, Burr. S. C. 513.

Annotation:—**Mentd.** R. *v.* Chillesford, R. *v.* Winslow (1825), 4 B. & C. 94.

266. —— ——.]—(1) Though a general hiring is a hiring for a year, yet there must be an obligation upon the servant to serve for a year, in order to his gaining a settlement under such a hiring (ASTON, J.).

(2) Here is a circumstance stated, which destroys the presumption of its being a general hiring for a year; namely, that the servant demanded an additional 6*d.* a week, alleging that he would otherwise quit the service; & the master complied (YATES, J.).—R. *v.* DEDHAM (INHABITANTS) (1769), Burr. S. C. 653; 2 Bott. 6th ed. 227.

Annotations:—*As to* (2) **Folld.** R. *v.* Seaton (1784), Cald. Mag. Cas. 440. **Apld.** R. *v.* Pucklechurch (1804), 5 East, 382. **Refd.** R. *v.* Dodderhill (1814), 3 M. & S. 243; R. *v.* Warminster (1826), 6 B. & C. 77. *Generally*, **Refd.** R. *v.* Newton Toney (1788), 2 Term Rep. 453. **Mentd.** R. *v.* Hanbury (1802), 2 East, 423.

267. ——.]—R. *v.* ALTON (INHABITANTS) (1784), Cald. Mag. Cas. 424; 2 Bott. 6th ed. 248.

Annotation:—**Mentd.** R. *v.* Apethorpe (1824), 4 Dow. & Ry. K. B. 487.

268. —— ——.]—(1) A general hiring is a hiring for a year.

(2) A weekly reservation of wages does not of itself determine whether a contract is weekly or annual but this must be collected from the circumstances attending the contract.—R. *v.* SEATON (1784), Cald. Mag. Cas. 440.

269. —— ——.]—It has been so long settled that a general hiring is a hiring for a year that it ought not now to be controverted (LORD KENYON, C.J.).—R. *v.* WORFIELD (INHABITANTS) (1794), 5 Term Rep. 506; 101 E. R. 285.

270. —— ——.]—Where a pauper had served a master under unstamped articles of agreement to work with him for three years, at certain rates of weekly wages, & under certain covenants; after which he had continued to serve his master for four years longer, without coming to any new

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PART IV. SECT. 1, SUB-SECT. 1.

d. *Engagement by season.*]—DICK *v.* HERON (1858), 8 C. P. 67.—**CAN.**

e. *Presumption of monthly hiring—Verbal agreement for year's hiring.*]—HARPER *v.* DAVIES (1880), 45 U. C. R. 442.—**CAN.**

f. —— *Monthly remuneration.*]—A hiring at a monthly salary is presumed to be a monthly hiring.—JOHNS *v.* WINNIPEG ELECTRIC RY. CO., [1925] 3 D. L. R. 314; [1925] 2 W. W. R. 282; 35 Man. L. R. 53.—**CAN.**

g. *Presumption of daily hiring—Daily remuneration.*]—A hiring "at a salary of $7.50 per day" is a daily hiring unless circumstances appear showing that the parties contemplated differently.—DICKENSON *v.* RURAL MUNICIPALITY OF STONEHENGE (Sask.), [1920] 1 W. W. R. 235; 50 D. L. R. 383.—**CAN.**

h. —— ——.]—ARJOON VISHNU *v.* HORMUSJEE SAPURJEE (1921), I. L. R. 46 Bom. 44.—**IND.**

PART IV. SECT. 1, SUB-SECT. 2.—A.

263 i. *General rule—Annual hiring presumed.*]—BEAL *v.* HALL (1870), 9 N. S. W. S. C. R. (L.) 285.—**AUS.**

263 ii. —— ——.]—When the hiring is general, it is presumed by law to be by the year.—RETTINGER *v.* MACDOUGALL (1860), 9 C. P. 485.—**CAN.**

263 iii. —— ——.]—FORGAN *v.* BURKE (1861), 12 I. C. L. R. 495.—**IR.**

263 iv. —— ——.]—MCMEEKIN *v.* SOUTHLAND COAL CO., LTD. (1914), 33 N. Z. L. R. 654.—**N.Z.**

agreement; though such unstamped writing cannot be received as evidence for the purpose of proving the agreement between the parties, yet the sessions may look at it for the purpose of seeing when it ceased to operate, in order to guide them in receiving parol evidence of service for the last four years, at wages; from whence the sessions might presume a yearly contract.

If there were only a general hiring, the law presume, that it is for a year; & if the rate of wages were not specified, he would be entitled to reasonable wages. . . . the law says that they [the sessions] may make such a presumption when there is nothing to repel it (LORD ELLENBOROUGH, C.J.).—R. *v.* PENDLETON (INHABITANTS) (1812), 15 East, 449; 104 E. R. 913.

Annotations:—**Mentd.** R. *v.* St. Martin (1828), 8 B. & C. 674; Thomas *v.* Cooke (1828), 3 Man. & Ry. K. B. 444; Williams *v.* Gerry (1842), 10 M. & W. 296; Buxton *v.* Cornish (1844), 12 M. & W. 426.

271. —— ——.]—The pauper asked an innkeeper for a place, who replied he had no objection, & put him on as ostler, saying, that he did not mean him to have a settlement. No earnest or wages were given, but the pauper was to have what he got as ostler. The pauper lodged & boarded in the master's house. The pauper could have left at any time he pleased; or the master might have turned him away at any time. The pauper lived with the innkeeper as ostler, under the above terms, more than a year:—*Held:* this was not a general, or yearly hiring, & no settlement was gained by service under it.

I do not consider that under a general hiring the parties are at liberty to separate when they please; on the contrary, I think that the one is bound to serve, & the other bound to employ, for a year; &, that if that is not the understanding the hiring is not general, but is a hiring for a less period than a year. A general hiring is, in contemplation of law, a hiring for a year (BAYLEY, J.).—R. *v.* GREAT BOWDEN (INHABITANTS) (1827), 7 B. & C. 249; 1 Man. & Ry. K. B. 13; 1 Man. & Ry. M. C. 39; 6 L. J. O. S. M. C. 17; 108 E. R. 716.

Annotations:—**Consd.** R. *v.* Rosliston (1828), 8 B. & C. 668. **Reld.** R. *v.* St. Andrew the Great (1828), 7 L. J. O. S. M. C. 28; R. *v.* St. Martin, Leicester (1828), 3 Man. & Ry. K. B. 377.

272. —— ——.]—LILLEY *v.* ELWIN, No. 813, *post.*

273. —— —— **Although determinable by notice.**]—R. *v.* HAMPRESTON (INHABITANTS), No. 317, *post.*

274. —— —— ——.]—A general hiring, subject to being determined by monthly warning, is a yearly hiring.—R. *v.* LEW (INHABITANTS) (1828), 8 B. & C. 655; 3 Man. & Ry. K. B. 369; 2 Man. & Ry. M. C. 12; 7 L. J. O. S. M. C. 18; 108 E. R. 1187.

Annotation:—**Consd.** R. *v.* Middlewich (1835), 3 Ad. & El. 156.

275. —— —— ——.]—An order of removal was made upon the examination of the pauper, which stated—"In 1828, when I was fifteen years old, I went to work at Messrs. C. & D.'s factory in P. There was a custom in the mill requiring the workpeople to give a fortnight's notice before leaving their employment. I remained in that employment better than two years, during the whole of which time I resided & slept in P.; I worked under the custom as to giving notice, & I was compelled to serve a fortnight's notice before leaving."

The grounds of appeal traversed the hiring, service, residence & settlement, in fact; & objected, that the examination was bad on the face of it, & did not warrant the order of removal, that it did not show or contain any legal evidence of the settlement in P. nor state sufficient facts to show that the pauper gained a settlement by hiring & service therein.

At the trial of the appeal, it was proved, on the part of resps., that, in 1828, the pauper went to work as a piecer at C. & D.'s cotton mill. He was to serve them, the master spinners; but the practice of such mills is, that the piecers assist certain spinners to whom respectively they are attached. The spinner receives the whole wages from the master spinners for the work done with such assistance, & thereout pays the piecers whom he engages & dismisses, without the interference of the master spinners. The pauper was engaged by E., a spinner, & served under him more than a year; & was paid his wages every fortnight by E.

It was objected, by applts. that there was no proof of a yearly or general hiring; & that the service being to E. varied from that stated in the examination. The sessions, however, overruled the objections, & confirmed the order:—*Held:* (1) the facts of the case were sufficient to prove a general hiring: (2) the sessions, having confirmed the order subject to the opinion of this ct. on the objections, must be presumed to have found that the hiring by E. was a hiring by C. & D. as stated in the examination, & the facts stated warranted such finding.

Hiring is a most difficult question of law. The justices of the peace may possibly have asked the pauper whether he was hired or not: the answer may have been, "I do not know what you call hired, but I will tell you what took place on the occasion"; & then he may possibly state facts, & if those facts which appear in the statement of the pauper amount to evidence of a hiring for a year, then the justices may properly adjudicate that the settlement was gained, & remove the party upon it; & they must govern their opinion by the effect of such statement, if it appear to amount to any evidence of facts sufficient for such a hiring (LORD DENMAN, C.J.).—R. *v.* PILKINGTON (INHABITANTS) (1844), 5 Q. B. 662; 3 Gal. & Dav. 319; 1 New Sess. Cas. 90; 13 L. J. M. C. 61; 2 L. T. O. S. 400; 8 J. P. 724; 8 Jur. 267; 114 E. R. 1398.

276. —— —— **Not confined to servants in husbandry—Applicable to domestic & other servants.**]—HUTTMAN *v.* BOULNOIS, No. 669, *post.*

277. —— —— **Although wages paid monthly.**]—The law founded upon usage, which justifies the discharge of domestic servants on giving a month's notice, though there was a yearly hiring, does not apply to a person in the situation of a clerk to an army agent, receiving a salary of £500 a year.

If a servant is hired generally, he is considered as hired for a year, that both master & servant may have the benefit of all the seasons. In the case of household servants, it is the custom to give only a month's notice, but I know of no practice or usage, nor is there any evidence given of any usage, applying to the case of servants of the description of this pltf. As to the monthly payments, though the hiring was for a year, yet payments may be made at more frequent intervals. If it had been proved that pltf. betrayed the secrets of his employer, or was guilty of other misconduct, that would justify his dismissal without any notice at all (BEST, C.J.).—BEESTON *v.* COLLYER (1827), 2 C. & P. 607, N. P.; *subsequent proceedings*, 4 Bing. 309.

Annotations:—**Reld.** Fawcett *v.* Cash (1834), 5 B. & Ad. 904; Davis *v.* Marshall (1861), 4 L. T. 216. **Mentd.** Elderton *v.* Emmens (1847), 16 L. J. C. P. 209; Sainter *v.* Ferguson (1849), 7 C. B. 716; Dobson *v.* Collis (1856), 1 H. & N. 81; Davey *v.* Shannon (1879), 4 Ex. D. 81.

Sect. 1.—*Duration: Sub-sect.* 2, *A., B. & C.*]

278. —— —— In absence of intention to contrary.]—If a clerk & foreman is engaged at a weekly salary & to have two suits of clothes *per annum* it is a yearly hiring within 6 Geo. 4, c. 16, s. 48.

This was a general hiring which is always considered a yearly hiring, unless there is something to show that was not the intention of the parties (*per* CUR.).—*Re* HUMPHREYS, *Ex p.* HUMPHREYS (1833), Mont. & B. 413; 3 Deac. & Ch. 114; 2 L. J. Bcy. 71, Ct. of R.

279. —— —— ——.]—The law is settled that in the case of a contract of hiring the engagement is for a year if there is nothing in the terms of the contract to rebut that presumption. Such a term as an agreement for weekly wages would be sufficient to rebut the presumption, but here the salary was to be yearly, &, the hiring being for an indefinite period, the rule applied (WRIGHT, J.).—TAYLOR *v.* GARNETT (1892), 8 T. L. R. 647; 36 Sol. Jo. 593, D. C.

280. —— —— In absence of custom to contrary.]—FAWCETT *v.* CASH, No. 312, *post.*

B. Hiring for Definite Period.

281. Hiring for a year & from year to year.]—COTES *v.* SADLER (1666), 2 Keb. 16; 84 E. R. 11.

282. ——.]—WILLIAMS *v.* BYRNE, No. 418, *post.*

283. Successive hirings for short periods.]—(1) A man settled in Horsham was hired Feb. 19, 1710, to serve in Shipley till May-tide following, from then he agreed to serve till Lady-Day, 1711, & from then till May-tide, 1711:—*Held:* no hiring for a whole year.

(2) J. S. hired for half a year, serves a year; then is hired for a whole year & serves half a year:—*Held:* it was a hiring & a service for a year.—HORSHAM PARISH *v.* SHIPLEY (1713), Sess. Cas. K. B. 16; 93 E. R. 16.

284. Hirings for half year & whole year—Service for year & half year.]—HORSHAM PARISH *v.* SHIPLEY, No. 283, *ante.*

285. Hiring from October 3 to Michaelmas following.]—Hiring from Oct. 3 to Michaelmas following:—*Held:* no hiring for a year.—WESTWOOD-HAY (INHABITANTS) (1718), Fortes. Rep. 303; 92 E. R. 862.

286. Hiring for a year—Terminable at end of any quarter.]—R. *v.* ATHERTON (INHABITANTS) (1742), Burr. S. C. 203.

287. —— Payment according to amount of work—Charge for board & lodging.]—R. *v.* KING'S NORTON (INHABITANTS) (1740), Burr. S. C. 152.

Annotations:—**Consd.** R. *v.* Birmingham (1780), Cald. Mag. Cas. 77. **Reld.** R. *v.* North Nibley (1792), 5 Term Rep. 21.

288. —— —— —— Custom permitting occasional absence.]—The pauper's husband, while unmarried, was hired in the parish of Birmingham for a year to make screws at so much a gross good earn, good hire. He served a year, sometimes lodging with his master & paying him for his diet & lodging & sometimes lodging with third parties. There was an implied liberty by the usage of the locality to be absent at times provided the servant did not work for any other master & of this liberty the pauper's husband duly availed himself:—*Held:* since distinctions ought not to be taken; there was an express hiring for a year in this case; whatever form the custom of the county or the nature of the service may be a sufficient performance made no difference as to the question of settlement.—R. *v.* BIRMINGHAM (INHABITANTS) (1780), 1 Doug. K. B. 333; Cald. Mag. Cas. 77; 99 E. R. 215.

Annotation:—**Reld.** R. *v.* North Nibley (1792), 5 Term Rep. 21.

289. —— For board & lodging—Liberty to do outside work.]—An agreement by a daughter to live with her father, & to do the offices of a servant for a year, for her board & lodging & other perquisites, is a good hiring for a year, though the daughter is to be at liberty to earn what she can by her labour.—R. *v.* CHERTSEY (INHABITANTS) (1787), 2 Term Rep. 37; 100 E. R. 21.

Annotations:—**Distd.** R. *v.* Polesworth (1824), 4 Dow. & Ry. K. B. 258; R. *v.* South Killingholme (1830), 10 B. & C. 802.

290. —— To do certain amount of work—At stipulated price.]—A pauper agreed to serve as a brickmaker from Michaelmas to Michaelmas, & to make seventy thousand bricks at a stipulated price:—*Held:* this was not a contract for a year's service absolutely, but a contract to serve till the completion of the job; & therefore a settlement was not thereby gained.—R. *v.* WOODHURST (INHABITANTS) (1818), 1 B. & Ald. 325; 106 E. R. 120.

Annotation:—**Reld.** R. *v.* Northowram (1846), 9 Q. B. 24.

291. Hiring at three shillings a week the year round—Determinable on fortnight's notice.]—Service for a year under a hiring at 3*s.* per week the year round with liberty to go on a fortnight's notice will give a settlement.—R. *v.* BIRDBROOKE (INHABITANTS) (1791), 4 Term Rep. 245; 100 E. R. 998.

Annotation:—**Expld.** R. *v.* Hampreston (1793), 5 Term Rep. 205.

292. Hiring for fifty-one weeks—After week's service under general hiring.]—A pauper was hired to serve for part of a year. Three weeks before the expiration of the period of service, the mistress asked the pauper to stay again. The pauper replied that she had no objection if they could agree about wages. They did agree for £3 10*s.* & 1*s.*, earnest was paid; nothing was then said as to the time for which the pauper was to serve, but a week afterwards the mistress said to the pauper, I have hired you, but mentioned no time; remember that you are hired for fifty-one weeks, to which the pauper assented:—*Held:* this was a good hiring for a year.—R. *v.* MARKET BOSWORTH (INHABITANTS) (1824), 2 B. & C. 757; 4 Dow. & Ry. K. B. 306; 2 Dow. & Ry. M. C. 217; 107 E. R. 564.

293. Conditional hiring for a year.]—A pauper was hired to serve as carter, from Michaelmas to Michaelmas, if the master had no sale, & if he should have a sale the pauper was to go: in a few months the master had a sale, & the pauper left:—*Held:* the hiring was a good contract for a year, & the pauper having served the master a year, & part of that time under such yearly hiring, gained a settlement.—R. *v.* FARLEIGH WALLOP (INHABITANTS) (1830), 1 B. & Ad. 336; 9 L. J. O. S. M. C. 9; 109 E. R. 812.

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278 i. —— —— —— *In absence of intention to contrary.*]—GOULD *v.* MCCRAE (1907), 9 O. W. R. 626; 14 O. L. R. 194.—**CAN.**

278 ii. —— —— ——.]—The hiring of pltf., an overman or put boss at a coal mine, under a yearly salary, there being no time expressly limited for the duration of the contract, held under all the circumstances not to be a yearly hiring but one of unfixed duration &, therefore, subject to termination by either party on reasonable notice.—STRICKLAND *v.* NORTH AMERICAN COLLIERIES, LTD. (Alta.), [1926] 3 D. L. R. 284; [1926] 2 W. W. R. 529.—**CAN.**

278 iii. ——————.]—ARMSTRONG *v.* BAINBRIDGE (1846), 9 Dunl. (Ct. of Sess.) 29; 19 Sc. Jur. 1.—**SCOT.**

294. Two hirings for two successive half years.]—Under Poor Relief Act, 1601 (c. 11), s. 7. two hirings for two succeeding half years respectively, both made before the commencement of the service under either, constitute a good yearly hiring.—R. *v.* RAVENSTONEDALE (INHABITANTS) (1840), 12 Ad. & El. 73; 3 Per. & Dav. 469; 9 L. J. M. C. 76; 4 J. P. 396; 4 Jur. 651; 113 E. R. 738.

295. Hiring for three years "at my option."]—Deft., having established smelting works at Carthagena, in Spain, offered to employ pltf. as foreman, by letter containing the following passages—"I should require you to enter into an agreement to remain with me for at least three years at my option; salary £250 *per annum*. I should require you to visit some of the best smelting works in England before you come out." Pltf. accepted the employment, & on Feb. 1, 1850, proceeded to visit certain smelting works, & was so occupied until Feb. 15, when he departed for Carthagena, & arrived there on Mar. 6. He continued in the service of deft. until Feb. 15, 1851, when he was discharged. He had been paid his first year's salary, as commencing on Feb. 1, 1850. In an action to recover the second year's salary: —*Held:* the term "at my option," did not enable deft. to put an end to the service at his will; it was a yearly hiring, with an option for deft. to require pltf.'s service for three years, or to put an end to it at the expiration of the first, second, or third year.—DOWN *v.* PINTO (1854), 9 Exch. 327; 2 C. L. R. 547; 23 L. J. Ex. 103; 22 L. T. O. S. 247; 2 W. R. 202; 156 E. R. 139.

Annotations:—**Expld.** Lowe *v.* Walter (1892), 8 T. L. R. 358. **Distd.** *ite* African Assocn. & Allen, [1910] 1 K. B. 396.

296. Hiring for a year & "from time to time"—Provision for quarter's notice.]—It was agreed between A. & B. that A. should enter into the service of B. as a traveller; & it was stipulated that the agreement should be "binding between them for twelve months certain from the date thereof, & continue from time to time until three months' notice in writing be given by either party to determine the same":—*Held:* this was a contract for a year certain only, & B. was at liberty to put an end to it at the expiration of the year, by giving A. three months' previous notice.—BROWN *v.* SYMONS (1860), 8 C. B. N. S. 208; 29 L. J. C. P. 251; 2 L. T. 323; 6 Jur. N. S. 1079; 8 W. R. 460; 141 E. R. 1145.

Annotations:—**Folld.** Costigan *v.* Gray Boyler Engines (1925), 41 T. L. R. 372. **Refd.** Gardner *v.* Ingram (1889), 61 L. T. 729.

C. Service and Continuation Thereof.

297. Service for year—As servant in husbandry.]—R. *v.* LYTH (INHABITANTS) (1793), 5 Term Rep. 327; Nolan, 256; 101 E. R. 183.

Annotation:—**Consd.** Baxter *v.* Nurse (1844), 7 Scott, N. R. 801.

298. Continuation after expiration of definite period.]—If a servant live three years in service with the same master, it is evidence from which the justices at the sessions may infer a hiring for a year, though it appear that at first the servant was only hired for part of a year.—R. *v.* LONG WHATTON (INHABITANTS) (1793), 5 Term Rep. 447; 101 E. R. 252.

299. —.]—R. *v.* HALES (INHABITANTS), No. 218, *ante*.

300. ——.]—A., an innkeeper, said to B., "I have a lad coming in a fortnight, but you may stay till he comes." B. was to have board, lodging, & vails. The other lad came but did not remain. B. continued in the service three years without anything further passing:—*Held:* ct. of quarter sessions was at liberty to infer a general hiring.—R. *v.* ST. MARTIN, LEICESTER (INHABITANTS) (1828), 8 B. & C. 674; 3 Man. & Ry. K. B. 377; 2 Man. & Ry. M. C. 22; 7 L. J. O. S. M. C. 31; 108 E. R. 1194.

301. —— **Agreement "to stay on."**]—Where the servant had been hired for eleven months for 10 guineas, & at the expiration of which the master told him "he might stay on an end," without mentioning the wages, to which the servant assented; the second agreement was held to be a general hiring, & the party serving a year under it gained a settlement.—R. *v.* MACCLESFIELD (INHABITANTS) (1789), 3 Term Rep. 76; 100 E. R. 463.

Annotation:—**Expld.** R. *v.* Ardington (1834), 1 Ad. & El. 260.

302. —— ——.]—A. for two successive years was hired by B. as a farm servant from a few days after Michaelmas day until the Michaelmas day following at a certain amount of wages for the whole time. A few days after the Michaelmas day on which the second hiring expired, B. paid A. the wages agreed upon, & asked him if he chose to go on with him, to which A. replied "Yes": —*Held:* this conversation was not evidence of a yearly hiring, so that a service under it might be connected with the antecedent service.—R. *v.* ARDINGTON (INHABITANTS) (1834), 1 Ad. & El. 260; 3 Nev. & M. K. B. 304; 2 Nev. & M. M. C. 223; 110 E. R. 1205.

Annotation:—**Refd.** R. *v.* Fouch (1841), 2 Q. B. 308.

303. - - - - - - **On same terms.**]—(1) A pauper was hired as shepherd for eleven months. At the end of that time he was hired for one month. In the course of that month he was hired "to go on upon the same terms." He continued in the service two years uninterruptedly: —*Held:* the last was a general hiring, under which the pauper gained a settlement.

(2) A pauper was hired as shepherd by the tenantry farmers, of a manor, to keep the tenantry flock, at 14*s.* a week, & was to have a piece of land, called the Shepherd's Croft, which was to make up money as good as 16*s.* a week; he served a year under that hiring. The tenantry farmers were leaseholders & copyholders of the manor. By agreement of 1799, between the lord of the manor, his lessee of the manor & the leaseholders & copyholders of the manor, arbitrators were appointed for dividing & allotting the open fields & downs within the manor, among the lessee & the leaseholders & copyholders of the manor, in lieu of the lands they had in the manor. The arbitrators allotted to the lessee of the manor,

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PART IV. SECT. 1, SUB-SECT. 2.—C.

298 i. *Continuation after expiration of definite period.*]—Where a contract of service is for a year certain, & then to be at the option of the employer, if, after the end of the year, the engagement runs on without further remark, the presumption is that the contract runs on for another year.—BULLOCK *v.* WIMMERA FELLMONGERY & WOOLSCOURING CO., LTD. (1879), 5 V. L. R. (L.) 362.—**AUS.**

298 ii. ——.]—Where a bookkeeper is engaged for the term of one year, & his employment is continued after the expiration of that time there is no presumption that it is to continue for another year absolutely.—HARNWELL *v.* PARRY SOUND LUMBER CO. (1897), 24 A. R. 110.—**CAN.**

298 iii. ——.]—BAIN *v.* ANDERSON (1898), 28 S. C. R. 481.—**CAN.**

298 iv. ——.]—Where a contract of hiring of three years' duration has been completed, & by tacit consent, the relationship of the contracting parties continues, there arises an implied contract for a further period, & the question whether it is a contract from year to year or for an indefinite period is a question of fact & not of law.—PARKER *v.* BEECHING (Alta.), [1923] 4 D. L. R. 35; [1923] 3 W. W. R. 63; 19 Alta. L. R. 660.—**CAN.**

Sect. 1.—*Duration: Sub-sect.* 2, *C., D., E., F.* (*a*) *&* (*b*), *& G.* (*a*).]

in trust for the shepherd of the tenantry flock, in lieu of lands in the manor held by custom by the shepherd, the piece of land called the "Shepherd's Croft," which the pauper had when he was hired as shepherd, & he occupied part, & let off part to a tenant, during all the time he served as shepherd:—*Held:* the pauper took the land in his character of servant, in lieu of wages, & therefore he gained no settlement by estate.—R. *v.* SOUTH NEWTON, WILTS (INHABITANTS) (1830), 10 B. & C. 838; 3 Man. & Ry. M. C. 115; 5 Man. & Ry. K. B. 715; 8 L. J. O. S. M. C. 90; 109 E. R. 660.

304. —— Agreement to provide clothes—Servant at liberty to leave at will.]—The ct. will not quash an order of sessions upon a question of yearly hiring, merely because from the facts stated, they would have drawn a different conclusion. If there be any facts which may warrant the conclusion, so as not to be repugnant to the facts, the ct. will confirm the order. Accordingly, the pauper was hired for a fortnight or three weeks. Afterwards, she was told, by her mistress, that she might sleep in the house, & that when she wanted clothes she, the mistress, would find them. She was told by her mistress two or three times, while she stayed, that she might provide a place for herself elsewhere when she could. The sessions held this to be a general hiring; & the ct. for the above reason confirmed the order.—R. *v.* ST. ANDREW THE GREAT, CAMBRIDGE (INHABITANTS) (1828), 8 B. & C. 664; 3 Man. & Ry. K. B. 374; 2 Man. & Ry. M. C. 19; 7 L. J. O. S. M. C. 28; 108 E. R. 1190.

Annotation:—**Reid.** R. *v.* Rosliston (1828), 3 Man. & Ry. K. B. 420.

D. Annual Remuneration.

305. General rule—Annual hiring presumed.]—In an action by a servant, who was dismissed, for wages, the proof was, that he was to have wages at the rate of £80 *per annum*:—*Held:* the *primâ facie* presumption was, that the hiring was for a year.—TURNER *v.* ROBINSON (1833), 5 B. & Ad. 789; 2 Nev. & M. K. B. 829; 110 E. R. 982; *previous proceedings*, 6 C. & P. 15, N. P.

Annotations:—**Reid.** Thomas *v.* Williams (1834), 3 L. J. K. B. 202; Ridgway *v.* Hungerford Market Co. (1835), 3 Ad. & El. 171. **Mentd.** Healey *v.* Soc. Anon. Francaise Rubastic, [1917] 1 K. B. 946.

306. —— ——.]—BROXHOLM *v.* WAGSTAFF, No. 822, *post.*

307. —— — —.]—EMMENS *v.* ELDERTON, No. 826, *post.*

308. —— ——.]—Defts. orally agreed on a Saturday to employ pltf. as a sales manager at a salary of £450 a year, the service to begin on the following Monday. Nothing was said as to conditions of payment or notice:—*Held:* there was a presumption that the parties intended a year's hiring beginning on the Monday.—CAYME *v.* ALLAN, JONES & CO. (1919), 35 T. L. R. 453, D. C.

309. —— —— **In absence of custom to contrary.**]—(1) Where a clerk is hired at a certain sum "*per annum*" simply, the hiring is a hiring for a year, & in absence of a custom to the contrary, he cannot be discharged before the end of the year. The custom must be general, of reasonable antiquity, uniform, & sufficiently notorious that people would make their contracts on the supposition that it exists.

(2) It was left to the jury to determine whether in the case of clerks employed by finance cos. there was a custom to discharge at three months' notice, & the jury found that there was such a custom.—FOXALL *v.* INTERNATIONAL LAND CREDIT CO. (1867), 16 L. T. 637, N. P.

310. —— —— ——.]—BUCKINGHAM *v.* SURREY & HANTS CANAL CO., No. 392, *post.*

E. Monthly Remuneration.

311. Not inconsistent with annual hiring.]—BEESTON *v.* COLLYER, No. 277, *ante.*

312. —— Agreement for yearly increase.]—On Mar. 5, 1832, A. entered as warehouseman into the service of B., the latter engaging to pay A. at the rate of £12 10*s.* per month for the first year, & to advance £10 *per annum* until the salary was £180:—*Held:* this was a contract by B. to employ A. for one whole year.

In the case of domestic servants, the rule is well established, that the contract may be determined by a month's notice or a month's wages; but that depends upon custom. Here no custom having been proved, the contract must be taken to have been a hiring for a year (LITTLEDALE, J.).—FAWCETT *v.* CASH (1834), 5 B. & Ad. 904; 3 Nev. & M. K. B. 177; 2 Nev. & M. M. C. 114; 3 L. J. K. B. 113; 110 E. R. 1026.

Annotation:—**Mentd.** Emmens *v.* Elderton (1853), 4 H. L. Cas. 624.

313. —— Hire of clerk.]—Where a servant was hired for a year in the capacity of a clerk, & dismissed without notice:—*Held:* he was entitled to recover compensation for the year, & the fact of his wages being payable monthly, was not inconsistent with a hiring for a year, short periodical payments being necessary to persons in that position of life.—DAVIS *v.* MARSHALL (1861), 4 L. T. 216; 9 W. R. 520.

F. Weekly Remuneration.

(a) In General.

314. Yearly remuneration in addition.]—*Re* HUMPHREYS, *Ex p.* HUMPHREYS, No. 278, *ante.*

315. Contract by author—Serials to extend over a year.]—S., proprietor of a weekly newspaper, by a letter to F., an author, agreed that F. should write two tales, extending over one year, at £10 per week for each number, to contain about the same quantity as was sent under a former similar engagement, & to receive the first number on Apr. 22, 1855, & to continue to receive one number weekly during one year, conditionally that F. should not write for any other newspaper published at less than 6*d.* F. accepted, received £20 deposit, & wrote regularly for some weeks; then went to Paris, sent an abrupt conclusion of the then current tale in a small quantity of manuscript, refused to proceed with his engagement with S., & entered into another engagement with C. S. thereupon stopped his payments to F., & employed another author to conclude the half-finished tale:—*Held:* the above engagement was

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PART IV. SECT. 1, SUB-SECT. 2.—D.

305 i. *General rule—Annual hiring presumed.*]—Where a document appointing pltf. agent for defts. contained the following passage: "Remuneration allowed by the co. is a nominal salary of one shilling *per annum* payable in advance & commission as dealt with in separate circular":—*Held:* this constituted an employment from year to year.—MACKENZIE *v.* UNION FIRE & MARINE INSURANCE CO. OF NEW ZEALAND (1880), 1 N. S. W. L. R. (L.) 103.—**AUS.**

305 ii. —— ——.]—ARCHIBALD *v.* HYGIENIC FRESH MILK CO. (1913), 47 N. S. R. 150; 13 E. L. R. 44.—**CAN.**

PART IV. SECT. 1, SUB-SECT. 2.—E.

311 i. *Not inconsistent with annual hiring.*]—DOWLING *v.* HENDERSON & SON (1890), 17 R. (Ct. of Sess.) 921.—**SCOT.**

a yearly engagement, & could not be closed by F. as a weekly engagement.—STIFF *v.* CASSELL (1856), 2 Jur. N. S. 348.

316. Engagement of manager of company—Additional commission on profits.]—LEVY *v.* ELECTRICAL WONDER CO. (1893), 9 T. L. R. 495, N. P.

Presumption of weekly hiring—From payment of weekly remuneration.]—*See* Sub-sect. 3, A., *post.*

(b) Provision for Month's Notice.

317. Annual hiring presumed.]—(1) A hiring at the rate of 4*s.* per week, with liberty of parting on a month's notice on either side, is a general hiring, & the pauper gains a settlement by a service under it for a year.

(2) Either party's having power to put an end to the service by a notice, shall not prevent a hiring from being considered as general; & such an indefinite hiring, is a hiring for a year (KENYON, C.J.).

(3) A hiring at so much per week, without any other expression, is not a hiring for a year, because there being no other words or circumstances to explain the duration of the contract, these words are construed as being meant to comprehend the period of the service as well as the mode of payment (BULLER, J.).—R. *v.* HAMPRESTON (INHABITANTS) (1793), 5 Term Rep. 205; Nolan, 216; 101 E. R. 116.

Annotations:—*As to* (1) **Refd.** R. *v.* Hanbury (1802), 2 East, 423. *As to* (2) **Folld.** R. *v.* Great Yarmouth (1816), 5 M. & S. 114. **Refd.** Green *v.* Wright (1876), 1 C. P. D. 591; Taylor *v.* Garnett (1892), 8 T. L. R. 647. *Generally,* **Mentd.** R. *v.* St. Giles-without-Cripplegate (1863), 4 B. & S. 509.

318. ——.]—A hiring at weekly wages, either party to be at liberty to part at a month's notice, was held to be a yearly hiring; although the case stated that the pauper let himself by the week, it being also stated that at the time pauper let himself by the week nothing passed between him & his master as to his being hired by the week, except that he was to have weekly wages.—R. *v.* GREAT YARMOUTH (INHABITANTS) (1816), 5 M. & S. 114; 105 E. R. 993.

Annotation:—**Mentd.** R. *v.* St. Giles-without-Cripplegate (1863), 4 B. & S. 509.

319. ——.]—A pauper was hired by the commanding officer of a Royal Military College to act as a servant in that establishment. By the terms of the hiring, he was to obey all orders of the officers of the institution, & to be allowed weekly wages, & if he wished to quit the College, he was to give one month's notice; but should the College be dissatisfied with his conduct, it retained the power of dismissing him at a moment's notice:—*Held:* this was a good hiring for a year, although either party might determine it before the expiration of the year.—R. *v.* SANDHURST (INHABITANTS) (1827), 7 B. & C. 557; 1 Man. & Ry. K. B. 95; 1 Man. & Ry. M. C. 63; 6 L. J. O. S. M. C. 15; 108 E. R. 831.

Annotation:—**Mentd.** R. *v.* Sparsholt (1836), 4 Ad. & El. 491.

320. ——.]—A hiring at so much per week, a month's wages or a month's warning, is a hiring for a year.—R. *v.* ST. ANDREW, PERSHORE (1828), 8 B. & C. 679; 7 L. J. O. S. M. C. 23; 108 E. R. 1195.

Annotation:—**Refd.** R. *v.* Pilkington (1844), 1 New Sess. Cas. 90.

G. Rebuttal of Presumption.

(a) In General.

321. Piece work.]—TRINITY *v.* ST. PETER'S, DORCHESTER, No. 265, *ante.*

322. Demand of weekly increase—Compliance by master.]—R. *v.* DEDHAM (INHABITANTS), No. 266, *ante.*

323. Agreement to act as helper—To other servant during illness—Agreement made only with other servant.]—The pauper came to an inn at the request of the waiter, who was ill, to help him, & continued there boarding & lodging nineteen months; & the waiter went away in thirteen months, after which time the pauper continued to serve in the same manner that he had done before, without making any agreement at all with the master, though the master knew of his being in the service the second day; it was held that he did not gain a settlement by such service, because there was no hiring for a year either express or implied. He could only be considered as the servant of the master during the last six months.—R. *v.* ST. MATTHEW, IPSWICH (INHABITANTS) (1789), 3 Term Rep. 449; 100 E. R. 671.

324. Payments at irregular periods.]—In an action by an assistant surgeon for wages, it was proved that pltf. had served deft. for nearly half a year, & that payments were made during that time on account of wages, but not according to any yearly amount, or at any definite periods of the year. Pltf. afterwards fell ill & was taken to a hospital, & after his recovery did not return to his employment, nor did deft. require him to do so:—*Held:* there was no evidence of any hiring for a year, & pltf. was entitled to recover wages on a *quantum meruit* for the time he served.—BAYLEY *v.* RIMMELL (1836), 1 M. & W. 506; 2 Gale, 60; Tyr. & Gr. 806; 150 E. R. 534; *sub nom.* BAILEY *v.* RIMMELL, 5 L. J. Ex. 192.

325. Payment by commission—Commercial travellers.]—On a contract to pay a traveller, etc. by commission, no implication arises of a yearly hiring, nor, without an express & clear stipulation, is there any obligation to pay the commission on orders, etc. from customers originally obtained by the agent, but sent after he has ceased to be so.—NAYLER *v.* YEARSLEY (1860), 2 F. & F. 41, N. P.

326. Presumption capable of rebuttal.]—The rule, that an indefinite hiring is a hiring for a year, is not an inflexible rule of law; it must be considered in connection with the circumstances of the particular case.

A. was engaged as editor of a new periodical publication by B. at a salary to be paid weekly. The publication was abandoned by B. soon after its commencement. In an action by A. against B. for dismissing him before the termination of a year, a usage was proved that such a hiring was annual, with regard to established periodicals:—*Held:* the jury were properly directed to consider whether such usage was applicable to a newly started publication.—BAXTER *v.* NURSE (1844), 6 Man. & G. 935; 7 Scott, N. R. 801; 13 L. J. C. P. 82; 2 L. T. O. S. 311; 8 Jur. 273; 134 E. R. 1171.

Annotation:—**Refd.** *Re* Hutton, *Ex p.* Allpas, *Ex p.* Chipchase (1867), 17 L. T. 179.

327. ——.]—Except in the case of menial servants, there is no inflexible rule with respect to the duration & mode of determining general contracts of service; but every case depends on its own peculiar circumstances, & is for the jury to determine.

Pltf. was engaged as a clerk by deft. a ship broker, at a yearly salary of £150, & was paid his wages weekly; &, on leaving the service, at deft.'s instance, accepted a month's salary instead of notice. He subsequently re-entered deft.'s service at a yearly salary of £250, nothing being expressly said as to notice, & no time fixed for the

Sect. 1.—*Duration: Sub-sect.* 2, *G.* (*a*) & (*b*); *sub-sect.* 3, *A.* & *B.*; *sub-sects.* 4 & 5. *Sect.* 2: *Sub-sect.* 1.]

duration of the service; but pltf. was paid weekly a sum equal to a week's salary. Pltf. having been dismissed with a month's notice:—*Held:* it was properly left to the jury to say whether the last hiring was on the same terms as the first, & whether the terms of the previous hiring were determined by the acceptance of a month's wages, instead of notice.

From much experience of juries, I have come to the conclusion, that usually the indefinite hiring of a clerk is not a hiring for a year, but rather one determinable by three months' notice (POLLOCK, C.B.).—FAIRMAN *v.* OAKFORD (1860), 5 H. & N. 635; 29 L. J. Ex. 459; 157 E. R. 1334.

Annotations:—**Consd.** Croen *v.* Wright (1876), 1 C. P. D. 591. **Refd.** Foxall *v.* International Land Credit Co. (1867), 16 L. T. 637.

328. Reservation of weekly wages.]—TAYLOR *v.* GARNETT, No. 279, *ante*.

——.]—*See* Sub-sect. 3, A., *post*.

Service with relation.]—*See* Nos. 221–225, *ante*.

Service on charitable footing.]—*See* No. 225, *ante*.

(*b*) *Hiring at Will.*

329. Presumption rebutted.]—R. *v.* TROWBRIDGE (1816), cited in 3 B. & C. p. 462; 5 Dow. & Ry. K. B. 314; 107 E. R. 805.

Annotations:—**Folld.** R. *v.* Christ's Parish in York (1824), 3 B. & C. 459; R. *v.* Great Bowden (1827), 7 B. & C. 249; R. *v.* Rosliston (1828), 8 B. & C. 668.

330. ——.]—A., at ten years of age, went to D. for meat & clothes as long as he had a mind to stop; he was to do what he could, & what he was bid. A. remained two years with D. upon these terms:—*Held:* there as no yearly hiring, & therefore no settlement gained by the service.—R. *v.* CHRIST'S PARISH, YORK (CHURCHWARDENS, ETC.) (1824), 3 B. & C. 459; 5 Dow. & Ry. K. B. 314; 2 Dow. & Ry. M. C. 442; 3 L. J. O. S. K. B. 85; 107 E. R. 804.

Annotations:—**Folld.** R. *v.* Great Bowden (1827), 7 B. & C. 249; R. *v.* Rosliston (1828), 7 L. J. O. S. M. C. 33. **Distd.** R. *v.* St. Martin, Leicester (1828), 3 Man. & Ry. K. B. 377.

331. ——.]—R. *v.* GREAT BOWDEN (INHABITANTS), No. 271, *ante*.

332. ——.]—Let him stop what time he will, I will give him satisfaction, if not in money, in clothes:—*Held:* the sessions were at liberty to infer that this was not a general hiring.—R. *v.* ROSLISTON (INHABITANTS) (1828), 8 B. & C. 668; 3 Man. & Ry. K. B. 420; 2 Man. & Ry. M. C. 37; 7 L. J. O. S. M. C. 33; 108 E. R. 1191.

333. ——.]—R. *v.* ALL SAINTS, STAMFORD (INHABITANTS) (1837), Will. Woll. & Dav. 40; 1 J. P. 71; 1 Jur. 52.

SUB-SECT. 3.—PRESUMPTION OF WEEKLY HIRING.

A. Weekly Remuneration.

334. Whether hiring for week presumed.]—R. *v.* SEATON, No. 268, *ante*.

335. ——.]—A mere indefinite hiring, without any mention whatever of time, which is otherwise a hiring for a year, if accompanied with a reservation of wages weekly, will not be considered as a hiring for a year.—R. *v.* ELSTACK (INHABITANTS) (1785), 4 Doug. K. B. 211; Cald. Mag. Cas. 489; 99 E. R. 845.

336. ——.]—A hiring at so much per week is not an implied hiring for a year.—R. *v.* NEWTON TONEY (INHABITANTS) (1788), 2 Term Rep. 453; 100 E. R. 244.

Annotations:—**Folld.** R. *v.* Hanbury (1802), 2 East, 423; R. *v.* Pucklechurch (1804), 5 East, 382; R. *v.* Mitcham (1810), 12 East, 351. **Refd.** Evans *v.* Roe (1872), L. R. 7 C. P. 138.

337. ——.]—A service for a year, under an hiring to serve as an ostler at so much per week, without fixing any time of service, will not give a settlement.—R. *v.* ODIHAM (INHABITANTS) (1788), 2 Term Rep. 622; 100 E. R. 334.

338. ——.]—R. *v.* HAMPRESTON (INHABITANTS), No. 317, *ante*.

339. ——.]—A hiring at so much a week, meat, drink, washing, & lodging, & to part on a week's notice by either party, will not warrant a conclusion of a general hiring, though the servant continued six years with the master, & the wages were raised during the period; & therefore no settlement can be gained under such hiring & service.—R. *v.* HANBURY (INHABITANTS) (1802), 2 East, 423; 102 E. R. 430.

Annotation:—**Consd.** R. *v.* Mitcham (1810), 12 East, 351.

340. ——.]—A hiring at so much a week for as long time as the master & servant could agree, is only a weekly hiring under which no settlement can be gained.—R. *v.* MITCHAM (INHABITANTS) (1810), 12 East, 351; 104 E. R. 137.

Annotation:—**Apld.** R. *v.* Dodderhill (1814), 3 M. & S. 243.

341. ——.]—A hiring at two guineas a week for one year is a hiring by the week & not by the year.—ROBERTSON *v.* JENNER (1867), 15 L. T. 514.

342. —— .]—Pltf. entered the service of defts. under a memorandum in writing, as follows:—"Apr. 13, 1871. I hereby agree to accept the situation as foreman of the works of Messrs. Roe & Co., flock & shoddy manufacturers, etc., & to do all that lays in my power to serve them faithfully, & promote the welfare of the said firm, on my receiving a salary of £2 per week & house to live in from Apr. 19, 1871":—*Held:* a weekly hiring from Apr. 19, 1871; & evidence of a conversation at the time of signing the contract, tending to show that a hiring for a year was intended, was not admissible.—EVANS *v.* ROE (1872), L. R. 7 C. P. 138; 26 L. T. 70.

343. —— **Alteration of wages in summer or winter.**]—Where there is a hiring at weekly wages, & nothing is said as to the term, the hiring will be held weekly, as the wages. In this case there were other circumstances in corroboration of a weekly hiring, particularly the servant's obtaining an occasional increase of his wages, as the summer or winter came, upon an application by the servant to the master, & without a previous running contract or stipulation for any time.—R. *v.* PUCKLECHURCH (INHABITANTS) (1804), 5 East, 382; 1 Smith, K. B. 552; 102 E. R. 1116.

Annotation:—**Refd.** R. *v.* Warminster (1826), 6 B. & C. 77.

344. —— ——.]—A hiring at 6*s.* a week for the winter & 9*s.* a week for the summer, nothing being said as to the duration of the service, is not a yearly hiring.—R. *v.* WARMINSTER (INHABITANTS) (1826), 6 B. & C. 77; 9 Dow. & Ry. K. B. 70; 4 Dow. & Ry. M. C. 197; 5 L. J. O. S. M. C. 12; 108 E. R. 381.

Annotation:—**Folld.** R. *v.* Rolvenden (1828), 1 Man. & Ry. K. B. 689.

PART IV. SECT. 1, SUB-SECT. 3.—A.

k. General rule—Hiring for week presumed.] — WHIM WELL COPPER MINES, LTD. *v.* PRATT (1910), 12 W. A. L. R. 166.—**AUS.**

l. —— ——.] — Pltf. was employed by deft. as foreman in a printing office, & sued for wages due him, proving on the trial that deft. was in the habit of settling the amount thereof weekly:—*Held:* the hiring was a weekly one.—RETTINGER *v.* MACDOUGALL (1860), 9 C. P. 485.—**CAN.**

m. —— ——.] — FIDDES *v.* FAMOUS PLAYERS, [1924] 4 D. L. R.

345. —— ——.]—A pauper agreed with an innkeeper to serve him as ostler at 2*s.* a week in the summer, & 1*s.* 6*d.* a week in the winter :—*Held :* this was a weekly hiring only, & a year's service under it conferred no settlement.

The mere arrangement that the wages shall be at one rate in the summer, & at another in the winter, does not show that the parties contemplated a service to endure through the summer & the winter, &, therefore, that they intended a hiring for a year ; but shows, only, that they intended that if the servant, being hired at weekly wages, should remain till the summer, he should then have so much per week, & if he should remain till the winter, he should then have so much per week. The true meaning of such an arrangement is merely this : that the servant's wages, as a weekly servant, are to be regulated by the season (BAYLEY, J.).—R. *v.* ROLVENDEN (INHABITANTS) (1828), 1 Man. & Ry. K. B. 689 ; 1 Man. & Ry. M. C. 259 ; 6 L. J. O. S. M. C. 60.

346. —— Increase of wages for harvest.]—A servant in husbandry, hired to serve for the weekly wage of 4*s.* board, washing & lodging, except in the harvest month, when his wages were to be increased to 10*s.* 6*d.* per week, & then again reduced to 4*s.* does not gain a settlement ; for that is only a weekly hiring.—R. *v.* DODDERHILL (INHABITANTS) (1814), 3 M. & S. 243; 105 E. R. 601.

Annotations :—**Consd.** R. *v.* Warminster (1826), 6 B. & C. 77. **Refd.** Evans *v.* Roe (1872), L. R. 7 C. P. 138.

347. —— ——.]—A hiring at 8*s.* per week, & two guineas for the harvest, to do any thing the gardener should set him about, is not a yearly hiring.—R. *v.* LAMBETH (INHABITANTS) (1815), 4 M. & S. 315 ; 105 E. R. 851.

Annotation :—**Consd.** R. *v.* Warminster (1826), 9 Dow. & Ry. K. B. 70.

348. —— Actual payments at irregular intervals — Agreement subject to fortnight's notice.]—GREGSON *v.* WATSON, No. 695, *post.*

B. Rebuttal of Presumption.

349. Payment by piece work.]—WARBURTON *v.* HEYWORTH, No. 693, *post.*

SUB-SECT. 4.—CONTRACT SUBJECT TO CUSTOM OR USAGE.

Effect of usage upon contracts generally.]—*See* CUSTOM & USAGES, Vol. XVII., pp. 39 *et seq.*

350. From half year to half year.]—R. *v.* LOWTHER (INHABITANTS) (1771), Burr. S. C. 674.

Annotation :—**Distd.** R. *v.* Ravenstonedale (1840), 12 Ad. & El. 73.

351. Service for less than year — Hiring for year.]—Where in a part of the country the custom is for servants hiring themselves for a year to enter on Jan. 2 & to leave on Dec. 26 following, & a servant does so enter & leave :—*Held :* this custom not being alluded to at the time of hiring cannot be considered as a part of the contract, & the servant's leaving on Dec. 26 was a dispensation of his services by his master which did not prevent a settlement being gained under the hiring, which the sessions were justified in finding to be a hiring for a year.—R. *v.* TWEMLOW (INHABITANTS) (1856), 27 L. T. O. S. 65 ; 20 J. P. 645 ; 4 W. R. 462.

Engagement of newspaper editors, journalists, etc.]—*See* PRESS & PRINTING.

352. Notice to discontinue usage — Servant undertaking fresh duties—Fresh contract without usage implied.]—MEEK *v.* PORT OF LONDON AUTHORITY, No. 646, *post.*

Parol evidence to prove usage.]—*See* No. 237, *ante*, & CUSTOM & USAGES, Vol. XVII., pp. 35-38, 41, 55, 56, Nos. 398-427, 455, 457, 602.

SUB-SECT. 5.—CONSTRUCTION OF CONTRACTS.

See, generally, CONTRACT, Vol. XII., pp. 607 *et seq.* ; DEEDS, Vol. XVII., pp. 212 *et seq.*

353. Hiring on basis of contract with third party —Annulment & new contract.]—By a contract with the British Govt., dated Apr. 1, 1854, for the purpose of carrying the mails between Dover & Calais & Dover & Ostend, six steam vessels were to be employed by A. This contract was to terminate on Oct. 1, 1858, on twelve months' notice by either party ; but if no notice given, on the expiration of any twelve months' notice after that date. A. engaged B. as superintending engineer of the vessels to be employed, at a salary & also a percentage out of the net profits of the contract. On June 21, 1855, the contract was annulled by the Govt. under the terms of it, & a new one entered into between the parties, which was to expire in 1863 :—*Held :* (1) the agreement between A. & B. was one of hiring & service : (2) B. had a right to an account of the profits, as well as payment of the salary ; (3) under the peculiar circumstances of the case, the agreement between them, although it was to terminate on June 20, 1855, continued until Oct. 1, 1858.—HARRINGTON *v.* CHURCHWARD (1860), 29 L. J. Ch. 521 ; 2 L. T. 114 ; 24 J. P. 484 ; 6 Jur. N. S. 576 ; 8 W. R. 302.

354. Hiring until certain event —"Such period within two years"—Contract for two years.]—NIELANS *v.* CUTHBERTSON (1891), 7 T. L. R. 516, C. A.

355. Effect of superannuation scheme—Scheme providing for pension or gratuity—Option of employers.]—TYLER *v.* LONDON & INDIA DOCKS JOINT COMMITTEE (1892), 9 T. L. R. 11, C. A.

Appointment of managing director of company.]—*See* COMPANIES, Vol. IX., pp. 528, 529, Nos. 3488, 3489, 3492.

SECT. 2.—TERMINATION.

SUB-SECT. 1.—IN GENERAL.

See, generally, CONTRACT, Vol. XII., pp. 332 *et seq.*

356. Termination by mutual consent.]—A servant who had been hired for a year, was taken

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1260 ; [1924] 3 W. W. R. 619 ; 34 Man. L. R. 476 ; *revsg.*, [1924] 3 D. L. R. 35 ; [1924] 2 W. W. R. 363 ; 34 Man. L. R. 398.—**CAN.**

PART IV. SECT. 1, SUB-SECT. 3.—B.

n. *Special circumstances of service.*]—WILD *v.* GREAT MATRIX RUBY MINING CO. (1890), 24 S. A. L. R. 48.—**AUS.**

PART IV. SECT. 1, SUB-SECT. 5.

o. *Hiring for six months at weekly wage—Right to payment weekly.*]—A servant hired for six months at weekly wages, on condition that the expense of bringing him to the place of service is to be deducted if he leave before the end of the period, is entitled to payment weekly, a sufficient sum being retained for such expenses till the six months expire.—GAFFNEY *v.* WERNER (1876), 2 V. L. R. 6.—**AUS.**

p. *Commencement of hiring.*]—FORTIER *v.* ROYAL CANADIAN INSURANCE CO. (1878), 29 C. P. 353.—**CAN.**

q. *Hiring for eight months at monthly wage—Right to payment monthly.*]—MOSSEAU *v.* TONE (1907), 7 Terr. L. R. 369 ; 6 W. L. R. 117.—**CAN.**

r. *Hiring for special job — Construction of works.*]—BON ACCORD IRRIGATION BOARD *v.* BRAINE, [1923] App. D. 480.—**S. AF.**

PART IV. SECT. 2, SUB-SECT. 1.

t. *Termination by marriage of master with servant.*]—WILKINSON *v.* LAWSON (1878), 28 C. P. 603.—**CAN.**

a. *Dismissal of servant — What*

Secl. 2.—*Termination: Sub-sects.* 1, 2, 3, 4, 5 & 6, *A.*]

ill five days before the end of the year, on which he went to his mother's & sent to his master for his money; the latter sent him the whole year's wages, deducting 1*s.* for the rest of the year, & the servant said he was satisfied:—*Held:* this was an agreement by the master & servant to put an end to the contract before the end of the year.—R. *v.* WHITTLEBURY (INHABITANTS) (1795), 6 Term Rep. 464; 101 E. R. 650.

Annotation:—**Mentd.** *Ex p.* Tollerton Overseers (1842), 3 Q. B. 792.

357. —— Servant entering another service.]—Five days before the end of the year a servant absented himself by leave one day from his master's service to look out for another place, & on his return the master on some trivial pretence said he should not stay any longer in his service, & offered him a trifle less than his whole wages; which the servant refused; but was then ready to have accepted his whole wages, though he would rather have staid out his year; & immediately applied to a magistrate to oblige his master either to pay him the whole or to receive him into his service for the remainder of the year; when the magistrate ordered half a crown to be deduced; & the servant thereupon hired himself to another master, before his first year was out; & after the year received from his first master his whole wages:—*Held:* this was a dissolution of he contract before the end of the year by mutual consent, signified on the part of the servant by his entering into another service.—R. *v.* LEIGH (INHABITANTS) (1806), 7 East, 539; 3 Smith, K. B. 567; 103 E. R. 209.

Annotation:—**Refd.** R. *v.* Hardhom with Newton (1810), 12 East, 51.

358. Sale of master's business.]—Where the master of a servant under a yearly hiring, twenty-eight days before the end of the year, gave up his business, sold his stock, & paid off & discharged the servant, with all his other servants, paying them their full wages, & telling them to go where they liked, & the servant took his wages, left the house, & worked with another person, with the master's knowledge, during the twenty-eight days:—*Held:* this was a dissolution of the contract.—R. *v.* BRAY (INHABITANTS) (1814), 3 M. & S. 20; 105 E. R. 519.

359. —— Temporary employment of servant in different capacity—Without remuneration.]—A., who had been the farm servant of B. but who had ceased to be so, was employed by B. to collect his debts, it being B.'s intention to go to America, & to take A. with him, & set him up there in business for himself. There was no agreement for any remuneration to be paid by B. to A. for collecting the debts:—*Held:* A. could not be convicted on this evidence of embezzling the sums received by him on behalf of B. as the prisoner's service ended when the farm was given up, & no new service was created.—R. *v.* HOARE (1859), 1 F. & F. 647.

Annotation:—**Refd.** R. *v.* Tonkinson (1881), 44 L. T. 821.

360. Imprisonment on charge of felony — Preferred by mistress—Charge subsequently withdrawn.]—Pltf. went into the service of deft. as servant on Nov. 19, with wages at the rate of £12 12*s.* the year. A few days before the termination of the second month she was sent to prison on a charge of felony made by her mistress, which was afterwards abandoned. She remained in confinement for four days of the third month, when she was liberated, there being no charge substantiated against her. She then demanded three months' wages: wages for two months were tendered; those for the third were refused, upon the ground that the service had ceased when she was given into custody before the complete expiration of the second month:—*Held:* the wages for the third month might be recovered on a general count for work & labour, as the imprisonment of pltf. by deft. on a charge subsequently abandoned did not amount to a dissolution of the contract, & the relation of master & servant still subsisted, though in a slight degree.—SMITH *v.* GAINSFORD (1836), 2 Hodg. 109; 5 L. J. C. P. 271; *sub nom.* SMITH *v.* KINGSFORD, 3 Scott, 279.

Annotation:—**Refd.** Fowlings *v.* Tisdal (1847), 1 Exch. 295.

SUB-SECT. 2.—DEATH OF PARTY.

See CONTRACT, Vol. XII., p. 593, Nos. 4934–4936.

SUB-SECT. 3.—IMPOSSIBILITY OF PERFORMANCE.

See CONTRACT, Vol. XII., pp. 374, 378, 382, 383, 384, 385, 400–402, Nos. 3101, 3122, 3157, 3166, 3237–3245.

SUB-SECT. 4.—LUNACY OF PARTY.

See, generally, LUNATICS, Vol. XXXIII., pp. 128 *et seq.*

361. Insanity of servant — Contract not terminated.]—A yearly servant, being deprived of his reason forty days before the end of the year, was taken home by his father who lived in another parish, & who received the wages for the whole year:—*Held:* the servant was settled in the master's parish though he continued in his father's house during the remainder of the year.

I am clearly of opinion that the relation of master & servant continued during the whole year. . . . If he had recovered his reason before the expiration of the year the master might have

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amounts to.] — LASH *v.* MEREDEN BRITANNIA CO. (1882), 8 A. R. 680.—**CAN.**

b. —— ——.]—It does not require any form of words to amount to a dismissal of a servant.—FENERON *v.* O'KEEFE (1884), 2 Man. L. R. 40.—**CAN.**

c. —— *Duty to go quietly.*]—When a servant is improperly dismissed before the expiry of the term of service, his duty is to leave quietly, & his silence is not to be regarded as evidence of his acquiescence of his master's breach of contract.—ROSS *v.* PENDER (1894), 1 R. (Ct. of Sess.) 352; 11 Sc. L. R. 175.—**SCOT.**

d. Acquiescence in dismissal by servant.]—BURNET *v.* HOPE (1885), 9 O. R. 10.—**CAN.**

e. Onus of proof.]—In an action for wrongful dismissal deft. rested his defence wholly on the ground that pltf. left his service voluntarily. This pltf. denied. A yearly hiring being admitted:—*Held:* the burden of establishing his defence rested upon deft.—MCINNES *v.* FERGUSON (1900), 32 N. S. R. 516.—**CAN.**

f. ——.]—Pltf. was sent to Nova Scotia, but towards fall he desired to return to Ontario. He did so, defts. alleging that he thereby terminated his contract, but pltf. continued in defts.' employ, as he alleged, without any change of wages:—*Held:* the onus was on defts. to show that the contract was terminated.—MCCABE *v.* NATIONAL MFG. CO. (1910), 15 O. W. R. 662; 1 O. W. N. 606; *affd.*, 16 O. W. R. 944; 2 O. W. N. 26.—**CAN.**

g. Omission to take leave during service—No right to pay in lieu thereof after termination.]—R. was appointed servant of a local board by a letter which stated that he was entitled to fourteen days' leave *per annum* on full pay. After the end of twelve months R.'s services were terminated by the board. R. had not taken any leave during the year's service:—*Held:* the termination of the contract also terminated any rights of R. in regard to leave, or pay in lieu thereof.—RICHMOND, ETC. *v.* REED (1922), 43 N. L. R. 337.—**S. AF.**

been compelled to receive him again into his house (LORD KENYON, C.J.).—R. *v.* SUTTON (INHABITANTS) (1794), 5 Term Rep. 657 ; 101 E. R. 366.

Annotations :—**Distd.** R. *v.* Whittlebury (1795), 6 Term Rep. 464. **Refd.** R. *v.* Hulcott (1796), 6 Term Rep. 583 ; R. *v.* East Winch (1840), 12 Ad. & El. 697.

362. —— Whether cause for dismissal.]—*Qu.* : whether the insanity of a servant be a good cause for discharging her.—R. *v.* HULCOTT (INHABITANTS) (1796), 6 Term Rep. 583 ; 101 E. R. 716.

Annotations :—**Mentd.** Lowther *v.* Radnor (1806), 8 East, 113 ; R. *v.* All Saints, Southampton (1828), 7 B. & C. 785 ; R. *v.* Downshire (1836), 4 Ad. & El. 698 ; *Ex p.* Morgan (1840), 4 Jur. 916 ; Brook *v.* Jenney (1841), 2 Q. B. 265 ; Taylor *v.* Clemson (1844), 11 Cl. & Fin. 610.

363. Insanity of master—Whether operative as dismissal of servant—Effect of lunacy order.]—(1) Bequest of a legacy to the servant of testatrix, in consideration of her long & faithful services, to be paid within twelve months after the decease of testatrix, provided she remains in my service till my death. The servant was in the service of testatrix for twenty-one years, when one of the next of kin of testatrix caused testatrix to be removed to a lunatic asylum, & upon her own authority dismissed the servant, who was desirous to continue in the service of her mistress. Subsequently an order in lunacy was obtained by the next of kin by which it was declared that testatrix had been ascertained to be of unsound mind, & her furniture & effects were directed to be sold : —*Held* : the order in lunacy operated as a dismissal of the servant, & the conditional legacy to her therefore failed.

(2) *Semble* : the mere circumstances of testatrix becoming of unsound mind did not *per se* operate as a dismissal of the servant.—*Re* HARTLEY'S TRUSTS (1878), 47 L. J. Ch. 610 ; 26 W. R. 590.

SUB-SECT. 5.—SUBSEQUENT CONTRACT BETWEEN PARTIES.

364. Re-hiring of servant for definite period—After general hiring.]—A pauper was hired three weeks before Martinmas at £4 wages, & received 1*s.* earnest, but no period was mentioned for duration of the service. The pauper went into the service a week after Martinmas, & upon the same day his master told him that it was not the custom to hire servants in that parish for more than fifty-one weeks, that he forgot to mention it at the time when he hired him, & therefore, that, if he had no objection, he would hire him again for fifty-one weeks, & give him another shilling for earnest. The pauper accepted it, & remained in the service till the following Martinmas. There not having been a year's service, the sessions held that there had been a dissolution of the original contract, & not a dispensation with the week's service :—*Held* : that was a question of fact for the sessions, & they having determined it, this ct. refused to disturb their decision.—R. *v.* BOTTESFORD (INHABITANTS) (1825), 4 B. & C. 84 ; 6 Dow. & Ry. K. B. 99 ; 3 Dow. & Ry. M. C. 24 ; 3 L. J. O. S. K. B. 152 ; 107 E. R. 990.

365. Engagement in different character.] —A contract by which a servant hires himself to a master as a footman & groom is not dissolved by a subsequent contract by which he engages to bind himself to serve in a different character, at higher wages & in a foreign country, although the servant accompanies his master into such foreign country, the service performed abroad being the same as that originally contracted for.—R. *v.* BUCKINGHAM (INHABITANTS) (1834), 5 B. & Ad. 953 ; 3 Nev. & M. K. B. 72 ; 2 Nev. & M. M. C. 42 ; 3 L. J. M. C. 64 ; 110 E. R. 1043.

366. Where contracts inconsistent.]—In Apr. 1865, A. was, under Poor Relief Act, 1819 (c. 12), s. 7, elected by the vestry of the parish of West Malling, & duly appointed by two justices, assistant overseer of the parish, at a salary of £20 a year. The warrant of appointment defined his duties, amongst which were the collection of poor rates & the keeping of accounts. In June, 1865, deft. became surety for A. in a bond to the guardians of the union which comprised West Malling, the condition of which bond was that A. should faithfully perform all the duties of his office, & in all matters relating thereto obey the overseers, subject to the orders of the poor law board, & keep books, & pay over moneys to such persons as the overseers should direct.

In Apr. 1866, the board of guardians of the Malling Union, on the recommendation of the vestry of West Malling, appointed A. collector of the poor rates for West Malling at a poundage of 6*d.* The poor law board duly approved the appointment, & made an order fixing the remuneration of the collector at 6*d.* in the pound, as proposed. The duties under the two appointments were substantially the same. After the last appointment A. continued to perform the same duties as he had before performed, & the appointment of Apr. 1865, was not otherwise resigned or revoked. A. having made default, after the last appointment, in keeping books & in paying over money, deft. was sued on the bond :—*Held* : the two appointments were inconsistent & incompatible—the appointment of Apr. 1865, ceased, by virtue of Poor Law Amendment Act, 1844 (c. 101), s. 62, on A.'s acceptance of the appointment by the guardians in 1866 ; & consequently the liability of deft. as surety on the bond was at an end.

Semble : there was, under the circumstances, both a revocation of the first appointment by the vestry, & a resignation by A.—MALLING UNION *v.* GRAHAM (1870), L. R. 5 C. P. 201 ; 39 L. J. C. P. 74 ; 22 L. T. 789 ; 18 W. R. 674.

Annotation :—**Refd.** Green *v.* Mepham (1878), 2 Hop. & Colt. 458.

——.]—*See* CONTRACT, Vol. XII., p. 335, Nos. 2816, 2817.

After dissolution of partnership.]—*See* PARTNERSHIP.

Implied new contract—Notice to discontinue usage implied in old contract.]—*See* No. 646, *post*.

SUB-SECT. 6.—INTERRUPTION OF SERVICE.

A. Absence of Servant.

367. Visit to sick parent.]—R. *v.* ISLIP (INHABITANTS) (1721), Fortes. Rep. 305 ; 1 Stra. 423 ; 11 Mod. Rep. 341 ; 92 E. R. 863.

Annotations :—**Distd.** R. *v.* Castlechurch (1735), Burr. S. C. 70. **Folld.** St. Peter, Sandwich *v.* Goolaston (1745), 2 Stra. 1232. **Distd.** R. *v.* Clayhydon (1790), 4 Term Rep. 100. **Folld.** R. *v.* Polesworth (1819), 2 B. & Ald. 483. **Refd.** R. *v.* Christchurch (1760), Burr. S. C. 494.

368. For purpose of new hiring.]—R. *v.* ISLIP (INHABITANTS) (1721), Fortes. Rep. 305 ; 1 Stra. 423 ; 11 Mod. Rep. 341 ; 92 E. R. 863.

Annotations :—**Distd.** R. *v.* Castlechurch (1735), Burr. S. C. 70. **Folld.** St. Peter, Sandwich *v.* Goolaston (1745), 2

h, *Substitution of weekly for yearly hiring.*]—HOLLOWAY *v.* LINDBERG (1898), 30 N. S. R. 421.—CAN.

Sect. 2.—Termination: Sub-sect. 6, A., B. & C.; sub-sects. 7, 8, 9 & 10, A.]

Stra. 1232. **Distd.** R. *v.* Clayhydon (1790), 4 Term Rep. 100. **Folld.** R. *v.* Polesworth (1819), 2 B. & Ald. 483. **Refd.** R. *v.* Christchurch (1760), Burr. S. C. 494.

369. ——.]—The servant a few days before the end of the year for which he was hired, went away, in order to get another place for the next year, without asking his master's consent. On his return before the end of the year, the master insisted on turning him away, & offered him his wages up to that time, which he accepted without making any objection; this was held to be a dissolution of the contract, though the servant wished to stay out the year.—R. *v.* CLAYHYDON (INHABITANTS) (1790), 4 Term Rep. 100; 100 E. R. 916.

370. ——.]—Where a pauper, being hired for a year, & having served till within a few days of the end of the year, went, without his master's leave, to the statutes to hire himself for the next year; & on the master dismissing him for that, went before a magistrate with his master, & there offered to serve his year out; but upon receiving his full year's wages, was satisfied, & did not return to his service; but neither hired nor offered to hire himself into any fresh service till the year had expired:—*Held:* this amounted only to a dispensation with his service for the remainder of the year.—R. *v.* POLESWORTH (INHABITANTS) (1819), 2 B. & Ald. 483; 106 E. R. 442.

371. With consent of master.]—If a master gives his servant leave to go upon any other service, or to be absent for a short time, & pays him his whole wages. This is a fair *bonâ fide* service.

If the servant is taken ill, by the visitation of God, it is a condition incident to humanity, & is implied in all contracts. Therefore the master is bound to provide for & take care of the servant so taken ill in his service; & can not deduct wages in proportion to the continuance of the servant's sickness (LORD MANSFIELD, C.).—R. *v.* CHRISTCHURCH (INHABITANTS) (1760), Burr. S. C. 494.

Annotations:—**Distd.** R. *v.* Whittlebury (1795), 6 Term Rep. 464; R. *v.* Sudbrooke (1803), 4 East, 356. **Refd.** R. *v.* Sutton (1794), 5 Term Rep. 657.

372. ——.]—*Re* LAWSON, WARDLEY *v.* BRINGLOE, No. 149, *ante*.

373. —— **Servant providing another to do work.**]—No dissolution of the contract is stated: the master paid him his wages for the whole year. Here was leave given by the master, three weeks before Michaelmas, to be absent during the herring fishery: In the mean time, he provided one to do his business, & received his whole year's wages (LORD LEE, C.J.).—R. *v.* GOODNESTONE NEXT WINGHAM (INHABITANTS) (1745), Burr. S. C. 251; *sub nom.* ST. PETER, SANDWICH *v.* GOOLASTON, 2 Stra. 1232; 93 E. R. 1150.

Annotations:—**Refd.** R. *v.* Westerleigh (1773), Burr. S. C. 753; R. *v.* Mildenhall (1810), 12 East, 482.

374. —— **Dispensation from rest of service.**]—R. *v.* POTTER HEIGHAM (INHABITANTS) (1771), Burr. S. C. 690.

Annotation:—**Refd.** R. *v.* Roxley (1829), 5 Man. & Ry. K. B. 40.

375. —— ——.]—A master being obliged to leave his house seven days before the end of a year for which he had hired a servant, told the latter that he had no further occasion for her services, & paid her the whole year's wages; the master would otherwise have kept her, & she was unwilling to leave the service:—*Held:* a dispensation of the service for the rest of the year.—R. *v.* ST. MARY, LAMBETH (INHABITANTS) (1799), 8 Term Rep. 236; 2 Bott. 6th ed. 169; 101 E. R. 1365.

B. Enlistment of Servant.

See, generally, ROYAL FORCES.

376. Annual service with militia.]—A servant at the time of hiring for a year told his intended master that he had served in the local militia for the preceding year & that he expected to be called out again in the year then current. It was therefore agreed that he should allow his master to deduct out of his wages 1*s.* a day for as many days as he should be absent on service with the militia. He served his master under this hiring for the year, except fourteen days, during which he served in the militia & for which a deduction was made as agreed:—*Held:* this was a good conditional hiring & The Militia Act (48 Geo. 3, c. 111) having declared that service under the Act should not be deemed an absence from the service of a master, there was a year's service, sufficient for the purpose of settlement.—R. *v.* ELMLEY CASTLE (INHABITANTS) (1832), 3 B. & Ad. 826; 1 L. J. M. C. 78; 110 E. R. 304.

Annotation:—**Consd.** R. *v.* St. Mary-at-the-Walls, Colchester (1834), 5 B. & Ad. 1023.

377. Voluntary enlistment.]—Pltf.'s husband had been an employee of a co-operative society & a member of a provident fund in connection with it. The rules of the fund provided that in case of the death of a member his nominee or legal personal representative was to be entitled to a sum of money, but that no person leaving the society's employment of his own accord should have any claim upon the fund. In Sept. 1914, pltf.'s husband enlisted in the army on the terms of a notice issued by the society that on his return from military service he would be re-employed by the society, or if he was not fit for the society's service he would be allowed to go upon the provident fund. In Oct. 1915, he was killed on active service. In an action by his widow against the trustees of the fund to recover benefits in accordance with the rules:—*Held:* though pltf. would have been entitled to recover the benefits claimed if her husband had remained in the service of the society & had remained a member of the fund until his death, yet his contract of service did not continue after his enlistment, & as the provision with regard to the loss of benefits on leaving the society's employment could not be held to be contrary to public policy merely because pltf.'s husband had left the society's employment in order to enlist, pltf. was not entitled to recover.—JOYCE *v.* EBURY (LORD) (1916), 33 T. L. R. 145, D. C.

Annotation:—**Refd.** Stretch *v.* Scout Motor Co. (1918), 62 Sol. Jo. 451.

378. ——.]—Testator gave a legacy of shares in a co. to each of his three sons who should, prior to attaining twenty, enter the employ of a named co., & remain in such employ until the age of thirty-three. One of the sons, who was born in 1895, in 1913, before attaining the age of twenty, entered into the co.'s employ, but in Sept. 1914, he voluntarily, but with the consent of the co.'s directors, joined His Majesty's Forces, from which he had not obtained his discharge:—*Held:* the son had not ceased to be in the employ of the co., although from the time when he entered the army he had not actively served the co.—*Re* COLE, COLE *v.* COLE, [1919] 1 Ch. 218; 88 L. J. Ch. 82; 120 L. T. 374; 35 T. L. R. 183.

Annotation:—**Distd.** *Re* Drake, Drake *v.* Green, [1921] 2 Ch 99.

379. Conscription.]—Where a servant is called to the colours pursuant to 6 & 7 Geo. 5, c. 13, his contract of employment is terminated & not merely suspended, inasmuch as the contract was made on the basis that it was & should continue

to be lawful for it to be performed in its entirety.—MARSHALL *v.* GLANVILLE, [1917] 2 K. B. 87; 86 L. J. K. B. 767; 116 L. T. 560; 33 T. L. R. 301, D. C.

Annotations:—**Refd.** Schostall *v.* Johnson (1919), 36 T. L. R. 75. **Mentd.** Cramb *v.* Goodwin (1919), 35 T. L. R. 314.

380. Enrolment as munitions volunteer.]—Where an employer promises his workman a bonus on condition that he remains in his service during the war, & the workman subsequently enrols as a munitions volunteer, &, under the terms of Munitions of War Act, 1915 (c. 54), is afterwards ordered to work at a controlled establishment, the workman's claim to the bonus is forfeited. The fact that he has voluntarily enrolled as a volunteer, thereby rendering himself liable to be transferred to another service, constitutes a voluntary leaving of the service of the employer.—STRETCH *v.* SCOUT MOTORS, LTD. (1918), 87 L. J. K. B. 1006; 118 L. T. 665; 34 T. L. R. 544; 62 Sol. Jo. 651, C. A.

C. Illness of Servant.

See CONTRACT, Vol. XII., pp. 377–378, 424, Nos. 3115-3124, 3408.

SUB-SECT. 7.—BANKRUPTCY AND WINDING UP.

381. Issue of commission of bankruptcy against employer.]—THOMAS *v.* WILLIAMS, No. 654, *post.*

382. Appointment of receiver & manager—Service of employee continued.]—BEDFORD *v.* COOPER (1847), 10 L. T. O. S. 161.

383. Dissolution of company.]—An insurance co. covenanted with C. for valuable consideration to appoint him their agent in S., together with A., & that if A. should be displaced from the agency they would pay C. a certain sum, the co. having transferred their business to another co., & wound up their affairs & dissolved themselves:—*Held:* this was a displacement of A. within the meaning of the covenant.—STIRLING *v.* MAITLAND (1864), 5 B. & S. 840; 5 New Rep. 46; 34 L. J. Q. B. 1; 11 L. T. 337; 29 J. P. 115; 11 Jur. N. S. 218; 13 W. R. 76; 122 E. R. 1043.

Annotations:—**Expld.** City of Dublin Steam Packet Co. *v.* R. (1908), 24 T. L. R. 657. **Refd.** Rhodes *v.* Forwood (1876), 1 App. Cas. 256; *Re* Ry. & Electric Appliances Co. (1888), 38 Ch. D. 597; Brace *v.* Calder (1895), 64 L. J. Q. B. 582; Ogdens *v.* Nelson, Ogdens *v.* Telford, [1903] 2 K. B. 287. **Mentd.** Hamlyn *v.* Wood, [1891] 2 Q. B. 488.

——.]—*See* COMPANIES, Vol. IX., pp. 529, 536–537, 544, Nos. 3494, 3528–3534, 3588.

SUB-SECT. 8.—DISSOLUTION OF PARTNERSHIP.

See PARTNERSHIP.

SUB-SECT. 9.—REPUDIATION BY EMPLOYER.

See, generally, CONTRACT, Vol. XII., pp. 338 *et seq.*

Damages for wrongful dismissal.]—*See* Part VI., Sect. 2, sub-sect. 2, B., *post.*

SUB-SECT. 10.—NOTICE.

A. Express Agreement as to Notice.

384. What constitutes agreement as to notice—Contract contained in letters—Agreement contained in earlier letters—Subsequent letters on other matters.]—MCKEAN *v.* COWLEY, No. 770, *post.*

385. —— Rules posted in factory.]—J., after serving an apprenticeship with R., a paper manufacturer, was engaged verbally as journeyman at weekly wages, nothing being said as to any notice to quit. In the factory, a printed notice was stuck up that no servant should leave without a fortnight's notice. J. left without notice, & was summoned for absenting himself without lawful excuse:—*Held:* the justices might have inferred from the circumstances that the fourteen days' notice did form part of the contract, though nothing expressly had been stated between the parties, & the justices were wrong if they found the contract did not include such notice, merely because it was not in writing, or because nothing express had been stated on the subject.—RIDEOUT *v.* JENKINSON (1874), 38 J. P. 424, D. C.

386. —— ——.]—Applts. were proprietors of a mill in which resp. had been a weaver, paid by the piece. Rules were posted so that the workpeople passed them on going to their work; amongst them, one required fourteen days' notice before termination of employment. Resp. left his work without notice, but it was not proved that his attention had been called to the rules, or that he had seen them or assented to them, or was able to read. The justices held that there was not sufficient evidence of a contract to justify a conviction of resp. under 30 & 31 Vict. c. 141, s. 9, & they refused to admit evidence of custom:—*Held:* the rules as they were posted, or a well known custom in the district, might be sufficient to establish a contract if found as a fact to exist.—CARUS *v.* EASTWOOD (1875), 32 L. T. 855; 40 J. P. 103, D. C.

—— Custom.]—*See* Sub-sect. 10, B. (*c*), *post.*

387. Hiring for fixed period—Afterwards determinable on notice—Right to determine at end of period—Without notice.]—Deft. agreed to serve pltf. as a traveller & agent "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving the other a three months' notice":—*Held:* at the close of the twelve months the agreement could be determined by either party without any notice, & the stipulation as to a three months' notice only applied in case the engagement was prolonged beyond the twelve months.—LANGTON *v.* CARLETON (1873), L. R. 9 Exch. 57; 43 L. J. Ex. 54; 29 L. T. 650.

Annotation:—**Refd.** Tilling *v.* James (1906), 94 L. T. 823.

388. —— —— —— After notice.]—Pltf. entered the service of defts. under an agreement by which the engagement "was deemed to have commenced on Sept. 11, 1922, & was to continue for a period of twelve calendar months from such date, & thereafter until determined by three calendar months' notice in writing given by either party at any time to the other":—*Held:* although the agreement could not be terminated until the

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PART IV. SECT. 2, SUB-SECT. 7.

383 1. *Dissolution of company.*]—The passing of a resolution to wind up a co. operates as notice of dismissal to the co.'s servants.—*Re* FORSTER & Co., *Ex p.* SCHUMANN (1887), 19 L. R. Ir. 240.—**IR.**

PART IV. SECT. 2, SUB-SECT. 10.—A. k. *What constitutes agreement as to notice.*]—Pltf. & deft. entered into a contract in writing for the hiring of pltf. by deft., the term of hiring to commence on Apr. 25, & deft. reserving to himself, if he had cause, the right to discharge pltf. at any time during the engagement paying him up to the day of his discharge:—*Held:* under the reservation in the contract, deft. had the right to discharge pltf. at any time, provided he exercised the right *bonâ fide* & without malice.—DOYLE *v.* WURTZBURG (1899), 32 N. S. R. 107.—**CAN.**

1. *Right to reasonable notice.*]—CROMER *v.* HARRY RICKARDS' TIVOLI THEATRES, LTD., [1921] S. A. S. R. 325.—**AUS.**

Sect. 2.—Termination: Sub-sect. 10, A. & B. (a), (b) i. & ii.]

expiration of the twelve months, it could be terminated at the end of, or at any time after the expiry of, the twelve months by three calendar months' notice given either during the twelve months or after the end of the twelve months.—COSTIGAN *v.* GRAY BOVIER ENGINES, LTD. (1925), 41 T. L. R. 372, C. A.

—— —— **Commercial agents.**]—*See* AGENCY, Vol. I., p. 547, Nos. 1986, 1987.

389. —— Determinable at any time on notice—Right to determine without assigning reason.]—BAKER *v.* DENKERA ASHANTI MINING CORPN., LTD. (1903), 20 T. L. R. 37, N. P.

Whether custom excluded.]—*See, generally,* CUSTOM & USAGES, Vol. XVII., p. 53, Nos. 581 *et seq.*

—— **Schoolmaster.**]—*See* EDUCATION, Vol. XIX., p. 592, No. 222.

B. Where No Agreement as to Notice.

(a) In General.

390. No inflexible rule as to method of termination—Except for menial servants.]—FAIRMAN *v.* OAKFORD, No. 327, *ante.*

391. Yearly service — Cannot be determined before end of year.]—WILLIAMS *v.* BYRNE, No. 418, *post.*

392. — — —.]—A hiring at a sal. ry of £500 a year is *primâ facie,* & in the absence of any custom to the contrary, a hiring for a year certain.

As a general rule, where the hiring is a yearly hiring, it cannot be put an end to by either party before the end of the year. This rule, however, is subject to an exception in cases in which the agreement of hiring is subject to some stipulation, either express or implied by custom, enabling either party to determine the contract by notice (GROVE, J.).—BUCKINGHAM *v.* SURREY & HANTS CANAL CO. (1882), 46 L. T. 885; 46 J. P. 774, D. C.

Annotation:—**Reid.** Cayme *v.* Allan, Jones (1919), 35 T. L. R. 453.

Presumption of yearly hiring.]—*See* Sect. 1, sub-sect. 2, *ante.*

(b) Reasonable Notice.

i. Necessity for.

393. General rule—Reasonable notice necessary.]—The contract is to endure for a reasonable time if no specific time be fixed & is determinable by a reasonable notice (BAYLEY, J.).—WINSTONE *v.* LINN (1823), 1 B. & C. 460; 2 Dow. & Ry. K. B. 465; 1 Dow. & Ry. M. C. 327; 1 L. J. O. S. K. B. 126; 107 E. R. 171.

Annotations:—**Reid.** Westwick *v.* Theodor (1875), L. R. 10 Q. B. 224. **Mentd.** Phillips *v.* Clift (1859), 4 H. & N. 168; Raymond *v.* Minton (1866), 12 Jur. N. S. 435; Learoyd *v.* Brook, [1891] 1 Q. B. 431; Waterman *v.* Fryer, [1922] 1 K. B. 199.

394. —— ——.]—The question in each case, in the absence of an express agreement as to the determination of an employment of service, must be a question of reasonableness. If a custom, or practice, can be found, that may be treated by the judge or by the jury before whom the case is tried as governing the relations.—SWALE *v.* IPSWICH TANNERY (1906), 11 Com. Cas. 88.

395. —— ——.]—PAYZU *v.* HANNAFORD, No. 404, *post.*

396. — — —— **Ship's captain.**]—Pltf., a master mariner, accepted the command of deft.'s ship under a written agreement, as follows: "I hereby accept the command of the ship *City Camp* on the following terms: Salary to be at & after the rate of £180 sterling *per annum.*" "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, & the owners have the option of paying or not paying his expenses travelling home." "Wages to begin when captain joins the ship":—*Held:* pltf. could not, except under unusual circumstances be so dismissed without a reasonable notice.—CREEN *v.* WRIGHT (1876), 1 C. P. D. 591; 35 L. T. 339; 3 Asp. M. L. C. 254.

397. —— —— **Free church minister.**]—TOMKINS *v.* MARTIN (1886), 3 T. L. R. 163, N. P.

398. —— —— **Foreign correspondent of newspaper.**]—LOWE *v.* WALTER, No. 411, *post.*

399. —— —— **Manager of company.**]—LEVY *v.* ELECTRICAL WONDER CO. (1893), 9 T. L. R. 495, N. P.

400. —— — —— **Contributor to newspaper.**]—LANDA *v.* GREENBERG (1908), 24 T. L. R. 441; 52 Sol. Jo. 354.

401. — — —— **Trade assistant in Africa.**]—In the absence of misconduct on the part of a servant, employers cannot dismiss him except by the giving of reasonable notice, unless in the agreement of service there are words enabling the employers to dismiss the servant summarily.

By an agreement between the employers & the employee it was provided, by clause 2, that the latter should "as & from the date of his leaving Liverpool for Africa, become &, subject as hereinafter provided, continue for two years, or until the date of his leaving Africa, in the service & employment of the said employers as clerk & trade assistant. . . . Provided always,

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PART IV. SECT. 2, SUB-SECT. 10.—B. (a).

391 i. *Yearly service — Cannot be determined before end of year.*]—BURGESS *v.* ST. LOUIS (1899), 6 Terr. L. R. 451.—**CAN.**

m. *Employment for specified period—Expiration of period—No right to notice.*]—COOK *v.* SYDNEY & COUNTY BANK (1882), 3 N. S. W. L. R. (L.) 273.—**AUS.**

n. —— —— ——.]—SHORTT *v.* LAKEY (1891), 11 N. Z. L. R. 17.—**N.Z.**

o. —— —— ——.]—BRENAN *v.* CAMPBELL'S TRUSTEES (1898), 25 R. (Ct. of Sess.) 423; 35 Sc. L. R. 341; 5 S. L. T. 275.—**SCOT.**

p. *Monthly service—Month's notice.*]—Under a monthly hiring a month's notice is sufficient to terminate it & damages for wrongful dismissal are limited to a month's wages.—JOHNS *v.* WINNIPEG ELECTRIC RY. CO., [1925] 3 D. L. R. 314; [1925] 2 W. W. R. 282; 35 Man. L. R. 53.—**CAN.**

q. —— ——.]—Apart from contracts of menial or domestic hiring, when the service is from month to month, to terminate the same by notice, at least one month's notice must be given, so as to expire with the end of one of the monthly periods.—PEMBERTON N. O. *v.* KESSELL, [1905] T. S. 174.—**S. AF.**

PART IV. SECT. 2, SUB-SECT. 10.—B. (b) i.

393 i. *General rule—Reasonable notice necessary.*]—DALGEHY *v.* HUSBAND (1878), 4 V. L. R. (L.) 432.—**AUS.**

393 ii. ——.]—Pltf. agreed with deft. to work for him for $2.25 per day. The judge found that there was evidence upon which a yearly hiring might be found:—*Held:* the presumption was in favour of a yearly hiring, & pltf. was entitled to reasonable notice of termination of his employment.—GOULD *v.* MCCRAE (1907), 9 O. W. R. 626; 14 O. L. R. 194.—**CAN.**

393 iii. ——.]—Where there is a general hiring at a yearly salary, & the service continues after the first year, the hiring becomes one from year to year, & is determinable only by a reasonable notice expiring at the end of the current year.—WOOD *v.* WELLINGTON WOOLLEN CO. (1895), 14 N. Z. L. R. 296.—**N.Z.**

393 iv. —— ——.]—LIGHTBAND *v.* MAINE BROTHERS (1905), 25 N. Z. L. R. 50.—**N.Z.**

r. —— —— *Manager.*]—FEDERATED MUTUAL INSURANCE CO. OF AUSTRALIA, LTD. *v.* SABINE, [1920] S. A. L. R. 284.—**AUS.**

t. —— —— ——.]—The manager of a restaurant is only entitled to reasonable notice, having regard to the nature of the employment & the surrounding circumstances.—

however, that the employers may at any time hereafter, at their absolute discretion, terminate this engagement at any earlier date than specified if they may desire to do so." The employee was to be paid a salary " at & after the rate of £250 for the first year, & £250 for the second year, & so for any less period than a year." By clause 8 it was provided that should the employee " fail to give satisfaction to the employers, or to their agent or other representative . . . & of such failure the said agent or other representative of the employers shall be the sole judge . . . the said agent or other representative may summarily dismiss " the employee :—*Held :* in the absence of misconduct on the part of the employee the employers were not entitled, under the proviso to clause 2 of the agreement, to terminate his engagement without giving him reasonable notice. —*Re* AFRICAN ASSOCN., LTD. & ALLEN, [1910] 1 K. B. 396 ; 79 L. J. K. B. 259 ; 102 L. T. 129 ; 26 T. L. R. 234, D. C.

—— —— **Commercial agent.**]—*See* AGENCY, Vol. I., p. 547, No. 1988.

402. Contract void under Statute of Frauds—Servant not entitled to reasonable notice.]—In an action for wrongful dismissal pltf. proved that deft. agreed verbally to employ him for a year. The agreement was concluded on a Saturday, & the employment was to commence on the following Monday. Pltf. served for part of the year, & was then dismissed :—*Held :* the contract was within Stat. Frauds, s. 4, no agreement under which pltf. would be entitled to reasonable notice of dismissal could be implied, the case was not taken out of the statute by part performance, & therefore pltf. could not recover.—BRITAIN *v.* ROSSITER (1879), 11 Q. B. D. 123 ; 48 L. J. Q. B. 362 ; 40 L. T. 240 ; 43 J. P. 332 ; 27 W. R. 482, C. A.

Annotations :—**Mentd.** Maddison *v.* Alderson (1883), 8 App. Cas. 467 ; *Re* Whitehead, *Ex p.* Whitehead (1885), 14 Q. B. D. 419 ; McManus *v.* Cooke (1887), 35 Ch. D. 681 ; *Re* Roberts, Evans *v.* Thomas (1887), 57 L. T. 79 ; British South Africa Co. *v.* Companhia de Moçambique, [1893] A. C. 602 ; Richardson *v.* Methley School Board (1893), 3 Ch. 510 ; Isaacs *v.* Evans (1899), 16 T. L. R. 113 ; Dollar *v.* Parkington (1901), 84 L. T. 470 ; Smith *v.* Gold Coast & Ashanti Explorers (1903), 72 L. J. K. B. 235 ; Turner *v.* Mellador (1903), 19 T. L. R. 273 ; Elliott *v.* Roberts (1912), 107 L. T. 18 ; Morris *v.* Baron, [1918] A. C. 1 ; Cayme *v.* Allan, Jones (1919), 35 T. L. R. 453 ; *Re* A Bankruptcy Notice, [1924] 2 Ch. 76 ; Rawlinson *v.* Ames, [1925] Ch. 96.

ii. *What is Reasonable Notice.*

403. Question of fact.]—LEVY *v.* ELECTRICAL WONDER CO. (1893), 9 T. L. R. 495, N. P.

404. ——.]—Where a contract of service for an indefinite period is silent regarding the notice which is to be given to terminate it, a term must be implied that reasonable notice should be given. What is reasonable notice is a question of fact to be decided according to the circumstances in each case.—PAYZU *v.* HANNAFORD, [1918] 2 K. B. 348 ; 87 L. J. K. B. 1017 ; 119 L. T. 282 ; 82 J. P. 216 ; 34 T. L. R. 442, D. C.

405. Advertising agent.]—Where a written agreement to employ a person as an advertising & canvassing agent contained no provision as to the notice which should determine the agreement a month's notice was held a reasonable & proper one for that purpose.—HISCOX *v.* BATCHELLOR (1867), 15 L. T. 543, N. P.

Annotation :—**Refd.** Creen *v.* Wright (1876), 1 C. P. D. 591.

406. Clerk—Yearly salary payable monthly.]—BRITTAIN *v.* LONDON & NORTH WESTERN RY. CO. (1857), 28 L. T. O. S. 253 ; 21 J. P. Jo. 69.

407. —— **Yearly salary payable weekly.**]—FAIRMAN *v.* OAKFORD, No. 327, *ante.*

408. —— **Yearly salary payable fortnightly—Clerk in telegraph office.**]—A stationery clerk in a telegraph office at a salary of £135 *per annum*, payable fortnightly, found to be entitled to a month's notice.—VIBERT *v.* EASTERN TELEGRAPH CO. (1883), Cab. & El. 17, N. P.

409. Governess.]—TODD *v.* KERRICH, No. 136, *ante.*

410. Journalist.]—*Re* ILLUSTRATED NEWSPAPER CORPN. (1900), 16 T. L. R. 157.

411. —— **Foreign correspondent of newspaper.**]—There is no rule of law that a foreign correspondent of a newspaper is entitled to twelve months' notice of dismissal, or six months' terminating with the year. In the absence of custom or special agreement, the length of notice must be reasonable. The jury found that there was no custom proved, & that a six months' notice given by deft. to pltf. was reasonable.—LOWE *v.* WALTER (1892), 8 T. L. R. 358, N. P.

Editors & staff of newspapers.]—*See* PRESS & PRINTING.

412. Manager—Of shops—Salary deducted weekly from moneys received.]—Pltf. was the manager of several shops belonging to deft., & received a salary of £250, of which he deducted a proportionate part weekly out of the moneys which came to his hands, & there was no agreement between the parties as to the length of notice necessary to terminate the engagement. Deft. gave pltf. a week's notice, but the jury found pltf. entitled to a month's notice.—BYRNE *v.* SCHOTT (1883), Cab. & El. 17, n., N. P.

413. —— **Of company.**]—LEVY *v.* ELECTRICAL WONDER CO. (1893), 9 T. L. R. 495, N. P.

414. Servant of company—After winding up order.]—The rule that an order for winding up a co. operates as a notice of discharge to the servants when the business of the co. is not continued after the date of the order, applies though the liquidator without continuing the business employs the servants in analogous duties with a view to reconstruction.

Three months' notice is the notice which the law in an ordinary case allows & requires for a person in the position of M. (CHITTY, J.).—*Re* ORIENTAL BANK CORPN., MACDOWALL'S CASE (1886), 32 Ch. D. 366 ; 55 L. J. Ch. 620 ; 54 L. T. 667 ; 34 W. R. 529.

Annotation :—**Apld.** Reid *v.* Explosives Co. (1886), 56 L. J. Q. B. 68.

LAMBERTON *v.* VANCOUVER TEMPERANCE HOTEL CO. (1904), 11 B. C. R. 67.—**CAN.**

a. —— —— ——.]—It is an implied term of a hiring as mill manager that the service may be determinated on reasonable notice. — HENDERSON *v.* CANADIAN TIMBER & SAW MILLS, LTD. (1906), 12 B. C. R. 294.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 10.—B. (b) ii.

403 i. *Question of fact.*]—MCDONALD *v.* CAPE BRETON ELECTRIC CO. (1905), 40 N. S. R. 631.—**CAN.**

403 ii. ——.]—What is reasonable notice will be determined from the facts & circumstances surrounding the particular case.—PARKER *v.* BEECHING, [1923] 4 D. L. R. 35 ; [1923] 3 W. W. R. 63 ; 19 Alta. L. R. 660.—**CAN.**

403 iii. ——.]—ADAMS *v.* BURNS (1925), 36 B. C. R. 217.—**CAN.**

403 iv. ——.]—What is reasonable notice must, in the absence of custom, depend on the circumstances of each case.—HUNT *v.* EASTERN PROVINCE BOATING CO. (1883), 3 E. D. C. 12.—**S. AF.**

403 v. ——.]—FRAMES *v.* BUFFALO WOOL SCOURING CO., [1921] E. D. L. 288.—**S. AF.**

b. *Assistant superintendent.*]—A party holding the position of assistant superintendent in the construction of a railway, & engaged by the month, though there be no agreement for a month's notice to terminate the service, was held to be entitled to such.—MCBEAN *v.* NEWFOUNDLAND RY. CO. (1883), 6 Nfld. L. R. 501.—**NFLD.**

c. *City engineer.*]—A servant or employee engaged under a yearly hiring is entitled to reasonable notice

Sect. 2.—Termination: Sub-sect. 10, B. (c) i., ii., iii., iv. & v., C. & D.; sub-sect. 11, A. (a).]

(c) *Custom.*

i. *In General.*

See, generally, CUSTOM & USAGES, Vol. XVII., pp. 1 *et seq.*

415. General rule—Implied term of contract.]—CARUS *v.* EASTWOOD, No. 380, *ante.*

416. —— ——.]—BUCKINGHAM *v.* SURREY & HANTS CANAL CO., No. 392, *ante.*

417. —— ——.]—SWALE *v.* IPSWICH TANNERY, No. 394, *ante.*

418. Must be expressly alleged.]—(1) A contract between A. & B., for A. to serve B., & B. to employ A. for one whole year, from a certain day named, & so from year to year, to the end of each year commenced, so long as the parties respectively please, is a yearly contract, & can only be determined at the end of a current year. A notice alleged to be usual & reasonable, given in the middle of a year, was insufficient.

(2) In an action for the breach of such contract, if either party rely upon the existence of a custom authorising him to determine the contract upon a reasonable notice previous to the end of a current year, such custom must be expressly alleged as a fact on the record, & it is not enough to aver simply that a reasonable notice was given.—WILLIAMS *v.* BYRNE (1837), 7 Ad. & El. 177; 2 Nev. & P. K. B. 139; Will. Woll. & Dav. 532; 6 L. J. K. B. 239; 1 J. P. 234; 112 E. R. 438; *sub nom.* WILLIAMS *v.* BIRD, 1 Jur. 578.

419. ——.]—In an action by a commercial traveller to recover damages for his wrongful dismissal, the declaration alleged that, in consideration that pltf. at the request of deft. would enter the service of deft. for one year, deft. agreed to employ him in such service for the space of one whole year at a yearly salary, etc. At the trial it appeared that it was a custom of the trade that yearly hirings might be put an end to by three months' notice:—*Held:* pltf. ought to have alleged the custom in his declaration as a part of the contract.—METZNER *v.* BOLTON (1854), 9 Exch. 518; 2 C. L. R. 685; 23 L. J. Ex. 130; 23 L. T. O. S. 22; 2 W. R. 302; 156 E. R. 221.

Annotations:—**Refd.** Parker *v.* Ibbetson (1858), 27 L. J. C. P. 236; Produce Brokers Co. *v.* Olympia Oil & Cake Co., [1916] 1 A. C. 314. **Mentd.** Wheeler *v.* Bavidge (1854), 9 Exch. 668; Hanan *v.* Ehrlich, [1911] 2 K. B. 1056.

420. Whether excluded by agreement for term certain—Custom to determine without notice.]—When the hiring is expressly for a term certain, a custom of the trade for master or servant to determine it at any time without notice is inadmissible to control the contract.—PETERS *v.* STAVELEY (1866), 15 L. T. 275; 31 J. P. 40.

Whether excluded by agreement as to notice.]—*See, generally,* CUSTOM & USAGES, Vol. XVII., pp. 42, 53, Nos. 462–465, 581.

Necessary characteristics.] — *See* CUSTOM & USAGES, Vol. XVII., p. 28, Nos. 303 *et seq.*

Proof of custom.]—*See* CUSTOM & USAGES, Vol. XVII., p. 35, Nos. 398 *et seq.*

ii. *Menial and Domestic Servants.*

421. General rule—Month's notice.]—BEESTON *v.* COLLYER, No. 277, *ante.*

422. —— ——.]—FAWCETT *v.* CASH, No. 312, *ante.*

423. —— ——.]—NOWLAN *v.* ABLETT, No. 131, *ante.*

424. —— ——.]—JOHNSON *v.* BLENKENSOPP, No. 134, *ante.*

425. —— ——.]—BROXHOLM *v.* WAGSTAFF, No. 822, *post.*

426. —— ——.]—TURNER *v.* MASON, No. 463, *post.*

427. —— ——.]—TODD *v.* KERRICH, No. 136, *ante.*

428. —— ——.]—BRITTAIN *v.* LONDON & NORTH WESTERN RY. CO. (1857), 28 L. T. O. S. 253; 21 J. P. Jo. 69.

429. —— ——.]—NICOLL *v.* GREAVES, No. 137, *ante.*

430. —— ——.]—MOULT *v.* HALLIDAY, No. 431, *post.*

431. Right to give notice before end of first fortnight—To determine service at end of first month—Whether court will take judicial notice of custom.]—(1) A custom with regard to the hiring of domestic servants, to the effect that, in the absence of special contract, there is a right, on the part of either the master or the servant, to determine the service, at the end of the first calendar month, by notice given at or before the expiration of the first fortnight, is not a notorious custom of which the cts. will take judicial notice, but where such a custom is relied on, its existence must be proved by evidence in each particular case. Such a custom is not unreasonable; & therefore, if, in any particular case, its existence were sufficiently proved by evidence, the ct. would give effect to it.

(2) There is the custom of a month's notice or a month's wages, which is so well known that every person who is hired as a domestic servant is taken to be engaged on those terms, unless there is an express stipulation to the contrary (CHANNELL, J.).—MOULT *v.* HALLIDAY, [1898] 1 Q. B. 125; 67 L. J. Q. B. 451; 77 L. T. 794; 62 J. P. 8; 46 W. R. 318; 14 T. L. R. 109; 42 Sol. Jo. 117, D. C.

Annotation:—*As to* (1) **Consd.** George *v.* Davies, [1911] 2 K. B. 445.

432. —— —— ——.]—Pltf., a domestic servant, entered deft.'s service on Nov. 3, 1910, at yearly wages payable monthly, there being no express agreement as to notice. On Nov. 17, she gave notice to leave at the expiration of the first month of her service. She accordingly left on Dec. 3, & upon deft. refusing to pay her the wages for the month during which she had been in the service, upon the ground that she had left without giving one month's notice, she brought an action in the county ct. to recover the month's wages, alleging a custom that either party to the contract of the hiring of a domestic servant was entitled, in the absence of special agreement as to notice, to determine the service at the end of the first month by notice given at or before the expiration of the first fortnight. Pltf. called no evidence in support of the custom. The county ct. judge said that he had taken judicial notice of the custom in previous cases, & he would take judicial notice of it in this case. He accordingly gave judgment for pltf. for the amount claimed:—*Held:* (1) the county ct. judge was entitled to take judicial notice of the custom; (2) apart from the custom, & assuming that pltf. wrongfully left deft.'s service, she was entitled to recover the month's wages which had already accrued due to her.—GEORGE *v.*

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of dismissal; & in the case of a city engineer any period less than six months is not reasonable notice.—SPEARMAN *v.* CALGARY CITY (1908), 1 Alta. L. R. 454; 9 W. L. R. 264. —CAN.

d. *Shipping agent—Yearly contract.*] —STEVENSON *v.* NORTH BRITISH RY. CO. (1905), 7 F. (Ct. of Sess.) 1106. —SCOT.

421 1. *General rule—Month's notice.*] —MANSON *v.* MCKEN (N. W. T.) (1906), 4 W. L. R. 545.—CAN.

DAVIES, [1911] 2 K. B. 445; 80 L. J. K. B. 924; 104 L. T. 648; 27 T. L. R. 415; 55 Sol. Jo. 481, D. C.

Right to wages in lieu of notice.]—*See* Sub-sect. 11, B., *post.*

iii. *Commercial Travellers and Agents.*

433. Commercial traveller — Three months' notice.]—METZNER *v.* BOLTON, No. 419, *ante.*

434. —— ——.]—A commercial traveller is, in the absence of a special agreement, entitled to receive three months' notice upon dismissal.—GRUNDON *v.* MASTER & CO. (1885), 1 T. L. R. 205.

Agent.]—*See* AGENCY, Vol. I., p. 546, Nos. 1981–1985.

iv. *Newspaper Editors, Printers and Staff.*

See PRESS & PRINTING.

v. *Other Cases.*

435. Actress—Engaged for run of the piece.]—THOMAS *v.* GATTI (1906), *Times*, June 22.

436. Chorus girl — Fortnight's notice.] — THOMAS *v.* GATTI (1906), *Times*, June 22.

437. Clerk — Of finance company — Three month's notice.]—FOXALL *v.* INTERNATIONAL LAND CREDIT CO., No. 309, *ante.*

438. Farm bailiff—No custom to dismiss by months' notice.]—LOUTH *v.* DRUMMOND (1849), *Times*, Mar. 28.

Annotation :—**Distd.** Nicoll *v.* Greaves (1864), 17 C. B. N. S. 27.

439. Film editor—No custom to dismiss as newspaper editor.]—Pltf. was engaged by defts. as editor of a reel film of current events, his duties being to send out operators for the purpose of photographing current events, to make up the stories, & arrange, describe, cut down, trim & condense them. He made out posters describing the contents, & the stories were sent round to the cinema halls & thrown on the screens with the captions & explanatory matter which pltf. had written. Defts. terminated pltf.'s employment by giving him one month's notice, & pltf. brought an action claiming that as editor he was entitled to six months' notice according to the custom of journalism :—*Held :* though pltf. performed duties analogous to those of a newspaper editor, yet, as there was no evidence that the customary notice applied in a case which was only analogous to that of a newspaper editor, the action failed.—MCCABE *v.* PATHÉ FRÈRES CINEMA (1919), 35 T. L. R. 313.

440. Milk carrier—Week's notice.]—EVANS *v.* WARE, No. 186, *ante.*

Schoolmaster & teachers.]—*See, generally*, EDUCATION, Vol. XIX., pp. 603–610.

C. Who may give Notice.

Notice to schoolmasters & teachers.]—*See* EDUCATION, Vol. XIX., pp. 603–610, Nos. 294–313, 328–355.

Notice to servant of partnership.] — *See* PARTNERSHIP.

D. Validity of Notice.

441. Notice given in middle of year—Yearly service.]—WILLIAMS *v.* BYRNE, No. 418, *ante.*

442. Notice expiring at end of furlough.]—Pltf. was employed by defts. under an agreement, by which his engagement was determinable on six months' notice. Defts. granted pltf. eighteen months' furlough, & told him that his services would not at the end of the furlough be required. Pltf. contended that the notice to determine his engagement could not be given until the end of the furlough :—*Held :* pltf. had received due notice under the agreement.—WILKINS *v.* SCINDE, PUNJAUB & DELHI RY. CO. (1885), 1 T. L. R. 383, C. A.

443. Notice by council—Necessity for properly constituted meeting.]—WILLETT *v.* TAVERNER (1897), 41 Sol. Jo. 778.

444. Request to resign.]—When a clerk breaks an unwritten but well recognised rule of his employer, & receives in consequence a letter requiring him to resign, that notice, although polite instead of peremptory language was used, is a dismissal.—STEPHENSON *v.* LONDON JOINT STOCK BANK, LTD. (1903), 52 W. R. 183; 20 T. L. R. 8; 47 Sol. Jo. 876, C. A.

SUB-SECT. 11.—DISMISSAL WITHOUT NOTICE.

A. Grounds for Dismissal.

(*a*) *In General.*

445. Justification a question of fact.]—READ *v.* DUNSMORE, No. 546, *post.*

446. ——.]—Deft. had been the clerk of pltfs. under an agreement for £140 a year, determinable by three months' notice or payment of three months' salary, & had been dismissed without notice. In a plaint in the county ct. for money had & received, he claimed to set off three

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PART IV. SECT. 2, SUB-SECT. 10.—B. (c) v.

e. *Clerk.*]—CLINT *v.* MARTIN (1909), 11 W. L. R. 27.—**CAN.**

f. *Surveyor's assistant.*] — In an action brought by a surveyor's assistant to recover wages in lieu of a month's notice deft. co. set up a custom among surveyors terminating employment without notice :—*Held :* pltf. was not entitled to recover.—ANDREWS *v.* PACIFIC COAST COAL MINES, LTD. (1910), 15 B. C. R. 56.—**CAN.**

g. *Hotel housekeeper.*]—The housekeeper of a large hotel is not a menial servant, & cannot be dismissed on a month's notice in the absence of express agreement.—LAWLER *v.* LINDEN (1876), I. R. 10 C. L. 188.—**IR.**

h. *Manager at yearly salary.*] — A person engaged to manage a department of a merchant's business at a yearly salary is entitled to three months' notice of dismissal.—NIXON & CO. *v.* BLAINE (1879), Buch. 217.—**S. AF.**

k. *Piece worker.*] — The fact that a servant is paid by the piece is not conclusive evidence against his service being periodical, week by week or month by month, so as to entitle him to notice.—BAKER *v.* DORMER (1881), 1 S. C. 253.—**S. AF.**

PART IV. SECT. 2, SUB-SECT. 10.—D.

l. *Conditional notice.*] — KEON *v.* HART (1869), 17 W. R. 681.—**IR.**

m. *Notice given at end of year.*]—A party came to an agreement with the Newfoundland Government for five years, terminable at the end of the first year by either party giving to the other a three months' notice. At the end of the first year a notice was given by the Government terminating the agreement :—*Held :* to effectually terminate agreement at the end of the first year, the notice should have preceded that time.—SCOTT *v.* NEWFOUNDLAND GOVERNMENT (1887), 7 Nfld. L. R. 230.—**NFLD.**

n. *Ten days' notice — Implied contract from year to year.*]—STEVENSON *v.* EARLE (1901), 8 Nfld. L. R. 511.—**NFLD.**

o. *When notice must expire.*] — Where a person is employed at an annual salary with an agreement that three months' notice on either side shall terminate the agreement, it is not necessary that the notice of dismissal should expire at the end of the year.—ZEIGLER *v.* MONCKTON (1885), 4 N. Z. L. R. 213 (S. C.).—**N.Z.**

p. *Time for giving notice.*] — A month's notice may be given at any time on the first day of the month & such a notice covers the entire month.—TIOPAIZI *v.* BUKWAYS MUNICIPALITY, [1923] App. D. 317.—**S. AF.**

PART IV. SECT. 2, SUB-SECT. 11.—A. (a).

q. *Master sole judge of grounds by terms of agreement.*]—MCRAE *v.* MARSHALL (1891), 19 S. C. R. 10.—**CAN.**

r. ——.]—ALLMAN *v.* YUKON CONSOLIDATED GOLD FIELDS CO. (Y. T.) (1908), 8 W. L. R. 373.—**CAN.**

t. *Right to dismiss for good cause.*

Sect. 2.—Termination: Sub-sect. 11, A. (a), (b), (c) & (d) i. & ii.]

months' salary, which claim was disputed, on the ground that his conduct to pltfs. justified his immediate dismissal:—*Held:* (1) whether his conduct justified his immediate dismissal was a question of fact, & therefore, not one in respect of which an appeal lay; (2) as pltfs. upon such dismissal became liable in debt or *indebitatus assumpsit* to pay deft. three months' salary, his claim for such salary was the proper subject of a set-off.—EAST ANGLIAN RYS. CO. *v.* LYTHGOE (1851), 10 C. B. 726; 2 L. M. & P. 221; Cox, M. & H. 380; 20 L. J. C. P. 841; 16 L. T. O. S. 487; 15 Jur. 400: 138 E. R. 287.

Annotations:—*Generally,* **Mentd.** Cawley *v.* Furnell (1851), 12 C. B. 291; Cuthbertson *v.* Parsons (1852), 12 C. B. 304; Midland Ry. *v.* Bromley (1856), 17 C. B. 372.

447. ——.]—HORTON *v.* MCMURTRY, No. 559, *post.*

448. ——.]—SMITH *v.* ALLEN, No. 560, *post.*

449. ——.]—BASTER *v.* LONDON & COUNTY PRINTING WORKS, No. 563, *post.*

450. ——.]—CLOUSTON & CO., LTD. *v.* CORRY, No. 509, *post.*

451. When engagement & dismissal in writing—Question for court.]—When the circumstance of an engagement & dismissal are all proved by written documents in evidence, the question becomes one for the decision of the ct. & not for the jury.—MORGAN *v.* SAVIN (1867), 16 L. T. ..33; *subsequent proceedings,* 16 L. T. 457.

452. Onus of proof—On master.]—In an action of *assumpsit* brought by pltf., a servant, for dismissing him during the period for which he was hired, the declaration stated that deft. refused to permit pltf. to continue in his service during the term, & wrongfully dismissed him therefrom. Plea, that, after the making of the agreement, & before the discharge & dismissal, pltf. conducted himself in an improper & disobedient manner, & disobeyed deft.'s lawful orders; without this, that deft. wrongfully dismissed & discharged pltf. without reasonable cause; concluding to the country. Issue thereon:—*Held:* although the plea might be bad on special demurrer, as putting in issue an immaterial allegation in the declaration, yet, as issue had been taken on the plea, pltf.'s misconduct, as well as the fact of his dismissal, were in issue, & consequently evidence of such misconduct offered at the trial by deft. was improperly rejected, & the *onus* of such proof lay on deft.—LUSH *v.* RUSSELL (1850), 5 Exch. 203; 1 L. M. & P. 369; 19 L. J. Ex. 244; 15 L. T. O. S. 162; 14 Jur. 435; 155 E. R. 87.

Annotations:—**Consd.** Horton *v.* McMurtry (1860), 5 H. & N. 667. **Mentd.** Coles & Smith *v.* Lovell (1850), 16 L. T. O. S. 304; Houle *v.* Penning (1850), 16 L. T. O. S. 87; Smith *v.* Lovell (1850), 10 C. B. 6; Dalby *v.* India & London Life Assce. (1854), 15 C. B. 365; General Steam Navigation Co. *v.* Rolt (1858), 6 C. B. N. S. 550; Reindel *v.* Schell (1858), 4 C. B. N. S. 97; R. *v.* Saddlers' Co. (1861), 3 E. & E. 72.

453. Reason for dismissal need not be assigned—Power to dismiss at discretion.]—When a power is given to dismiss at discretion any parties from office, such discretion may be exercised without assigning any reason or calling upon the parties to show cause.

A relieving officer appointed under Poor Law Amendment Act, 1834 (c. 76), was dismissed by the Poor Law Comrs. by virtue of their powers contained in sect. 48 without assigning any cause or calling upon him to answer any charge:—*Held:* such dismissal was lawful.—*Ex p.* TEATHER (1850), 1 L. M. & P. 7; *sub nom.* R. *v.* POOR LAW COMRS., 4 New Mag. Cas. 41; 14 L. T. O. S. 355; 14 J. P. Jo. 36; *sub nom. Re* TEATHER & POOR LAW COMRS., 19 L. J. M. C. 70.

Annotation:—**Mentd.** Everett *v.* Ryder (1926), 135 L. T. 302.

Servant of public authorities.]—*See* PUBLIC AUTHORITIES.

Crown servants.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 505, Nos. 77–88.

Poor law officers.]—*See* POOR LAW.

Schoolmasters.]—*See* EDUCATION, Vol. XIX., pp. 585, 603–612, Nos. 176, 294 *et seq.*

Naval & military officers.]—*See* ROYAL FORCES.

Power of agent to dismiss.]—*See* AGENCY, Vol. I., p. 306, No. 298.

(b) Grounds Not Known to Master at Time.

See Nos. 497–502, *post.*

(c) Absence.

454. Absence when wanted—Sleeping out at night—Domestic servant.]—ROBINSON *v.* HINDMAN (1800), 3 Esp. 235, N. P.

455. Short absence—Where no injury to master—Assistant schoolmaster.] — A schoolmaster retained pltf. as a teacher of the French language, on a yearly engagement, at a certain salary, with board & lodging, & dismissed him for absenting himself for two days. In an action for salary, deft. pleaded that pltf. wrongfully absented himself an unreasonable time, to wit, for two days:—*Held:* after verdict for deft., not to be a sufficient reason for dismissal, as it showed neither moral misconduct nor any injury accruing to deft. from the absence of pltf.—FILLIEUL *v.* ARMSTRONG (1837), 7 Ad. & El. 557; 2 Nev. & P. K. B. 406; Will. Woll. & Dav. 616; 7 L. J. Q. B. 7; 1 Jur. 921; 112 E. R. 580.

Annotations:—**Refd.** Turner *v.* Mason (1845), 14 M. & W. 112; Pearce *v.* Foster (1886), 34 W. R. 602. **Mentd.** East Anglian Rys. *v.* Lythgoe (1851), 10 C. B. 726.

456. Absence on account of assumed illness.]—BEATTIE *v.* PARMENTER, No. 561, *post.*

457. Absence without reasonable cause.]—LILLEY *v.* ELWIN, No. 813, *post.*

458. ——.]—HICKS *v.* THOMPSON (1857), 28 L. T. O. S. 255.

459. Absence without leave.]—HANLEY *v.* PEASE & PARTNERS, LTD., No. 830, *post.*

460. Burden of proof—To show justification for absence—On servant.]—THOMAS *v.* VIVIAN, No. 249, *ante.*

(d) Disobedience of Orders.

i. *In General.*

461. Justifiable ground for dismissal.] — If a servant hired for a year refuse to obey his master's

—WILSON *v.* SANDERSON-HAROLD CO., LTD. (1913), 24 O. W. R. 686; 4 O. W. N. 1403.—**CAN.**

a. —— *Although condition as to notice in agreement.*]—BUXTON *v.* LOWES (1915), 31 W. L. R. 768.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 11.—A. (c).

b. *Absence with leave — Onus of proof.*]—In an action by a grocery manager for wrongful dismissal the employer showed that the servant absented himself from work from June 26 to July 15. This was held to amount to misconduct justifying dismissal unless the servant satisfied the burden, which was on him, of establishing leave of absence.—LUCKING *v.* THOMAS (Sask.) (1913), 3 W. W. R. 585; 12 Sask. L. R. 407.—**CAN.**

c. *Question of fact.*] — In deciding whether an employee's absence from duty is sufficient to justify his dismissal the ct. will consider the circumstances of each case.—BROWN *v.* SESSELL, [1908] T. S. 1137.—**S. AF.**

PART IV. SECT. 2, SUB-SECT. 11.—A. (d) i.

461 i. *Justifiable ground for dismissal.*]—If a servant commit a breach of duty the master may be justified in dismissing him without notice, even though the act of the servant be

orders, the master is justified in dismissing him before the end of the year, & the servant cannot recover any wages.—SPAIN *v.* ARNOTT (1817), 2 Stark. 256, N. P.

Annotations :—**Apld.** Turner *v.* Mason (1845), 2 Dow. & L. 898. **Consd.** *Re* Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315. **Reld.** Harmer *v.* Cornelius (1858), 5 C. B. N. S. 236.

462. ——.]—CALLO *v.* BROUNCKER, No. 533, *post.*

463. ——.]—*Assumpsit* for the wrongful dismissal of a domestic servant, without a month's notice or payment of a month's wages. Plea, that pltf. requested deft. to give her leave to absent herself from his service during the night, & that he refused such leave, & forbade her from so absenting herself & that against his will she nevertheless absented herself for the night, & until the following day, whereupon he discharged her. Replication, that when pltf. requested deft. to give her leave to absent herself from his service, her mother had been seized with sudden & violent sickness, & was in imminent danger of death, & believing herself likely to die, requested pltf. to visit her to see her before her death, whereupon pltf. requested deft. to give her leave to absent herself for that purpose, she not being like thereby to cause any injury or hindrance to his domestic affairs & not intending to be thereby guilty of any improper omission or unreasonable delay of her duties ; & because deft. wrongfully & unjustly forbade her from so absenting herself for the purpose of visiting her mother, etc., she left his house & service, & absented herself for that purpose for the time mentioned in the plea, the same being a reasonable time in that behalf, & she not causing thereby any hindrance to his domestic affairs, nor being thereby guilty of any improper omission or unreasonable delay of her duties, as she lawfully might, etc. :—*Held :* (1) on demurrer the plea was good, as showing a dismissal for disobedience to a lawful order of the master, & the replication was bad, as showing no sufficient excuse for such disobedience.

(2) There may undoubtedly be cases justifying a wilful disobedience of such an order ; as when the servant apprehends danger to her life, or violence to her person, from the master ; or where from an infectious disorder raging in the house, she must go out for the preservation of her life. But the general rule is obedience, & wilful disobedience is a sufficient ground for dismissal (ALDERSON, B.).

(3) The contract between the master & a domestic servant is a contract to serve for a year, the service to be determined by a month's warning or by payment of a month's wages (PARKE, B.).—TURNER *v.* MASON (1845), 14 M. & W. 112 ; 2 Dow. & L. 898 ; 14 L. J. Ex. 311 ; 5 L. T. O. S. 97 ; 153 E. R. 411.

Annotations :—*As to* (1) **Reld.** Thompson *v.* British Berna Motor Lorries (1917), 33 T. L. R. 187. *Generally,* **Reld.** Brittain *v.* L. & N. W. Ry. (1857), 21 J. P. Jo. 69.

464. ——.]—HARRIS *v.* COLLEY (1846), 7 L. T. O. S. 89, 188.

465. ——.]—LILLEY *v.* ELWIN, No. 813, *post.*

Justifiable grounds for disobedience.]—*See* Sect. 2, sub-sect. 11, A. (*d*) iv., *post.*

ii. *What Amounts to Disobedience.*

466. Question for jury.]—*Primâ facie,* the construction of written documents is for the judge ; but, where it is shown by extrinsic evidence that the terms are ambiguous, evidence is admissible to explain the ambiguity ; & then it is for the jury to say in which sense the ambiguous expressions were used. A. was engaged by B. as clerk, under a contract for hiring for two years, to conduct the business of a shipping agent at Southampton. In the course of such employ, it was the duty of A. to pay freight, dock-dues, etc., to meet which B. remitted the necessary funds. A. wrote to B. for a remittance of £140 inclosing an account of the purposes for which it was required, one of them being the payment of £30 for salary due to himself. Ten days afterwards, B. sent A. £100 inclosed in a letter directing him to apply the money for business purposes ; A. having appropriated £30 of the money in satisfaction of his salary, B. discharged him. In *assumpsit* by A. against B. for breach of the contract of hiring, B. pleaded a plea justifying the discharge of A. on the ground of his having wrongfully & improperly misappropriated the money remitted, & wrongfully & improperly disobeyed B.'s orders to apply the money to business purposes. The judge left it to the jury to say whether plaintiff had been guilty of any wrongful & improper misappropriation of the moneys entrusted to him by deft., or of any wrongful or improper disobedience of orders :—*Held :* (1) this was a proper direction ; & the judge was not bound to tell the jury that it was not necessary, to justify the dismissal of pltf., that he should have been guilty of any moral delinquency ; (2) in awarding a sum equal to twelve months' salary, pltf. having been discharged after about one quarter's service, the jury had not given excessive damages.—SMITH *v.* THOMPSON (1849), 8 C. B. 44 ; 18 L. J. C. P. 314 ; 137 E. R. 424.

Annotations :—*As to* (1) **Reld.** Horton *v.* McMurtry (1860), 5 H. & N. 667. *As to* (2) **Consd.** Addis *v.* Gramophone Co., [1909] A. C. 488. *Generally,* **Mentd.** Stuckey *v.* Bally (1862), 1 H. & C. 405 ; Bank of New Zealand *v.* Simpson, [1900] A. C. 182.

467. ——.]—Pltf. who was known to be acting in the capacity of a lace-buyer, was engaged by deft., a lace-dealer, under the following memorandum :—M. agrees to engage P. for the term of three years from Monday, Aug. 15, 1859, at the yearly salary of £500, payable monthly. P. to give the whole of his services, & to be advised & guided by M. if necessary. In an action by P. against M. for a wrongful dismissal pending the term on the alleged ground of disobedience of

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innocent.—KELMAR *v.* SOUDEN (1902), 2 S. R. N. S. W. 348 ; 19 N. S. W. W. N. 235.—**AUS.**

461 ii. ——.]—*Held :* resp. was guilty of misconduct in that he wilfully disobeyed the reasonable orders given by the co., & the co. was justified in dismissing the resp.—COLLIE COAL CO. *v.* WILSON (1919), 21 W. A. L. R. 75.—**AUS.**

461 iii. ——.]—A servant who has been guilty of deliberate disobedience to lawful orders may be discharged ; & in such a case it was not necessary to prove that a loss resulted from the disobedience.—YOUNGASH *v.* SASKATCHEWAN ENGINE CO. (1911), 16 W. L. R. 268 ; 4 Sask. L. R. 63—**CAN.**

461 iv. ——.]—A single deliberate act of disobedience of a particular order given in a particular matter, in such manner as to indicate an intention to defy the authority of the master, warrants the instant dismissal of a servant.—CONNELL *v.* GISBORNE TIMES CO., LTD. (1909), 28 N. Z. L. R. 299.—**N.Z.**

461 v. ——.]—*Held :* a master was justified in dismissing a farm servant for refusing obedience to a reasonable order, although not strictly relating to the description of labour in which he was generally employed on the farm.—WILSON *v.* SIMSON (1844), 6 Dunl. (Ct. of Sess.) 1256 ; 16 Sc. Jur. 549.—**SCOT.**

461 vi. ——.]—The dismissal of a servant is justified by refusal to disobey lawful orders.—REID *v.* SCOTT, THOMSON & CO. (1863), 3 Hyde, 172.—**IND**

PART IV. SECT. 2, SUB-SECT. 11.—A. (d) ii.

466 i. *Question for jury.*]—SIDEY *v.* WILLSALLEN (1897), 18 N. S. W. L. R. 341 ; 14 N. S. W. W. N. 54.—**AUS.**

466 ii. ——.]—BEWELL *v.* WHEAT CITY FLOUR CO. (Man.) (1908), 8 W. L. R. 273.—**CAN.**

Sect. 2.—Termination: Sub-sect. 11, A. (d) ii., iii. & iv., & (e).]

lawful orders:—*Held:* evidence was admissible to show the capacity in which pltf. was engaged, viz. as "lace-buyer"; & it was properly left to the jury to say whether or not the orders which he was alleged to have disobeyed were such as a person in that position was bound to obey.—PRICE *v.* MOUAT (1862), 11 C. B. N. S. 508; 142 E. R. 895.

Annotation:—**Mentd.** Krell *v.* Henry, [1903] 2 K. B. 740.

468. Must be wilful disobedience.]—CALLO *v.* BROUNCKER, No. 533, *post.*

469. —— Of lawful order.] — TURNER *v.* MASON, No. 463, *ante.*

470. —— ——.]—PRICE *v.* MOUAT, No. 467, *ante.*

471. Refusal to go to employer — Railway engineer.]—Pltf., a civil engineer, was employed by deft., a railway contractor, as resident engineer on one of deft.'s railways, at a salary, subject to three months' notice on either side. Pltf. alleged that it was understood between them that he should be at liberty to occupy his time in other business besides that of deft., but this was denied by deft. Pltf. came up to London twice at request of deft. on business between them, & on each occasion deft. paid pltf. his travelling expenses just before he set off to return. Deft. telegraphed & wrote to pltf. to come up a third time, when pltf. answered first by telegraph that the message had come too late for him to go on the day deft. required him, then by letter, "I am sorry that at present I cannot comply with your wishes as I am too much engaged in preparing for the action I have brought against the railway co. At the latter end of the week I shall have pleasure in attending your wishes." Deft. in answer, after alluding to this telegram & letter, wrote, "I have therefore to request you to take notice that your engagement with me terminated on the above-named Aug. 2, the date of pltf.'s letter, & that I shall not consider any salary due to you under our agreement beyond that date." In reply, pltf. wrote, "Had you sent me the necessary funds to carry out your instructions, I should at once have attended to them." In an action for wrongful dismissal, & work & materials, to which deft. pleaded a justification & an inspectorship-deed:—*Held:* this was a wilful & inexcusable disobedience on the part of pltf. of deft.'s lawful order.—MORGAN *v.* SAVIN (1867), 16 L. T. 457.

472. Breach of rules—Assistant schoolmaster.]—HALLWARD *v.* SNELL (1886), 2 T. L. R. 836.

473. —— Rules of colliery.] — Coal Mines Regulation Act, 1887 (c. 58), s. 12, does not preclude an owner from dismissing a collier, who, contrary to express instructions, continues to send up an undue proportion of dust.—CHELL *v.* HALL & BOARDMAN (1896), 12 T. L. R. 408, D. C.

Refusal to work.]— *See* Sub-sect. 11, A. (*d*) iii., *post.*

iii. *Refusal to Work.*

474. Justifiable ground for dismissal.] — Pltf., a seaman, declared against a shipowner on an agreement, under 5 & 6 Will. 4, c. 18, ss. 2, 3, to employ pltf. as carpenter's mate of a vessel during a south sea voyage, & to pay him, by way of wages, on discharge & sale of the cargo, a stated proportion of the net proceeds: breach, that deft. wrongfully discharged pltf. before the end of the voyage, whereby his wages were lost. Plea: that it was by the agreement stipulated that pltf. should not cause disobedience of orders or mutiny on board the ship, & that the wages should not be due unless pltf. should have well & truly performed the voyage according to the agreement: that, during the voyage, the master died, whereupon S., the first mate, became & was & exercised the duties of master till the completion of the voyage; & that pltf., afterwards & during the voyage, refused to perform his duty as carpenter's mate, though commanded by S. so to do, & mutinously refused to proceed on the voyage, & tried to excite mutiny & disobedience; wherefore deft. discharged pltf. Replication, that, although S. became & was & exercised the duties as master on board the ship in manner, etc., nevertheless, etc., *de injuria sua absque residuo causæ.* Issue thereon. On the trial it appeared that S. was a foreigner, disqualified to command the vessel by 3 & 4 Will. 4, c. 54, s. 16: that S. after taking the command, required the crew to sign a fresh agreement with himself: & that pltf. & others refused, & refused also to do duty on board the ship unless in taking her to an English port:—*Held:* pltf., having admitted, by his replication, that S. was master, could not, under such allegation *de injuria*, etc., offer evidence of his disqualification; & the refusal to navigate the ship unless to an English port was mutiny against the master *de facto*, & bore out the justification.—RENNO *v.* BENNETT (1842), 3 Q. B. 768; 3 Gal. & Dav. 54; 12 L. J. Q. B. 17; 6 Jur. 992; 114 E. R. 702.

475. ——.] — The messman of a regiment having once distinctly refused to serve up dinner until threatened with arrest:—*Held:* rightly dismissed, although it was in a moment of irritation, & next day followed by an apology. The mess committee having been changed, & the dismissal being by the new committee, *semble*, the action was not maintainable.—CHURCHWARD *v.* CHAMBERS (1860), 2 F. & F. 229, N. P.

476. ——.] — BEALE *v.* GREAT WESTERN RY. Co. (1901), 17 T. L. R. 450, D. C.

477. ——.] — PARKIN *v.* SOUTH HETTON COAL Co., No. 667, *post.*

478. Husband & wife hired together — Refusal by wife — Whether justification for dismissal of both.]—In an action of *assumpsit* for wrongfully discharging pltf. & his wife from the service of deft., into which they had entered as dyers, deft. pleaded in justification that the wife of pltf. obstinately refused to work for deft. in the capacity agreed on:—*Held:* bad on general demurrer.—

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469 i. *Must be wilful disobedience—Of lawful order.*]—Wilful disobedience by an employee of a lawful order of his employer is not a ground for dismissal unless the disobedience is of such a nature that it amounts to a renunciation of the contract.—ADAMI *v.* MAISON DE LUXE, LTD. (1924), 35 C. L. R. 143; [1925] V. L. R. 147.—**AUS.**

d. *Sending solicitor's letter to employer.*] — CLARK *v.* CAPP (1905), 5 O. W. R. 174; 9 O. L. R. 102.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 11.—A. (d) iii.

474 i. *Justifiable ground for dismissal.*]—ALLEN *v.* RAILWAYS COMR. (1906), 8 W. A. L. R. 178.—**AUS.**

474 ii. ——.]—It is a reasonable request to ask a fishery servant who is shipped "as a hand in a boat, or anything else in his power for the good of the voyage," to go as a hand in a boat with provisions to the scene of a wreck; his refusal to obey will justify his dismissal.—LAKEMAN *v.* GOODRIDGE (1857), 4 Nfld. L. R. 181.—**NFLD.**

474 iii. ——.]—COETZEE *v.* ARGUS PRINTING & PUBLISHING CO., [1914] C. P. D. 749.—**S. AF.**

474 iv. ——.]—It is not every act of insubordination or disobedience that will justify the summary dismissal by an employer of his servant. There must be a deliberate & serious refusal to obey an order.—MOONIAN *v.* BALMORAL HOTEL (1925), 46 N. L. R. 215.—**S. AF.**

JACQUOT *v.* BOURRA (1839), 7 Dowl. 348; 3 Jur. 776.

iv. *Justifiable Grounds for Disobedience.*

479. Apprehension of personal danger.]—The servant is not bound to risk his safety in the service of his master, & may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself (LORD ABINGER, C.B.).—PRIESTLEY *v.* FOWLER (1837), 3 M. & W. 1; Murp. & H. 305; 7 L. J. Ex. 42; 1 Jur. 987; 150 E. R. 1030.

Annotations:—**Consd.** Wiggett *v.* Fox (1856), 11 Exch. 832; Woodley *v.* Met. Dist. Ry. (1877), 2 Ex. D. 384. **Refd.** Brown *v.* Mallett (1848), 5 C. B. 599; Hutchinson *v.* York, Newcastle & Berwick Ry. (1850), 5 Exch. 343; Wigmore *v.* Jay (1850), 5 Exch. 354; Seymour *v.* Maddox (1851), 16 L. T. O. S. 387; Couch *v.* Steel (1854), 3 E. & B. 402; Southcote *v.* Stanley (1856), 1 H. & N. 247; Dynen *v.* Leach (1857), 26 L. J. Ex. 221; Scott *v.* Manchester Corpn. (1857), 26 L. J. Ex. 132; Bartonshill Coal Co. *v.* McGuire (1858), 31 L. T. O. S. 258; Bartonshill Coal Co. *v.* Reid (1858), 31 L. T. O. S. 255; Vose *v.* L. & Y. Ry. (1858), 2 H. & N. 728; Mellors *v.* Shaw (1861), 1 B. & S. 437; Riley *v.* Baxendale (1861), 6 H. & N. 445; Searle *v.* Lindsay (1861), 11 C. B. N. S. 429; Clarke *v.* Holmes (1862), 7 H. & N. 937; Waller *v.* S. E. Ry. (1863), 2 H. & C. 102; Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669; Morgan *v.* Vale of Neath Ry. (1865), 14 W. R. 144; Tunney *v.* Mid. Ry. (1866), L. R. 1 C. P. 291; Hoey *v.* Dublin & Belfast Ry. (1870), 18 W. R. 930; Fowler *v.* Lock (1872), L. R. 7 C. P. 272; Turner *v.* G. E. Ry. (1875), 33 L. T. 431; Lovell *v.* Howell (1876), 1 C. P. D. 161; Rourke *v.* White Moss Colliery Co. (1876), 1 C. P. D. 556; Swainson *v.* N. E. Ry. (1878), 3 Ex. D. 341; Gibbs *v.* G. W. Ry. (1883), 11 Q. B. D. 22; Murphy *v.* Wilson (1883), 52 L. J. Q. B. 524; Griffiths *v.* London & St. Katharine Docks Co. (1884), 13 Q. B. D. 259; Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685; Johnson *v.* Lindsay, [1891] A. C. 371; Hedley *v.* Pinkney S.S. Co., [1892] 1 Q. B. 58; Marley *v.* Osborn (1894), 10 T. L. R. 388; Groves *v.* Wimborne, [1898] 2 Q. B. 402; Tozeland *v.* West Ham Union Grdns., [1906] 1 K. B. 538; Young *v.* Hoffmann Manufacturing Co., [1907] 2 K. B. 646; Coldrick *v.* Partridge, Jones, [1910] A. C. 77; Lees *v.* Dunkerley, [1911] A. C. 5; Heasmer *v.* Pickfords (1920), 36 T. L. R. 818. **Mentd.** Metcalfe *v.* Hetherington (1855), 11 Exch. 257; Bland *v.* Ross, The Julia (1860), 14 Moo. P. C. C. 210; Bamford *v.* Turnley (1862), 3 B. & S. 66; Griffiths *v.* Dudley (1882), 9 Q. B. D. 357; The Petrel, [1893] P. 320; Watkins *v.* Naval Colliery Co. (1912), 107 L. T. 321; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523; Baker *v.* James, [1921] 2 K. B. 674.

480. ——.]—TURNER *v.* MASON, No. 463, *ante*.

481. ——.]—WIGGETT *v.* FOX, No. 86, *ante*.

482. Infectious disease in master's house.]—TURNER *v.* MASON, No. 463, *ante*.

Right of servant to determine contract of service.]—*See* Sub-sect. 12, *post*.

(*e*) *Illness.*

483. Whether justification for dismissal—Temporary illness.]—Pltf., by agreement in writing, agreed to serve deft. for the term of ten years in the capacity of a brewer: in consideration of the premises, & "of the due, full & complete service" of pltf. "as aforesaid," deft. agreed to pay pltf. £20 on execution of the agreement, to furnish him with a house & coals "during the whole of the said term of ten years," & to pay him "the weekly sum of £2 10*s.* during the said term of ten years." Pltf. entered into deft.'s service under the agreement. Some years afterwards, pltf. fell ill, & was unable to attend personally to business; but during that time he instructed deft., at deft.'s request, in the art of brewing. Deft. refused to pay pltf. his wages for the period during which he had been ill, but retained him in the service; &, after he was able to attend again personally to business, paid him as before under the agreement. To an action by pltf. to recover wages for the period during which he had been ill, deft. pleaded that pltf. was not, during any part of the time for which such wages were claimed, ready & willing or able to render, & did not in fact during any part of such time render, the agreed or any service:—*Held:* the averment that pltf. was not ready & willing, etc., was not supported by his physical inability, for a time only, & not through his own default, to attend personally to the business: & the contract not having been rescinded, deft. was not entitled to suspend the weekly payments during that time; & pltf. was therefore entitled to a verdict.

If pltf., from unskilfulness, had been wholly incompetent to brew, or by the visitation of God he had become from paralysis or any other bodily illness permanently incompetent to act in the capacity of brewer for deft., we think that deft. might have determined the contract. He could not be considered incompetent by illness of a temporary nature; but if he had been struck with disease so that he could never be expected to return to his work, we think deft. ought to have dismissed him & employed another brewer in his stead (LORD CAMPBELL, C.J.).—CUCKSON *v.* STONES (1858), 1 E. & E. 248; 28 L. J. Q. B. 25; 32 L. T. O. S. 242; 5 Jur. N. S. 337; 7 W. R. 134; 120 E. R. 902.

Annotations:—**Apld.** K—— *v.* Raschen (1878), 38 L. T. 38; Warren *v.* Whittingham (1902), 18 T. L. R. 508. **Distd.** Niblett *v.* Mid. Ry. (1906), 23 T. L. R. 240. **Consd.** Storey *v.* Fulham Steel Works Co. (1907), 23 T. L. R. 306. **Apld.** Warburton *v.* Co-op. Wholesale Soc., [1917] 1 K. B. 663. **Refd.** Loates *v.* Maple (1903), 88 L. T. 238; Nordman *v.* Rayner & Sturges (1916), 33 T. L. R. 87; Price *v.* Guest, Keen & Nettlefolds, [1917] 1 K. B. 780; Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522.

484. ——.]—A. enters the service of B. & is ill & cannot perform his work. No action will lie against him; but B. may hire a fresh servant & not wait his recovery, & if his illness would put an end, in a business sense, to their business engagement & would frustrate the object of that engagement: a short illness would not suffice, if consistent with the object they had in view (BRAMWELL, B.).—JACKSON *v.* UNION MARINE INSURANCE CO. (1874), L. R. 10 C. P. 125; 44 L. J. C. P. 27; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. L. C. 435, Ex. Ch.

Annotations:—**Apld.** Storey *v.* Fulham Steel Works Co. (1907), 24 T. L. R. 89. **Refd.** Poussard *v.* Spiers (1876), 1 Q. B. D. 410. **Mentd.** De Wolf *v.* Archangel Bank & Insce. (1874), L. R. 9 Q. B. 451; Hudson *v.* Hill (1874), 43 L. J. C. P. 273; King *v.* Parker (1876), 34 L. T. 887; Dahl *v.* Nelson, Donkin (1880), 6 App. Cas. 38; Inman S.S. Co. *v.* Bischoff (1882), 7 App. Cas. 670; Bush *v.* Whitehaven Town & Harbour Trustees (1888), 52 J. P. 392; The Alps, [1893] P. 109; *Re* Jamieson & Newcastle Steamship Freight Insce. Assocn., [1895] 2 Q. B. 90; Bensaude *v.* Thames & Mersey Marine Insce. (1896), 75 L. T. 155; Carlton S.S. Co. *v.* Castle Mail Packets Co. (1898), 78 L. T. 661; Weir *v.* Pirie (No. 2) (1898), 3 Com. Cas. 271; Nickoll & Knight *v.* Ashton, Edridge (1900), 69 L. J. Q. B. 640; Turnbull, Martin *v.* Hull Underwriters' Assocn., [1900] 2 Q. B. 402; Manchester Liners *v.* British & Foreign Marine Insce. (1901), 18 T. L. R. 183; Herne Bay Steam Boat Co. *v.* Hutton, [1903] 2 K. B. 683; Krell *v.* Henry, [1903] 2 K. B. 740; *Re* Carver & Sassoon (1911), 17 Com. Cas. 59; Dunford *v.* Cia Anon. Maritima Union (1911), 104 L. T. 811; Embiricos *v.* Reid, [1914]

PART IV. SECT. 2, SUB-SECT. 11.—A. (d) iv.

e. Servant too ill to obey order.]—A master is not justified in dismissing a servant for refusal to obey an order to do certain work if the state of the servant's health is such that he is not fit to do the work.—MICHAUD *v.* STROOBANTS (Sask.), [1919] 3 W. W. R. 46. —**CAN.**

f. Refusal to do work outside scope of employment.]—COOK *v.* STABB & ROCHE (1888), 7 Nfld. L. R. 240.—**NFLD.**

g. ——.]—MOFFAT *v.* BOOTHBY (1884), 11 R. (Ct. of Sess.) 501; 21 Sc. L. R. 342.—**SCOT.**

h. ——.]—A servant may rightly refuse to do work which does not come within the scope of the duties he has undertaken to perform.—OATEN *v.* BENTWITCH & LICHTENSTEIN, [1903] T. H. 118.—**S. AF.**

PART IV. SECT. 2, SUB-SECT. 11. A. (e).

483 *i. Whether justification for dismissal—Temporary illness.*]—MANSON *v.* DOWNIE (1885), 12 R. (Ct. of Sess.) 1103; 22 Sc. L. R. 741.—**SCOT.**

Sect. 2.—Termination: Sub-sect. 11, A. (e), (f) & (g) i.]

3 K. B. 45; Porter *v.* Tottenham U. C., [1915] 1 K. B. 776; Smith, Coney & Barrett *v.* Becker, Gray (1915), 112 L. T. 914; Horlock *v.* Beal, [1916] 1 A. C. 486; Leiston Gas Co. *v.* Leiston-cum-Sizewell U. C., [1916] 2 K. B. 428; Millar *v.* Taylor, [1916] 1 K. B. 402; Tamplin S.S. Co. *v.* Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 397; Heilgers *v.* Cambrian Steam Navigation Co. (1917), 33 T. L. R. 348; Inverkip S.S. Co. *v.* Bunge, [1917] 2 K. B. 193; Scottish Navigation Co. *v.* Souter, Admiralty Shipping Co. *v.* Weidner, Hopkins, [1917] 1 K. B. 222; Blackburn Bobbin Co. *v.* Allen, [1918] 2 K. B. 467; Countess of Warwick S.S. Co. *v.* Nickel Soc. Anon., Anglo-Northern Trading Co. *v.* Emlyn Jones & Williams, [1918] 1 K. B. 372; Metropolitan Water Board *v.* Dick, Kerr, [1918] A. C. 119; Naylor, Benzon *v.* Krainische Industrie-Gesellschaft, [1918] 1 K. B. 331; Akt. Olivebank *v.* Dansk Svovlsyre Fabrik, [1919] 2 K. B. 162; Bank Line *v.* Capel, [1919] A. C. 435; Comptoir Commercial Anversois *v.* Power, [1920] 1 K. B. 868; Larrinaga *v.* Soc. Franco-Americaine des Phosphates de Medulla (1923), 92 L. J. K. B. 455; Hirji Muljі *v.* Cheong Yue S.S. Co., [1926] A. C. 497.

485. —— Permanent incapacity.]—CUCKSON *v.* STONES, No. 483, *ante.*

486. —— Illness frustrating object of engagement.]—JACKSON *v.* UNION MARINE INSURANCE CO., No. 484, *ante.*

Whether contract dissolved.]—*See* CONTRACT, Vol. XII., pp. 377, 378, Nos. 3115–3124.

Insanity of servant.]—*See* Sub-sect. 4, *ante.*

(f) Incompetency.

487. Justifiable ground for dismissal.]—When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes.

Misconduct in a servant is . . . a justification of a discharge. The failure to afford the requisite skill which had been expressly or impliedly promised, is a breach of legal duty, & therefore misconduct (WILLES, J.).—HARMER *v.* CORNELIUS (1858), 5 C. B. N. S. 236; 28 L. J. C. P. 85; 32 L. T. O. S. 62; 22 J. P. 724; 4 Jur. N. S. 1110; 6 W. R. 749; 141 E. R. 94.

Annotations:—**Refd.** Cuckson *v.* Stones (1858), 1 E. & E. 248. **Mentd.** Andrewes *v.* Garstin (1861), 10 C. B. N. S. 444.

488. ——.]—CUCKSON *v.* STONES, No. 483, *ante.*

489. ——.]—SEARLE *v.* RIDLEY, No. 681, *post.*

——.]—*See, further,* AGENCY, Vol. I., pp. 543, 692, Nos. 1964, 3011.

490. Not temporary inefficiency — Unless going to root of contract.]—HARLEY *v.* HENDERSON (1884), *Times*, Feb. 18, 19.

491. Genuine dissatisfaction of employer — Though no good grounds—Contract to serve to employer's satisfaction.]—By an agreement in writing defts. engaged pltf. as shop superintendent. The agreement provided that the engagement should be for one year, subject to pltf.'s carrying out his duties to the satisfaction of the directors. Before the expiration of the year defts. dismissed pltf. on the ground that he had not carried out his duties satisfactorily. In an action brought by pltf. to recover damages for wrongful dismissal the jury found that defts. were genuinely dissatisfied with pltf.'s discharge of his duties; but that they had no good grounds for such dissatisfaction. The county ct. judge entered judgment for defts.:—*Held:* upon the findings of the jury judgment was properly entered for defts., inasmuch as genuine dissatisfaction was sufficient to entitle them to terminate the agreement, & their reasons for such dissatisfaction were immaterial.—DIGGLE *v.* OGSTON MOTOR CO. (1915), 84 L. J. K. B. 2165; 112 L. T. 1029, D. C.

(g) Misconduct.

i. In General.

492. Justifiable ground for dismissal.] — BEESTON *v.* COLLYER, No. 277, *ante.*

493. ——.]—WISE *v.* WILSON, No. 542, *post.*

494. ——.]—HARMER *v.* CORNELIUS, No. 487, *ante.*

495. ——.]—By an agreement in writing deft. engaged pltf., who was of full age, as an improver to the trade of watch repairing, & undertook to teach pltf. or cause him to be taught for two years. Pltf. paid a premium & was paid a weekly wage & undertook to employ himself industriously & to the best of his abilities. The agreement also provided that pltf. should work the weekly standard hours, & that any short time occasioned by pltf. either by sickness or any other cause should be deducted from his weekly wage in proportion to the loss of time, & that any overtime worked should be paid for in the same ratio. Pltf. having been dismissed for gross misconduct during the currency of the agreement, sued deft. for damages for breach of contract:—*Held:* on the construction of the agreement, it was not a contract of apprenticeship, & deft. was entitled to dismiss pltf.—JAMES *v.* KRAUTH (1910), 26 T. L. R. 240, D. C.

496. ——.]—*Re* RUBEL BRONZE & METAL CO. & VOS, No. 782, *post.*

497. —— Whether knowledge of master essential.]—RIDGWAY *v.* HUNGERFORD MARKET CO., No. 510, *post.*

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485 i. —— *Permanent incapacity.*]—Where a contract for service provided that it could be terminated by either party giving the other a month's notice therefor or by the employer paying or the employee forfeiting a month's wages:—*Held:* illness of the employee by which he is permanently incapacitated from performing his service would itself terminate the contract.—DARTMOUTH FERRY COMMISSION *v.* MARKS (1904), 34 S. C. R. 366.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 11.—A. (f).

487 i. *Justifiable ground for dismissal.*]—A servant hiring for the performance of specified duties impliedly warrants that he is possessed of the requisite skill, & if he have it not he may be dismissed.—FENERON *v.* O'KEEFE (1884), 2 Man. L. R. 40.—**CAN.**

487 ii. ——.]—PARSONS *v.* CHANDLER (1906), 1 E. L. R. 176.—**CAN.**

487 iii. ——.]—ALLCROFT *v.* ADAMS (1907), 27 C. L. T. 239; 38 S. C. R. 365.—**CAN.**

487 iv. ——.]—*Held:* the circumstances of the case justified the discharge, the employment being an important one & the result of the same being a heavy financial loss due chiefly to the incompetence of pltf.—BASHFORTH *v.* PROVINCIAL STEEL CO., LTD. (1913), 24 O. W. R. 334; 4 O. W. N. 1019; 10 D. L. R. 187.—**CAN.**

487 v. ——.] — Unskilfulness in a servant is no ground for dismissal unless it amounts to absolute incompetence.—WILLIAMS *v.* GREAT EASTERN HOTEL CO. (1864), Cor. 76; 2 Hyde, 166.—**IND.**

491 i. *Genuine dissatisfaction of employer—Though no good grounds—Contract to serve to employer's satisfaction.*]—Pltf. was appointed by deft. co. "subject to satisfactory service":—*Held:* in an action for damages for wrongful dismissal, the question for the jury was whether defts.' dissatisfaction was honestly entertained.—CONNOLLY *v.* THE LABOR DAILY, LTD. (1925), 25 S. R. N. S. W. 398; 42 N. S. W. W. N. 109.—**AUS.**

PART IV. SECT. 2, SUB-SECT. 11.—A. (g) i.

497 i. *Justifiable ground for dismissal—Whether knowledge of master essential.*]—Improper acts of a servant previous to his dismissal, but unknown at the time of dismissal, justify the dismissal, though occurring long before.—GOBY *v.* GORDON IRONSIDES & FARES CO. (1910), 15 W. L. R. 258.—**CAN.**

497 ii. ——.]—A master cannot plead, in justification of the summary dismissal of his servant, a cause the existence of which was unknown to him at the time of such dismissal.—DEBARSEE *v.* JOUGUET (1874), 6 N. W. 130.—**IND.**

497 iii. ——.]—In an action for damages for wrongful dismissal a plea of justification can be supported on facts which were in existence at the time of the dismissal, but which were only ascertained subsequently by the

498. ——— ———.]—CUSSONS *v.* SKINNER, No. 505, *post.*

499. ——— ———.]—(1) **A knowledge of a servant's misconduct is not essential to justify his dismissal.**

(2) Wherever pltf. has anything to prove, either to obtain a verdict or to ascertain the amount of damages, he has the right to begin, although in form the affirmative of the issues be upon deft.—MERCER *v.* WHALL (1845), 5 Q. B. 447; 1 New Pract. Cas. 246; 14 L. J. Q. B. 267; 5 L. T. O. S. 304; 9 Jur. 576; 114 E. R. 1318.

Annotations:—As to (1) **Refd.** Lomax *v.* Arding (1855), 10 Exch. 734; Philps *v.* Clift (1859), 28 L. J. Ex. 153; Raymond *v.* Minton (1866), L. R. 1 Exch. 244. *As to* (2) **Refd.** Cannam *v.* Farmer (1849), 3 Exch. 698.

500. ——— ———.]—(1) If an employer discharge his servant, & at the time of the discharge a good cause of discharge in fact exists, the employer is justified in discharging the servant, although at the time of the discharge the employer did not know of that cause.

(2) If a traveller receive part of a bill due to his employer in cash, & set off the residue against a debt due from himself to the debtor, & afterwards render to his employer an account of the cash, but omit to mention the set-off. *Semble:* this would not be a good ground of discharge unless it were done fraudulently & wilfully.—WILLETS *v.* GREEN (1850), 3 Car. & Kir. 59.

501. ——— ———.]—SPOTSWOOD *v.* BARROW, No. 530, *post.*

502. ——— ———.]—The promoter of pltf. co. agreed with deft. that he should be employed as managing director of the intended co. for five years at a yearly salary. By the arts. of assocn. it was provided that deft. should be managing director for five years at the yearly salary mentioned in the agreement, payable quarterly. Afterwards the co. by a written instrument adopted the agreement between the promoter & deft. Deft., on behalf of the co., contracted for the construction of certain fishing smacks, &, unknown to the co., took a commission from the shipbuilders on the contract. Several months afterwards pltf. co. at an extraordinary meeting passed a resolution dismissing deft. from his office on the ground of other alleged acts of misconduct, which they were not able to substantiate in the action: being at that time ignorant of his receipt of the commission from the shipbuilders. Deft. was a shareholder in an ice co. & a fish carrying co., which paid, in addition to the ordinary dividends, bonuses to shareholders who were owners of fishing smacks & who employed the cos. in supplying ice & carrying for them. Deft. employed these cos. in respect of pltfs.' smacks, & received bonuses as if the smacks were his own. Pltf. co. brought an action against deft. for an account of commissions & bonuses received by him, & for damages for alleged breaches of duty; & deft. counterclaimed for wrongful dismissal & for the salary for the quarter which had expired before his dismissal:—*Held:* (1) the receipt of a commission from the shipbuilding co. was good ground for dismissal, although it was not discovered till after the dismissal had taken place; & although it happened several months previously, & might have been an isolated act, deft. must account to pltfs. for the bonuses received from the ice & carrying cos., as they had been paid in respect of pltfs.' smacks: although pltfs. could not themselves have received the bonuses, not being shareholders of the cos.; (2) the contract between pltfs. & deft. was contained in the agreement between the promoter & deft. as adopted by the co., & was not modified by the arts. of assocn., the salary was consequently payable yearly & not quarterly, &, therefore, deft. having been dismissed for misconduct was not entitled to any part of the unpaid salary for the current year of his service.

(3) It is prejudicial to the interests of the co., when a man whose duty it is to buy at the lowest price enters into a bargain which makes it his interest to buy at the highest (FRY, L.J.).—BOSTON DEEP SEA FISHING & ICE CO. *v.* ANSELL (1888), 39 Ch. D. 339; 59 L. T. 345, C. A.

Annotations:—As to (1) **Apld.** Rhodes *v.* Macalister (1923), 29 Com. Cas. 19. **Refd.** Costa Rica Ry. *v.* Forwood, [1901] 1 Ch. 746; Erskine, Oxenford *v.* Sachs, [1901] 2 K. B. 504; Swale *v.* Ipswich Tannery (1906), 11 Com. Cas. 88; *Re* Famatina Development Corpn., [1914] 2 Ch. 271; Taylor *v.* Oakes, Roncoroni (1922), 127 L. T. 267; Adams *v.* Morgan, [1923] 2 K. B. 234. *As to* (2) **Refd.** Healey *v.* Soc. Anon. Française Rubastic, [1917] 1 K. B. 946. *Generally,* **Refd.** General Billposting Co. *v.* Atkinson, [1908] 1 Ch. 537; Federal Supply & Cold Storage Co. of South Africa *v.* Angehrn & Piel (1910), 80 L. J. P. C. 1.

503. Degree of misconduct — No fixed rule of law—Question for jury.]—CLOUSTON & CO., LTD. *v.* CORRY, No. 509, *post.*

504. Dismissal on other grounds—Misconduct a defence to action.]—BAILLIE *v.* KELL, No. 526, *post.*

505. ——— ——— **When known to master at time of dismissal.**]—(1) To an action against defts., proprietors of a cotton manufactory, for refusing to employ pltf. as manager pursuant to agreement, & discharging him from their service before the period mentioned in the agreement; defts. pleaded that pltf. so wrongfully, disobediently, & unskilfully conducted himself as such manager, that they, defts., suffered & sustained great loss, to wit, to the amount of £1,000, etc.:—*Held:* in order to support such a plea, it was necessary to show, not only disobedience, but such disobedience as occasioned a loss, & there being no evidence of any loss, that the plea was not supported.

(2) Where there has been disobedience, or an act of misconduct by a servant, known to the master at the time he discharges him, although the master does not mention that as the precise ground of discharge, he may afterwards, by showing that the fact existed, & that he knew it, justify such discharge. *Semble:* it is otherwise where the act of misconduct was not known to the master at the time of the discharge, as it could not then be the cause of it.—CUSSONS *v.* SKINNER (1843), 11 M. & W. 161; 12 L. J. Ex. 347; 152 E. R. 758.

Annotation:—Generally, **Refd.** Pearce *v.* Foster (1885), 55 L. J. Q. B. 121.

506. Time from which dismissal operates—Where antecedent misconduct—Not being ground of dismissal.]—Pltf. was appointed managing director of deft. co. for fifteen years at an annual

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master.—KENRICK *v.* CENTRAL DIAMOND MINING CO. (1885), 3 H. C. 414. —**S. AF.**

497 iv. ——— ———.]—HAUPT *v.* DIEBEL BROTHERS (1888), 5 H. C. 185.—**S. AF.**

497 v. ——— ———.]—Where certain managing directors of a co. engaged under a contract of service had been suspended by the directors, & summarily dismissed by the co., & thereupon brought an action for damages for wrongful dismissal against the co.:—*Held:* the co. was entitled to rely upon facts not known to the directors at the time of the suspension, nor to the shareholders at the time of the dismissal.—NOURSE *v.* FARMERS' CO-OPERATIVE CO., LTD. (1905), 19 E. D. C. 291.—**S. AF.**

k. ***Misconduct previous to employment—Whether grounds for dismissal.***]—In an action to recover damages for wrongful dismissal it is not *ipso facto* a justification for the dismissal that pltf., in a previous employment by another person, was guilty of acts of misconduct.—GORDON & GOTCH (AUSTRALASIA), LTD. *v.* COX (1923), 31 C. L. R. 370.—**AUS.**

l. ——— ———.]—Misconduct of an

Sect. 2.—*Termination: Sub-sect.* 11, *A.* (*g*) *i., ii. & iii.*]

salary payable monthly, & it was paid at the end of each month down to the end of May, 1915. Before that date pltf. had been guilty of misconduct justifying dismissal, & in Oct. 1915, he was dismissed, but this misconduct, although suspected, was not made the ground of dismissal. Pltf. brought an action for wrongful dismissal claiming (*a*) salary for the months between May & Oct. 1915, & (*b*) damages, & at the trial defts. relied on the misconduct which took place before May, 1915, & on the contention that after that date pltf.'s omission to confess his misconduct was a breach of his contract. The jury found that the dismissal was justified, & the question of pltf.'s right to salary for the months between May & Oct. 1915, was left to the judge:—*Held:* pltf.'s right to salary became vested at the end of each month, his omission to disclose his own misdoing was not a breach of contract, & the right of defts. to determine the contract in Oct. 1915, by reason of antecedent misconduct subsequently discovered did not entitle them to treat it as determined from any date earlier than Oct. 1915, & therefore pltf. was entitled to recover salary for the months between May & Oct. 1915.—HEALEY *v.* SOCIÉTÉ ANONYME FRANÇAISE RUBASTIC, [1917] 1 K. B. 946; 86 L. J. K. B. 1254; 117 L. T. 92; 33 T. L. R. 300.

ii. *Conduct Inconsistent with Service.*

507. General rule.]—Pltf. had been employed as clerk by defts., who were merchants, for many years, & ultimately they agreed to retain him in their employment for a term of ten years. Before the expiration of that period defts. discovered that pltf. had for many years previously been engaged in speculating in differences upon the Stock Exchange to the extent of many hundreds of thousands of pounds, & they thereupon dismissed him from their service:—*Held:* the dismissal of pltf. was justifiable.

The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. . . . But if a servant is guilty of such a crime outside his service as to make, & unsafe for a master to keep him in his employ, the servant may be dismissed by his master; & if the servant's conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him (LORD ESHER, M.R.).—PEARCE *v.* FOSTER (1886), 17 Q. B. D. 536; 55 L. J. Q. B. 306; 54 L. T. 664; 51 J. P. 213; 34 W. R. 602; 2 T. L. R. 534, C. A.

508. ——.]—A servant can only be dismissed without notice on account of misconduct so serious as to be inconsistent with the continuance of the relationship of master & servant.—PROCTER *v.* BACON (1886), 2 T. L. R. 845.

509. ——.]—(1) There is no fixed rule of law defining the degree of misconduct which will justify dismissal from service.

(2) It is a question for the jury whether the degree of misconduct was inconsistent with the fulfilment of the express or implied conditions of service, so as to justify dismissal.

The judge should not submit any issue to them if, in his opinion, no evidence of justification has been given. If he submits the issue he should direct, guide & assist them; direct, by informing them of the nature of the acts which as a matter of law would justify dismissal; guide, by calling their attention to the material facts; assist, in a manner & to an extent which there is no reason to define.

In an action for wrongful dismissal where a plea of justification was substantially set up:—*Held:* the judge was right in submitting the issues of fact to the jury; the verdict for pltf. was so unsatisfactory it ought not to be maintained.

(3) Certainly when the alleged misconduct consists of drunkenness there must be considerable difficulty in determining the extent or conditions of intoxication which will establish a justification for dismissal. The intoxication may be habitual & gross, & directly interfere with the business of the employer or with the ability of the servant to render due service. But it may be an isolated act committed under circumstances of festivity & in no way connected with or affecting the employer's business. In such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts—& is a question of fact (LORD JAMES OF HEREFORD).—CLOUSTON & CO., LTD. *v.* CORRY, [1906] A. C. 122; 75 L. J. P. C. 20; 93 L. T. 706; 54 W. R. 382; 22 T. L. R. 107, P. C.

Annotations:—As to (1) **Folld.** Thompson *v.* British Berna Motor Lorries (1917), 33 T. L. R. 187. *Generally,* **Mentd.** Skeate *v.* Slaters, [1914] 2 K. B. 429.

510. What amounts to—Entering protest on minute book—Clerk in employment of company.]—(1) A servant, discharged for improper conduct, cannot recover any part of the salary current from the last pay day at the time of his dismissal. A master, who has dismissed a servant, may justify the dismissal by showing that at the time of the dismissal he knew the servant to have committed an act which justified it: & a jury ought not to be asked whether the master was induced to dismiss him by that act or by some other cause. A clerk employed by a co. to enter proceedings in their minute book, entered on the margin of the minute book a protest in his own name against a summons for appointing a successor to himself:—*Held:* a jury were justified in finding this to be a sufficient cause of dismissal.

The master is justified in dismissing him for misconduct, & in that case he cannot recover *pro rata.* The act of entering the protest on the minute book was inconsistent with his service (COLERIDGE, J.).

I think the justification would be good, even if the fact, existing at the time, were not known to the master. . . . I think the existence of the justification sufficient whether that was or was not the motive of the dismissal (LORD DENMAN, C.J.).

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employee justifying dismissal may take place before or after the commencement of the period of employment.—DILKS *v.* POSTMAS DIAMOND PROSPECT, LTD., [1921] W. L. D. 4.—**S. AF.**

PART IV. SECT. 2, SUB-SECT. 11.—A. (*g*) ii.

507 i. *General rule.*]—In an action for wrongful dismissal, if the employee's conduct is such as to be clearly inconsistent with his duties to his employer the ct. should not leave the justification of the dismissal to the jury, but should nonsuit pltf.—FIELDHOUSE *v.* OPPENHEIMER & CO. (1915), 34 N. Z. L. R. 1104.—**N.Z.**

m. *What amounts to—Speculating on Stock Exchange.*]—PRIESTMAN *v.* BRADSTREET (1888), 15 O. R. 558.—**CAN.**

n. —— *Using information obtained through employment for own benefit.*]—A servant is not entitled to obtain for himself, by means of information acquired by him while acting in the employ & on the instructions of his master, a benefit coming within the scope of his master's business.—MAY *v.* RAW & CO. (1881), 2 N. L. R. 158.—**S. AF.**

o. —— *Coachman taking out own friends.*] — *Held:* a mistress was

(2) Pltf. declared that defts., a co., had employed him at a quarterly salary; the minute book of his appointment showed an annual salary only, but several quarterly payments were proved, & no annual one. *Semble:* no variance appeared.

Qu.: whether, if a servant, hired for a year, be improperly dismissed in the middle of a year, he can sue in *assumpsit* for the wages for that year or is confined to a special action for an improper dismissal.—RIDGWAY *v.* HUNGERFORD MARKET CO. (1835), 3 Ad. & El. 171; 1 Har. & W. 244; 4 Nev. & M. K. B. 797; 4 L. J. K. B. 157; 111 E. R. 378.

Annotations:—*As to* (1) **Distd.** Mercer *v.* Whall (1845), 5 Q. B. 447. **Consd.** Pearce *v.* Foster (1886), 34 W. R. 602. **Refd.** Cussons *v.* Skinner (1843), 11 M. & W. 161; Lomax *v.* Arding (1855), 10 Exch. 734; *Re* Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315. *As to* (2) **Refd.** Davis *v.* Marshall (1861), 4 L. T. 216. *Generally*, **Refd.** Taylor *v.* Carr (1861), 30 L. J. M. C. 201; Moriarty *v.* Regent's Garage Co., [1921] 1 K. B. 423. **Mentd.** Giraud *v.* Richmond (1846), 2 C. B. 835; Taylor *v.* Oakes, Roncoroni (1922), 127 L. T. 267.

511. —— Drawing bills for salary before due.]—GOULD *v.* WEBB, No. 558, *post.*

512. —— Speculating on Stock Exchange—Confidential clerk.]—PEARCE *v.* FOSTER, No. 507, *ante.*

513. —— Question for jury.]—CLOUSTON & CO., LTD. *v.* CORRY, No. 509, *ante.*

iii. *Conduct Prejudicial to Master's Interests.*

514. Betraying secrets of master.]—BEESTON *v.* COLLYER, No. 277, *ante.*

515. Assisting apprentice to quit master's service.]—TURNER *v.* ROBINSON (1833), 6 C. & P. 15, N. P.; *subsequent proceedings*, 5 B. & Ad. 789.

Annotations:—**Refd.** Thomas *v.* Williams (1834), 3 L. J. K. B. 202; Ridgway *v.* Hungerford Market Co. (1835), 3 Ad. & El. 171; Healey *v.* Soc. Anon. Française Rubastic, [1917] 1 K. B. 946.

516. Conduct injurious to master's business—Acting manager of theatre.]—If the acting manager of a theatre conducts himself in such an improper manner as to make it injurious to the interests of the theatre to keep him, the lessee or proprietor may lawfully dismiss him.—LACY *v.* OSBALDISTON (1837), 8 C. & P. 80, N. P.

Annotation:—**Consd.** Pearce *v.* Foster (1886), 34 W. R. 602.

517. —— Surgeon's assistant.]—WISE *v.* WILSON, No. 542, *post.*

518. Claim to partnership—Managing clerk.]—If a clerk, retained at a salary to manage a mercantile business, declares that he is a partner, & will transact the business as such, the employer may immediately dismiss him. Although the party has not committed any other act of misconduct, nor refused, in terms, to go on as clerk.—AMOR *v.* FEARON (1839), 9 Ad. & El. 548; 2 Will. Woll. & H. 81; 1 Per. & Dav. 398; 8 L. J. Q. B. 95; 112 E. R. 1320.

Annotations:—**Refd.** Turner *v.* Mason (1845), 14 M. & W. 112; East Anglian Ry. *v.* Lythgoe (1851), 10 C. B. 726. **Mentd.** Lush *v.* Russell (1849), 14 L. T. O. S. 157.

519. Failure to promote master's interest—Manager of iron-works.]—Declaration stated, that pltf. agreed with deft. to serve him for three years, as manager of certain iron-works at the salary of £4 per week, upon the terms, that pltf. would, during that time, use his best endeavours to promote the interest of deft., & attend to & carry out all reasonable requests made to him by deft. The declaration after stating that pltf. entered into such service, etc., alleged as a breach, the wrongful dismissal by deft. of pltf. from the service without any reasonable or probable cause, & deft.'s refusal to pay pltf. any salary after such dismissal.

Plea: that pltf. did not, whilst he was in deft.'s employ under the agreement, use his best endeavours to promote the interest of deft., according to the agreement; therefore deft. dismissed pltf., & refused to pay him any salary after such dismissal:—*Held:* on demurrer, the plea was good.

Suppose pltf. had conducted himself on all occasions in a negligent & lazy spirit, there may be insuperable difficulty in a legal definition of pltf.'s conduct, & yet deft. would be justified in discharging him from his service (POLLOCK, C.B.).—LOMAX *v.* ARDING (1855), 10 Exch. 734; 24 L. T. O. S. 244; 156 E. R. 636; *sub nom.* ARDING *v.* LOMAX, 24 L. J. Ex. 80; 19 J. P. 151.

520. Sale of goods to brothel keeper—Commercial traveller.]—BLENKARN *v.* HODGES' DISTILLERY CO., LTD., No. 562, *post.*

521. Promoting insubordination—Ship's officer.]—The owners of a vessel have a right to dismiss an officer who directly or indirectly promotes

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entitled to dismiss her coachman for having, against her orders, carried friends of his own in her carriage.—THOMSON *v.* STEWART (1888), 15 R. (Ct. of Sess.) 806; 25 Sc. L. R. 541.—**SCOT.**

PART IV. SECT. 2, SUB-SECT. 11.—A. (g) iii.

514 i. *Betraying secrets of master.*]—In an action for wrongful dismissal by a servant of a telegraph co., who is employed under a written agreement containing no obligation in it for secrecy or preventing disclosure of the co.'s business, it is no defence to set up that the servant disclosed the contents of a telegraph message which went through the co.'s offices.—MORISON *v.* TELEGRAPH CO. (1859), 4 Nfld. L. R. 328.—**NFLD.**

p. *Conduct injurious to master's business—Hospital nurse.*]—In an action claiming damages for wrongful dismissal of pltf. as a nurse or nurse in training in the hospital controlled or operated by deft. corpn. deft. justified pltf.'s dismissal on the ground that while a member of the training school in connection with the hospital, she so misconducted herself as to bring discredit upon the institution.—MCKAY *v.* ST. JOSEPH'S HOSPITAL BOARD (1921), 54 N. S. R. 140; 56 D. L. R. 581.—**CAN.**

q. *Contracting bargain prejudicial to duty.*]—Where a servant has proposed to a third person to enter upon a course of action prejudicial to his master's interests, the master is justified in dismissing him.—LANGHORNE *v.* BENNETT (1877), 3 V. L. R. (L.) 108.—**AUS.**

r. ——.]—GRAHAM *v.* PATON, LTD., [1917] S. C. 203.—**SCOT.**

t. *Carrying on business in competition with employer.*]—Pltf. was engaged by deft. for two years as clerk, & shortly afterwards entered into partnership with other parties for the purpose of carrying on the same kind of business as his employer:—*Held:* this was such a breach of duty as would justify his dismissal.—TOZER *v.* HUTCHISON (1869), 1 Han. 540.—**CAN.**

s. *Acting as agent for rival insurance company.*]—To act as agent for a rival insurance co. is a breach of an insurance agent's agreement, "to fulfil conscientiously all the duties assigned to him, & to act constantly for the best interest of his employer," & is sufficient justification for his dismissal.—EASTMURE *v.* CANADA ACCIDENT INSURANCE CO. (1896), 25 S. C. R. 691.—**CAN.**

b. *Railway servant drinking on duty.*]—It is good cause for the summary dismissal by a ry. co. of one of its employees that he was proved while on duty to have drunk intoxicating liquor with other employees.—MARSHALL *v.* CENTRAL ONTARIO RY. CO. (1897), 28 O. R. 241.—**CAN.**

c. *Making defamatory statement of master.*]—MCGEORGE *v.* ROSS (1901), 5 Terr. L. R. 116.—**CAN.**

d. ——.]—LEONARD *v.* SCOTT (1894), 11 S. C. 358.—**S. AF.**

e. *Commission agent borrowing from customers.*]—MCDOUGAL *v.* VAN ALLEN (1909), 14 O. W. R. 173; 19 O. L. R. 351.—**CAN.**

f. *Single acts harmless—Injurious in the aggregate.*]—A servant whose conduct is injurious to his master's interests may be dismissed where such conduct consists of an accumulation of acts which, occuring singly, would not in themselves justify dismissal.—BURNETT *v.* DISTRIBUTING AGENCY, LTD., [1923] N. Z. L. R. 169.—**N.Z.**

g. *Untrustworthiness.*]—In an action for wrongful dismissal by an employee who occupied a responsible position the dismissal will be held to have been justified where his untrustworthiness for the position is disclosed by the evidence on the trial.—ASPINALL *v.* MID-WEST COLLIERIES, [1926] 3 D. L. R. 362; [1926] 2 W. W. R. 456; 22 Alta. L. R. 225; *affg.*, [1926] 2 D. L. R. 258.—**CAN.**

Sect. 2.—*Termination: Sub-sect.* 11, *A.* (*g*) *iii., iv., v., vi. & vii.*]

insubordination, & such officer has no right to wages otherwise due to him by agreement after such dismissal.—THE MARINA (1881), 50 L. J. P. 33; 29 W. R. 508.

522. Contracting prejudicially to employer—Company's agent.]—BOSTON DEEP SEA FISHING & ICE CO. *v.* ANSELL, No. 502, *ante.*

iv. *Unlawful and Dishonest Conduct.*

523. General rule.] — In an action against a master for breach of his covenants in an indenture of apprenticeship pleaded that the apprentice defrauded & robbed him, so that it became unsafe to continue the said apprentice in his service, whereupon, etc.:—*Held:* the plea was no answer to the action.—PHILLIPS *v.* CLIFT (1859), 4 H. & N. 168; 28 L. J. Ex. 153; 32 L. T. O. S. 282; 23 J. P. 120; 5 Jur. N. S. 74; 7 W. R. 295; 157 E. R. 801.

Annotations:—**Consd.** Learoyd *v.* Brook, [1891] 1 Q. B. 431. **Refd.** Westwick *v.* Theodar (1875), 39 J. P. 646; Waterman *v.* Fryer, [1922] 1 K. B. 499.

524. Dishonesty.] — If a servant robs his master he may, though a month's notice is required, dismiss him without any notice, & need not pay him a month's wages; & if he is negligent in his business & injures his master, I am not prepared to say that the master may not dismiss him, as if he were kept, it might be very injurious, as he might do the business very carelessly when he knew he was not to be kept any longer (PARKE, J.).—CUNNINGHAM *v.* FONBLANQUE (1833), 6 C. & P. 44, N. P.

525. ——.]—*Re* RUBEL BRONZE & METAL CO. & VOS, No. 782, *post.*

526. Fraud.] — To a count in *assumpsit* for the breach of an agreement to continue pltf. in the employ of defts., members of a co., as an accountant, defts. pleaded, that pltf. received moneys of the co. for which he neglected to account, that he made wrongful & improper payments on account of the co., that he made false, fraudulent, & improper entries in the books & accounts, & rendered false, fraudulent, & fabricated accounts of pretended payments, that he made false, fraudulent, & fictitious representations of things done by him as accountant, that he refused to obey the commands of defts., that his accounts were so incorrectly, unskilfully, & improperly kept as to be utterly valueless to defts., & that he was unfit & incompetent to perform the duties of an accountant. Pltf. replied *de injuria.* At the trial defts. proved that pltf. had made false entries in the books & accounts of the co., & had concurred with certain of the directors in making false representations as to the state of the co.'s affairs; wherefore defts. discharged pltf. from their service:—*Held:* (1) the several allegations of misconduct in the plea being distinct & independent, defts., on proof of enough to justify their putting an end to the contract, were entitled to the verdict; (2) the fact of their having, at the time of dismissing the plaintiff, assigned a totally different reason for so doing, did not preclude defts. from setting up the alleged acts of misconduct as a defence at the trial.—BAILLIE *v.* KELL (1838), 4 Bing. N. C. 638; 6 Scott, 379; 7 L. J. C. P. 249; 132 E. R. 934.

Annotations:—*Generally,* **Refd.** *Re* Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315. **Mentd.** Radakissen & Doss *v.* Ramchurn Mullick (1851), 2 C. L. R. 1667, n.

527. ——.]—PHILLIPS *v.* FOXALL, No. 567, *post.*

528. —— **Omission in accounts.**] — WILLETS *v.* GREEN, No. 500, *ante.*

529. —— **Travelling without ticket.**] — Pltf. was convicted of travelling on the railway without a ticket, & was dismissed by the London County Council from his office of district surveyor on the ground that he was guilty of the offence.

In an action by pltf. for an injunction to restrain them from so doing:—*Held:* he was, on the evidence, then brought before Ct., entitled to a declaration that he was not guilty of the offence with which he had been charged.—PARSONS *v.* LONDON COUNTY COUNCIL (1893), 9 T. L. R. 619.

530. Misappropriation of money.] — To an action for wrongfully discharging pltf. from deft.'s service as a traveller & salesman, defts. pleaded that pltf. refused to obey the lawful & reasonable commands of defts. with reference to pltf.'s conduct & proceedings in the said employ, & that pltf. received from divers customers of defts. divers moneys which he wrongfully appropriated to his own use; wherefore defts. did by reason of the premises refuse to continue pltf. in their employ, & therefore discharged him. Replication, *de injuria.* At the trial, it was proved that pltf. had misappropriated defts.' moneys, but the fact of such misappropriation was not known to the defts. until after they had discharged pltf.:—*Held:* defts. having justifiable cause for discharging pltf., the judge was wrong in leaving it to the jury to say whether they discharged him for that cause, for that their motive & intention was not in issue under the replication *de injuria.*—SPOTSWOOD *v.* BARROW (1850), 5 Exch. 110; 19 L. J. Ex. 226; 14 L. T. O. S. 446; 155 E. R. 48.

Annotation:—**Mentd.** Cowan *v.* Milbourn (1867), L. R. 2 Exch. 230.

531. —— **In satisfaction of own salary.**]—SMITH *v.* THOMPSON, No. 466, *ante.*

532. Crime committed outside service - Making employment unsafe.]—PEARCE *v.* FOSTER, No. 507, *ante.*

Receipt of secret commission.]—*See* AGENCY, Vol. I., p. 483, Nos. 1628–1633.

v. *Immoral Conduct.*

533. General rule.] — To justify a master in dismissing a yearly servant before the expiration of the year, there must be, on the part of the servant, either moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect.

There is a contract for a year with an implied

PART IV. SECT. 2, SUB-SECT. 11.—A. (g) iv.

h. *Dishonesty—Before employment.*] — A master is not, in the absence of express provision in the contract of employment, justified in summarily discharging a servant on the ground that he has been guilty of dishonesty before entering the master's employment.—GILL *v.* COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LTD., [1912] V. L. R. 146.—**AUS.**

k. —— *Suspicion not sufficient.*] —PATTERSON *v.* SCOTT (1876), 38 U. C. R. 642.—**CAN.**

526 l. *Fraud.*]—ENGLISH & AUSTRALIAN COPPER CO., LTD. *v.* JOHNSON (1911), 13 C. L. R. 490.—**AUS.**

l. *Misappropriation of money — No fraudulent intent.*]—CHARLTON *v.* BRITISH COLUMBIA SUGAR REFINING CO. (B. C.), [1924] 4 D. L. R. 1182; *revsg.*, [1924] 1 D. L. R. 570; [1924] 1 W. W. R. 546; 33 B. C. R. 414.—**CAN.**

m. *Acting as bearer of challenge to duel.*]—To have been knowingly the bearer of a challenge to fight a duel is such an offence as will justify a merchant in the immediate dismissal of a clerk from his employment.—DOLBY *v.* KINNEAR (1842), 1 Kerr, 480.—**CAN.**

n. *Misappropriation of goods—Club servant.*] — GOURMANY *v.* MANITOBA CLUB (Man.) (1905), 1 W. L. R. 175.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 11.—A. (g) v.

533 i. *General rule.*]—Immorality or intemperance of master of ship not alone sufficient ground for dismissal.—

agreement that if there is any moral misconduct, either pecuniary or otherwise wilful disobedience or habitual neglect, deft. should be at liberty to part with pltf. (PARKE, J.).—CALLO *v.* BROUNCKER (1831), 4 C. & P. 518; 2 Man. & Ry. M. C. 502, N. P.

Annotations:—**Distd.** Read *v.* Dunsmore (1840), 9 C. & P. 588. **Expld.** Lomax *v.* Arding (1855), 10 Exch. 734; Horten *v.* McMurtry (1860), 2 L. T. 297. **Consd.** Pearce *v.* Foster (1886), 34 W. R. 602. **Refd.** Amor *v.* Fearon (1839), 1 Per. & Dav. 398; Turner *v.* Mason (1845), 14 M. & W. 112; East Anglian Rys. Co. *v.* Lythgoe (1851), 16 L. T. O. S. 487.

534. Degree of immorality.]—PEARCE *v.* FOSTER, No. 507, *ante*.

535. Maidservant enceinte.]—A servant-maid may be removed from her service on account of being with child.—R. *v.* MARLBOROUGH (INHABITANTS) (1700), 12 Mod. Rep. 402; 88 E. R. 1409.

536. ——.]—A master is justified in discharging a maidservant for being with child.—R. *v.* BRAMPTON (INHABITANTS) (1777), Cald. Mag. Cas. 11.

537. Criminal intimacy with maidservant.]—A master is justified in discharging a servant in husbandry for criminal intimacy with a servant girl in the master's employment.—R. *v.* WELFORD (INHABITANTS) (1778), Cald. Mag. Cas. 57.

538. ——.]—A clerk & traveller, hired by the year, assaulted his employer's maidservant, with intent to ravish her:—*Held:* to be good cause for his dismissal without any notice. *Semble:* a person dismissed under such circumstances is not entitled to wages even for the time during which he has served.—ATKIN *v.* ACTON (1830), 4 C. & P. 208, N. P.

539. Imputation of immoral relations with master—Though false to knowledge of master.]—In an action for words, imputing to pltf., a governess, that she had had a child by her master, the declaration alleged, as special damage, that her master had dismissed her from his employment. The words were spoken by deft. to pltf.'s father, at a time when pltf. was visiting her father, & were repeated by the father to the master, who then declined to receive pltf. again, though he knew the charge to be false, on the ground that it might be injurious to her character to do so, & would be unpleasant to both of them.

It is said the words could not have occasioned the dismissal, because L. knew they were not true, & a dismissal by him on that account would have been illegal. . . . It was perfectly reasonable & proper that the master should refuse to keep pltf. in his service after such a statement had been made, although he knew it to be untrue (LORD DENMAN, C.J.).—GILLETT *v.* BULLIVANT (1840), 7 L. T. O. S. 490.

vi. *Drunkenness.*

540. General rule.]—This evidence . . . was clearly intended to show that the pltf. was not discharged except for drunkenness, & that would have been a justifiable ground of discharge (LORD ABINGER, C.B.).—SPECK *v.* PHILLIPS (1839), 5 M. & W. 279; 7 Dowl. 470; 8 L. J. Ex. 249, 277; 3 J. P. 421; 151 E. R. 119.

Annotation:—**Mentd.** Watt *v.* Watt, [1905] A. C. 115.

541. ——.]—GORDON *v.* POTTER, No. 584, *post*.

542. Not occasional drunkenness.]—A person has a right to dismiss a servant for misconduct but has no right to turn away an apprentice because he misbehaves; but the case of a young man seventeen years old, who, under a written agreement not under seal, is placed with a surgeon, as pupil & assistant, & with whom a premium is paid, is a case between that of apprenticeship & service; & if such a person on some occasions come home intoxicated, this alone will not justify the surgeon in dismissing him. But if the pupil & assistant by employing the shop boy to compound the medicines, occasion real danger to the surgeon's practice, this would justify the surgeon in dismissing him.

In *assumpsit* for wrongfully dismissing a pupil & assistant to a surgeon, deft. pleaded that the pupil & assistant so misconducted himself as to make it necessary to dismiss him to prevent his ruining deft.'s practice, & pltf. replied *de injuria*:—*Held:* on these pleadings pltf. was entitled to begin.—WISE *v.* WILSON (1845), 1 Car. & Kir. 662, N. P.

Annotation:—**Expld. & Distd.** Phillips *v.* Clift (1859), 4 H. & N. 168.

543. —— **Unless interfering with service.**]—CLOUSTON & CO., LTD. *v.* CORRY, No. 509, *ante*.

544. Habitual drunkenness.]—CLOUSTON & CO., LTD. *v.* CORRY, No. 509, *ante*.

545. Arrest for drunkenness.]—CLOUSTON & CO., LTD. *v.* CORRY, No. 509, *ante*.

vii. *Insolence and Improper Behaviour.*

546. Trespassing on preserves of master's employer—After notice against trespass.]—(1) Pltf., a journeyman carpenter, sued his master on the custom of the trade, by which the master, when the journeyman is sent to work in the country, has to pay the coach fare of the man back to London, & also the back carriage of his tools. It appeared that this custom did not apply where the man, while in the country, was dismissed for misconduct, or dismissed himself.

(2) If a master carpenter sends his men from London to work at a gentleman's house in the country, he may dismiss them for improper conduct, although it does not amount to either moral misconduct, wilful disobedience, or habitual neglect; & where, in such a case, a journeyman was found in one of the preserves of the gentleman at whose house the work was done, after a caution had been given to him to keep the paths, & upon complaint by the gentleman, the master dismissed the journeyman, the judge left it to the jury to say whether the master was not justified in such

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THE BELLA MUDGE (*circa* 1875), Y. A. D. 222.—**CAN.**

o. *Servant boasting of immorality.*]—DENHAM *v.* PATRICK (1910), 15 O. W. R. 349; 20 O. L. R. 347.—**CAN.**

p. ——.]—Pltf. was dismissed from his employment as a member of the fire brigade of deft. corpn.:—*Held:* his boasting to his comrades in the brigade of having illicit relations with his neighbour's wife was good ground for his dismissal.—MCPHERSON *v.* CITY OF TORONTO (1918), 43 O. L. R. 326; 43 D. L. R. 604.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 11.—A. (g) vi.

542 i. *Not occasional drunkenness.*]—EDWARDS *v.* MACKIE (1848), 11 Dunl. (Ct. of Sess.) 67.—**SCOT.**

542 ii. ——.]—Where a master dismissed a domestic servant on account of a single lapse into insobriety:—*Held:* the dismissal was not justified.—HOLT *v.* CLARKE (1894), 8 E. D. C. 182.—**S. AF.**

544 i. *Habitual drunkenness.*]—BRINDAMOUR *v.* ROBERT, ROBERT *v.* BRINDAMOUR (Y. T.) (1907), 6 W. L. R. 821.—**CAN.**

544 ii. ——.]—KING *v.* VANES (1898), 12 E. D. C. 171.—**S. AF.**

544 iii. ——.]—SCARROTT *v.* GRAHAMSTOWN BRICK & TILE CO., [1907] E. D. C. 279.—**S. AF.**

q. *Drunken choir-master.*]—Defts. engaged pltf. as choir-master. Upon the first occasion that the choir met for practice pltf. was drunk & unable to perform his duties, whereupon he was immediately dismissed:—*Held:* the dismissal was justified.—MARTIN *v.* LANE & ALL SAINTS CHURCH (CHURCHWARDENS) (1885), 3 Man. L. R. 314.—**CAN**

Sect. 2.—*Termination: Sub-sect.* 11, *A.* (*g*) *vii.*, (*h*), (*i*) & (*j*), & *B.* (*a*).]

dismissal.—READ *v.* DUNSMORE (1840), 9 C. & P. 588, N. P.

Annotation :—*As to* (2) **Consd.** Pearce v. Foster (1886), 34 W. R. 602.

547. Violence & noise — Domestic servant—Right to give into custody.]—If a servant, in the house of his master, at a late hour of the night, be violent in his manner, & be making a great noise, & abuse his master, & lay hold of him & struggle with him, the master will be justified in giving the servant into the custody of a policeman to be dealt with according to law.—SHAW *v.* CHAIRITIE (1850), 3 Car. & Kir. 21, N. P.

548. Insolence.]—HICKS *v.* THOMPSON (1857), 28 L. T. O. S. 255.

549. —— Single instance not sufficient.]—EDWARDS *v.* LEVY, No. 553, *post.*

550. Rudeness.]—SMITH *v.* ALLEN, No. 560, *post.*

(h) Neglect.

551. Habitual neglect of duties.]—CALLO *v.* BROUNCKER, No. 533, *ante.*

552. ——.]—LOMAX *v.* ARDING, No. 519, *ante.*

553. ——.]—In an action for wrongful dismissal of a newspaper critic engaged for a year :—*Held :* mere angry expressions which neither support a plea of justification nor of rescission by mutual assent, & an isolated instance of neglect or insolence would be no ground of dismissal, at all events unless the insolence were such as to be incompatible with the continuance of the employment.

As to neglect, although habitual neglect would be a good ground of dismissal, an occasional neglect would be no justification. A single instance of insolence on the part of a gentleman employed in such a capacity would hardly justify dismissal (HILL, J.).—EDWARDS *v.* LEVY (1860), 2 F. & F. 94, N. P.

554. Neglect combined with other misconduct.]—ROBINSON *v.* HINDMAN (1800), 3 Esp. 235, N. P.

555. ——.]—HICKS *v.* THOMPSON (1857), 28 L. T. O. S. 255.

556. Not occasional neglect.]—EDWARDS *v.* LEVY, No. 553, *ante.*

557. Negligence in business.]—CUNNINGHAM *v.* FONBLANQUE, No. 524, *ante.*

558. Neglect to send letter of news—Newspaper correspondent.]—Pltf. was engaged as European correspondent of a foreign newspaper, & it was pleaded that the engagement was on the terms & condition that he should send a letter of the current news by every steamer, & that he should not draw bills on deft. before his salary was due, & that pltf. neglected to send such letters on two occasions, & drew bills before his salary became due :—*Held :* these matters were no justification of discharge, & the subject of cross-action, only.—GOULD *v.* WEBB (1855), 4 E. & B. 933 ; 24 L. J. Q. B. 205 ; 25 L. T. O. S. 80 ; 1 Jur. N. S. 821 ; 3 W. R. 399 ; 119 E. R. 347.

Annotations :—**Mentd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239 ; Swiss Bank Corpn. *v.* Boehmische Industrial Bank, [1923] 1 K. B. 673.

559. Failure in faithful service—Question of fact.]—It is not every failure in faithful service which will warrant a master in discharging his servant, & if he does, he must discharge him on the occasion of his misconduct & not at any time after, at the master's option. . . . It was a proper question to leave the jury to say whether deft. was justified in dismissing pltf. (BRAMWELL, B.).

It appears to me that the conduct of pltf. . . . was good ground for dismissal, at least it raised a question for the jury & not one of law for the ct. (POLLOCK, C.B.).—HORTON *v.* MCMURTRY (1860), 5 H. & N. 667 ; 29 L. J. Ex. 260 ; 2 L. T. 297 ; 8 W. R. 528 ; 157 E. R. 1347.

Annotation :—**Consd.** Clouston *v.* Corry, [1906] A. C. 122.

560. Irregularity in attendance.]—In an action for a wrongful dismissal from an employment, the dismissal being justified ; it is for the jury not only whether matter of fact existed which would be valid grounds of dismissal ; but whether the dismissal were *bonâ fide* & really on such grounds.

Rudeness is an uncertain term, & persons may differ as to what is rudeness. It was proper to state the expressions which were used. . . . With respect to the time or hours of attendance, or the degree of personal attention in the factory, it is for you [the jury] to say whether the hours of pltf.'s attendance were the ordinary & proper hours in a business of this nature, or whether the degree of personal attention which the nature of the business required. Deft. . . . at the time did not profess himself dissatisfied, but, on the contrary, appeared to be satisfied, & if he were not so, & thought that he had reason to complain, or that the business was really being injured for want of sufficient attention, he ought, at the time, to have said so, & openly complained of it, & so have given pltf. fair warning, instead of contenting himself with the keeping a secret record of the hours of pltf.'s attendance (COCKBURN, C.J.).—SMITH *v.* ALLEN (1862), 3 F. & F. 157, N. P.

561. ——.]—There had been constant irregularities in the attendance of pltf. . . . the going to Scarborough or Brighton on account of illness was a sham, the illness was a sham, & it was assumed in order to avoid work. . . . As regards the irregularities in attendance, deft. could not rely upon them, inasmuch, as, after full knowledge of them, he continued pltf. in his service. But the other acts afforded a justification for the dismissal (LORD ESHER, M.R.).—BEATTIE *v.* PARMENTER (1889), 5 T. L. R. 396, C. A.

562. Failure to remit money immediately—Commercial traveller.]—A. was employed as traveller to a distillery co. at a yearly salary, being bound by the terms of his agreement to remit immediately all sums collected. He sold some of the co.'s wines to a brothel keeper & neglected to

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PART IV. SECT. 2, SUB-SECT. 11.—A. (g) vii.

548 i. *Insolence.*]—Action upon an agreement in writing between pltf. & deft., by which pltf. was engaged as editor of a newspaper. Deft. pleaded that pltf. conducted himself in such an improper, offensive, & disobedient manner towards him, that he dismissed pltf. as he lawfully might :—*Held :* a good plea.—HUNTER *v.* FOOTE (1862), 12 C. P. 175.—**CAN.**

549 i. —— *Single instance not sufficient.*]—A single disrespectful retort by an employee, which has been provoked or called forth by an unbecoming remark of the employer, is not a sufficient ground for dismissal of the employee.—WILLIAMS *v.* HAMMOND (1906), 4 W. L. R. 208 ; 16 Man. L. R. 369.—**CAN.**

r. —— —— *Unless of aggravated character.*]—Where insolence relied on as justification for dismissal of a servant occurs on one single occasion, it must be of a very aggravated character.—OCHSE *v.* HAUMANN, [1910] O. F. S. 59.—**S. AF.**

550 i. *Rudeness.*]—FARLEY *v.* LUMS (1917), 19 W. A. L. R. 117.—**AUS.**

550 ii. ——.]—FLEMING *v.* HILL (1876), 1 R. & C. 268.—**CAN.**

550 iii. ——.]—Where resp., who had been engaged to manage a farm, wrote to his employer a very offensive letter :—*Held :* the employer was justified in dismissing him & terminating the contract.—JAMIESON *v.* ELSWORTH, [1915] App. D. 115.—**S. AF.**

remit immediately sums of money collected by him:—*Held:* either circumstance was sufficient to justify his dismissal without a notice.—BLENKARN *v.* HODGES' DISTILLERY CO., LTD. (1867), 16 L. T. 608, N. P.

563. Forgetfulness — Whether single instance sufficient—When causing damage.]—A single instance of forgetfulness by a servant, by reason of which damage is caused to a valuable machine of which he has the care & management, may constitute such neglect of duty as to justify his master in dismissing him without notice.

Neglect as often arises from forgetfulness as from anything else; & if the forgetfulness is with respect to an important thing it may well, in my view, be good ground for dismissal of the servant without notice. I do not say that it would be a good ground for dismissal in every case. Some trivial acts of forgetfulness might not even justify a complaint or remark; but to forget to do a thing which, if not done, may cause considerable damage to the master, or to his property, or to fellow servants, may be a serious neglect of duty (DARLING, J.).

As to whether a single act would justify dismissal, that depends upon the character of the act & the duties of the man who does it. . . . The question is one of fact & degree in all cases (CHANNELL, J.).—BASTER *v.* LONDON & COUNTY PRINTING WORKS, [1899] 1 Q. B. 901; 68 L. J. Q. B. 622; 80 L. T. 757; 63 J. P. 439; 47 W. R. 639; 15 T. L. R. 331; 43 Sol. Jo. 438, D. C.

564. Substantial negligence.] — *Re* RUBEL BRONZE & METAL CO. & VOS, No. 782, *post.*

(i) Non-Disclosure of Material Facts.

565. General rule—No justification.]—In an action by a governess for breach of an agreement in writing, in which she was described as K., spinster, & by which deft. undertook that she should be employed for a term of three years, it was pleaded that pltf. intending to induce deft. to enter into the contract, concealed from him a fact material to her qualifications as such governess, & material to be known by deft. in engaging her as such governess, namely, that she had previously been married, & that the marriage had been dissolved by decree of the Divorce Ct.:—*Held:* the plea was bad, as there was no allegation of fraud, & the mere non-disclosure of a material fact was, except in the case of policies of insurance, no answer to an action upon a contract.—FLETCHER *v.* KRELL (1872), 42 L. J. K. B. 55; 28 L. T. 105; 37 J. P. 198.

Annotation:—**Refd.** Pearce *v.* Foster (1885), 2 T. L. R. 76.

(j) Effect of Condonement by Master.

566. Servant continued in service—After knowledge of misconduct.]—HORTON *v.* MCMURTRY, No. 559, *ante.*

567. —— ——.]—The law gives the master the right to terminate the employment of a servant on his discovering that the servant is guilty of fraud. He is not bound to dismiss him, & if he elects, after knowledge of the fraud, to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned (BLACKBURN, J.).—PHILLIPS *v.* FOXALL (1872), L. R. 7 Q. B. 666; 41 L. J. Q. B. 293; 27 L. T. 231; 37 J. P. 37; 20 W. R. 900.

Annotations:—**Consd.** Durham Corpn. *v.* Fowler (1889), 22 Q. B. D. 394. **Refd.** Lawder *v.* Simpson (1873), 21 W. R. 439; Sanderson *v.* Aston (1873), L. R. 8 Exch. 73; Kingston-upon-Hull Corpn. *v.* Harding, [1892] 2 Q. B. 494; Caxton & Arrington Union *v.* Dew (1899), 68 L. J. Q. B. 380; Federal Supply & Cold Storage Co. of South Africa *v.* Angehrn & Piel (1910), 80 L. J. P. C. 1; London General Omnibus Co. *v.* Holloway (1911), 105 L. T. 550. **Mentd.** Welton *v.* Somes (1888), 5 T. L. R. 46.

568. —— ——.]—BEATTIE *v.* PARMENTER, No. 561, *ante.*

569. —— **Acceptance of servant's denial of misconduct—Without making inquiries.**]—Where a master dismissed his servant on the ground of the servant's taking a secret commission, & established a *primâ facie* case, the burden of proof held to be shifted & to lie on the servant to prove the innocence of the transaction. A man cannot condone a wrong which he does not believe that servant to have committed, & of which he accepts the servant's denial, without making inquiries which would have disclosed the truth. The master does not waive his rights by postponing action until he is fully satisfied of the servant's guilt.—FEDERAL SUPPLY & COLD STORAGE CO. OF SOUTH AFRICA *v.* ANGEHRN & PIEL (1910), 80 L. J. P. C. 1; 103 L. T. 150; 26 T. L. R. 626, P. C.

Condonement after dismissal.]—*See* CONTRACT, Vol. XII., p. 359, No. 2988.

Effect on settlement.]—*See* POOR LAW.

B. Payment of Wages in lieu of Notice.

(a) In General.

570. Master entitled to dismiss on payment.]—HARTLEY *v.* HARMAN, No. 794, *post.*

571. ——.]—A menial servant, entitled under the hiring to a month's warning or a month's wages, cannot recover a month's wages for having been improperly dismissed without a month's warning, upon the common *indebitatus* count for work & labour.

The true nature of the contract is, that it is a contract for a year, & the master is to be at liberty to turn away the servant with a month's warning, or, in lieu thereof, a month's wages (PARKE, B.).—FEWINGS *v.* TISDAL (1847), 1 Exch. 295; 5 Dow. & L. 196; 17 L. J. Ex. 18; 11 Jur. 977; 145 E. R. 125; *sub nom.* FLEWINGS *v.* TISDAL, 10 L. T. O. S. 166.

Annotations:—**Mentd.** Goodman *v.* Pocock (1850), 15 Q. B. 576; East Anglian Rys. *v.* Lythgoe (1851), 20 L. J. C. P. 84; Emmens *v.* Elderton (1853), 13 C. B. 495.

572. ——.]—Pltf. was a servant of deft. co. under a contract which could be terminated by a fortnight's notice. He was also the secretary of a branch of the Amalgamated Society of Railway Servants. In that capacity he wrote a letter to another employé of defts. requiring him to

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PART IV. SECT. 2, SUB-SECT. 11.—A. (j).

566 i. *Servant] continued in service—After knowledge of misconduct.*]—*Held:* in an action for wrongful dismissal the mere fact of having repeatedly passed over acts of misconduct does not amount to condonation, so as to prevent the master from justifying the dismissal. — MEYRICK *v.* STIRLING BROTHERS, LTD. (1899), 1 W. A. L. R. 51.—**AUS.**

566 ii. —— ——.]—When the master has full knowledge of the nature & extent of misconduct on the part of his servant sufficient to justify dismissal, he cannot retain him in his employment, & afterwards, at any distant time, turn him away for that fault, without anything new.—MCINTYRE *v.* HOCKIN (1889), 16 A. R. 498.—**CAN.**

566 iii. —— ——.]—DEACON *v.* CREHAN, [1925] 4 D. L. R. 664.—**CAN.**

566 iv. —— ——.]—A servant engaged with definite working hours wilfully disregarded his contract in that respect &, notwithstanding repeated warnings, came to work late on many occasions:—*Held:* the master was entitled to dismiss the servant on another breach occurring although the prior breaches had been condoned.—MEERHOLZ *v.* NORMAN, [1916] T. P. D. 332.—**S. AF.**

PART IV. SECT. 2, SUB-SECT. 11.—B. (a).

570 i. *Master entitled to dismiss on payment.*]—FORSYTH *v.* HEATHERY KNOWE COAL CO. (1880), 7 R. (Ct. of Sess.) 887; 17 Sc. L. R. 637.—**SCOT.**

Sect. 2.—*Termination: Sub-sect.* 11, *B.* (*a*) *&* (*b*), *& C.; sub-sect.* 12.]

apologise for an accusation of theft he had made against a fellow servant, who was also a member of the branch of the Amalgamated Society of Railway servants. For writing this letter pltf. was dismissed by defts. & was given fourteen days' wages in lieu of notice. In an action claiming damages for wrongful dismissal:—*Held:* the action failed & defts. were justified in dismissing pltf.—AUSTWICK *v.* MIDLAND RY. CO. (1909), 25 T. L. R. 728.

573. ——.]—It is not competent for a servant to contend that he has been wrongfully dismissed when, instead of being given a week's notice to quit, in accordance with the terms of his contract, he is paid a week's salary & dismissed. Such a transaction does not amount to a wrongful dismissal, coupled with a tender of damages.—DENNIS (W.) & SONS, LTD. *v.* TUNNARD BROTHERS & MOORE (1911), 56 Sol. Jo. 162.

(*b*) *Menial and Domestic Servants.*

574. General rule—Payment of month's wages.]—If a master turns away a servant, without a previous notice or warning, the servant is entitled to a month's wages.—ROBINSON *v.* HINDMAN (1800), 3 Esp. 235, N. P.

575. ——.]—BEESTON *v.* COLLYER, No. 277, *ante.*

576. ——.]—FAWCETT *v.* CASE, No. 312, *ante.*

577. ——.]—BROXHOLM *v.* WAGSTAFF, No. 822, *post.*

578. ——.]—TURNER *v.* MASON, No. 463, *ante.*

579. ——.]—TODD *v.* KERRICH, No. 136, *ante.*

580. ——.]—BRITTAIN *v.* LONDON & NORTH WESTERN RY. CO. (1857), 28 L. T. O. S. 253; 21 J. P. Jo. 69.

581. ——.]—NICOLL *v.* GREAVES, No. 137, *ante.*

582. ——.]—MOULT *v.* HALLIDAY, No. 431, *ante.*

583. ——.]—LINDSAY *v.* QUEEN'S HOTEL CO., No. 779, *post.*

584. —— Whether board wages included.]—(1) A domestic servant, engaged at a yearly wage, discharged without reason is entitled to the wages accruing up to the time of her discharge, & to a calendar month's wages in addition, but not to board wages for the month.

(2) A servant guilty of moral misconduct, by getting drunk would not be entitled to any wages which had not accrued due before the drunkenness, nor to a month's wages in advance, nor to anything; a master has a right to discharge a servant simply by payment of a month's wages, in addition to the accruing wages up to the time of the discharge.

(3) Where a dismissal is unjustifiable, the expense of the journey back to the town where the servant lives, from deft.'s house, may be added to the wages, where deft. expressly agreed to pay the expenses of the servant's journey to deft.'s house.—GORDON *v.* POTTER (1859), 1 F. & F. 644.

Annotation:—**Refd.** Lindsay *v.* Queen's Hotel Co., [1919] 1 K. B. 212.

585. Right of servant to expenses of journey home—Where express agreement to pay expenses to master's house.]—GORDON *v.* POTTER, No. 584, *ante.*

C. Rights Incidental to Dismissal.

586. Right to give into custody—Servant violent & abusive.]—SHAW *v.* CHAIRITIE, No. 547, *ante.*

587. —— Servant drunk & disorderly.]—POOL *v.* WHITCOMBE (1862), 3 F. & F. 70, N. P.; *subsequent proceedings*, 12 C. B. N. S. 770.

588. Medical examination — Suspected pregnancy.]—Pltf.'s mistress requested a doctor to examine pltf., who was a domestic servant, in order to ascertain whether she was pregnant. Pltf. objected to the examination, but undressed by the doctor's orders, & submitted to be examined. The doctor examined her, & ascertained that she was not pregnant. He used no violence or threats & did nothing more than was necessary for the examination. The mistress was not present. Pltf. sued her master & mistress & the doctor for assault. At the trial the judge directed a verdict for the master & mistress, & the jury found a verdict for the doctor:—*Held:* there was no evidence against the master & mistress, & the verdict in favour of the doctor was right, & a rule for a new trial was rightly discharged.—LATTER *v.* BRADDELL (1881), 50 L. J. Q. B. 448; 44 L. T. 369; 45 J. P. 520; 29 W. R. 366, C. A.

589. Right to search boxes—Domestic servant.]—POOL *v.* WHITCOMBE (1862), 3 F. & F. 70, N. P.; *subsequent proceedings*, 12 C. B. N. S. 770.

590. Right to eject—Manager of hotel.]—In 1899 pltf., a hotel proprietor, assigned his property to deft., as trustee for creditors upon trust to carry on the hotel business as long as deft. should think fit, with power to sell, & in the meantime to engage the services of pltf. as manager, who, with his wife & family should during such engagement be entitled to reside & board in the hotel. In 1901 the trustee dismissed pltf. from his position as manager, & pltf. then commenced an action claiming a declaration that he was entitled under the deed to be engaged as manager. Defendant, before delivering a defence, moved for an injunction until the trial to restrain pltf. & his family from remaining in the hotel, & from interfering with the conduct of the business:—*Held:* deft. had power to dismiss pltf., & the latter & his family had no right to remain in the hotel; & the injunction asked for was properly granted.—COLLISON *v.* WARREN, [1901] 1 Ch. 812; 70 L. J. Ch. 382; 84 L. T. 482; 17 T. L. R. 362; 45 Sol. Jo. 377, C. A.

SUB-SECT. 12.—SUMMARY TERMINATION BY SERVANT.

591. Grounds for termination—Danger to personal safety.]—If a master of a ship by inhuman treatment compels a sailor to quit a ship, it is not such a desertion as shall amount to a forfeiture of his claim for his wages for the voyage performed.

PART IV. SECT. 2, SUB-SECT. 11.—B. (b).

t. General rule — Payment of two weeks' wages.]—In the case of domestic servants there is a consensus that two weeks' wages is a sufficient sum to be paid in lieu of notice upon summary dismissal.—MONTAGUE *v.* GRAND TRUNK PACIFIC RY. (1915), 8 W. W. R. 528; 23 D. L. R. 355; 25 Man. L. R. 372. —CAN.

PART IV. SECT. 2, SUB-SECT. 11.—C.

a. Right of servant to an inquiry.]—AUSTRALIAN TRAMWAYS EMPLOYERS ASSOCN. *v.* PRAHRAN & MALVERN TRAMWAYS TRUST (1918), 25 C. L. R. 394.—AUS.

PART IV. SECT. 2, SUB-SECT. 12.

b. Grounds for termination — Inability to obtain [illegible]]—FENERON *v.* O'KEEFE (1884), 2 Man. L. R. 40.—CAN.

c. —— Whether refusal to pay wages sufficient.]—Pltfs. entered the service of deft. for eight months at $55 per month on the understanding that deft. could not pay the full amount of wages due until the end of the term. The pltfs. left because deft. refused to pay $30, less than the amount then due: *Held:* pltfs. were not justified

There are reciprocal duties between master & servants. From the servant, is due obedience & respect; from the master, protection & good treatment. Desertion is a forfeiture of wages; but if the captain conducts himself in such a way as puts the toiler in that situation; that he cannot without damage to his personal safety continue in his service, human nature speaks the language—a servant is justified in providing for that safety (LORD KENYON, C.J.).—LIMLAND *v.* STEPHENS (1801), 3 Esp. 269, N. P.

592. —— ——.]—Pltf., a workman in the employ of a contractor engaged by defts., had to work in a dark tunnel rendered dangerous by the passing of trains. After he had been working a fortnight he was injured by a passing train. The jury found that defts. in not adopting any precautions for the protection of pltf. had been guilty of negligence:—*Held:* pltf. having continued in his employment with full knowledge, could not make defts. liable for any injury arising from danger to which he voluntarily exposed himself.

If pltf. had been misled in supposing that precautionary measures such as the dangerous nature of the service rendered reasonably necessary would be taken, he had a right to throw up his engagement & to decline to go on with the work (COCKBURN, C.J.).—WOODLEY *v.* METROPOLITAN DISTRICT RY. CO. (1877), 2 Ex. D. 384; 46 L. J. Q. B. 521; 36 L. T. 419; 42 J. P. 181, C. A.

Annotations:—**Consd.** Yarmouth *v.* France (1887), 19 Q. B. D. 647. **Distd.** Thrussell *v.* Handyside (1888), 20 Q. B. D. 359. **Consd.** Membery *v.* G. W. Ry. (1889), 14 App. Cas. 179 **Refd.** Charles *v.* Taylor, Walker (1878), 38 L. T. 773. **Mentd.** Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685.

593. —— **Ill-treatment—Failure to supply with provisions.**]—A seaman, who had engaged to serve on board a collier, from Shields to London, & back, quits the vessel at the port of London:—*Held:* he had not incurred a forfeiture of his wages; the master failing to supply him with provisions.

Seamen must be found with provisions as long as they remain on board, & are willing to do their duty.—CASTILIA (1822), 1 Hag. Adm. 59; 166 E. R. 22.

Annotation:—**Refd.** Edward *v.* Trevellick (1854), 2 C. L. R. 1605.

594. —— —— **Unreasonable flogging.**]—Action by a seaman for work & labour on board a British registered ship Y. Plea: that the work was done after the passing of 7 & 8 Vict. c. 112; that pltf. had engaged himself on board a British registered merchant ship *C.* as seaman for a voyage from Liverpool to San Francisco, which was continuing during the performance of the work & labour; & pltf. belonged to the vessel *C.* for the voyage, within 7 & 8 Vict. c. 112; &, whilst he was such seaman on board the *C.*, & before doing or contracting for the work & labour, deserted the *C.*, within 7 & 8 Vict. c. 112, s. 9; &, while he was such deserter & belonged to the *C.*, engaged himself with deft., who was master of the *Y.*, as seaman, for wages; & that the action was brought to recover such wages; & that the desertion was entered in the log book of the *C.*, & certified by the signatures of the master & mate of the *C.*

Replication: that, before pltf. deserted the *C.*, the captain & officers of the *C.*, on many occasions, flogged & punished pltf. with great & unreasonable cruelty & severity; that such floggings & punishments were not rendered necessary by pltf.'s conduct, but were unnecessary & unreasonable; that pltf. requested the captain & officers to desist, which the captain refused to do: & thereupon pltf., because he had just & reasonable cause to believe, & did believe, that the captain & officers would continue to punish & flog him with such great & unreasonable cruelty & severity, did, in order to escape from such great & unreasonable cruelty & severity, desert the *C.*:—*Held:* a good replication, as showing that there was no desertion within 7 & 8 Vict. c. 112, s. 9.—EDWARD *v.* TREVELLICK (1854), 4 E. & B. 59; 2 C. L. R. 1605; 24 L. J. Q. B. 9; 1 Jur. N. S. 110; 119 E. R. 23.

595. —— **Dismissal by master in moment of anger.**]—CALLOW *v.* WATTLEWORTH (1824), Bluett, 56.

596. —— **Threat to sell as a slave—Where execution impossible.**]—EDWARD *v.* TREVELLICK, No. 594, *ante*.

597. —— **Alteration of contract—Change of voyage—Outbreak of war.**]—Pltf. agreed with deft. to serve as one of the crew of a ship, whereof deft. was master, for twelve months, from London to Rio, or any other of the ports specified in the agreement, amongst which were ports in the Pacific Ocean, & back to a final port of discharge, & to obey during that period all deft.'s lawful commands. He subsequently sailed for Rio with the ship. She was destined, as it appeared from her charterparty, for the service of the Peruvian Govt., & had on board a cargo of coal & ammunition. In the course of her voyage to Rio she joined company with two Peruvian war steamers, to which from time to time she supplied coal & ammunition. At Rio it became known to pltf. & deft. that hostilities had commenced between Spain & Peru, two powers at peace with England. Deft., notwithstanding this circumstance, announced to pltf. that he intended to go on to Callao, in the Pacific, another Peruvian port. He was at that time acting under the direction of a Peruvian agent on board the ship, who received his instructions from the commanders of the two war steamers. Pltf. objected to serve any further on the voyage on the ground that it had become illegal, & involved greater danger than he had anticipated when he entered into his agreement with deft. He accordingly left the ship. In an action for breach of contract brought by him against deft.:—*Held:* deft. must be taken to have engaged pltf. for an ordinary voyage, & pltf. was entitled to treat as a breach of contract deft.'s employment of him on a voyage which would expose him to greater danger than he originally had reason to anticipate.—BURTON *v.* PINKERTON (1867), L. R. 2 Exch. 340; 36 L. J. Ex. 137; 16 L. T. 419; 31 J. P. 615; 15 W. R. 1139; 2 Mar. L. C. 547.

Annotations:—**Consd.** O'Neil *v.* Armstrong, Mitchell, [1895] 2 Q. B. 70; Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522. **Refd.** Austin Friars Steam Shipping Co. *v.* Strack, [1905] 2 K. B. 315; Connelly *v.* Sibery (1905), 69 J. P. 115; Lloyd *v.* Sheen (1905), 93 L. T. 174; Palace Shipping Co. *v.* Caine, [1907] A. C. 386. **Mentd.** Hobbs *v.* L. & S. W. Ry. (1875), L. R. 10 Q. B. 111.

—— —— ——.]—*See, further,* SHIPPING.

598. —— —— **As to system of working.**]—RYLANDS *v.* LINDLEY (1887), 3 T. L. R. 494; 51 J. P. Jo. 196.

599. —— **Increased risk—Outbreak of war.**]—The Japanese Govt. purchased in this country a warship, which was placed in charge of a master

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in leaving.—NEVILLE *v.* MACDONALD (Sask.), [1917] 3 W. W. R. 240; 36 D. L. R. 594; 10 Sask. L. R. 284.—CAN.

d. —— ——.]—Where a certain sum is due for wages at the end of a month, whether the neglect or refusal of the master to pay it justifies the servant in quitting depends on whether the master's conduct evidences an intention no longer to be bound by the contract & this is to be determined by the terms of the contract & the circumstances existing in each particular case.—ABRAMOFF *v.* PODRATZ, FEODOROFF *v.*

Sect. 2.—Termination: Sub-sects. 12 & 13. Part V. Sects. 1 & 2: Sub-sect. 1, A. & B.]

to navigate on their behalf from the Tyne to Yokohama. Pltf. contracted with the master to serve as one of the crew for the voyage for a fixed sum. The ship sailed from the Tyne, but before she arrived at her destination news reached her that war had been declared by Japan against China. Pltf. thereupon refused to continue to serve & left the ship. In an action brought by pltf. for his wages:—*Held:* the master was responsible to pltf. for the act of his principals in declaring war, &, as the consequence of such declaration of war would be to expose pltf., in the event of his continuing the voyage, to greater risks than those he had contracted to run, pltf. was justified in leaving the ship, & was entitled to recover the stipulated sum notwithstanding that the voyage was not completed.—O'NEIL *v.* ARMSTRONG, MITCHELL & Co., [1895] 2 Q. B. 418; 65 L. J. Q. B. 7; 73 L. T. 178; 11 T. L. R. 548; 8 Asp. M. L. C. 63; 14 R. 703, C. A.

Annotations:—**Consd.** Austin Friars Steam Shipping Co. *v.* Strack, [1905] 2 K. B. 315; Lloyd *v.* Sheen (1905), 93 L. T. 174; Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522. **Refd.** Connelly *v.* Sibery (1905), 69 J. P. 115; Palace Shipping Co. *v.* Caine, [1907] A. C. 386; St. Enoch Shipping Co. *v.* Phosphate Mining Co., [1916] 2 K. B. 624.

——— ———.]—*See, further,* SHIPPING.

600. ——— Illegality of part of contract.]—KEARNEY *v.* WHITEHAVEN COLLIERY Co., No. 244, *ante.*

SUB-SECT. 13.—ORDER OF THE COURT.

Jurisdiction of county court.]—*See* Employers & Workmen Act, 1875 (c. 90), s. 3 (2).

Jurisdiction of justice.] — *See* Employers & Workmen Act. 1875 (c. 90), s. 4.

Part V.—Remuneration.

SECT. 1.—REMUNERATION AS FACTOR IN RELATIONSHIP OF MASTER AND SERVANT.

Wages.]—*See* Sect. 2, *post.*

Remuneration other than wages.]—*See* Sect. 3, *post.*

Remuneration by third party.]—*See* Sect. 4, *post.*

On charges of embezzlement.]—*See* CRIMINAL LAW, Vol. XV., pp. 922, 923, Nos. 10,160–10,170.

SECT. 2.—WAGES.

SUB-SECT. 1.—RIGHT TO WAGES.

A. Necessity for Contract.

601. General rule.]—A servant who comes over from the West Indies, where he has been a slave, & who continues in the service of his master in England, without any agreement for wages, is not entitled to any, unless there has been an express promise.—ALFRED *v.* FITZJAMES (MARQUIS) (1799), 3 Esp. 3, N. P.

602. ———.] — A. & his wife boarded & lodged in the house of B. the brother of A., & both A. & his wife assisted B. in carrying on his business. A. brought an action for the services, to which B. pleaded a set-off for board & lodging:—*Held:* neither the services on the one hand, nor the board & lodging on the other, could be charged for unless the jury were satisfied that the parties came together on the terms that they were to pay & to be paid: but, if that were not so, no *ex post facto* charge could be made on either side.—DAVIES *v.* DAVIES (1839), 9 C. & P. 87, N. P.; *subsequent proceedings* (1840), 9 C. & P. 252.

603. ———.]—REEVE *v.* REEVE, No. 605, *post.*

604. ———.]—ROBERTS *v.* SMITH, No. 612, *post.*

605. Implied contract.] — Service, however long continued, creates no claim for remuneration without a bargain for it, either express or implied from circumstances showing an understanding on both sides that there should be payment.

An action cannot be maintained for remuneration merely because it may appear to be reasonable (MARTIN, B.).—REEVE *v.* REEVE (1858), 1 F. & F. 280, N. P.

606. ———.] — Wherever a relation exists between two parties, which involves the performance of certain duties by one of them & the payment of reward to him by the other, the law will imply or a jury may infer, a promise by each party to do what is to be done by him.—MORGAN *v.* RAVEY (1861), 6 H. & N. 265; 30 L. J. Ex. 131; 3 L. T. 784; 25 J. P. 376; 9 W. R. 376; 158 E. R. 109; *previous proceedings* (1860), 2 F. & F. 283, N. P.

Annotations:—**Consd.** Robb *v.* Green (1895), 64 L. J. Q. B. 593. **Refd.** Baylis *v.* Lintott (1873), L. R. 8 C. P. 345; Batthyany *v.* Walford (1887), 36 Ch. D. 269; Jackson *v.* Watson, [1909] 2 K. B. 193. **Mentd.** Herbert *v.* Markwell (1881), 45 L. T. 649; Medawar *v.* Grand Hotel Co., [1891] 2 Q. B. 11.

607. ———.]—LOFFUS *v.* MAW, No. 724, *post.*

608. ——— On continuation of service—Promis of present.]—A master having admitted that, by his factor's agreement, he promised to his servant, in addition to his ordinary wages, a present of £20, the service to be at all events till the end of one year; & that sum not having been paid at the expiration of the year, & the service having continued for several years:—*Held:* the contract was renewed in all its parts from year to year; &, nothing being said to the contrary by either party, £20 was due for every year of the service.—MANSFIELD (EARL) *v.* SCOTT (1833), 1 Cl. & Fin. 319; 6 E. R. 936, H. L.

609. ——— On performance of service—Servant resigning during term of service.]—LAMBURN *v.* CRUDEN, No. 655, *post.*

610. ——— ——— Work done on the order of another.]—In an action by pltf., a surveyor, against deft., one of the acting committee of a projected railway, it appeared that prospectuses were issued, & arge sums received as deposits upon shares. At a meeting of the committee,

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PODRATZ (Sask.), [1920] 2 W. W. R. 6; 51 D. L. R. 313; 13 Sask. L. R. 215.—CAN.

PART V. SECT. 2, SUB-SECT. 1.—A.

601 i. *General rule.*]—Wages are the personal ... artisans, & it is an essential ingredient in wages that the personal services of the labourer or artisan must not only be rendered but must have been contemplated as such in the contract.—COUTEZ *v.* LEAR, HUBBARD CLAIMANT, WINNIPEG ELECTRIC RY. Co. ... 238.—CAN.

601 ii.———.]—SHEA *v.* NEWFOUNDLAND GOVERNMENT (1892), 7 Nfld. L. R 668.—NFLD.

605 i. *Implied contract.*]—JOHANNESBURG MUNICIPALITY *v.* O'SULLIVAN, ...

at which deft. was present, there was a written resolution, that S. should be employed to make a valuation of the land & houses on the intended line. S. would not act, & G., another member of the committee, applied to pltf. & at a subsequent meeting deft. assented to pltf.'s appointment. The fact having been communicated by G. to pltf., he acted upon it, & sent in his report. Deft. was afterwards a party to an agreement entered into to refer pltf.'s bill to G., & another person, for settlement:—*Held:* the jury were properly directed that the question was, whether pltf. & deft. meant to contract on the footing of a personal liability of deft., either alone or as a member of the acting committee, or on the credit of the funds.

If [a party] does work on the order of another, under such circumstances as that it must be presumed, that he looks to be paid as a matter of right by him, then a contract would be implied with that person—under most circumstances, an absolute one, under some a conditional one—provided he receives funds wherewith to pay (PARKE, B.).—HIGGINS *v.* HOPKINS (1848), 3 Exch. 163; 6 Ry. & Can. Cas. 75; 18 L. J. Ex. 113; 12 L. T. O. S. 245; 154 E. R. 799.

Annotations:—**Refd.** Caldicott *v.* Griffiths & Lowe (1853), 1 C. L. R. 715. **Mentd.** Bailey *v.* Macaulay, Bailey *v.* Pearson, Bailey *v.* Haines, Bailey *v.* Bracebridge, Dawson *v.* Hay, Wilson *v.* Holden (1849), 13 Q. B. 815; Collingridge *v.* Gladstone (1890), 7 T. L. R. 60.

611. —— —— Servant having board & lodging.]—When services have been rendered without any express contract for wages, but with board & lodging, or other benefits, as the permission to keep poultry for profit, for the party serving, a contract to pay for such services is not to be implied.—FOORD *v.* MORLEY (1859), 1 F. & F. 496, N. P.

612. —— —— Presumption of contract on ordinary terms — Rebuttal of presumption.]—Pltf. wrote to deft. as follows:—"I agree to accept the appointment of secretary of the L. co. upon the following terms, viz., first, a salary of £300 *per annum*, commencing at the present date, if the co. be completely registered & put into operation; if not, I shall be satisfied with any remuneration for my time & labour you may think me deserving of & your means can afford." Deft. wrote in answer accepting the terms, & adding:—"It is distinctly agreed & understood that if the co. is not formed & carried out, that part of your letter which alludes to your salary be null & void, & that at the expiration of three months it is entirely left to me to give unto you such sum of money as I may deem right as compensation for labour done in the event of the co. not being carried out." Pltf. rendered some service, but the co. was never formed:—*Held:* there was no contract upon which pltf. could recover any part of the salary.

It is by no means a matter of law that a person shall be paid for his services, it is a matter of contract. No doubt there is a variety of labour from which there arises an irresistible inference that the person who has done it is to be paid, but that is a sort of labour which is always done for money, & in such cases a jury would presume a contract on the ordinary terms unless evidence was given to the contrary (MARTIN, B.).—ROBERTS *v.* SMITH (1859), 4 H. & N. 315; 28 L. J. Ex. 164; 32 L. T. O. S. 320; 157 E. R. 861.

Annotations:—**Expld.** Loftus *v.* Roberts (1902), 18 T. L. R. 532. **Refd.** Broome *v.* Speak, [1903] 1 Ch. 586.

613. —— Reasonable wages payable.]—R. *v.* PENDLETON (INHABITANTS), No. 270, *ante*.

614. —— Resolution to grant holiday with wages—Right to additional wages if no holiday allowed.]—The council of a corpn. passed a resolution "that all the workmen in the employ of the corpn. with not less than twelve months' service shall have one week's holiday in each year between the beginning of Apr. & the end of Oct. with pay: this arrangement to come into operation in the year 1907."

A workman who came within the terms of this resolution served from July 2, 1914, to Aug. 5, 1915, without having had the holiday. He was dismissed the service by a notice which expired on Aug. 5, 1915, but was not paid a week's wages, in lieu of the holiday:—*Held:* assuming the resolution contained the terms of the contract, it did not mean that the workman was entitled to a week's wages for each completed year of service if he was not allowed a week's holiday at some time between Apr. & Oct., & therefore he was not entitled to the week's pay claimed by him.—HURT *v.* SHEFFIELD CORPN. (1916), 85 L. J. K. B. 1684; 32 T. L. R. 393; 14 L. G. R. 614, D. C.

—— Remuneration at discretion of employer.]—*See* Sect. 2, sub-sect. 1, B., *post*.

615. Remuneration to be mutually arranged—No agreement arrived at.]—*Held:* there was no concluded contract until the parties had agreed upon the salary.—LOFTUS *v.* ROBERTS (1902), 18 T. L. R. 532, C. A.

Annotation:—**Refd.** Broome *v.* Speak, [1903] 1 Ch. 586.

B. Remuneration at Discretion of Employer.

616. Whether remuneration recoverable.] — Where a person performed work for a committee, under a resolution entered into by them "that any service to be rendered by him should be taken into consideration, & such remuneration be made

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613 i. —— *Reasonable wages payable.*]—Where a bye-law of a municipality appointed a health officer but did not fix his salary:—*Held:* the law would fix his salary at a reasonable sum, regard being had to the services performed.—BOGART *v.* TOWNSHIP OF SEYMOUR (1885), 10 O. R. 322.—**CAN.**

613 ii. —— ——.]—CLARK *v.* CLARK (Sask.) (1921), 62 D. L. R. 280.—**CAN.**

613 iii. —— ——.] — GISBORNE *v.* NEWFOUNDLAND & LONDON TELEGRAPH CO. (1855), 4 Nfld. L. R. 72.—**NFLD.**

e. Performance of services by near relative — Whether contract implied.]—Unless a specific contract of hiring be proved, the ct. will discountenance an action by a son or daughter against a parent for services performed while living in the parent's house.—SPRAGUE *v.* NICKERSON (1843), 1 U. C. R. 284.—**CAN.**

f. —— ——.] — WHITE *v.* WHITE (1852), 1 P. E. I. 75.—**CAN.**

g. —— ——.] — CAMPBELL *v.* MCKERRICHER (1883), 6 O. R. 85.—**CAN.**

h. —— ——.]—ILER *v.* ILER (1885), 9 O. R. 551.—**CAN.**

k. —— ——.] — PECKHAM *v.* DEPOTTY (1889), 17 A. R. 273.—**CAN.**

l. —— ——.] — MILLER *v.* MILLER (1898), 25 R. (Ct. of Sess.) 995; 35 Sc. L. R. 769; 6 S. L. T. 57.—**SCOT.**

m. —— ——.] — RUSSEL *v.* M'CLYMONT (1906), 8 F. (Ct. of Sess.) 821.—**SCOT.**

n. Performance of service—In expectation of marriage — Failure of marriage—Whether contract implied.]—Where services were rendered by pltf. to deft., in expectation that deft. would marry her, but there was no contract of hiring, & pltf. expressly said that she was not to receive & did not expect wages or pay:—*Held:* on deft.'s refusal to marry pltf., no action would lie as upon an implied promise to pay the value of such services in money.—ROBINSON *v.* SHISTEL (1873), 23 C. P. 114.—**CAN.**

o. —— *Must be alleged in statement of claim.*] — In an action for wages the statement of claim must allege that pltf. worked for deft. at the latter's request or such other facts as show that deft. made himself liable to pltf. for the wages earned.—ROBERTS *v.* POLLOCK (Sask.), [1926] 4 D. L. R. 1145; [1926] 3 W. W. R. 705.—**CAN.**

p. Terms of agreement — Question of fact.]—LOGG *v.* ELLWOOD (1887), 14 A. R. 496.—**CAN.**

PART V. SECT. 2, SUB-SECT. 1.—B.

616 i. *Whether remuneration recoverable.*]—WISMER *v.* WISMER (1864), 23 U. C. R. 519.—**CAN.**

Sect. 2.—Wages: Sub-sect. 1, B., C. & D. (a).]

as should be deemed right" :—*Held:* an action would not lie to recover a recompense for such work, the resolution importing that the committee were to judge whether any remuneration was due. —TAYLOR *v.* BREWER (1813), 1 M. & S. 290; 105 E. R. 108.

Annotations:—**Distd.** Bryant *v.* Flight (1839), 5 M. & W. 114. **Expld.** White *v.* Woodward (1848), 5 C. B. 810. **Distd.** Bird *v.* McGaheg (1849), 2 Car. & Kir. 707. **Expld.** Bill *v.* Darenth Valley Ry (1856), 26 L. J. Ex. 81. **Consd.** Hall *v.* Conder (1857), 26 L. J. C. P. 138. **Apprvd.** Roberts *v.* Smith (1859), 4 H. & N. 315. **Expld.** Loftus *v.* Roberts (1902), 18 T. L. R. 532. **Refd.** Lake *v.* Campbell (1862), 5 L. T. 582; Broome *v.* Speak, [1903] 1 Ch. 586.

617. —— Recovery on quantum meruit.]—If A. agrees to serve B. as an apothecary's assistant at such salary as C. should think reasonable, & it appear that no application had been made to C. to fix any salary, A. cannot recover anything for his services in an action for work & labour.—OWEN *v.* BOWEN (1829), 4 C. & P. 93, N. P.

618. —— ——.]—RAWLINGS *v.* CHANDLER (1854), 9 Exch. 687; 156 E. R. 295.

619. —— ——.]—ROBERTS *v.* SMITH, No. 612, *ante.*

620. —— ——.]—A. agreed to enter into the service of B., & wrote to him a letter as follows: —"I hereby agree to enter your service as weekly manager, commencing next Monday; & the amount of payment I am to receive I leave entirely to you." A. served B. in that capacity for six weeks:—*Held:* the contract implied that A. was to be paid something at all events for the services performed; & the jury, in an action on a *quantum meruit*, might ascertain what B., acting *bonâ fide*, would or ought to have awarded.—BRYANT *v.* FLIGHT (1839), 5 M. & W. 114; 2 Horn. & H. 84; 3 Jur. 681; 151 E. R. 49; *sub nom.* BRIANT *v.* FLIGHT, 8 L. J. Ex. 189.

Annotations:—**Dbtd.** Roberts *v.* Smith (1859), 4 H. & N. 315. **Expld.** Loftus *v.* Roberts (1902), 18 T. L. R. 532. **Refd.** Lake *v.* Campbell (1862), 5 L. T. 582; Broome *v.* Speak, [1903] 1 Ch. 586.

—— ——.]—*See, generally*, Part VI., Sect. 4, *post.*

621. —— After tender by employer—Of sum considered reasonable.]—On a parol contract with a public board to perform certain work & labour, for whatever "recompense the board might allow as right & proper," an action will lie to recover a reasonable recompense, although the board tender what they consider right & proper.—BIRD *v.* MCGAHEG (1849), 2 Car. & Kir. 707, N. P.

C. Payment Dependent on Contingencies.

622. Commission on profits—Deduction of losses for previous year.]—A clerk was engaged under an agreement to serve for ten years, at a yearly salary of £200 paid quarterly, & the employer agreed "yearly & every year to pay, over & above the salary, so much as should be equal to fifteen per cent. upon the clear yearly net gains & profits of the trade, after deducting all debts & expenses, interest on capital, & all losses that should happen for bad debts or otherwise. It was also agreed that a rest should be made yearly:—*Held:* the fifteen per cent. was to be paid upon the profits of each particular year, & the losses in former years could not be deducted.—PHILLIPS *v.* CURLING (1847), 10 L. T. O. S. 245.

623. Commission on articles "sold"—Articles commandeered by Government.]—Where an employee is entitled, in addition to his salary, to a commission on articles "sold" by his employers, he has no right to such commission on articles commandeered by the Govt. from his employers under Army Act, 1881 (c. 58), s. 115.—THOMPSON *v.* BRITISH BERNA MOTOR LORRIES, LTD. (1917), 33 T. L. R. 187.

Official of company—Payment after appointment.]—*See* COMPANIES, Vol. IX., p. 638, No. 4217.

—— **Payment after public allotment of shares.**] —*See* COMPANIES, Vol. IX., p. 544, No. 3592.

Negotiator for formation of company—Payment after commencement of business.]—*See* COMPANIES, Vol. IX., p. 638, No. 4218.

D. During Absence of Servant.

(a) In General.

624. Imprisonment by foreign power.] — A foreign prince, under pretence of precaution against a supposed act of aggression of our Govt., made a hostile seizure of British ships in his ports, & imprisoned our seamen on shore, & after six months they were released, & they resumed & concluded their voyage, & the owners received their freight:—*Held:* such seizure, however hostile in the manner, so far partook of the nature of an embargo in its result, & not of a capture, that it did not put an end to the contract of a mariner for wages even during the time of such detention & imprisonment. But even considering it as a temporary capture, yet, like the case of a capture & recapture, the mariner was still entitled to his wages; for a mariner's title to wages depends on the ship's earning her freight for the voyage, & the performance of his stipulated duty; & here freight for the voyage was ultimately earned, & the mariner was guilty of no breach of duty; for his stipulation not to be on shore under any pretence, without leave, before the voyage was ended, must be understood of a being on shore by the party's own unauthorised act; & even if such imprisonment on shore could be so considered, yet the master having afterwards received him again on board without objection amounted to a dispensation of the service in the interval, & entitled him to wages according to his original contract.—BEALE *v.* THOMPSON (1804), 4 East, 546; 1 Smith, K. B. 144, 102 E. R. 940; *affd. sub nom.* THOMSON *v.* BEALE (1813), 1 Dow, 299, H. L.; *previous proceedings* (1803), 3 Bos. & P. 405.

Annotations:—**Folld.** Johnson *v.* Broderick (1804), 4 East, 566. **Consd.** Dowthwaite *v.* Tibbut (1816), 5 M. & S. 75. **Distd.** Brown *v.* Milner (1817), 7 Taunt. 319. **Consd.** The Florence (1852), 19 L. T. O. S. 304. **Distd.** Melville *v.* De Wolf (1855), 4 E. & B. 844. **Consd.** Button *v.* Thompson (1869), L. R. 4 C. P. 330. **Expld.** Horlock *v.* Beal, [1916] 1 A. C. 486. **Refd.** Cuckson *v.* Stones (1858), 1 E. & E. 248; The Chieftain (1863), Brown. & Lush. 104; The Olympic, [1913] P. 92; Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522.

625. ——.]—JOHNSON *v.* BRODERICK (1804), 4 East, 566; 102 E. R. 947.

626. Absence at request of employers—School teacher.]—Regulations of an education committee provided that in the case of absence of teachers through illness for more than four weeks the

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PART V. SECT. 2, SUB-SECT. 1.—C.

q. Commission on profits.]—WATSON *v.* MILLER (1864), 23 U. C. R. 217.—**CAN.**

r. Wages to be paid out of proceeds of sale.]—MCDONELL *v.* COOK (1845), 1 U. C. R. 542.—**CAN.**

t. ——.]—TOWNSHEND *v.* ADAMS (1893), 26 N. S. R. 78.—**CAN.**

PART V. SECT. 2, SUB-SECT. 1.—D. (a).

a. Wartime service with Forces—Contract to pay during absence—Half-wages.]—GILMOUR *v.* SCOTTISH MINERS FEDERATION FRIENDLY SOCIETY, [1918] 1 S. L. T. 39.—**SCOT.**

b. While attending court under subpœna.]—The temporary absence of

committee would take into consideration the payment of salary after the expiration of the four weeks.

A married woman, head mistress of an infant school, expected her confinement early in Jan. 1911. On Sept. 10, 1910, the committee, in view of her condition, requested her to absent herself from her duties till after the birth of the child. They regarded her condition as an illness & declined to pay her full salary during her absence which extended from Sept. 10, 1910, to Feb. 6, 1911 :—*Held :* the teacher's absence from Sept. to Feb. was not "absence through illness," although this expression was not confined to absence during the time of actual illness, but absence during approaching illness & subsequent convalescence, but in consequence of the request of the committee ; & she was entitled to her full salary.

The law seems to be that loss arising from the temporary incapacity of a servant from illness falls upon the employer. The basis of that is that illness is not a breach of contract but something arising from the act of God (*per* CUR.).—DAVIES *v.* EBBW VALE URBAN DISTRICT COUNCIL (1911), 75 J. P. 533 ; 27 T. L. R. 543 ; 9 L. G. R. 1226.

627. Wartime service with forces—Contract to pay during absence—Servant of corporation.]—On Sept. 21, 1914, the corpn. of C. passed a resolution "that any officer or servant of the corpn. . . . who may volunteer & be accepted as such, & serve Great Britain afloat or ashore during this European War be allowed leave of absence during his naval or military services ; that he be reinstated upon his return with no loss of position or emoluments consequent upon his enforced absence ; that the corpn. pay him . . . during such period such sums as with the pay he receives from the Govt. will make up his full salary or wages. . . ."

Pltf. was employed by defts. as a tramcar driver at £1 11*s.* 6*d.* a week. Relying on the resolution of Sept. 1914, on July 6, 1915, he volunteered, contrary to the wishes of his employers, & was accepted for service. He claimed from defts. the difference between his army pay & the civil pay he was receiving before he enlisted :—*Held :* (1) by the resolution of Sept. 21, defts. had consented to pltf. enlisting ; (2) they had contracted to pay pltf. the sum claimed in the action ; (3) the contract, if *ultra vires* originally, was validated by Local Government (Emergency Provisions) Act, 1916 (c. 12), which was retrospective. Pltf. was therefore entitled to judgment.—SHIPTON *v.* CARDIFF CORPN. (1917), 87 L. J. K. B. 51 ; 116 L. T. 687 ; 15 L. G. R. 587.

628. —— —— —— War bonus included.]—On Sept. 15, 1914, the council of the deft. corpn. passed a resolution that the whole of their council employees, married or single, called up for service or volunteering for service with the Forces should be granted "full civil pay," less their service pay, calculated at 7*s.* per week, & in the case of married men in the army, less also the amount of the separation allowance for the wife, as from the date of mobilisation or enlistment, the council's payments to be continued so long as the employees were required to remain in the Forces & were in receipt of naval or military pay : & that increments of salary under any scale becoming due to any officer or employee during his period of service with the forces of the Crown should be paid as they accrued. Pltf., who was employed by the council as a riveter & driller, in reliance on that resolution volunteered for service with the Forces & enlisted on Nov. 11, 1914. He was at that time a married man & was in receipt of a weekly wage of £1 11*s.* 3*d.* Defts. had in fact no power to make the payments authorised by the resolution, but on May 17, 1916, Local Government (Emergency Provisions) Act, 1916 (c. 12), s. 1, came into force. As from the date of pltf.'s enlistment & down to the time of his demobilisation defts. paid to pltf. weekly sums which from time to time varied in amount, & which were calculated upon the assumption that, according to the contract between the parties, the "full civil pay" of pltf. was the pay he was receiving at the date of his enlistment. In an action brought by pltf. to recover the increments of pay to which he would have been entitled if he had remained in the service of defts. :—*Held :* the action was founded upon a simple contract debt & not upon a specialty debt arising out of Local Government (Emergency Provisions) Act, 1916 (c. 12), & therefore Stat. Limitations, & not Civil Procedure Act, 1833, applied ; therefore, pltf. could only recover such increments of pay as became payable within the six years preceding the issue of the writ in the action.—AYLOTT *v.* WEST HAM CORPN., [1927] 1 Ch. 30 ; 95 L. J. Ch. 533 ; 135 L. T. 424 ; 90 J. P. 165 ; 42 T. L. R. 516 ; 24 L. G. R. 429, C. A.

629. —— —— War bonus included.]—A circular issued by the Postmaster-General in 1914 stated that postal servants who entered the army would be allowed full civil pay, in addition to military pay. A telegraphist relying on the circular left his position in the Post Office for military service, & during his absence bonuses were given to the postal staff remaining at home, & he by petition of right claimed the amount of those bonuses :—*Held :* the bonuses were part of suppliant's pay, & he was entitled to the relief claimed.—SUTTON *v.* A.-G. (1923), 39 T. L. R. 295 ; 67 Sol. Jo. 422, H. L.

Annotations :—**Distd.** Railway Clearing House *v.* Druce (1926), 135 L. T. 417 ; Sisson *v.* West Ham Corpn. (1926), 135 L. T. 427. **Refd.** Pidduck, etc. *v.* R. (1924), 41 T. L. R. 51.

630. —— —— —— ——.]—On Aug. 21, 1924, the Railway Clearing House issued a circular in which it was stated that if a married man with dependants joined the Army, an allowance would be made to him which, with the amount deducted from his pay & separation allowance by the Army authorities, would not be less than four-fifths of his salary or standard rate of pay when he was in the service of the Clearing House. An unmarried man or widower with dependants was to receive an allowance according to individual circumstances. It was also stated that the men's posts were, as far as possible, to be kept open for them till their return to civil life. Pltfs., who had joined the Army, claimed a declaration that they were entitled under the circular in question to the difference between the emoluments paid to them during their service in His Majesty's Forces & the emoluments paid to other persons employed by the Clearing House during the same period who did not join the Forces. Pltfs. were selected from three classes : (*a*) those who had already enlisted when the circular was issued ; (*b*) those who enlisted between the date of the issue of the circular in question & June 25, 1916, when the Military Service Act, 1916 (c. 105), came into force ; &

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a servant from his master's employment, while attending ct. as a witness under a *subpœna*, is no ground for deduction from his salary.—MACINTYRE *v.* MCLEOD (1888), 27 N. B. R. 199.—CAN.

Sect. 2.—Wages: Sub-sect. 1, D. (a) & (b), E., F. & G.]

(*c*) those who enlisted after June 25, 1916 :—*Held :* the word "salary" necessarily connoted a contractually secured payment, & that excluded bonuses.—RAILWAY CLEARING HOUSE *v.* DRUCE (1926), 135 L. T. 417 ; 42 T. L. R. 663, H. L. ; *revsg.* S. C. *sub nom.* DRUCE *v.* RAILWAY CLEARING HOUSE (1925), 133 L. T. 514, C. A.

Annotation :—**Refd.** Sisson *v.* West Ham Corpn. (1926), 135 L. T. 427.

Unlawful absence—Forfeiture.]—*See* Sub-sect. 5, A., *post.*

Seamen's wages.]—*See* SHIPPING.

(b) Illness.

See, generally, CONTRACT, Vol. XII., p. 377, Nos. 3115 *et seq.*

631. General rule—Servant entitled to wages.]—R. *v.* CHRISTCHURCH (INHABITANTS), No. 371, *ante.*

632. ——— ———.]—A trader borrowed £550 under an agreement by which the lender was to become his clerk at a salary of £222 10*s.* a year. The trader agreed to produce his accounts & balance sheet to the lender, who was to get in the debts, & alone to draw cheques on the banking account. If the balance was in the trader's favour at any time, he might draw to the amount of it. On payment of the loan, or on proceedings being taken to recover it, the agreement was to be at an end. The lender was to have the option of becoming a partner. On the trader becoming bkpt. :—*Held :* the lender was a clerk entitled to payment of three months' salary in full, & the circumstances of the clerk having been absent from business owing to ill-health for the three months immediately preceding the bkpcy., with bkpts.' sanction, did not take away this right.—*Re* CLOSSON, *Ex p.* HARRIS (1845), De G. 105 ; 5 L. T. O. S. 203 ; 9 Jur. 497, Ct. of R.

633. ——— ———.]—H. was employed as a biscuit maker on the terms of a week's notice. One day he sent word that he was ill & unable to attend, & on inquiry this was found correct. After an absence of five weeks he returned, when the master refused to allow him to resume work. No notice had been given by the master to quit the service :—*Held :* the contract was not discharged by H.'s absence from illness, & H. was still a servant, & entitled to return & work till he got a week's notice.—CARR *v.* HADRILL (1874), 39 J. P. 246.

634. ——— ———.]—Pltf. entered deft.'s service for a period of five years, at a yearly salary, pltf. undertaking to devote the whole of his time to deft.'s business. During the period pltf. became temporarily ill, & was in consequence prevented from performing his work :—*Held :* pltf. was entitled to salary during the time of his illness.—WARREN *v.* WHITTINGHAM (1902), 18 T. L. R. 508.

Annotation :—**Refd.** Niblett *v.* Mid. Ry. (1907), 96 L. T. 462.

635. ——— ———.]—DAVIES *v.* EBBW VALE URBAN DISTRICT COUNCIL, No. 626, *ante.*

636. Right conditional on subsistence of contract—Contract for actual performance of services.]—By agreement defts. took pltf. into their service for five years, if he should so long live, & be able to perform, & actually perform, the services contracted for, & upon the like condition covenanted to pay him a certain salary :—*Held :* pltf. could not recover his salary for such time as he was absent from the place of his employment upon sick leave, though during that time he had not ceased to be in the service of defts.—INGLIS *v.* EAST-INDIA CO. (1851), 18 L. T. O. S. 93.

637. ———.]—CUCKSON *v.* STONES, No. 483, *ante.*

638. Illness caused by servant's misconduct—Before contract.]—Pltf. was engaged by defts. as a clerk at £120 *per annum*, & was to have one month's notice of dismissal. He began his duties on July 2, & served till Aug. 1. He was then obliged by illness to be absent till Sept. 2, when he tendered his services, which were refused. He had in the meantime received on Aug. 20, a letter from defts. terminating the engagement. In an action brought by him for wages from Aug. 1 to Sept. 20 :—*Held :* pltf. was entitled to wages for that period, & it was no answer to his claim that the illness was caused by an act of misconduct on his part, which occurred before the contract, & which he did not know, at the time of the contract, would lead to his illness, & render him incapable of performing his work.—K. ——— *v.* RASCHEN (1878), 38 L. T. 38 ; *sub nom.* K. *v.* R., 42 J. P. 264, D. C.

Annotations :—**Refd.** Loates *v.* Maple (1903), 88 L. T. 288 ; Niblett *v.* Mid. Ry. (1907), 96 L. T. 462.

639. Receipt of sick pay from friendly society—Railway servant.]—Pltf., a railway employee, upon entering the co.'s service, signed an undertaking to abide by the rules of the co. One of these rules required him to join the railway co.'s friendly society, which was independent of the co., but to the funds of which the co. contributed. By the rules of the society a member was entitled to sick pay during illness, but not if he was receiving wages from the co. Pltf. became ill in Feb. 1905, & received sick pay until Sept., when he received notice terminating his employment :—*Held :* he was not entitled to wages during that period.—NIBLETT *v.* MIDLAND RY. CO. (1907), 96 L. T. 462 ; 23 T. L. R. 240 ; 51 Sol. Jo. 211, D. C.

Annotation :—**Refd.** Warburton *v.* Co-op. Wholesale Soc., [1917] 1 K. B. 663.

640. What amounts to "illness"—Approach of illness—Convalescence.]—DAVIES *v.* EBBW VALE URBAN DISTRICT COUNCIL, No. 626, *ante.*

Seamen's wages.]—*See* SHIPPING.

E. Extra Wages.

641. Necessity for distinct agreement.]—If a clerk to the comrs. of the land tax be appointed clerk to the comrs. for managing other taxes, his

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PART V. SECT. 2, SUB-SECT. 1.—D. (b).

637 i. *Right conditional on subsistance of contract.*]—MARKS *v.* DARTMOUTH FERRY COMMISSION (1903), 36 N. S. R. 158 ; 34 S. C. R. 366.—**CAN.**

637 ii. ———.]—A servant is entitled to his wages or salary during absence through temporary illness, provided that the contract of service remains in existence during that time, & that he is ready & willing to carry out his duties save for the incapacity produced by the illness.—COLMAN *v.* NAISH (1914), 28 W. L. R. 487.—**CAN.**

637 iii. ———.]—MONTAGUE *v.* GRAND TRUNK PACIFIC RY. (1915), 8 W. W. R. 528 ; 23 D. L. R. 355 ; 25 Man. L. R. 372.—**CAN.**

637 iv. ———.]—RITCHIE *v.* HALL (1903), 23 N. Z. L. R. 409.—**N.Z.**

637 v. ———.]—MYERS *v.* SIERADSKI, [1910] T. P. D. 869.—**S. AF.**

637 vi. ———.]—BOYD *v.* STUTTAFORD & Co., [1910] App. D. 101.—**S. AF.**

c. Weekly servant—Whether entitled to wages.]—Where a servant hired by the week is absent, on account of illness, six or seven weeks, he is not entitled to be paid for the time during which he was absent.—MILLER *v.* MORTON (1891), 8 Man. L. R. 1.—**CAN.**

PART V. SECT. 2, SUB-SECT. 1.—E.

641 i. *Necessity for distinct agreement.*]—LATHAM *v.* EDINBURGH & GLASGOW RY. CO. (1866), 4 Macph. (Ct. of Sess.) 1084 ; 38 Sc. Jur. 564.—**SCOT.**

641 ii. ———.]—MACKENZIE *v.* BAIRD'S TRUSTEES, [1907] S. C. 838.—**SCOT.**

641 iii. ———.]—MACKISON *v.* DUNDEE BURGH, [1909] S. C. 971 ; 46 Sc. L. R. 577 ; [1909] 1 S. L. T. 383.—**SCOT.**

deputy who performed all the duties of his office is not therefore entitled to an increase of salary.

Had pltfs.' case rested wholly on the fact of the new duty being imposed upon him, I should not think it such a case as would have entitled him to come into a ct. of justice for an additional stipend on a *quantum meruit* (LORD KENYON, C.J.).—BELL *v.* DRUMMOND (1791), Peake, 63, N. P.

642. ——.]—A purser's steward on board one of His Majesty's ships cannot recover wages from the purser, upon an implied contract, for his services as such on board the ship in addition to wages as able seaman, payable by the Crown.—CARTER *v.* HALL (1818), 2 Stark. 361, N. P.

Annotations:—**Distd.** Clutterbuck *v.* Coffin (1841), Car. & M. 273; Clutterbuck *v.* Coffin (1842), 3 Man. & G. 842.

643. When contract to give full services.]—TAYLOR *v.* VANSITTART (1854), 24 L. T. O. S. 94.

644. ——.]—Pursuer was appointed in 1868 surveyor of police by the police comrs. of Dundee at a salary of £400, subsequently raised to £500, & continued in that office &, after 1894, as burgh surveyor to the town council until 1906. By the terms of his appointment it was stipulated that he should devote all his services to the business of the comrs. During the thirty-eight years of his employment he did work for the comrs. in excess of what was contemplated at the time of his appointment, & particularly in regard to the promotion of various bills in Parliament. On three occasions they paid him an honorarium, but otherwise he received no additional remuneration for his work. In 1906 he claimed, & brought an action against the comrs. for, £15,000 in respect of extra work:—*Held:* there was no evidence on which they could be held to be liable.—MACKISON *v.* DUNDEE MAGISTRATES, [1910] A. C. 285, H. L.

645. Effect of custom or usage.]—A mariner who has signed articles for a voyage at a certain pay per month, cannot claim any further wages or gratuity by usage or custom.

The only [contract] allowed was that entered into by articles & signed by him (LORD ALVANLEY, C.J.).—ELSWORTH *v.* WOOLMORE (1803), 5 Esp. 84, N. P.

Annotations:—**Distd.** Clutterbuck *v.* Coffin (1841), Car. & M. 273; Clutterbuck *v.* Coffin (1842), 3 Man. & G. 842.

646. —— **Payment of income tax by employer—Promotion to higher class of employment accepted.**]—Under Port of London Act, 1908 (c. 68), s. 60, servants of certain dock cos. which by that Act were transferred to the Port Authority held their office upon like "terms & conditions" as under the transferred dock cos. Pltfs., who were transferred employees, had entered the service at a time when there was a trade usage by the dock cos. to pay the income tax upon the salaries of such of their servants as were assessable thereto. At that time, having regard to the amount of their salaries, pltfs. were not so assessable. After the transfer, the Port Authority gave notice to discontinue the practice of paying income tax upon salaries. Pltfs were subsequently promoted by the Port Authority to higher grades of employment at increased salaries, & upon the passing of the Finance (No. 2) Act, 1915 (c. 30), they became assessable to income tax on the excess of their salaries over £120. They claimed a declaration that the Port Authority were liable to pay the tax:—*Held:* the acceptance by pltfs. of promotion to a higher class of employment, with notice of defts.' intention to discontinue the practice of paying income tax upon salaries, constituted a fresh contract of service, under which there was no obligation upon defts. to pay the tax.—MEEK *v.* PORT OF LONDON AUTHORITY, [1918] 2 Ch. 96; 87 L. J. Ch. 376; 119 L. T. 196; 82 J. P. 225; 34 T. L. R. 420; 16 L. G. R. 483, C. A.

647. Rescission of agreement—On transfer of business to statutory company.]—Pltf. had since 1892 been in the employment of the East London Waterworks co. That undertaking was by Metropolis Water Act, 1902 (c. 41), transferred to defts., the Metropolitan Water Board, & June 24, 1904, was the "appointed day" under the Act on which his transfer as one of the existing officers or servants of the East London Waterworks co. to defts. took place. By verbal agreement in 1899 that co. had arranged to pay pltf., in addition to his weekly wages, an extra sum for certain extra services performed by him. From June 24, 1902, to Nov. 16, 1906, no change was made by defts. as regards this extra weekly payment, but they then gave him notice that they would not in future pay this addition to his regular wages. Pltf. sued defts. for balance of wages from Nov. 17, 1906, & claimed a declaration that the agreement of 1899 was subsisting & binding on defts.:—*Held:* pltf.'s claim failed upon the ground that Metropolis Water Act, 1902, gave him no legal right to insist that his pay could never be altered so long as he was performing the same duties as he had previously performed. There was nothing in the words of sect. 47 which prevented defts., after an officer or servant had once been taken over by them from considering his rate of pay too high & consequently altering it. As the East London Waterworks co. had been entitled, at any time to give seven days' notice to change pltf.'s conditions of service & pay, defts. were equally entitled to do so. Pltf. had sustained no loss in consequence of the Act, & it was only if loss were sustained in consequence of the Act that any right to recover compensation arose under sect. 47.—ROWSELL *v.* METROPOLITAN WATER BOARD (1915), 84 L. J. K. B. 1869; 79 J. P. 267; 13 L. G. R. 654.

Wages of seamen.]—*See* SHIPPING.

F. Minimum Wages.

See WORK & LABOUR.

G. Apportionment of Wages.

648. Where agreement entire—Whether apportionment allowed.]—If A. appoint B. his collector, & direct B. to take & receive to his own use £100 out of the first money he collects, this is an entire agreement, & B. cannot bring an action of debt on it for £75 as for three-quarters of a

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641 iv. ——.]—"Salary" means fixed rate of payment for regular & continued services rendered & does not in its ordinary meaning include over-time or a periodical bonus.—BLACKBURN *v.* BLACKBURN, [1920] C. P. D. 13.—**S. AF.**

d. *Transfer to position of greater responsibility—Right to higher wages.*]—SMITH *v.* NEWFOUNDLAND GOVERNMENT (1885), 7 Nfld. L. R. 62.—**NFLD.**

PART V. SECT. 2, SUB-SECT. 1.—G.

648 i. *Where agreement entire—Whether apportionment allowed.*]—OWEN *v.* JAMES (1899), 4 Terr. L. R. 174.—**CAN.**

648 ii. —— ——.]—KNOX *v.* MUNRO (1900), 13 Man. L. R. 16.—**CAN.**

648 iii. —— ——.]—SHEDDON *v.* CITY OF REGINA (1907), 6 Terr. L. R. 290.—**CAN.**

648 iv. —— ——.]—A contract between a farmer & a farm labourer by which the latter agrees to work for the season at a certain sum per month to be paid at the expiration of the season is an entire contract & the labourer must complete the season before he is entitled to recover anything.—LA PLANTE *v.* KINNON (1915), 30 W. L. R. 949; 8 W. W. R. 332; 21 D. L. R. 293.—**CAN.**

648 v. —— ——]—HABER *v.*

Sect. 2.—*Wages: Sub-sect.* 1, *G.; sub-sects.* 2, 3 & 4.]

year's salary.—PLYMOUTH (COUNTESS) *v.* THROGMORTON (1688), 3 Mod. Rep. 153; 1 Salk. 65; 87 E. R. 99.

Annotations:—**Apld.** Cutter *v.* Powell (1795), 6 Term Rep. 320. **Refd.** Mills *v.* Funnell (1824), 4 Dow. & Ry. K. B. 561.

649. —— —— Effect of usage.]—(1) If a sailor hired for a voyage take a promissory note from his employer for a certain sum provided he proceed, continue & do his duty on board for the voyage, & before the arrival of the ship he dies, no wages can be claimed either on the contract or on a *quantum meruit*.

As it [the contract] is entire, & as deft.'s promise depends on a condition precedent to be performed by the other party the condition must be performed before the other party is entitled to receive anything under it. It has been argued that pltf. may now recover on a *quantum meruit:* but she has no right to desert the agreement (ASHHURST, J.).

(2) With regard to the common case of an hired servant . . . such a servant though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year. So if pltf. in this case could have proved any usage that persons in the situation of this mate are entitled to wages in proportion to the time they served, pltf. might have recovered according to that usage (LAWRENCE, J.).—CUTTER *v.* POWELL (1795), 6 Term Rep. 320; 101 E. R. 573.

Annotations:—*As to* (1) **Distd.** Thomas *v.* Williams (1834), 3 Nev. & M. K. B. 545. **Apld.** Appleby *v.* Myers (1867), L. R. 2 C. P. 651. **Consd.** Button *v.* Thompson (1869), L. R. 4 C. P. 330. **Apld.** Sumpter *v.* Hedges, [1898] 1 Q. B. 673. **Refd.** Collins *v.* Price (1828), 5 Bing. 132; Lilley *v.* Elwin (1848), 11 Q. B. 742; De Bernardy *v.* Harding & Pooley (1853), 1 C. L. R. 884; *Ex p.* Baker (1857), 3 Jur. N. S. 937; Munro *v.* Butt (1858), 8 E. & B. 738; Harrison *v.* James (1862), 31 L. J. Ex. 248; Stubbs *v.* Holywell Ry. (1867), L. R. 2 Exch. 311; Lockwood *v.* Tunbridge Wells L. B. (1884), Cab. & El. 289; O'Neil *v.* Armstrong, Mitchell, [1895] 2 Q. B. 70; Donkin *v.* Hastie (1897), 61 J. P. 568; Parkin *v.* South Hetton Coal Co. (1907), 97 L. T. 98; Harrowing S.S. Co. *v.* Thomas, [1913] 2 K. B. 171; Dakin *v.* Lee, [1916] 1 K. B. 566; Moriarty *v.* Regent's Garage Co., [1921] 1 K. B. 423. *As to* (2) **Consd.** Baxter *v.* Nurse (1844), 8 Jur. 273. **Apld.** George *v.* Davies, [1911] 2 K. B. 445. *Generally,* **Refd.** Goodman *v.* Pocock (1850), 15 Q. B. 576; Emmens *v.* Elderton (1853), 13 C. B. 495; The Camilla (1858), Sw. 312. **Mentd.** Burnby *v.* Bollett (1847), 16 M. & W. 644; Ehrensperger *v.* Anderson (1848), 3 Exch. 148; Dawson *v.* Collis (1851), 10 C. B. 523; Hochster *v.* De la Tour (1853), 2 E. & B. 678; Prickett *v.* Badger (1856), 1 C. B. N. S. 296; Danube & Black Sea Ry. & Kustendjie Harbour Co. *v.* Xenos, Xenos *v.* Danube & Black Sea Ry. & Kustendjie Harbour Co. (1861), 11 C. B. N. S. 152; Bartholomew *v.* Markwick (1864), 9 L. T. 651; Crawford *v.* Crawford (1867), 16 W. R. 411; Savage *v.* Canning (1867), 16 W. R. 133; Oxford *v.* Provand (1868), L. R. 2 P. C. 135; Robinson *v.* Mollett (1875), L. R. 7 H. L. 802; Byrne *v.* Leon Van Tienhoven (1880), 42 L. T. 371; James *v.* Evans (1897), 77 L. T. 78; Lodder *v.* Slowey, [1904] A. C. 442; Workman, Clark *v.* Lloyd Brazileño, [1908] 1 K. B. 968.

650. —— Salary at yearly rate.]—A. agreed by writing to receive B. as clerk, etc., in consideration of B. paying him a premium of £300, " & to pay him a salary at the following rates, viz.: for the first year £70; for the second, £90; for the third £110; for the fourth, £130; for the fifth & following years, £150 "; & in the case of the death of either to return £150. At or just before the execution of this agreement, B. said to A. that it would be convenient for him to receive his salary quarterly, & during the first three years the salary was so paid:—*Held:* in an action for work & labour & wages for the first quarter's salary in the fourth year, this was an agreement within Stat. Frauds, s. 4, & could not be varied by the conversations or acts of the parties; under it the salary was payable at the end of every year, & A. could not recover *pro rata* before the expiration of the year.—GIRAUD *v.* RICHMOND (1846), 2 C. B. 835; 15 L. J. C. P. 180; 10 Jur. 360; 135 E. R. 1172; *sub nom.* GERAUD *v.* RICHMOND, 1 New Pract. Cas. 404; 7 L. T. O. S. 85.

Annotations:—**Refd.** Evans *v.* Roe (1872), L. R. 7 C. P. 138; Williams *v.* Moss' Empires, [1915] 3 K. B. 242; Morris *v.* Baron, [1918] A. C. 1.

651. —— ——.]—BOSTON DEEP SEA FISHING & ICE CO. *v.* ANSELL, No. 502, *ante*.

652. —— Salary at weekly rate—Attachment of salary before expiry of week.]—S., a music hall artiste, was indebted to M. in the sum of £31 18*s.* 4*d.* for which amount & costs judgment was obtained against him. For the week beginning May 15, S. was engaged to give a week's performance at L. at a salary of £180 per week. On May 17 a garnishee order *nisi* was obtained by M. against S.'s employers to attach the proportion of salary alleged to be due to S. for the performances already given by him that week, the affidavit upon which the application was based stating that the garnishees were indebted to S. in the sum of £100 or thereabouts. By the terms of S.'s agreement his engagement was expressed to be for one week commencing May 15 at a salary of £180 per week. Clause 8 provided that " In case the artiste shall, except through illness . . . or accident, . . . fail to perform at any performance the artiste shall pay to the management as & for liquidated damages a sum equal to the sum which the artiste would have received for such performance in addition to costs incurred by the management through the default of the artiste. . . ." Clause 12 provided that " No salary shall be paid for days upon which the theatre is closed by reason of national mourning. . . ." " No salary shall be payable for any performance at which the artiste may not appear through illness or his own default. . . ." Clause 16 provided (*inter alia*): " If the artiste shall commit any breach of any of the terms & conditions of this contract or of the rules, the management . . . may forthwith determine this contract, & the artiste shall have no claim upon them for salary (other than a proportion for performances played) expenses, costs, or otherwise."

In an issue directed by the master it was contended on behalf of the garnishees that upon the construction of the contract the salary payable to S. did not become due until the expiration of the week for which he was engaged, & consequently was not liable to attachment before that time. It was contended for the judgment creditor that clauses, 8, 12 & 16 of the agreement showed that, although the salary was payable weekly, it was contemplated that the artiste should be taken to have earned his salary at the end of each performance. The master made the garnishee order absolute:—*Held:* the decision of the master was wrong, & there was no debt due to S. which was liable to attachment until the expiration of his

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BUTTERY (Sask.) (1919), 46 D. L. R. 681.—CAN

650 1. —— *Salary at yearly rate.*]—GLIDDON *v.* YARMOUTH PUBLIC SCHOOL (SEC. 17) TRUSTEES (1908), 12 O. W. R. 1001; 17 O. L. R. 343.—CAN.

e. On premature determination of contract—Determination by mutual consent.]—LIERLE *v.* ABBS (1921), 59 D. L. R. 661.—CAN.

f. Where salary in arrear.]—*Re* LOGAN (H. J.) Co. (Ont.), [1926] 2 D. L. R. 946; 7 C. B. R. 325.—CAN.

week's engagement.—MAPLESON *v.* SEARS (1911), 105 L. T. 639; 28 T. L. R. 30; 56 Sol. Jo. 54, D. C.

653. On premature determination of contract—Death of servant.]—CUTTER *v.* POWELL, No. 649, *ante*.

654. —— Determination by mutual consent—Yearly hiring — Bankruptcy of employer.]—(1) A clerk hired generally by the year at a certain salary, may, upon a dissolution of the contract by mutual consent within the year, recover salary *pro ratâ*, without any express agreement to that effect.

(2) The contracts of a trader with his clerks & servants are not dissolved by the issuing a commission of bkpcy. against him; therefore the clerk of a trader against whom a commission of bkpcy. issues during a current year of the hiring of such clerk, may, after the bkpt. has obtained his certificate, recover his salary for the whole year.

(3) So also he may recover *pro ratâ* where the contract has been dissolved by mutual consent within the year, but after the issuing of the commission.

(4) The departure of the clerks upon the ceasing of the trade, is evidence of a dissolution of such contract.—THOMAS *v.* WILLIAMS (1834), 1 Ad. & El. 685; 3 Nev. & M. K. B. 545; 3 L. J. K. B. 202; 110 E. R. 1369.

Annotations:—As to (1) **Refd.** Lamburn *v.* Cruden (1841), 2 Man. & G. 253. *As to* (2) **Consd.** Hopkins *v.* Thomas (1860), 7 C. B. N. S. 711.

655. —— —— Yearly salary — Question for jury.]—Where a contract for service at a yearly salary is by mutual consent put an end to in the middle of a quarter, the servant may recover salary *pro ratâ*: but, whether he be so entitled or not, is a question for the jury upon the whole of the circumstances.—LAMBURN *v.* CRUDEN (1841), 2 Man. & G. 253; 2 Scott. N. R. 533; Drinkwater, 86; 10 L. J. C. P. 121; 5 J. P. 242; 5 Jur. 151; 133 E. R. 741.

Annotation: **Refd.** Robins *v.* Power (1858), 1 Jur. N. S. 810.

656. —— Salary payable half yearly—Auditor & manager of estates—Apportionment Act, 1834 (c. 22).]—Where pltf. was by deed appointed to "the offices of auditor & superintending manager of deft.'s estates" at a salary of £1,800 payable half yearly, on July 7, & Jan. 7, in every year, & deft. had revoked the appointment in the middle of a current year:—*Held:* above Act did not enable pltf. to recover a proportionate part of the salary in respect of that portion of the year during which pltf. held the offices. That statute applies to cases where payment for the whole period must be made to some person & does not include a payment under a contract between employer & employed for services performed, where the payment entirely ceases upon the determination of claimant's right to receive it.—LOWNDES *v.* STAMFORD (EARL) (1852), 18 Q. B. 425; 21 L. J. Q. B. 371; 19 L. T. O. S. 227; 16 Jur. 903; 118 E. R. 160.

Annotation:—**Consd.** Moriarty *v.* Regent's Garage Co., [1921] 1 K. B. 423.

Forfeiture of wages.]—*See* Sub-sect. 5, *post*.

Quantum meruit.]—*See* Part VI., Sect. 4, *post*.

Wages of seamen.]—*See* SHIPPING.

SUB-SECT. 2.—PLACE OF PAYMENT.

See Payment of Wages in Public-Houses Prohibition Act, 1883 (c. 31).

SUB-SECT. 3.—ATTACHMENT OF WAGES.

See EXECUTION, Vol. XXI., pp. 632-634, Nos. 2143-2156.

SUB-SECT. 4.—DEDUCTIONS AND SET-OFF.

657. Set-off—Bills given to servant—Payment not proved.]—HEBDEN *v.* HARTSINK (1801), 4 Esp. 46, N. P.

Annotation:—**Refd.** Hickling *v.* Hardey (1817), 1 Moore, C. P. 61.

658. —— Value of goods lost—By negligence of servant.]—In an action by a servant against his master for wages, the latter cannot generally set off the value of the goods lost by the negligence of the former; but if it be proved to have been part of the original agreement between them, that the servant should pay out of his wages for all his master's goods lost through his negligence, the value of goods so lost may, under the general issue, be deducted from the amount of the wages.—LE LOIR *v.* BRISTOW (1815), 4 Camp. 134, N. P.

659. —— —— ——.]—*Indebitatus assumpsit* for work & labour, & for services in navigating certain barges for defts.

Plea, that the claim was for wages due for services performed by pltf. as master of a boat used by defts. for the carriage of goods, they being common carriers, & that pltf. was hired by them under an agreement, that, as master of the said boat, he was to be responsible for the safety & due delivery of all goods taken on board by him, & was to be chargeable for all pilferages of, or damage or losses to any goods under his charge; & that the amount thereof should be deducted from his wages, & might be pleaded or set off accordingly. The plea then averred the delivery of a pipe of wine to pltf. on board the boat; & that, whilst it was so in pltf.'s charge, the wine was pilfered & water substituted in lieu thereof, whereby the pipe of wine was greatly damaged, for which damage defts. were liable, & which damages amounted to a certain sum, etc., which far exceeded the amount of the causes of action in the declaration mentioned. Defts. then claimed to set off the loss they had thereby sustained, against pltf.'s demand. To this plea pltf. replied *de injuria:—Held:* the replication was improper. *Semble:* the plea amounted to the general issue.—CLEWORTH *v.* PICKFORD (1840), 7 M. & W. 314; 8 Dowl. 873; H. & W. 86; 10 L. J. Ex. 41; 5 Jur. 174; 151 E. R. 786.

Annotations:—**Mentd.** Salter *v.* Purchell (1811), 1 Q. B. 209; Livingston *v.* Ralli (1855), 1 Jur. N. S. 594.

660. —— Bill drawn by servant on master—Authority to draw for business purposes.]—A. was employed as storekeeper by B. & C., who were joint adventurers in a mine, & he was authorised to draw bills on B. for money laid out on account of the mining co. The bills were discounted by a banker, & the payment of them was guaranteed to him by B. & C. B. having been arrested, A.,

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PART V. SECT. 2, SUB-SECT. 4.

658 i. *Set-off—Value of goods lost—By negligence of servant.*]—*Re* BROWN & CRAFT, 21 C. L. T. 103.—CAN.

g. —— *Passage money received by stage driver.*]—MCRAE *v.* MCBEATH (1847), 3 Kerr, 446.—CAN.

h. *Deduction—Charge for medical attendance.*]—The request under Master & Servant Act, s. 12, of thirty or more workmen that the master deduct from their wages a sum to be paid to a medical practitioner for attendance upon them, affects only those who make it & the employer. Workmen who do not join in the request may make other arrangements for medical attendance as they see fit.—HALL *v.* LANE, [1923] 1 D. L. R. 903; [1923] 1 W. W. R. 545; 31 B. C. R. 507.—CAN.

k. —— *On summons for wages—Work not done within agreed time.*]—

Sect. 2.—Wages: Sub-sects. 4 & 5, A. & B.]

in order to provide funds to procure B.'s discharge, drew on B. a bill purporting to be on account of the mining co. The banker discounted the bill, & paid the amount to B. C. was afterwards compelled to take up the same in consequence of his guaranty. In an action brought by A. against B. & C. for his salary :—*Held :* C. could not set off the amount of the bill.—JONES *v.* FLEEMING (1827), 7 B. & C. 217 ; 6 L. J. O. S. K. B. 113 ; 108 E. R. 704.

—— **Children, young persons & women—Within Factory & Workshops Acts.**]—*See* Employers & Workmen Act, 1875 (c. 90), s. 11

661. Deduction—Charge for medical attendance —No special contract.]—If a servant has left his service for a considerable time, the presumption is, that all his wages have been paid It seems that a master is not bound to provide a menial servant with medical attendance & medicines during sickness ; but if a servant fall ill, & the master call in his own medical man to attend such servant, the master will not be allowed to deduct the charge for such medical attendance out of the servant's wages, unless there be a special contract between the master & servant that he should do so.—SELLEN *v.* NORMAN (1829), 4 C. & P. 80, N. P.

662. —— **Money paid on servant's behalf—Travelling expenses.**]—HEDGLEY *v.* HOLT, No. 707, *post.*

—— **On summons for wages—Work badly done.**] —*See* No. 831, *post.*

—— **Children, young persons & women—Within Factory & Workshops Acts.**]—*See* Employers & Workmen Act, 1875 (c. 90), s. 11.

—— **Forfeiture.**]—*See* Sub-sect. 5, *post.*

—— **Company manager.**]—*See* COMPANIES, Vol. IX., p. 544, Nos. 3594 *et seq.*

—— **School teacher.**]—*See* EDUCATION, Vol. XIX., p. 601, No. 284.

—— **Deductions under Truck Acts.**]—*See* FACTORIES, Vol. XXIV., pp. 935, 938-940, Nos. 237, 261, 263-279.

—— **Agricultural labourer.**]—*See* LANDLORD & TENANT, Vol. XXXI., p. 564, No. 7116.

—— **Coal mining regulations.**]—*See* MINES.

—— **Seamen's wages.**]—*See* SHIPPING.

—— **National insurance.**]—*See* WORK & LABOUR.

SUB-SECT. 5.—FORFEITURE.

A. Absence of Servant without Due Notice.

663. Right of servant to recover—Where wages accrued due at time of breach.]—GUY *v.* NICHOLS (1694), Comb. 265 ; 90 E. R. 468.

664. —— ——.]—Deft. having contracted with the Lords of the Admiralty to provide a steam vessel for exploring the river N., wrote to pltf. as follows : "I am willing to give you the command of the steamer destined for an exploring & trading voyage up the river N. & its tributaries. Your pay to be at the rate of £50 per month commencing from Dec. 1, 1853, & a commission of 20 per cent. on the net proceeds of the produce you may bring down." In reply, pltf. wrote to deft. as follows : "In answer to your letter of yesterday offering me the command of the vessel to go out in a trading & exploring voyage to the river N. & its tributaries at a fixed pay of £50 per month & 20 per cent. on the net proceeds of the goods obtained, I beg leave to say that I accept the service & the terms you mention." The vessel proceeded up the N. under the command of pltf. as far as D. when pltf. refused to proceed further & abandoned the command :—*Held :* this was not an entire contract for the whole voyage, but a contract which gave a cause of action for the salary as each month arose, & which, when once vested, was not subject to be lost or divested by pltf.'s desertion or abandonment of the contract.—TAYLOR *v.* LAIRD (1856), 1 H. & N. 266 ; 25 L. J. Ex. 329 ; 27 L. T. O. S. 221 ; 156 E. R. 1203.

Annotations :—**Apld.** Button *v.* Thompson (1869), L. R. 4 C. P. 330. **Reld.** Parkin *v.* South Hetton Coal Co. (1907), 98 L. T. 162.

665. —— ——.]—Pltf. shipped on board deft.'s vessel, as mate, at wages of £5 10*s.* per calendar month, under articles in the form sanctioned by the Board of Trade in pursuance of the Merchant Shipping Act, 1854, for a voyage from Shields to Alexandria, &, if required, to any port or ports in the Mediterranean, Black Sea, Danube, etc., & home to the ship's final port of discharge in the United Kingdom or continent of Europe ; the voyage not expected to exceed twelve months. During the voyage out there was evidence that pltf. had been guilty of drunkenness & violent & insubordinate conduct ; &, being on shore at Sulina, a port in the Danube, he was left behind, & the vessel came home without him. In an action for wages for the time pltf. actually served on board, the jury found that he had been guilty of drunkenness & abusive language subversive of discipline, & that he was not left behind by the wilful misconduct or negligence of the captain, but through his own negligence & misconduct. They, however, negatived desertion :—*Held :* notwithstanding this finding of the jury, pltf. was entitled to recover wages up to the time of his being left behind at Sulina, the contract being for a succession of voyages of indefinite duration, though "not expected to exceed twelve months," & the wages being vested & a debt at the end of each month of service, subject, it might be, to forfeiture in an event which had not happened, though perhaps no recoverable until the expiration of the period of service stipulated for.—BUTTON *v.* THOMPSON (1869), L. R. 4 C. P. 330 ; 38 L. J. C. P. 225 ; 20 L. T. 568 ; 17 W. R. 1067 ; 3 Mar. L. C. 231.

Annotations :—**Distd.** Saunders *v.* Whittle (1876), 33 L. T. 816. **Reld.** Parkin *v.* South Hetton Coal Co. (1907), 98 L. T. 162.

666. —— ——.]—MARGERISON *v.* BERTWISTLE (1872), 36 J. P. 100.

HAMILTON *v.* MOORE (1872), 33 U. C. R. 100.—**CAN.**

1. *Plea of set-off—Whether amounting to admission.*]—STEWART *v.* SCOTT (1867), 27 U. C. R. 27.—**CAN.**

PART V. SECT. 2, SUB-SECT. 5.—A.

663 i. *Right of servant to recover—Where wages accrued due at time of breach.*]—BLAKE *v.* SHAW (1852), 10 U. C. R. 180.—**CAN.**

663 ii. —— ——.]—JOHNSTON *v.* KEEMAN (1894), 3 Terr. L. R. 239.—**CAN.**

663 iii. ——.]—TAYLOR *v.* KINSEY (1899), 4 Terr. L. R. 178.—**CAN.**

663 iv. —— ——.]—BLAIN *v.* BRITANNIA SMELTING CO. (1908), 7 W. L. R. 368.—**CAN.**

663 v. ——.]—ASHMORE *v.* BANK OF BRITISH NORTH AMERICA (1913), 18 B. C. R. 257.—**CAN.**

663 vi. —— ——.]—FARROW *v.* GARDNER (1913), 24 W. L. R. 929 ; 12 D. L. R. 843.—**CAN.**

663 vii. —— ——.]—BERG *v.* COWIE (Sask.) (1918), 40 D. L. R. 250.—**CAN.**

663 viii. —— ——.]—Where a hiring is for $80 a month for 8 months the servant is entitled to recover at the end of each month, & if he quits, though unjustifiedly, he may recover his wages to the end of the month next preceding that in which he quits.—ABRAMOFF *v.* PODRATZ, FEODOROFF *v.* PODRATZ (Sask.) (1920) 2 W. W. R. 6 ; 51 D. L. R. 313 ; 13 Sask. L. R. 215.—**CAN.**

663 ix. —— ——.]—RAMJI MANOR *v.* LITTLE (1873) 10 Bom. 57.—**IND.**

667. —— ——.]—Pltf. was a putter in the service of a colliery co., his duty being to draw coal in tubs underground. His wages depended on the number of tubs drawn, & were payable fortnightly on the Friday following the end of each fortnight, a statement of the wages due, called a pay note, being handed to each workman on the proceding day. The total amount of work done each day was ascertained daily. On Thursday, July 12, 1906, pay notes were handed to the putters showing the wages due for the fortnight ending on July 7. A dispute arose as to the amount due to one of the putters, & in consequence on the Friday the putters declined to work, thus laying the pit idle. The putters were then informed that they had broken their contracts & forfeited all wages since the conclusion of the previous fortnight. On the following Monday the putters presented themselves for work but were refused unless they signed on afresh. By arrangement, however, they resumed work on the next day. Pltf. claimed for four days' wages from July 9 to July 12 inclusive, & damages for breach of contract in not allowing him to work on the Monday contending upon the latter point that laying the pit idle for a day or two was, to the knowledge of defts., common practice, & did not amount to a repudiation of the contract of service. The county ct. judge found that the wages became due each day as they were earned, & he gave judgment for pltf. for the wages claimed & damages. The Div. Ct. held pltf. was entitled to the wages, but not to the damages, as the refusal of the men to work justified their dismissal. Upon appeal by defts. upon the question of wages:—*Held:* as each day's wages became due daily, pltf. was entitled to recover.—PARKIN *v.* SOUTH HETTON COAL CO. (1907), 98 L. T. 162; 24 T. L. R. 193, C. A.

668. —— ——.]—GEORGE *v.* DAVIES, No. 432, *ante*.

669. —— **Where no wages accrued due at time of breach—Recovery for current period of hiring.**]—If a clerk be engaged at a salary of £100 a year, & having received his wages up to a certain time, serve for some time longer, & then leave the service before the year expires, without due cause, & without any notice. *Qu.:* whether he is entitled to recover wages up to the time of his quitting.

At all events, he is liable to a cross action for leaving the service without notice.

I must take it that the hiring in this case was a hiring for a year. The doctrine that a general hiring is a hiring for a year, is not confined to servants in husbandry, but extends also to domestic & other servants (ABBOTT, C.J.).—HUTTMAN *v.* BOULNOIS (1826), 2 C. & P. 510.

670. —— ——.]—WALSH *v.* WALLEY, No. 692, *post*.

671. —— —— ——.]—GREGSON *v.* WATSON, No. 695, *post*.

672. —— —— ——.]—Pltf. was hired by deft. as a painter, by the week, his wages to be sevenpence per hour, payable every Saturday at noon. The full week was fifty-four & a half hours, concluding at 5.30 p.m. on each Friday, but overtime was paid at the same rate. The engagement was determinable by either party at a week's notice. Pltf. left the service without notice, on a Friday, at noon, having completed fifty-seven hours including overtime, since the previous Friday:—*Held:* pltf. could not recover his wages for the current week of his leaving the service.—SAUNDERS *v.* WHITTLE (1876), 33 L. T. 816; 40 J. P. 136; 24 W. R. 406.

Annotations:—**Distd.** Warburton *v.* Heyworth (1880), 6 Q. B. D. 1; Parkin *v.* South Hetton Coal Co. (1907), 98 L. T. 162. **Refd.** Gregson *v.* Watson (1876), 34 L. T. 143.

673. —— —— ——.]—WARBURTON *v.* HEYWORTH, No. 693, *post*.

Effect of agreement as to forfeiture.] — *See* Sub-sect. 5, C., *post*.

B. Dismissal for Misconduct.

674. What amount forfeited—Wages of current period of hiring—Yearly hiring.]—SPAIN *v.* ARNOTT, No. 461, *ante*.

675. —— —— ——.]—ATKIN *v.* ACTON, No. 538, *ante*.

676. —— —— ——.]—TURNER *v.* ROBINSON, No. 305, *ante*.

677. —— —— ——.]—RIDGWAY *v.* HUNGERFORD MARKET CO., No. 510, *ante*.

678. —— —— ——.]—BOSTON DEEP SEA FISHING & ICE CO. *v.* ANSELL, No. 502, *ante*.

679. —— —— **Domestic servant.**]—GORDON *v.* POTTER, No. 581, *ante*.

680. —— —— **Weekly hiring.**]—W. was engaged to work for R. by the week as a miller; & had served two years, when near the end of one week he absented himself half a day drinking, & on his return was discharged. On summons against R. for wages, the justices awarded W. wages for the days of the current week during which he had worked:—*Held:* as W. was properly discharged he was not entitled to any wages for the current week.—ROBBINS *v.* WRENCH (1867), 31 J. P. 758.

681. —— ——.]—Pltf. agreed with deft. to enter the service of the latter, a railway contractor, as general superintendent of station buildings to be erected, & for general works; his salary to be at a fixed yearly sum, to be paid monthly; two months' notice in writing on either side to be given to terminate the agreement. Before the end of the first month deft. complained of pltf.'s incompetency & gave him notice in writing under the agreement. During the second month, deft. obtained further proof of pltf.'s incompetency &

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669 i. —— *Where no wages accrued due at time of breach—Recovery for current period of hiring.*]—Pltf. was engaged by defts. at a monthly salary. After working for nineteen days in a certain month, he left without giving any notice, & subsequently brought this action for 19 days' work actually performed:—*Held:* by leaving without notice, pltf. had forfeited his right to wages even for work done.—MCKEE *v.* CANADIAN PACIFIC RY. CO., 23 C. L. T. 121.—**CAN.**

669 ii. —— —— ——.]—When a monthly servant leaves his employment wrongfully in the course of the then current month, he loses all rights to wages for the time he had actually served during that month.—DHUMEE BEHARA *v.* SEVENOAKS (1886), I. L. R. 13 Calc. 80.—**IND.**

669 iii. —— —— ——.]—RALLI BROTHERS *v.* AMBICA PRASAD (1912), I. L. R. 35 All. 132.—**IND.**

669 iv. —— —— ——.]—BASSARAMADOO *v.* MORRIS (1888), 6 S. C. 28.—**S. AF.**

669 v. —— —— ——.]—ROBERTSON & CO. *v.* HEATHORN (1904), 21 S. C. 427.—**S. AF.**

PART V. SECT. 2, SUB-SECT. 5.—B.

674 i. *What amount forfeited—Wages of current period of hiring—Yearly hiring.*]—Where a person in the service of another under a yearly hiring is dismissed for cause by his employer during the currency of any one year, he is not entitled to any remuneration for the portion of the year that he has served.—TIBBS *v.* WILKES (1876), 23 Gr. 439.—**CAN.**

m. —— —— *After refusal to accept wages earned.*]—Where a servant whose salary is payable periodically, *e.g.* monthly, is justifiably dismissed for cause before the date when the salary for such a period becomes due & payable, the fact that the master, credits him with salary up to the date of his dismissal & offers him the amount thereof does not prevent the master, after the servant's refusal to accept said amount, from falling back on his right to refuse to pay any salary at all for said period.—KNIGHT *v.* DUCKLOW MOTORS, LTD. (Sask.), [1926] 4 D. L. R. 1111; [1926] 3 W. W. R. 684.—**CAN.**

681 i. —— ——.]—BROJO MOHUN MYTEE *v.* SWAYNE (1862), 1 Hay, 297.—**IND.**

Sect. 2.—Wages: Sub-sect. 5, B. & C.]

discharged him. Pltf. sued in a county ct. & obtained judgment for one month's salary; he afterwards sued again in same ct. for a second month's salary; the judge found as a fact that pltf. was incompetent to do the work for which he had contracted, & gave judgment on the second plaint for deft.:—*Held:* upon appeal, under the circumstances pltf. was not entitled to more than one month's salary.—SEARLE *v.* RIDLEY (1873), 28 L. T. 411.

682. —— Embezzlement by servant — Arrears of wages greater than sum embezzled.]—If a servant habitually embezzle his master's property, the amount embezzled is wholly immaterial; &, although the arrear of wages sought to be recovered may exceed the amount embezzled, the servant is not entitled to any thing (LORD TENTERDEN, C.J.).—BROWN *v.* CROFT (1828), 6 C. & P. 16, n.

683. —— Wages accrued due—Before current period of hiring.]—In an agreement between a master & his traveller for a yearly engagement payable quarterly, the traveller's misconduct, for which the master dismissed him, is no waiver of the quarter's salary due & payable previous to such misconduct.—WOOLLEY *v.* STEINITZ (1847), 8 L. T. O. S. 344.

684. —— —— ——.]—SEARLE *v.* RIDLEY, No. 681, *ante.*

685. —— —— ——.]—HEALEY *v.* SOCIÉTÉ ANONYME FRANÇAISE RUBASTIC, No 506, *ante.*

Effect of agreement as to forfeiture.] — *See* Sub-sect. 5, C., *post.*

C. Agreement for Forfeiture.

686. Construction of agreement — Forfeiture must come within terms.] — Pltf. declared in *assumpsit* for commission & wages due to him on a contract, whereby he agreed with defts. to sail for them to B., & purchase for them 1,200 tons of palm oil, & ship it on board of their ships; that he would faithfully abide by their instructions to him, & would not aid or assist, directly or indirectly, the trading of any other ships or cargoes, by giving advice for the purpose of selling or bartering the same for palm oil, except so far as it might be rendered necessary for carrying the agreement into effect, & for defts.' benefit, under the penalty of the forfeiture of his commission & wages. Defts. pleaded, that they were merchants trading to the coast of Africa, & having trading establishments there; & they were desirous of sending out an agent there, to purchase & ship for them palm oil, & to conduct exclusively their trading & take charge of their property there, which pltf. & one H. & one A. well knew; & that pltf. & those persons, contriving to defraud defts., fraudulently conspired & agreed together that H. & A. should fit out two ships for the coast of Africa, & that pltf. should apply for & obtain the employment as agent for defts., & under colour & by means of such employment, & without defts.' knowledge, & in fraud of his agreement with them, should assist & advise the said H. & A. in the trading of their ships, & the selling & bartering the cargoes for palm oil, & should assist the said ships by employing the workmen & servants of defts. upon them, & endeavour to establish a trade for the said H. & A. in competition with & to the prejudice of defts.; that, in pursuance of such conspiracy, they fitted out ships, & pltf. obtained the employment as agent, & induced defts. to enter into the agreement in the declaration mentioned, for the purposes before stated; & that he did, under colour of his employment, & without defts.' knowledge, & in fraud of his agreement, aid & assist H. & A. in the trading of their ships, & supplied them with palm oil, by employing defts.' workmen & servants upon them, & in other ways assisted them in the bartering their cargoes for palm oil, & in establishing a rival trade to defts. Replication *de injuriâ:—Held:* the plea was bad; for the purposes therein stated, could not vitiate the agreement itself when carried into effect; & the actual aiding & assisting of H. & A., which was charged against pltf., was not such as was specified in the agreement.—HEMINGWAY *v.* HAMILTON (1838), 4 M. & W. 115; 150 E. R. 1366.

687. —— Absence without leave — Continuing absence with leave.]—By one of the rules of a cotton mill, any person absenting himself on account of sickness or any other cause was immediately to give notice to the overlooker; in default thereof all wages then earned were to be forfeited. A weaver in the mill, in the middle of the day, asked the overlooker for leave of absence for half a day, promising to return to work the next morning at six. The weaver did not return the next day till half-past one in the afternoon:—*Held:* the weaver did not forfeit her wages under this rule, for she could not be said to be absent without notice merely by continuing her absence longer than the period which she had mentioned.—TAYLOR *v.* CARR & PORTER (1861), 30 L. J. M. C. 201; 30 L. J. Q. B. 295; 4 L. T. 414; 25 J. P. 375; 9 W. R. 699.

688. —— —— Late arrival at work.]—T. was employed by A., a cotton spinner, at a weekly wage of 15*s.*, ending on Wednesdays. The rules stated that a workman absenting himself would forfeit his wages. On Tuesday morning at 6 a.m. T. was late, & being refused entrance said he would leave for the day & went away. After breakfast he came again, & went in unobserved, till, on being noticed by the overlooker, he was told his work had been distributed, & T. went away again. On suing for the week's wages:—*Held:* the county ct. judge was wrong in finding that T. had not absented himself on these facts, & therefore T. could not recover his wages.—TOMLINSON *v.* ASHWORTH (1885), 50 J. P. 164; 2 T. L. R. 66, D. C.

Annotation:—**Apld.** Press *v.* Bowes & Partners (1893), 62 L. J. M. C. 145.

689. —— Official of employers to be sole judge of dispute—Finality of decision.]—Complainant became conductor of a tramway co. under an agreement by which he was to pay them £5, to be retained, together with his wages for the current week, as security for the discharge of his duties & the observance of the rules of the co., etc.: the co. to have power, in case of any breach by the conductor of the rules, to retain the £5 & his wages for the current week as liquidated damages for such breach; & it was provided that "the manager of the co. should be the sole judge between the co. & the conductor whether the co. was entitled to retain the whole or any part of the £5 & wages for the current week as liquidated damages; & that the certificate should be binding & conclusive evidence in all courts of justice, civil & criminal, & before all stipendiary & police magistrates, etc., that the amount thereby certified as the amount to be retained was the true amount to be retained,

681 ii. —— ——.]—BHAKTA, ETC. *v.* SITAL (1925), I. L. R. 48 All. 31.—IND.

681 iii. —— ——.]—RENE *v.* ALEXANDER, [1916] C. P. D. 608.—S. AF.

681 iv. —— ——.]—SPENCER *v.* GOSTELOW, [1920] App. D. 617.—S. AF.

& should bar the conductor of all right to recover it." Complainant having summoned the co. before a police magistrate, under London Hackney Carriages Act, 1843 (c. 86), to recover his deposit & wages :—*Held :* the agreement was not illegal, & the complaint being substantially a civil proceeding, the manager's certificate that the deposit & wages had been forfeited was conclusive evidence of the fact, precluding the magistrate from making any further inquiry.—LONDON TRAMWAYS CO. *v.* BAILEY (1877), 3 Q. B. D. 217 ; 47 L. J. M. C. 3 ; 37 L. T. 499 ; 42 J. P. 22 ; 26 W. R. 494, D. C.

Annotation :—**N.F.** Armstrong *v.* South London Tram. Co. (1890), 64 L. T. 96.

690. —— —— —— Servant not heard in defence.]—Pltf. became a conductor of deft. co. under a written agreement on the terms, amongst others, that, for a breach by him of the rules of the company, the co.'s manager might decide that wages owing to him might be retained by the co. as liquidated damages for the breach, & that the manager's certificate in writing to that effect should be binding & conclusive evidence between the co. & the conductor in all cts. of justice. Pltf., having been dismissed by the manager for a breach of the rules, brought an action to recover the wages due to him. After the action was brought the manager, without hearing anything that pltf. might wish to say, signed a certificate which declared the wages then due to pltf. to be forfeited to the co. :—*Held :* the certificate was no defence to the action, as the manager had not given pltf. an opportunity of being heard on the question of forfeiture.—ARMSTRONG *v.* SOUTH LONDON TRAMWAYS CO., LTD. (1890), 64 L. T. 96 ; 55 J. P. 340 ; 7 T. L. R. 123, C. A.

691. Effect of agreement —On liability of servant to criminal proceedings.]—R., a quarryman, was employed under a written agreement to serve D. for a certain period, the wages to be paid once every two months, & in case of absence without leave of D., then R. to forfeit the wages in hand then due to him. R., during the period, absented himself, whereupon D. proceeded against him under 4 Geo. 4, c. 34 :—*Held :* though the contract of hiring reserved to the master a remedy, such as forfeiture of the servant's wages, in case of the servant's absence without cause, the servant was not the less liable to the criminal punishment.—DEVONSHIRE (DUKE) *v.* RAWLINSON (1864), 28 J. P. 72.

692. What amount forfeited—All wages accrued due—Wages for past period of hiring.]—In an action to recover 22*s.* for wages it appeared that pltf. was a weaver in the employment of defts., who were cotton manufacturers, that he was a weekly servant, & that his wages were regulated by the number of pieces which from time to time he wove & delivered to his masters. The practice at defts.' mill was that the wages earned by the workmen at the mill were ascertained & fixed at noon on Thursday, but were not paid to the workmen till the following Saturday. The workmen worked under rules embodied in the contract of hiring, as follows : " All persons in our employ are required to give fourteen days' notice before leaving, such notice to be given at the time of booking up. Persons leaving without notice will forfeit all wages due." The term " booking up " is understood to mean the Thursday in each week. Fifteen shillings of the amount sued for was earned by pltf. in the week of his service, which ended at noon on Thursday, & the amount was then fixed. He worked till the forenoon of Friday, earning the balance claimed, & then left his service without any reasonable excuse :—*Held :* the wages earned in the week ending on Thursday were forfeited as the rules were so framed as to protect the master by making the workman always liable to forfeit something if he left without notice. —WALSH *v.* WALLEY (1874), L. R. 9 Q. B. 367 ; 43 L. J. Q. B. 102 ; 38 J. P. 470 ; *sub nom.* WALLEY *v.* WALSH, 22 W. R. 571.

Annotations :— **Distd.** Parkin *v.* South Hetton Coal Co. (1907), 98 L. T. 162. **Reld.** Warburton *v.* Heyworth (1880), 6 Q. B. D. 1.

693. —— —— ——.]—A weaver, a woman subject to the provisions of the Factory Acts, was employed at a mill in which amongst the rules were rule 15, that no person shall leave his or her work without giving fourteen days' previous notice, such notice to be given on a Saturday, & rule 16, that any person leaving without giving such notice "shall forfeit all wages then due, or earned, or unpaid." She was paid by the piece & all work done was booked up at 3 p.m. on Wednesday in each week, & paid for on the following Saturday, all work booked after 3 p.m. on Wednesday being carried forward to the following week. She left the mill before 3 p.m. on a Wednesday without giving the required notice, having previously carried in & had booked certain work which she had completed. On the following Saturday she applied for the wages due at the time she left & when she had completed her work, but payment was refused on the ground that the same was forfeited by rules 15 & 16. No claim was, however, made for damage sustained by the employer. . . . Employers & Workmen Act, 1875 (c. 90), s. 11, enacts that "in the case of a child, young person, or woman, subject to the provisions of the Factory Acts, any forfeiture on the ground of absence or leaving work shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage, if any, which the employer may have sustained by reason of such absence or leaving work" : —*Held :* the above facts did not show a weekly hiring at weekly wages, but showed that the price for the work done & booked when the weaver left on the Wednesday was then earned & due though not then payable, & the same would have been forfeited by rules 15 & 16 but as there was no damage & the weaver was a woman subject to the Factory Acts she was protected by Employers & Workmen Act, 1875 (c. 90), s. 11, & could not be deprived of what she had so earned.

If the hiring was a weekly hiring for weekly wages, then as no wages would be due until the end of the week, if applt. left before the end of the week, I am clearly of the opinion that this would not be within Employers & Workmen Act, 1875 (c. 90), s. 11, but would be a case in which applt. was claiming for a sum which was never due at all. . . . Suppose the operative, instead of being a woman had been a workman . . . then the rules being part of the contract, although he would have earned the price to be paid for his work, & would have been forfeited by rules 15 & 16 (BRETT, L.J.). —WARBURTON *v.* HEYWORTH (1880), 6 Q. B. D. 1 ; 50 L. J. Q. B. 137 ; 43 L. T. 461 ; 45 J. P. 38 ; 29 W. R. 91, C. A.

Annotation :—**Consd.** Parkin *v.* South Hetton Coal Co. (1907), 98 L. T. 162.

694. —— Wages during suspension of servant—Suspension followed by dismissal.]—By a rule of a co. the co. reserved the right to punish any servant, by immediate dismissal, fine, or suspension from duty, for certain offences, & they also reserved the right to deduct from the pay of their servants, & retain, the sums which might be imposed as fines, & to withhold their wages during the time of their

Sect. 2.—Wages: Sub-sect. 5, C.; sub-sect. 6, A. (a), (b) & (c), B. & C.; sub-sects. 7 & 8.]

suspension or absence from duty for any cause. The co. suspended one of their servants for two weeks under the rule, & at the expiration of the two weeks they dismissed him:—*Held:* he was entitled to his wages during the two weeks.—WARBURTON *v.* TAFF VALE RY. CO. (1902), 18 T. L. R. 420, D. C.

695. Employers & Workmen Act, 1875 (c. 90), s. 11—Applicable only where wages accrued due.]—Pltf., a factory winder, was paid every Saturday for the number of sets she had wound off during the week ending on the preceding Wednesday; one of the rules of defts.' factory, in which she worked was that fourteen days' notice in writing was required previous to leaving their employment, such notice to be given on a Thursday; & all persons leaving without notice would forfeit the whole of the wages to which they would otherwise have been entitled, & also render themselves liable to be proceeded against according to law.

Pltf. earned 3*s.* 7*d.* on the first two days of one week of her employment, was absent with leave on the Saturday, did not return, & wholly left deft.'s service, without leave or notice, on Monday. In an action for 3*s.* 7*d.* earned, the county ct. judge held that pltf.'s was a weekly hiring, & that, although deft.'s damage by reason of pltf.'s absence was only 3*s.* pltf. could not recover anything under above sect.:—*Held:* notwithstanding the fortnight's notice required, the facts justified the finding that the service was weekly; pltf. had no claim for wages or other sum due for work done; & the county ct. judge was right.—GREGSON *v.* WATSON (1876), 34 L. T. 143; 40 J. P. 312, D. C.

Annotations:—**Distd.** Warburton *v.* Heyworth (1880), 6 Q. B. D. 1; Parkin *v.* South Hetton Coal Co. (1907), 98 L. T. 162.

696. —— —— No damage claimed by employer.]—WARBURTON *v.* HEYWORTH, No. 693, *ante.*

697. Waiver of forfeiture—No consideration—Invalid.]—Debt for wages as hired servant. Plea, that pltf. was hired on the terms that, if he should be drunk during service, he should forfeit all wages then due: that after the wages became due & whilst pltf. was in deft.'s service, he was drunk, whereby, etc. Replication, after pltf. was drunk, deft. exonerated him from the forfeiture, & agreed to pay him the wages already due as aforesaid, & continued to employ him as such servant. New assignment, that part of the wages accrued due before pltf. was drunk, & the rest afterwards; & that pltf. declared not only for wages due before but also for wages due after, etc.:—*Held:* the replication was bad for not showing any consideration for agreeing to pay the forfeited wages.—MONKMAN *v.* SHEPHERDSON (1840), 11 Ad. & El. 411; 3 Per. & Dav. 182; 9 L. J. Q. B. 134; 113 E. R. 471.

Wages of seamen.]—*See* SHIPPING.

SUB-SECT. 6.—RECOVERY OF WAGES.

A. Action.

(a) In General.

When right arises.]—*See* Sub-sect. 1, *ante.*

Right to account—Commission on profits.]—*See* EQUITY, Vol. XX., p. 268, No. 279.

Evidence of contract—Secondary evidence in default of original.]—*See* EVIDENCE, Vol. XXII. p. 239, No. 2145.

Quantum meruit.]—*See* Part VI., Sect. 4, *post.*

(b) By and Against Whom Maintainable.

By whom maintainable—Representative of servant.]—*See* EXECUTORS, Vol. XXIII., pp. 289, 295 Nos. 3554, 3602.

698. Against whom maintainable—Agent of master—Servant engaged without authority.]—If A. employ B. to work for C. without warrant from C., A. is liable to pay for it (HOLT, C.J.).—ANON. (1698), 12 Mod. Rep. 256; 88 E. R. 1304

—— ——.]—*See, also,* AGENCY, Vol. I., p. 393 Nos. 964–966.

699. —— Master—Services lent by servant to third party—Payment made to master.]—If A while employed as master of a ship of which B. is the owner, gives part of his personal services to C for a stipulated sum, & C. pays this into the hands of B., an action to receive it cannot be supported against B. at the suit of A.—THOMPSON *v.* HAVELOCK (1808), 1 Camp. 527, N. P.

Annotations:—**Refd.** Frazer *v.* Hatton (1857), 2 C. B. N. S. 512. **Mentd.** Morison *v.* Thompson (1874), L. R. 9 Q. B. 480; Shipway *v.* Broadwood, [1899] 1 Q. B. 369; Rowland *v.* Chapman, Rowland *v.* Corrie, Rowland *v.* Brandrett (1901), 17 T. L. R. 669.

700. —— Commissioners under local paving Act.]—*Indebitatus assumpsit* will not lie against comrs. under a local paving Act, for salary of officers whom the Act authorises them to appoint at a salary to be paid out of the rates to be raised thereunder. The proper remedy is, either by an action upon the case, or a *mandamus.*—BOGG *v.* PEARSE (1851), 10 C. B. 534; 2 L. M. & P. 21; 20 L. J. C. P. 99; 16 L. T. O. S. 462; 15 J. P. 436; 138 E. R. 212.

Annotations:—**Distd.** Hall *v.* Taylor (1858), E. B. & E. 107 Bush *v.* Martin (1863), 2 H. & C. 311.

701. —— —— Clerk to Commissioners—Action by former clerk.]—Comrs. were appointed, to be elected annually, for executing a local Act. They had power to levy rates. By the Act they had power to appoint clerks & other officers, & to pay them salaries out of the money to be raised under the Act. They had power to execute many works. By the Act they might sue & be sued by their clerk; & the comrs. were exempted from personal liability for any contracts entered into by them as comrs.:—*Held:* a clerk, appointed by the comrs. for one year, might maintain an action for his salary against the clerk of the comrs. in a subsequent year.—HALL *v.* TAYLOR (1858), E. B. & E. 107; 27 L. J. Q. B. 311; 31 L. T. O. S. 151; 23 J. P. 20; 4 Jur. N. S. 877; 120 E. R. 447.

Annotation:—**Refd.** Bush *v.* Beavan (1862), 1 H. & C. 500.

702. —— Fellow employee—Cashier of employer—Accustomed to pay servant.]—Pltf. & deft. were servants to D., pltf. as a stage coach driver, deft. as clerk & book keeper. Deft. usually paid pltf. his wages & made up all the accounts, entering pltf.'s moneys in the books as being settled weekly: deft. & D. settled monthly. Pltf. having, as he alleged, £38 due, applied to deft. for it, admitting he had retained of D.'s eleven journeys of forty miles road money & parcels: deft. sent him £20 on account, & promised to pay the balance on pltf.'s calling to adjust accounts.

PART V. SECT. 2, SUB-SECT. 6.—A. (b).

n. *By whom maintainable—Infants.]*—13 & 14 Vict. c. 53, clause 27, does not restrict infants from suing in the div. cts. for any thing but wages, but was intended only to enable them to recover for their own labour contrary to the principles of the common law.—FERRIS *v.* FOX (1854), 11 U. C. R. 612.—CAN.

o. —— —— *Whether parent right to recover.]*—SLATER *v.* TUNNICLIFFE (1906), 4 W. L. R. 190, C.A.

p. *Action against estate—Proof of services.]*—HARRISON *v.* CROWE (1914), 14 E. L. R. 133; 16 D. L. R. 288; 47 N. S. R. 508.—CAN.

q. *Liability of assignee for wages due to servants by assignor.]*—An assign[illegible] of [illegible] ... [illegible]

Pltf. afterwards wrote to D. for the balance stating he should look to D. for payment. Pltf. subsequently brought this action for it against deft. :—*Held :* the action for money had & received by the coachman against the clerk could not be maintained.—GLOVER *v.* JONES (1852), 20 L. T. O. S. 113.

703. — — Member of unincorporated association—After dissolution of association.]—Pltf. was the secretary of a shipowners' association, which was unincorporated, & was managed by a committee, which might be chosen from persons who were not members of the association. The rules provided that a certain entrance fee & annual subscription should be paid for each vessel; & that, if the funds of the association were not sufficient to meet its liabilities, the committee might make calls after a hundred vessels had been entered. Pltf. was appointed secretary by an agreement, under which he was to have a salary & commission; it contained a clause whereby he exonerated the managing committee from liability for his salary, etc., holding the association, subject to the rules & regulations, alone responsible. The association was dissolved. A hundred vessels were never entered. In an action brought against a member of the association for salary, commission, & disbursements :—*Held :* pltf. could not recover, as on the true construction of the agreement, he had agreed to look for payment to the funds of the association, & not to the individual members.—DE VRIES *v.* CORNER (1865), 13 L. T. 636; 14 W. R. 262.

(c) Defences to Action.

704. Payment — Appropriation of payment—Due on contract under seal—Payment generally during subsequent contract not under seal.]—A. covenants with B. to serve him for certain wages for three years, at the end of which time a balance remains due to him from B. A. then enters into a fresh contract, not under seal, to serve B. at increased wages; & at the end of three years more, it appears that he has received, at different times, sums more than sufficient to cover the balance due on the former contract :—*Held :* the last mentioned sums having been paid generally, without specifying on what account, A. had a right to apply them to the satisfaction of the simple contract debt.—PETERS *v.* ANDERSON (1814), 5 Taunt. 596; 1 Marsh. 238; 128 E. R. 823.

Annotations :—**Refd.** Devaynes *v.* Noble, Clayton's Case (1816), 1 Mer. 572. **Mentd.** Mills *v.* Fowkes (1839), 5 Bing. N. C. 455; Seymour *v.* Pickett, [1905] 1 K. B. 715.

— — —.]—*See, generally,* CONTRACT, Vol. XII., p. 474, Nos. 3871 *et seq.*

705. — — Presumption of—Lapse of time since service.]—SELLEN *v.* NORMAN, No. 661, *ante.*

706. — — Proof of—Settlement of account.]—Malt was sold by deft. to pltf., by a measure called a hobbett, being a measure established by local custom, without specifying the proportion which that measure bore to the standard as directed by 5 Geo. 4, c. 74, s. 15. The parties afterwards settled their accounts, & (*inter alia*) as to the malt :—*Held :* in an action by pltf. against deft. for wages, deft. might prove that settlement of accounts as a payment of pltf.'s demand.—OWENS *v.* DENTON (1835), 1 Cr. M. & R. 711; 5 Tyr. 359; 4 L. J. Ex. 68; 149 E. R. 1266.

Annotation :—**Mentd.** Swan *v.* Blair (1835), 3 Cl. & Fin. 610.

— — *See, generally,* CONTRACT, Vol. XII., pp. 447 *et seq.*

707. Money advanced—To infant servant—Purchase of unnecessaries.] — (1) A master advanced money to his female servant, who was under age, for her to purchase a silk dress & other articles not necessary for her :—*Held :* these advances formed no defence to an action for her wages.

Payments made to an infant, on account of wages due to her, for her to purchase necessaries, are valid payments.

(2) Money paid by a master for coach fares for the mother of his servant, who was under age, cannot be deducted from the wages of the servant.—HEDGLEY *v.* HOLT (1829), 4 C. & P. 104, N. P.

708. — — — — Purchase of necessaries.]—HEDGLEY *v.* HOLT, No. 707, *ante.*

709. Lack of funds to pay salary—Action against local commissioners.]—Pltfs., exors. of J., sued deft., as clerk to certain local comrs., for salary, due under a local Act, to testator, for work done for the comrs. as their clerk. The plea in effect set out, that the comrs. had not, either at the time of the accruing of the debts, or afterwards, any funds in hand, raised under the Act, applicable to the claim, & that they had applied or appropriated all their funds, to other debts :—*Held :* the pleas did not answer the claim of pltfs., who, in any event, were entitled to judgment.—BUSH *v.* MARTIN (1863), 2 H. & C. 311; 3 New Rep. 90; 33 L. J. Ex. 17; 9 L. T. 510; 27 J. P. 825; 10 Jur. N. S. 347; 12 W. R. 204; 159 E. R. 129.

Annotations :—**Mentd.** *Re* Jones (1887), 36 Ch. D. 105; A.-G. *v.* Newcastle-on-Tyne Corpn. & N. E. Ry. (1889), 23 Q. B. D. 492.

Agreement to refer to arbitration.] — *See* ARBITRATION, Vol. II., pp. 333, 334, 360, Nos. 148–152, 307.

Set-off.]—*See* Nos. 657–660, *ante.*

Action out of time.] — *See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 384, 392, Nos. 665, 737.

B. Summary Procedure.

See Part VI., Sect. 9, *post.*

C. Bankruptcy and Winding Up.

Bankruptcy.]—*See* Part VI., Sect. 10, sub-sect. 1, *post.*

Winding up.]—*See* Part VI., Sect. 10, sub-sect. 2, *post.*

SUB-SECT. 7.—WAGES OF APPRENTICES.

See Part XV., Sect. 1, sub-sect. 10, C., *post.*

SUB-SECT. 8.—WAGES OF SEAMEN.

See SHIPPING.

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no liability in taking over the servants of the assignor, for wages due by the assignor to such servants.—ROBINSON & WILLS *v.* RIDLEY (1868), 5 Nfld. L. R. 246.—**NFLD.**

PART V. SECT. 2, SUB-SECT. 6.—A. (c).

r. Misconduct during service—Discovery after term of service.]—Pltfs. sued as assignees of H., for his wages. He was hired by the month. There was grossly immoral conduct on the part of H. throughout the greater part of the service. Deft. did not know of this until after H. quit work :—*Held :* pltf. could not recover as owing to the conduct of H. there were no wages owing to him.—WOOD *v.* BARKER (1909), 12 W. L. R. 225.—**CAN.**

t. Admission of monthly payment in District Court—Inconsistent defence raised on appeal.]—GRANT *v.* BRADLEY (1911), 18 W. L. R. 668; 4 Sask. L. R. 505.—**CAN.**

Sect. 2.—*Wages: Sub-sect.* 9. *Sect.* 3: *Sub-sects.* 1 & 2. *Sect.* 4.]

SUB-SECT. 9.—OTHER CASES.

710. Interest on arrears of wages.]—Pltf., by a verbal agreement, in the year 1858, agreed to become the manager of deft.'s ironworks. By the terms of the agreement, pltf. was to receive 7½ *per cent.* of the profits made by deft., in each year, to be made up to £500 in case the proportion in question could not amount to that sum. Pltf. continued to act as manager to deft. until the year 1864, when the business was sold. In the years 1859 & 1861 the sums due to pltf. under the agreement exceeded the fixed sum of £500 by £440 2*s.* & £405 17*s.* 6*d.* respectively. No portion of these two sums of £440 2*s.* & £405 17*s.* 6*d.* was demanded by pltf., or paid by deft., until Sept. 13, 1864, when deft. paid pltf. the sum of £554, leaving £291 19*s.* 6*d.* still due. Deft. was not chargeable with any fraud, or anything beyond a certain inaccurracy in his accounts:—*Held:* (1) pltf. was not entitled to interest on the sums of £440 2*s.* & £405 17*s.* 6*d.* for the respective periods preceding Sept. 13, 1864; (2) pltf. was entitled to interest on the sum of £291 19*s.* 6*d.* from Sept. 13, 1864, to the date of the present order.—RISHTON *v.* GRISSELL (1870), L. R. 10 Eq. 393; 18 W. R. 821.

711. Damages for delay in payment.]—Pltf., together with some other men, had been employed as a bricklayer by defts. He was working on night shift, & was given notice at 5 a.m. that his employment would end at 6 a.m. Upon the termination of his employment a sum of £5 4*s.* 8*d.* was due to pltf., & at 6 a.m. he went to the office of defts., to receive the amount to which he was entitled. There was no one there to pay him at the time & he was eventually kept waiting until 10.45 a.m. when he received his money. In these circumstances he brought an action against defts. claiming 3*s.* 11*d.* for loss of time owing to defts.' delay in paying the wages due to him. Evidence was given before the county ct. judge that it was usual to pay the workmen's wages at the expiration of the hour's notice given to them, so that there might be no delay in applying for another job. The county ct. judge gave judgment for pltf. for the amount claimed upon the ground that it was unreasonable to expect him to wait for some hours for his money after being dismissed at an hour's notice:—*Held:* the decision of the judge was wrong, & that upon the above facts no contract to pay pltf. for the time he was kept waiting for his wages could be implied.—HARPER *v.* LINTHORPE DINSDALE SMELTING CO., LTD. (1909), 101 L. T. 608; 26 T. L. R. 32, D. C.

SECT. 3.—REMUNERATION OTHER THAN WAGES.

SUB-SECT. 1.—IN GENERAL.

712. Board & lodging—Pauper placed with parishioner.]—A pauper placed by the parish with a parishioner, upon an agreement between the latter & the parish officers to find board, washing, & lodging for the pauper at 2*s.* 6*d.* per week, & that the pauper was to do what he was set about, does not constitute the relation of master & servant between such parishioner & the pauper so as to enable the latter to gain a settlement as by hiring & service. Neither does such relation arise by implication from a continuance of services by the pauper to the parishioner; living with him as before, after the parish had refused any longer to continue the parochial allowance: & the pauper, who was a Greenwich pensioner, going there twice a year without asking or receiving the leave of the parishioner: the latter, however, not refusing leave when informed of the other's going.—R. *v.* RICKINGHALL INFERIOR (INHABITANTS) (1806), 7 East, 373; 3 Smith, K. B. 373; 103 E. R. 144.

713. ——.]—On the trial of an indictment for larceny as a servant, it appeared that prisoner lived in the house of prosecutor & acted as nurse to his sick daughter, prisoner having board & lodging & occasional presents for her services, but no wages. While prisoner was so residing, prosecutor's wife gave prisoner money to pay a coal bill, which money prisoner kept, & brought back a forged receipt to the coal bill:—*Held:* prisoner was not the servant of prosecutor, but this was a larceny of the money.—R. *v.* SMITH (1844), 1 Car. & Kir. 423.

714. ——.]—FOORD *v.* MORLEY, No. 611, *ante.*

715. Food & clothes.]—R. *v.* CHRIST'S PARISH, YORK (CHURCHWARDENS, ETC.), No. 330, *ante.*

716. Gratuities — Servants of innkeeper.]—LAUGHER *v.* POINTER, No. 27, *ante.*

717. ——.]—MANSFIELD (EARL) *v.* SCOTT, No. 608, *ante.*

718. ——.]—A., being one of several proprietors of a Hereford & Birmingham coach, horsed it from Hereford to Worcester, & employed B. to drive it when he did not himself drive it; B. having all gratuities, as well when A. drove as when B. himself did so. It was the duty of B., on each day when he drove, to tell the book-keeper at Malvern how much money he had taken; the book-keeper entering that sum in a book & on the way bill, together with what he had taken himself; & he then had to pay over the latter to B., who was to give the two sums to A. B. gave true accounts to the book-keeper, who made true entries, but B. accounted for smaller sums to A., saying that those were all, & paid over to A. these smaller sums. All the proprietors were interested in the money, but A. was the person to receive it, & he was accountable to his co-proprietors:—*Held:* this was embezzlement, & B. was rightly described in the indictment as the servant of A., & the money embezzled was properly laid as the money of A.—R. *v.* WHITE (1839), 8 C. & P. 742; 2 Mood. C. C. 91, C. C. R.

719. ——.]—R. *v.* SMITH, No. 713, *ante.*

720. Promise of gift at end of service—Suit of clothes—When property passes.]—A servant being engaged for a year at thirty guineas & a suit of clothes, was provided with a livery suit on his entering the service. He was wrongfully turned away within the year:—*Held:* he could not maintain trover for the clothes, that not being the proper form of action.

This action is founded in property. If pltf. was dismissed without reasonable cause, whereby he was prevented from becoming entitled to this suit of clothes, he has his action for that; but he cannot maintain an action of trover, because he has no property in the clothes till he has served a

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PART V. SECT. 2, SUB-SECT. 9.

710 i. *Interest on arrears of wages.*]—On a reference in an action in which money is claimed for work & services agreed to be paid for at a fixed rate, the referee may allow interest on the amounts claimed from the times they became payable.—MCCULLOUGH *v.* NEWLOVE (1896), 27 O. R. 627.—**CAN.**

a. *Right to wages—Where cessatim of work due to misunderstanding.*]—WAKURYK *v.* MCARTHUR (1912), 21 W. L. R. 160; 6 D. L. R. 66.—**CAN.**

PART V. SECT. 3, SUB-SECT. 1.

b. *Promise of gift at end of service—Sum of money.*]—CROASDAILE *v.* HALL (1895), 3 B. C. R. 384.—**CAN.**

year (LORD TENTERDEN, C.J.).—CROCKER *v.* MOLYNEUX (1828), 3 C. & P. 470, N. P.

721. —— Sum of money—Dismissal before end of service—Right to dismiss unaffected by promise.]—(1) An agreement in writing, by which pltf. agreed to serve deft. as agent at a yearly salary, contained a proviso that deft. would, at the end of the year, if he found pltf. had done sufficient business, give him £30 more:—*Held:* there was nothing in this agreement inconsistent with a custom in the trade to terminate the service, by either party giving to the other a month's notice.

(2) To an action for wrongfully dismissing pltf. from deft.'s service under the above agreement, deft. pleaded that he determined the service by a month's notice, according to the custom. The judge left it to the jury to say whether, looking at the proviso in the contract, they inferred that the parties meant to exclude the custom:—*Held:* a misdirection.—PARKER *v.* IBBETSON (1858), 4 C. B. N. S. 346; 27 L. J. C. P. 236; 31 L. T. O. S. 101; 22 J. P. 659; 4 Jur. N. S. 536; 6 W. R. 519; 140 E. R. 1118.

Annotation:—*As to* (1) **Consd.** Bridges *v.* Potts (1864), 17 C. B. N. S. 314.

722. —— —— —— Consideration of gift in assessment of damages.]—LAKE *v.* CAMPBELL, No. 780, *post.*

723. Expectation of testamentary bequest—Whether remuneration by wages or bequest—Finding of jury.]—STROUD *v.* STROUD (1844), 7 Man. & G. 417; 8 Scott, N. R. 166; 3 L. T. O. S. 126; 135 E. R. 174.

724. —— Failure of bequest—Whether enforceable notwithstanding failure.]—A. rendered domestic services on the faith of a promise by B. that he would compensate her, & of a codicil by which, in pursuance of such promise, he bequeathed to her a life interest in certain houses. B. revoked that codicil by another, which was duly proved:—*Held:* it appearing that A. had been induced to render valuable services to B. on the faith that by so doing she would become entitled to the benefit of the trusts created in her favour by the former codicil, testator had no right to revoke the same, & such trusts must be performed.—LOFFUS *v.* MAW (1862), 3 Giff. 592; 32 L. J. Ch 49; 6 L. T. 346; 8 Jur. N. S. 607; 10 W. R. 513; 66 E. R. 544.

Annotations:—**Expld.** Coles *v.* Pilkington (1874), L. R. 19 Eq. 174. **Consd.** Maddison *v.* Alderson (1883), 8 App. Cas. 467. **Mentd.** Traill *v.* Baring (1864), 3 New Rep. 362; M'Askie *v.* M'Cay (1868), 16 W. R. 1187.

725. —— —— ——.]—Intestate induced a woman to serve him as his housekeeper without wages for many years & to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land, & afterwards signed a will, not duly attested, by which he left her the life estate:—*Held:* there was no contract, & even if there had been & although the woman had wholly performed her part of serving till the intestate's death without wages, yet her service was not unequivocally & in its own nature referable to any contract, & was not such a part performance as to take the case out of the operation of the Stat. Frauds, s. 4; & she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land.—MADDISON *v.* ALDERSON (1883), 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 47 J. P. 821; 31 W. R. 820, H. L.; *affg.* S. C. *sub nom.* ALDERSON *v.* MADDISON (1881), 7 Q. B. D. 174, C. A.

Annotations:—**Mentd.** Humphreys *v.* Green (1882), 10 Q. B. D. 148; A.-G. *v.* Hubbuck (1884), 13 Q. B. D. 275; *Re* Beetham, *Ex p.* Broderick (1886), 18 Q. B. D. 380; Miles *v.* New Zealand Alford Estate Co. (1886), 32 Ch. D. 266; McManus *v.* Cooke (1887), 35 Ch. D. 681; Gillman, Spencer *v.* Carbutt (1889), 61 L. T. 281; Lucas *v.* Dixon (1889), 22 Q. B. D. 357; Blackburn *v.* Blackburn (1891), 36 Sol. Jo. 27; Davis *v.* Leicester Corpn., [1894] 2 Ch. 208; Hodson *v.* Heuland, [1896] 2 Ch. 428; Licenses Insce. Corpn. & Guarantee Fund *v.* Lawson (1896), 12 T. L. R. 501; Coleman *v.* North (1898), 47 W. R. 57; Isaacs *v.* Evans (1899), 16 T. L. R. 113; Miller & Aldworth *v.* Sharp, [1899] 1 Ch. 622; *Re* Fickus, Farina *v.* Fickus, [1900] 1 Ch. 331; Thursby *v.* Eccles (1900), 70 L. J. Q. B. 91; *Re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360; Chapronière *v.* Lambert, [1917] 2 Ch. 356; Banbury *v.* Bank of Montreal, [1918] A. C. 626; Morris *v.* Baron, [1918] A. C. 1; *Re* Bankruptcy Notice, [1924] 2 Ch. 76; Rawlinson *v.* Ames, [1925] Ch. 96.

726. Permission to keep poultry for profit.]—FOORD *v.* MORLEY, No. 611, *ante.*

Occupation of premises.]—*See* LANDLORD & TENANT, Vol. XXX., p. 520, Nos. 1748–1752.

SUB-SECT. 2.—THE TRUCK ACTS.

Persons to whom Acts apply.]—*See* FACTORIES, Vol. XXIV., pp. 934–937, Nos. 231–252.

Transactions to which Acts apply.] — *See* FACTORIES, Vol. XXIV., pp. 937–940, Nos. 253–275.

Special provisions as to hosiery trade.]—*See* FACTORIES, Vol. XXIV., p. 940, Nos. 276–279.

Proceedings under the Acts.]—*See* FACTORIES, Vol. XXIV., pp. 940, 941, Nos. 280–284.

SECT. 4.—**REMUNERATION BY THIRD PARTY.**

727. Relationship of master & servant—Between party serving & party served—Coachman paid by job-master.]—In a suit of subtraction of legacy, a coachman, a married man, originally hired by,

724 i. *Expectation of testamentary bequest—Failure of bequest—Whether enforceable notwithstanding failure.*]—WALKER *v.* BOUGHNER (1889), 18 O. R. 448.—**CAN.**

724 ii. —— —— ——.]—Where services are rendered upon the faith of a promise to leave property by will, which the testator fails to perform, an action may be maintained against his representatives to recover compensation for the services in the shape of damages for breach of the previous promise.—SMITH *v.* MCGUGAN (1894), 21 A. R. 542.—**CAN.**

724 iii. ——————.]—*Re* MESTON, MESTON *v.* GRAY (Sask.), [1925] 4 D. L. R. 887; [1925] 3 W. W. R. 656.—**CAN.**

c. —— *Sufficiency of bequest.*]—SMITH *v.* HOPPER (1912), 21 O. W. R. 891; 3 O. W. N. 1039; 3 D. L. R. 339.—**CAN.**

d. *Gift of hay to servant—Whether intended as remuneration in addition to wages.*]—CLEVELAND *v.* GRAND TRUNK RY. CO. (1913), 24 O. W. R. 586; 4 O. W. N. 1281; 11 D. L. R. 118.—**CAN.**

e. *Agreement to share net profits—Whether includes share of profit on sale of goodwill.*]—A right to a share of the net profits of a business does not confer upon the servant a right to a share of the amount obtained by the employer on a sale by him of the goodwill of the business.—WASHBURN *v.* WRIGHT (1914), 31 O. L. R. 138; 19 D. L. R. 412; 6 O. W. N. 131.—**CAN.**

f. —— ——.]—SIMS *v.* HARRIS (1901), 21 C. L. T. 230; 1 O. L. R. 445.—**CAN.**

g. *Agreement to distribute bonus—Under profit-sharing scheme.*]—SMITH *v.* WHITE OWL DRUG CO. (Man.), [1922] 3 W. W. R. 501; 70 D. L. R. 550.—**CAN.**

h. *Agreement for commission outside wages—Whether attaching to gross proceeds or net profits.*]—IRELAND *v.* DAYMOND (1893), 7 Nfld. L. R. 757.—**NFLD.**

PART V. SECT. 4.

k. *Liability of master to servant for remuneration—Notwithstanding judgment recovered by servant against third party.*]—HEROD *v.* FERGUSON (1894), 25 O. R. 656.—**CAN.**

l. *Third party supplying goods to master—Remuneration out of purchase price.*]—GRACE *v.* RUTHERFORD BROTHERS (1867), 5 Nfld. L. R. 214.—**NFLD.**

Sect. 4.—Remuneration by third party. Part VI. Sect. 1: Sub-sects. 1 & 2.]

& who had lived five years with, testatrix, residing over her stables in town, occasionally accompanying her into the country, where he lived in the house, though, like all her servants, on board wages; waiting sometimes at table, & remaining with her though she changed her job-man:—*Held:* although the several job masters paid him his wages & board-wages, except 3*s.* per week extra in the country, & found him in liveries, entitled under a bequest to each of my servants living with me at the time of my death £10 & extrix. condemned in full costs.—HOWARD *v.* WILSON (1832), 4 Hag. Ecc. 107; 162 E. R. 1387.

Annotation:—Refd. Blackwell *v.* Pennant (1852), 22 L. J. Ch. 155.

728. —— —— Servant paid by fellow servant.]—Resps., potters, engaged applt. to work for them, at specified work, in their manufactory, for a year, at daily wages. The same day resps. engaged R. to work for them by piece-work for the same period. The work which applt. had to do was, in fact, included in the piece-work of R., & R. paid applt.'s wages out of the amount paid by resps. to R. for the piece-work:—*Held:* the contract of master & servant subsisted between resps. & applt., notwithstanding the fact of the payment of his wages by the hands of R., &, consequently, applt. was liable to be convicted, under 4 Geo. 4, c. 34, for neglecting his service with resps.—WILLETT *v.* BOOTE (1860), 6 H. & N. 26; 30 L. J. M. C. 6; 3 L. T. 276; 25 J. P. 40; 158 E. R. 11.

—— —— Filler paid by collier.]—*See* MINES.

Part VI.—Breach of Contract and Remedies Therefor.

SECT. 1.—WHAT AMOUNTS TO BREACH.

SUB-SECT. 1.—BY SERVANT.

729. Refusal to work—Dispute amongst workmen.]—At the hearing of a complaint under Employers & Workmen Act, 1875 (c. 90), by the proprietors of a coal mine against deft., one of their workmen, it appeared that the workmen were employed under contracts determinable on fourteen days' notice, & subject to certain regulations under which the employer might dismiss or suspend any workman for disobedience to orders, & the workmen, in descending or ascending the mine in the cages, were to obey the orders of the banksman. Part of the miners employed at the colliery, including deft., were members of a trade union. The unionists addressed a notice to complainants that, at the expiration of fourteen days, all non-unionists must descend & ascend the mine by themselves. On the morning of the day on which such notice expired, certain workmen, of whom deft. was one, were at the pit mouth for the purpose of going down by the cage then in readiness for them. The first to enter the cage was a non-unionist, whereupon the other men, who were unionists, refused to go down with him. The non-unionist then went down alone, &, upon the next cage coming up a few seconds afterwards, the unionists offered to go down; but the undermanager in charge refused to allow them to do so. This occurred on three successive days. The justices ordered deft. to pay substantial damages for wrongfully absenting himself from complainants' service, & dismissed a counterclaim by him against them for having wrongfully refused to allow him to follow his lawful employment:—*Held:* under the circumstances, there had been such a breach of contract on the part of deft. as entitled complainants to substantial, & not merely to nominal, damages, & the counterclaim could not be maintained.—BOWES & PARTNERS *v.* PRESS, [1894] 1 Q. B. 202; 63 L. J. Q. B. 165; 70 L. T. 116; 58 J. P. 280; 42 W. R. 340; 10 T. L. R. 55; 9 R. 302; *sub nom.* PRESS *v.* BOWES & PARTNERS, LTD., 38 Sol. Jo. 56, C. A.

730. —— Extra hours as authorised by contract of service.]—Applt. was employed by resps. as a collier upon terms which provided (*inter alia*) that the hours of labour should be such as are authorised by Coal Mines Regulation Act, 1908 (c. 57), s. 1, which enacts that the period of work shall be limited to eight hours a day, & sect. 3, sub-sect. 1 of which enacts that the hours of work may be extended on not more than sixty days in a year, by not more than one hour a day, provided the owner, agent or manager takes the steps prescribed by the Act to secure such extension & that on any day on which such an extension of time is made in accordance with that sect. the time so extended shall be substituted for the purposes of the Act as respects that mine for the time as fixed by the Act. The manager put up notices stating that on certain days the hours of working would be extended from eight hours to nine. These notices complied with the provisions of the Act. Applt. refused to work the extra hour:—*Held:* applt.'s refusal was a breach of his contract of service.—ROBINSON *v.* INSOLES, LTD. (1909), 102 L. T. 45; 74 J. P. 47.

731. Failure to perform at entertainment.]—Declaration stated that deft. agreed that he & his wife should for three months perform as equestrians on the stage & in the ring in all entertainments which might be produced at A., or elsewhere, under the direction of pltf., in such parts as pltf. should require, & should attend all calls & rehearsals; that although pltf. had an establishment at P. under his direction, for equestrian entertainments, & although pltf. required deft. & his wife to join pltf.'s establishment at P. for the purpose of performing in entertainments to be produced there, & although a reasonable time for joining elapsed before the suit, yet deft. & his wife did not join or perform in the entertainments to be produced at P., etc. On demurrer, the declaration was held good, inasmuch as it sufficiently appeared that the requisition by pltf. was to appear & perform as equestrians on the stage or in the ring. Also that the breach was good, showing substantially an entire refusal to perform the contract.—BATTY *v.* MELILLO (1850), 10 C. B. 282; 1 L. M. & P. 571; 19 L. J. C. P. 362; 16 L. T. O. S. 281; 138 E. R. 114.

732. Failure to attend rehearsals.]—Declaration that pltf., a singer, agreed with deft., director of the Italian Opera in London, that he would undertake the part of first tenor in the theatres, halls, &

m. *Failure to carry out terms of contract—Non-disclosure [of trade secret.]*—BLAKE *v.* KIRKPATRICK (1881), 6 A. R. 212.—CAN.

drawing-rooms in the United Kingdom during his engagement, to begin on Mar. 30, 1875, & terminate on July 13, 1875, at a salary of £150 per month; that pltf. should sing in concerts as well as operas, but should not sing anywhere out of the theatre in the United Kingdom from Jan. 1 to Dec. 1, 1875, without the written permission of deft., except at more than fifty miles from London, & out of the season of the theatre; that pltf. agreed to be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals. Averment, that pltf. did not sing anywhere in the United Kingdom from Jan. 1, 1875, to the date of the commencement of the action; that pltf. was prevented by temporary illness from being in London before Mar. 28, 1875, on which day he arrived in London; & that, save as aforesaid, he was & is ready to perform his part of the contract. Breach, that deft. refused to receive pltf. into his service. Plea, that pltf. was not in London six days before the commencement of the engagement ready for rehearsals, as was necessary for him to be, wherefore deft. refused to receive pltf. into his service. Demurrer: —*Held:* the stipulation as to rehearsals was not a condition precedent; for it did not go to the root of the matter, as pltf. was to sing in concerts at halls & drawing-rooms as well as at the theatre, & was also to abstain from singing within fifty miles of London from Jan. 1 previous to the commencement of the engagement Mar. 30. The plea was therefore bad.—BETTINI *v.* GYE (1876), 1 Q. B. D. 183; 45 L. J. Q. B. 209; 34 L. T. 246; 40 J. P. 453; 24 W. R. 551.

Annotations:—**Refd.** Poussard *v.* Spiers & Pond (1876), 24 W. R. 819. **Mentd.** London Guarantie Co. *v.* Fearnley (1880), 5 App. Cas. 911; Hosking *v.* Pahang Corpn. (No. 1) (1891), 36 Sol. Jo. 107; Kidston *v.* Monceau Ironworks Co. (1902), 86 L. T. 556; Leiston Gas Co. *v.* Leiston-cum-Sizewell U. C., [1916] 2 K. B. 428; Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1; Kidner *v.* Stimpson (1918), 34 T. L. R. 434; Dawsons *v.* Bonnin, [1922] 2 A. C. 413.

SUB-SECT. 2.—BY MASTER.

Performance of contracts generally, *see* CONTRACT, Vol. XII., pp. 303 *et seq.*

733. Neglect of master to find other situation —In accordance with agreement.]—Declaration upon an agreement, which stipulated, amongst other things, that it had been mutually agreed between pltf. & deft.; &, pltf. agreed that he would serve deft. as a manufacturer & assistant for the term of seven years, at a salary of £100 *per annum*, etc.; deft. agreed to pay the yearly salary, & if he should, from any cause, give up his business as a manufacturer, or not require pltf.'s services, then that he would use his best endeavours to procure for pltf. employment in some similar business, & for which he would receive a salary of not less than £100 *per annum*, or in case he should be unable to do so, deft. would pay the yearly salary of £100 during the residue of the term of seven years. Averment of performance on the part of pltf. Breach, that deft. did not continue pltf. in his employ until the expiration of the seven years, but refused to do so, & wrongfully discharged pltf. therefrom, without reasonable or probable cause, &, further, that although deft. had not continued pltf. in his employ, but had discharged him, yet deft. did not use his best or any endeavours to procure, nor did he procure pltf. employment in some similar business, for which he should receive a salary of £100 a year, but had wholly failed to find pltf. such employment. Plea, that at the time when pltf. was discharged, deft. was, & thence hitherto had been, wholly unable to procure for pltf. any such employment as in the agreement mentioned:—*Held:* (1) the agreement did not leave it open to deft. to pay pltf. after his discharge £100 a year without first using any endeavours to obtain a situation for pltf.; but the undertaking by deft. to use his best endeavours to procure employment for pltf. in some similar business was a primary part of the agreement, which deft. was bound to fulfil, & that part of the breach was good; (2) it was not necessary to aver a request by pltf. that deft. would use his best endeavours; the allegation of performance was sufficient, without any averment of readiness & willingness, & the mode in which the breach was alleged rendered it unnecessary to aver that a reasonable time had elapsed.—RUST *v.* NOTTIDGE (1852), 1 E. & B. 99; 22 L. J. Q. B. 73; 20 L. T. O. S. 92; 17 Jur. 278; 1 W. R. 51; 118 E. R. 374.

734. —— Sale of ship during voyage.]—On a contract to employ pltf. on board a particular ship, on certain specified voyages:—*Held:* a breach, to sell the ship before those voyages are completed without procuring him similar employment on board that particular vessel.—DRISCOLL *v.* AUSTRALIAN ROYAL MAIL STEAM NAVIGATION CO. (1859), 1 F. & F. 458, N. P.

735. Refusal to employ—Contract commencing at future date.]—HOCHSTER *v.* DE LA TOUR, No. 762, *post.*

736. Wrongful dismissal—Variation of agreement—Question for jury.]—In an action for a wrongful dismissal of a servant, who had been retained under an annual salary, but had assented to a proposal not to be paid further salary until works should be resumed, which had not in fact been resumed:—*Held:* it was for the jury whether the original contract had been put an end to, & if so, the defence arose under a plea of rescission.—HOPKINS *v.* WANOSTROCHT (1861), 2 F. & F. 368.

737. —— Sale of business.]—(1) A master paying a clerk his salary two days before the end of the quarter, & telling him that the business is disposed of, does not necessarily amount to a dismissal, & therefore his service & salary may continue during the next quarter.

(2) Action of *indebitatus assumpsit* for work & labour will lie if a servant be engaged for a fixed period, & the master without dismissing him, refuses to supply him with work.—COOK *v.* SHERWOOD (1863), 2 New Rep. 28; 11 W. R. 595.

738. —— Dissolution of partnership.]—BRACE *v.* CALDER, No. 776, *post.*

739. —— Company ceasing to carry on business.]—By an agreement dated Dec. 27, 1915, & made between pltf. & a limited co., which carried on business in Lancashire, in consideration of pltf. subscribing for £1,000 in shares of the co. & of introducing to the co. certain new classes of goods to be manufactured by them, the co. appointed him their sole agent in the United Kingdom, India, & the Colonies for the sale of those goods for the term of seven years, if the agent should so long live, & thereafter until the agreement should be determined by six months' notice on either side.

735 i. *Refusal to employ—Contract commencing at future date.*]—JOHNSTON *v.* MEAD (Y. T.) (1906), 4 W. L. R. 192.—CAN.

n. *Wrongful dismissal—Variation of agreement.*]—POS *v.* JOHNSON (1913), 18 B. C. R. 159.—CAN.

Sect. 1.—*What amounts to breach: Sub-sect.* 2. *Sects.* 2 & 3: *Sub-sect.* 1, *A. & B.; sub-sect.* 2, *A.*]

The agent was to use his best endeavours to obtain orders for the co.'s said goods at prices to be from time to time agreed upon, & all orders obtained by the agent were at once to be communicated to the co., who upon approving or rejecting the same were to inform the agent thereof & who were to carry out such orders as were accepted without undue delay; & the agent was not definitely to accept orders for the co., but only subject to confirmation & acceptance by the co. such confirmation or acceptance not to be unreasonably withheld. The co. were to pay the agent a commission upon the invoiced prices of all goods delivered by the co. & duly paid for by the respective purchasers. A few months afterwards the co. required fresh capital, & they applied to pltf. to assist them in finding it, telling him that otherwise they would have to close down. Pltf. tried to do so, but failed. The co. then asked pltf. to give up the agency for the Manchester district, telling him that he would have to stand down so far as that district was concerned, in which case they thought that they could find the necessary capital, but he refused. The co. thereupon, being insolvent, passed resolutions for voluntary winding up & ceased to do business through pltf., & eventually sold their business. In an action to recover damages for breach of the agreement to employ pltf. as their agent for the seven years:—*Held:* the agreement was to employ pltf. as agent for the seven years, & a term could not be implied to the effect that the co. could terminate the agency at any time by ceasing to carry on their business; & the circumstances, coupled with the voluntary winding up, showed a repudiation by the co. of the agreement, & they were therefore liable in damages for the breach.—REIGATE *v.* UNION MANUFACTURING CO. (RAMSBOTTOM), [1918] 1 K. B. 592; 87 L. J. K. B. 724; 118 L. T. 479, C. A.

Annotation:—**Mentd.** Thomas *v.* Todd, [1926] 2 K. B. 511.

740. —— Resignation procured through pressure.]—In an action for balance of salary & for wrongful dismissal brought by pltf., who had been engaged by defts. as manager of their music hall, defts. set up as a bar to the claim an arrangement which was come to in the course of a discussion in which pltf. was asked to explain some alleged irregularities in his accounts, which arrangement was embodied in a deed executed by pltf. under which he was to send in his resignation & was to accept in settlement of cross claims between him & defts. a certain sum for salary, & was to sign the deed of release. Pltf. replied that he was induced to execute the deed by defts.' threat unlawfully to imprison him, & that he executed it when overwhelmed by the threat, & that he gave no real or free consent to its execution. The jury having negatived the threats by defts. of criminal proceedings or imprisonment, but having found that pltf. was induced to make the agreement by undue pressure exercised by defts. to force him to make it:—*Held:* the undue pressure so found was not sufficient in law to entitle pltf. to set aside the arrangement or the deed which embodied it, & to fall back upon his original claims; &, further, as pltf. had tendered his resignation, which was accepted, there was no wrongful dismissal.—BARNES *v.* RICHARDS (1902), 71 L. J. K. B. 341; 86 L. T. 231; 50 W. R. 363; 18 T. L. R. 328; 46 Sol. Jo. 298.

741. —— Letter posted outside jurisdiction—Not breach within jurisdiction.]—When a servant is wrongfully dismissed by a letter posted by the employer abroad & received by the servant within the jurisdiction, there is no breach within the jurisdiction of the contract to employ, & leave cannot be given to serve out of the jurisdiction notice of the writ in an action by the servant for wrongful dismissal, under R. S. C., Ord. II., r. 1 (*e*).—HOLLAND *v.* BENNETT, [1902] 1 K. B. 867; 71 L. J. K. B. 490; 86 L. T. 485; 50 W. R. 401; 18 T. L. R. 510; 46 Sol. Jo. 431, C. A.

Annotations:—**Mentd.** Mutzenbecher *v.* Aseguradora Espanola (1905), 94 L. T. 127; Martin *v.* Stout, [1925] A. C. 359.

—— Dismissal without notice.]—*See* Part IV., Sect. 2, sub-sect. 6, *ante*.

—— Damages for.]—*See* Sect. 3, sub-sect. 2, B., *post*.

742. Change in nature of employment—Exposure to greater danger—Outbreak of hostilities.]—BURTON *v.* PINKERTON, No. 597, *ante*.

743. —— —— ——.]—O'NEIL *v.* ARMSTRONG, MITCHELL & CO., No. 599, *ante*.

Breach of collateral stipulation.]—*See* CONTRACT, Vol. XII., pp. 423, 424, Nos. 3399–3406.

744. Refusal to allow servant to work—After previous refusal by servant.]—BOWES & PARTNERS *v.* PRESS, No. 729, *ante*.

SECT. 2.—ELECTION OF REMEDY.

Action for damages.]—*See* Sect. 3, *post*.

Quantum meruit.]—*See* Sect. 4, *post*.

Action for balance of wages—Constructive service.]—*See* Sect. 5, *post*.

745. Servant must elect remedy—Continuing or rescinded contract.]—A clerk dismissed in the middle of a quarter brought an action for a wrongful dismissal, the declaration containing a special count for such dismissal. The jury were directed not to take into account the services actually rendered during the broken quarter, as they were not recoverable except under an *indebitatus* count; & they gave damages accordingly. Pltf. then brought a second action to recover under an *indebitatus* count for his services during the broken quarter:—*Held:* the action was not maintainable; because pltf., by his former action on the special contract, had treated it as an open contract, & he could not afterwards recover under the *indebitatus* count, as for services under a rescinded contract; &, in the former action, the jury ought to have been directed to take the services rendered during the broken quarter into account, in awarding damages under the special count for the wrongful dismissal. *Semble:* under an *indebitatus* count, the servant, wrongfully dismissed before the termination of the period for which he was hired, cannot recover his whole wages up to such termination, as for a constructive service, but can recover only in respect of his service up to the time of his dismissal.

In a case like this the servant may either treat the contract as rescinded & bring *indebitatus* or he may sue on the contract; but he cannot do both (COLERIDGE, J.).—GOODMAN *v.* POCOCK (1850), 15 Q. B. 576; 19 L. J. Q. B. 410; 14 Jur. 1042; 117 E. R. 577.

Annotation:—**Refd.** Taylor *v.* Laird (1856), 25 L. J. Ex. 329.

746. Effect of reference to arbitration.]—Declaration stated that in consideration that pltf., at the request of deft., would enter into the employ of deft. in a certain capacity for a year, at the rate of five guineas per week throughout the year, deft.

undertook to employ him for a year, & alleged as a breach that deft. dismissed pltf. from his employ before the end of the year without any reasonable or probable cause. The declaration contained counts for wages, & for work & labour, etc. The cause, which was commenced before the expiration of the year, was referred to an arbitrator, who awarded pltf. a sum of money equivalent in amount to the wages he would have been entitled to receive from deft. on the day when the action was commenced. No claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, & the evidence of the employment & the dismissal might amount to such a claim. Pltf. having afterwards brought an action to recover compensation in damages in consequence of the dismissal from deft.'s employ before the end of the year:—*Held:* the award of the arbitrator was a bar to such action.—DUNN *v.* MURRAY (1829), 9 B. & C. 780; 4 Man. & Ry. K. B. 571; 7 L. J. O. S. K. B. 320; 109 E. R. 290.

Annotations:—**Refd.** *Re* Gillon & Mersey & Clyde Navigation Co. (1832), 3 B. & Ad. 493; Hadley *v.* Green (1832), 2 Cr. & J. 374; Routledge *v.* Hislop (1860), 2 E. & E. 549; Gueret *v.* Audouy (1893), 62 L. J. Q. B. 633. **Mentd.** Stewart *v.* Todd (1846), 9 Q. B. 767; *Re* Baker (1857), 2 H. & N. 219.

See, generally, ARBITRATION, Vol. II., pp. 305 *et seq.*

SECT. 3.—ACTION FOR DAMAGES.

SUB-SECT. 1.—BREACH COMMITTED BY SERVANT.

A. In General.

Damages generally, *see* DAMAGES, Vol. XVII., pp. 78, *et seq.*

747. Right of master to sue—Leaving service without notice.]—HUTTMAN *v.* BOULNOIS, No. 669, *ante*.

748. —— ——.]—Pltf. had left his employment without notice & gone out on strike. The strike subsequently terminated through an agreement come to between the representatives of the parties interested:—*Held:* the terms of the agreement did not prevent the employers recovering damages from pltf. for breach of contract in leaving their service without proper notice.—AYLING *v.* LONDON & INDIA DOCKS COMMITTEE (1893), 9 T. L. R. 409.

749. —— **Breach of stipulation in contract.**]—GOULD *v.* WEBB, No. 558, *ante*.

750. —— **Breach of duty to master—Insertion of libel.**]—The proprietor of a newspaper, who has been convicted & fined for a libel inserted therein by the editor without his knowledge or consent, cannot, it seems, maintain an action against the editor for the damages occasioned by the conviction.

A declaration stated that deft. had been employed & retained by pltf. as the editor of a publication called the "Court Journal," for reward in that behalf, & that he did not perform the duties of editing the same in a proper manner, but without the knowledge, leave, authority or consent of pltf., falsely, maliciously, & negligently inserted & published in the same a false & malicious libel, etc. That afterwards, an information was exhibited against pltf. for the falsely & maliciously printing & publishing of the libel, & such proceedings were thereupon had that pltf. was convicted of that offence, & fined £100:—*Held:* in arrest of judgment, the declaration was insufficient, as it did not appear that the printing & publishing, which was the act for which pltf. was convicted, was the same act as that alleged in the declaration as a breach of duty, *i.e.* the inserting & publishing, & therefore, the injury sustained was not properly connected with that breach of duty.—COLBURN *v.* PATMORE (1834), 1 Cr. M. & R. 73; 4 Tyr. 677; 3 L. J. Ex. 317; 149 E. R. 999.

Annotations:—**Refd.** R. *v.* Holbrook (1878), 4 Q. B. D. 42; Burrows *v.* Rhodes, [1899] 1 Q. B. 816; Leslie *v.* Reliable Advertising & Addressing Agency, [1915] 1 K. B. 652. **Mentd.** Shackell *v.* Rosier (1836), 2 Bing. N. C. 634; Feret *v.* Hill (1854), 2 W. R. 493; Weld-Blundell *v.* Stephens, [1920] A. C. 956.

751. —— —— **Failure to render accounts.**]—A commercial traveller being employed by a merchants' house, under an agreement, with six months' mutual notice, gave such notice & left their service, having from time to time rendered general accounts, but not a special one, on a particular occasion, when he was requested by letter sent after him to do so. A bill was filed against him, charging misconduct, & asking for a special account during his whole term of service, & payment by way of damages or otherwise, such misconduct being denied:—*Held:* (1) although pltfs. were entitled to an account, it was not the practice of merchants to require more than had been rendered, &, therefore, there would only be an account from the date of the letter, although there were no settled accounts; (2) the ct. had no jurisdiction to decree payment by way of damages.—HUNTER *v.* BELCHER (1863), 9 L. T. 501; 12 W. R. 121; *on appeal* (1864), 2 De G. J. & Sm. 194, L. JJ.

B. Measure of Damages.

Measure of damages generally, *see* DAMAGES, Vol. XVII., pp. 130–136, Nos. 380–421.

752. Refusal to work—Special loss.]—COPES *v.* SADLER (1666), 2 Keb. 16; 84 E. R. 11.

753. —— **Substantial damages.**]—BOWES & PARTNERS *v.* PRESS, No. 729, *ante*.

Penalty or liquidated damages.]—*See* DAMAGES, Vol. XVII., pp. 136–153, Nos. 422–546.

SUB-SECT. 2.—BREACH COMMITTED BY MASTER.

A. In General.

754. Agreement to refer to arbitration.]—ROBERTS *v.* HILL'S PLYMOUTH CO., LTD. (1897), 14 T. L. R. 21, C. A.

——.]—*See* ARBITRATION, Vol. II., pp. 333, 334, 360, Nos. 148–152, 307.

755. Clause providing for appeal in case of dismissal.]—Applt. was employed by resps. on a contract of service, art. 10 of which, headed discipline & dismissal, provided for investigation of charges by the co. & for an appeal by the

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PART VI. SECT. 3, SUB-SECT. 1.—A.

749 i. *Right of master to sue—Breach of stipulation in contract.*]—Deft. engaged to devote his entire time to the advertising interests of pltfs., & to engage in no other business during the period covered by the agreement then made. Deft. engaged in other business:—*Held:* liable to the master for damages for breach of contract.—SHEPPARD PUBLISHING CO. *v.* HARKINS (1905), 5 O. W. R. 482; 9 O. L. R. 504.—CAN.

o. —— *Servant deserting service.*]—WHELAN *v.* STEVENS (1827), Tay. 439.—CAN.

PART VI. SECT. 3, SUB-SECT. 2.—A.

p. *Servant must elect remedy.*]—DOHERTY *v.* VANCOUVER GAS CO. (1905), 1 W. L. R. 252.—CAN.

q. ——.]—If an employee, claiming he has been wrongfully dismissed under a contract of hiring, elects to treat the contract at an end & brings an action on the *quantum meruit* for his services, a subsequent action on the same contract for damages for wrongful dismissal will be stayed.—GREGORY

Sect. 3.—*Action for damages: Sub-sect.* 2, *A. & B.* (*a*), (*b*) & (*c*) *i.*]

employee if he was not satisfied with the co.'s decision.

Applt. was accused of certain irregularities in his work. An investigation was held on behalf of the co. at which applt. was present, & as a result of this investigation applt. was dismissed from his position of passenger conductor in the co.'s employment. Instead of appealing to the higher officials under art. 10 of the agreement he brought an action against the co. claiming damages for alleged wrongful dismissal upon the footing that the co. had violated, by inaccuracy & impropriety of procedure art. 10 of the agreement:—*Held:* the allegations made by applt. against the regularity or propriety of the investigation being proved to be unfounded the action failed.—CAVEN *v.* CANADIAN PACIFIC RY. CO. (1925), 95 L. J. P. C. 23; 133 L. T. 774; 41 T. L. R. 616; 69 Sol. Jo. 746, P. C.

756. Right to sue in respect of individual breach —Employment not terminated.]—Where one party contracts to serve another for a period of five years at a guaranteed salary *per annum*, & at the expiration of one year sues for damages in respect of non-payment for such year, confining his declaration to the non-payment for such year, he is not precluded at the expiration of the term from suing for damages in respect of non-payment during the subsequent years, the pleadings in the former action not showing that the contract was put an end to, or that he was discharged from his employment.—CLOSSMAN *v.* LACOSTE (1854), 23 L. T. O. S. 91; 2 W. R. 455.

757. —— Employment treated as terminated.]—CLOSSMAN *v.* LACOSTE, No. 756, *ante*.

758. —— —— Action brought for second breach of original contract.] — Applts. engaged resp., under a written agreement, dated Sept. 25, 1865, as a file-forger, for two years, after the rate of the Sheffield list of prices for the time being. On Feb. 24, 1866, applts. refused to give resp. work. On Mar. 16, 1846, resp. entered a plaint in a county ct. against applts.; & in his particulars alleged that applts. had neglected & refused to perform, & had not performed, their agreement, whereby resp. had sustained damages to the amount of £7 14*s.*, being four weeks' average wages in lieu of notice. Applts. paid £7 14*s.* & the costs into ct. on Apr. 19, 1866. On the next day, Apr. 20, resp. again went to work for applts., but was dismissed on Apr. 21. On July 4, 1866, resp. entered another plaint against applts., & in his particulars alleged that applts. refused to employ resp., but illegally discharged him from their service, & claimed £48 12*s.* At the trial the jury found a verdict for resp. for £33 12*s.* It was admitted that the agreement sued on in the first plaint was the same agreement as was sued on in the second plaint:—*Held:* there was no evidence to go to the jury of such agreement, & the judge ought to have directed a nonsuit.—BARNSLEY *v.* TAYLOR (1867), 37 L. J. Q. B. 39; 32 J. P. 229.

Annotation:—**Refd.** James *v.* Evans (1897), 77 L. T. 78.

759. Effect of wrongful dismissal—Repudiation of entire contract — Restrictions on trade.]—Employers agreed with their manager that he should hold office subject to termination at twelve months' notice by either party & with a restriction on his right to trade after its termination. The employers having wrongfully dismissed him without notice:—*Held:* he was entitled to treat the dismissal as a repudiation of the contract & to sue them for damages for breach of contract, & was no longer bound by the restriction on trade.—GENERAL BILLPOSTING CO., LTD. *v.* ATKINSON, [1909] A. C. 118; 78 L. J. Ch. 77; 99 L. T. 943; 25 T. L. R. 178, H. L.

Annotations:—**Apld.** Measures *v.* Measures, [1910] 2 Ch. 248. **Consd.** Dennis *v.* Tunnard & Moore (1911), 56 Sol. Jo. 162. **Distd.** Konski *v.* Peet, [1915] 1 Ch. 530. **Refd.** *Re* Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315; Martin *v.* Stout, [1925] A. C. 359. **Mentd.** Newsum *v.* Bradley, [1918] 1 K. B. 271; British Concrete Co. *v.* Schelff, [1921] 2 Ch. 563.

Covenants in restraint of trade, *see* TRADE & TRADE UNIONS.

B. Damages for Wrongful Dismissal.

(*a*) *In General.*

760. Nature of claim.]—*Re* RUBEL BRONZE & METAL CO. & VOS, No. 782, *post*.

761. Action may be brought immediately.] — If an agreement be entered into for the employment of a clerk for four years from Jan. 1, 1823, at a salary of £400 a year, & the salary be paid up to Jan. 1, 1825, & in July 1825, the clerk is dismissed from his employment he may commence an action in Michaelmas Term, 1825, though at that time, according to the agreement, a year's salary would not be due.—PAGANI *v.* GANDOLFI (1826), 2 C. & P. 370, N. P.

Annotation:—**Refd.** Goodman *v.* Pocock (1850), 19 L. J. Q. B. 410.

762. —— Breach before commencement of service.]—Agreement in consideration that pltf. would enter deft.'s service as courier on June 1, 1852 & travel with him for three months certain from that day, deft. would employ him & pay him £10 per month, during the service. Breach, that before June 1, 1852 deft. refused & declined to employ pltf., & wholly absolved & exonerated & discharged pltf. from his agreement:—*Held:* pltf. might sue deft. immediately upon the refusal & breach of the agreement; & was not bound to wait until the day for the commencement of the service had arrived.—HOCHSTER *v.* DE LA TOUR (1853), 2 E. & B. 678; 1 C. L. R. 846; 22 L. J. Q. B. 455; 22 L. T. O. S. 171; 17 Jur. 972; 1 W. R. 469; 118 E. R. 922.

Annotations:—**Apld.** Curtis *v.* B. U. R. T. Co. (1912), 28 T. L. R. 353. **Refd.** Unwin *v.* Clarke (1866), L. R. 1 Q. B. 417; Frost *v.* Knight (1872), L. R. 7 Exch. 111; Donkin *v.* Hastie (1897), 61 J. P. 568; James *v.* Evans (1897), 77 L. T. 78; *Re* Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315; Martin *v.* Stout, [1925] A. C. 359. **Mentd.** Burton *v.* G. N. Ry. (1854), 9 Exch. 507; Lewis *v.* Clifton (1854), 14 C. B. 245; Avery *v.* Bowden (1855), 5 E. & B. 714; Reid *v.* Hoskins (1856), 26 L. J. Q. B. 5; Croockewit *v.* Fletcher (1857), 1 H. & N. 893; Hall *v.* Wright (1859), E. B. & E. 765; Roberts *v.* Brett (1859), 6 C. B. N. S. 611; Danube, etc., Ry. *v.* Xenos (1861), 11 C. B. N. S. 152; Jonassohn *v.* Young (1863), 4 B. & S. 296; Bartholomew *v.* Markwick (1864), 15 C. B. N. S. 711; Hughes *v.* Graeme (1864), 4 New Rep. 190; Church-

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v. WILLIAMS (1916), 44 N. B. R. 204.—**CAN.**

r. *Delay in paying wages—Whether servant a right to damages.*]—Masters & Servants Act, 1892, does not give to a servant whose wages have not been paid on the due date a right to damages or compensation for loss suffered by the delay in payment.—CLARKE *v.* CONNOR (1906), 8 W. A. L. R. 81.—**AUS.**

PART VI. SECT. 3, SUB-SECT. 2.—B. (a).

761 i. *Action may be brought immediately.*]—Deft. agreed to employ pltf. for three years at an annual salary, but dismissed him without sufficient cause before the end of the second year:—*Held:* pltf. had an immediate right of action for breach of the agreement.—MEADE *v.* DOHERTY (1851), 2 All. 195.—**CAN.**

761 ii. ——.]—DOHERTY *v.* VANCOUVER GAS CO. (1905), 1 W. L. R. 252.—**CAN.**

761 iii. ——.]—GARLAND *v.* SCOTT (1880), 6 Nfld. L. R. 243.—**NFLD.**

761 iv. ——.]—An employee entitled to a month's notice of termination of his engagement is not bound, on summary dismissal, to wait until the expiration of a month before suing.—

ward *v.* R. (1865), L. R. 1 Q. B. 173; *Re* Agra Bank, *Ex p.* Tondeur (1867), L. R. 5 Eq. 160; Wilkinson *v.* Verity (1871), L. R. 6 C. P. 206; Brown *v.* Muller (1872), L. R. 7 Exch. 319; Roper *v.* Johnson (1873), L. R. 8 C. P. 167; Metcalfe *v.* Britannia Ironworks Co. (1877), 2 Q. B. D. 423; Société Générale de Paris *v.* Milders (1883), 49 L. T. 55; Mersey Steel & Iron Co. *v.* Naylor, Benzon (1884), 9 App. Cas. 434; Johnstone *v.* Milling (1886), 16 Q. B. D. 460; Gueret *v.* Audouy (1893), 62 L. J. Q. B. 633; Synge *v.* Synge, [1894] 1 Q. B. 466; Roth *v.* Taysen, Townsend (1896), 1 Com. Cas. 306; Ellis *v.* Pond, [1898] 1 Q. B. 426; Rhymney Ry. *v.* Brecon & Merthyr Tydfil Junction Ry. (1900), 69 L. J. Ch. 813; Tredegar Iron & Coal Co. *v.* Hawthorn (1902), 18 T. L. R. 716; Sapwell *v.* Bass (1910), 102 L. T. 811; Fratelli Sorrentino *v.* Buerger, [1915] 3 K. B. 367; Veithardt & Hall *v.* Rylands (1917), 86 L. J. Ch. 604; Bradley *v.* Newsom, [1919] A. C. 16; Consorzio Veneziano di Armamento e Navigazione *v.* Northumberland Shipbuilding Co. (1919), 88 L. J. K. B. 1194.

763. —— ——.] — GLINSERETTI *v.* RICKARDS (1907), *Times*, Jan. 26, C. A.

Annotation:—**Distd.** Harvey *v.* Tivoli, Manchester (1907), 23 T. L. R. 592.

—— ——.]—*See, also*, CONTRACT, Vol. XII., pp. 340–342, Nos. 2841–2856.

(*b*) *Proof of Readiness to Serve.*

764. Necessity for averment of tender of service.]—UGHTRED'S CASE (1601), Jenk. 260; 7 Co. Rep. 9 B; 145 E. R. 186.

Annotations:—**Refd.** Peters *v.* Opie (1672), 1 Vent. 214; Metzner *v.* Bolton (1854), 9 Exch. 518. **Mentd.** Clarke *v.* Gurnell (1612), 1 Bulst. 167; Constable *v.* Cloberie (1626), Palm. 397; R. *v.* Hampden (1637), 3 State Tr. 825; Berry *v.* White (1662), O.Bridg. 82; Thomason *v.* Mackworth (1666), O. Bridg. 502; Griffith *v.* Mansell (1673), Freem. K. B. 93; Thomas *v.* Sorrel (1673), 3 Keb. 223; Smith *v.* Shelbury (1675), Freem. K. B. 195; Bankers Case (1694), Skin. 601; Thorpe *v.* Thorpe (1701), 1 Ld. Raym. 662; Lock *v.* Wright (1723), 1 Stra. 569; Churchill *v.* Wilkins (1786), 1 Term Rep. 447; Terry *v.* Duntze (1795), 2 Hy. Bl. 389; Wynne *v.* Wynne (1840), 2 Man. & G. 8; Brooke *v.* Spong (1846), 15 M. & W. 153.

765. ——.] — Declaration alleged that, on Oct. 15, in consideration that pltf., at deft.'s request, would enter deft.'s service, & serve him for a certain time, from the day & year till the service should be determined, by reasonable notice in that behalf on either side, for a salary named, deft. promised pltf. to retain & employ him on the terms aforesaid, & pay him such salary, & continue him in such service until such service should be determined by reasonable notice, as before; that pltf., on the day & year, entered the service of deft. on the terms, & had always, from the commencement thereof hitherto, been ready & willing to remain & continue in the service, etc., & during all that time tendered & offered himself to serve deft. in such service, etc., of all which deft. during all that time had notice; yet deft. did not nor could continue pltf. in his service, but, on the contrary thereof, on the same day & year aforesaid, refused to suffer pltf. to continue any longer in the said service, & discharged pltf. therefrom, without any previous notice in that behalf, & without any reasonable or probable cause in that behalf, & had, thence hitherto, refused any longer to retain pltf. in his said service. On special demurrer:—*Held:* (1) the word "from" was, on this record, to be taken as including Oct. 15, within the time of service contracted for; & it could not therefore be objected that deft. appeared to have discharged pltf. from the service before its commencement; (2) the declaration was not double for averring pltf.'s willingness to serve as well as his tender; & issue might have been taken on the tender alone; (3) the declaration was not bad for want of an allegation pltf. had given no notice to determine the service, there being an averment that he always was willing to serve & continually tendered himself to do so, of which deft. had notice.—WILKINSON *v.* GASTON (1846), 9 Q. B. 137; 15 L. J. Q. B. 339; 7 L. T. O. S. 225; 10 Jur. 804; 115 E. R. 1227.

Annotation:—*As to* (2) & (3) **Distd.** Wallis *v.* Warren (1849), 4 Exch. 361.

766. —— **After wrongful dismissal.**] — In an action for the wrongful dismissal of pltf. by deft., the declaration stated that pltf. was ready & willing to serve & offered to serve deft. The gist of this averment is the readiness which implies the ability & willingness of pltf. to continue the services from which deft. wrongfully dismissed him. If pltf., therefore, is ready & willing, it is not at all necessary that he should offer to continue in the service of deft. when he has been once sent wrongfully away.—WALLIS *v.* WARREN (1849), 4 Exch. 361; 7 Dow. & L. 58; 18 L. J. Ex. 449; 14 L. T. O. S. 108; 154 E. R. 1252.

(*c*) *Measure of Damages.*

i. *In General.*

Measure of damages generally, *see* DAMAGES, Vol. XVII., pp. 130 *et seq.*

767. Amount of compensation — Hiring for a fixed term—Amount of wages lost.]—BRYANT *v.* FLIGHT, No. 620, *ante*.

768. —— —— ——.] — SMITH *v.* THOMPSON, No. 466, *ante*.

769. —— —— ——.]—DAVIS *v.* MARSHALL, No. 313, *ante*.

770. —— **Compensation for loss of wages.**]—(1) A series of letters passed between pltf. & defts. relative to an engagement, by the year, of pltf. as commission agent. In the earlier letters mention was made of notice to be given to determine the engagement. A subsequent letter set out the terms of remuneration; but omitted any mention of notice:—*Held:* all previous terms which had been settled were unaffected by it.

(2) Pltf. having served for one year, the engagement was put an end to without notice:—*Held:* pltf. was not entitled to recover the whole of the second year's salary, but so much as would compensate him.—MCKEAN *v.* COWLEY (1863), 1 New Rep. 396; 7 L. T. 828.

DONALDSON *v.* WEBBER (1887), 4 H. C. 403.—**S. AF.**

PART VI. SECT. 3, SUB-SECT. 2.—B. (b).

766 i. *Necessity for averment of tender of service—After wrongful dismissal.*]—LLOY *v.* BILLMAN (1906), 1 E. L. R. 351.—**CAN.**

PART VI. SECT. 3, SUB-SECT. 2.—B. (c) i.

767 i. *Amount of compensation—Hiring for a fixed term—Amount of wages lost.*]—Pltf., who had been engaged for one year by defts., at a monthly salary, was dismissed wrongfully during the year:—*Held:* pltf. was entitled to recover damages covering the unexpired term of his engagement.—HOPKINS *v.* GOODERHAM (1904), 24 C. L. T. 104; 10 B. C. R. 250.—**CAN.**

767 ii. —— —— ——.]—It a servant is hired for the year & during the year dismissed without cause he is entitled to his wages to the end of the year.—BERNEY *v.* O'BRIEN & Co. (1869), 5 Nfld. L. R. 260.—**NFLD.**

767 iii. —— —— ——.]—DENNY *v.* SOUTH AFRICAN LOAN, MORTGAGE & MERCANTILE AGENCY CO., LTD. (1883), 3 E. D. C. 47.—**S. AF.**

770 i. —— *Compensation for loss of wages.*]—GILLES *v.* BANK OF VICTORIA (1872), 3 V. R. (Law.) 46.—**AUS.**

770 ii. —— ——.]—MANNERS *v.* DENNY BROTHERS (1912), 14 W. A. L. R. 91.—**AUS.**

770 iii. —— ——.]—MCGUFFIN *v.* CAYLEY (1845), 2 U. C. R. 308.—**CAN.**

770 iv. —— ——.]—SYDNEY LAND & LOAN CO., LTD. *v.* ROUNTREE (1907), 42 N. S. R. 49.—**CAN.**

770 v. —— ——.]—HALLIDAY *v.* CANADIAN PACIFIC RY. CO. (1912), 23 O. W. R. 168; 4 O. W. N. 162; 7 D. L. R. 198.—**CAN.**

770 vi. —— ——.]—ROCKLAND *v.* AUCKLAND ELECTRIC TRAMWAY CO., LTD., [1918] N. Z. L. R. 824.—**N.Z.**

t. ——.]—The measure of damages for wrongful dismissal is based on what the servant would have

Sect. 3.—*Action for damages: Sub-sect.* 2, *B.* (*c*) *i. & ii.*]

771. —— —— No actual loss suffered.]—SMITH *v.* CHARING-CROSS, EUSTON & HAMPSTEAD RY. CO. (1903), 19 T. L. R. 614; *on appeal* (1904), 20 T. L. R. 465, C. A.

Aggravation & mitigation of damages.]—*See* DAMAGES, Vol. XVII., pp. 120 *et seq.*

Liquidated damages.]—*See* DAMAGES, Vol. XVII., p. 149, No. 515.

Assessment of damages.]—*See* DAMAGES, Vol. XVII., p. 156, No. 573.

ii. *Matters to be Taken into Consideration.*

772. All benefits of contract.]—The partners in certain brassworks enter into articles with A., that he shall serve them as their manager & overseer, during his life; &, besides a stipulated yearly salary, he was to have 3*s.* 6*d.* for every hundredweight of brass wire made by him, or any other person during his life. A. was afterwards discharged by the partners from their service; & on a bill brought for a specific performance of these articles, it was decreed, that pltf. was entitled to all the advantages thereby stipulated for him, except the 3*s.* 6*d.* payable to him for every hundredweight of brass wire made at the mills; which the judge conceived was intended as a reward, attending the produce of the works during such time only as pltf. supervised the same. But this part of the decree was reversed, & he was held to be entitled to this allowance during his life.—BALL *v.* COGGS (1710), 1 Bro. Parl. Cas. 140; 1 E. R. 471, H. L.

Annotations:—**Apld.** Adderley *v.* Dixon (1824), 1 Sim & St. 607. **Refd.** Stocker *v.* Brockelbank (1851), 15 Jur. 591.

773. Possibility of obtaining similar employment.]—The measure of damages . . . is obtained by considering what is the usual rate of wages for the employment here contracted for, & what time would be lost before a similar employment could be obtained . . . when a promise for continuing employment is broken by the master it is the duty of the servant to use diligence to find another employment (ERLE, J.).—BECKHAM *v.* DRAKE (1849), 2 H. L. Cas. 579; 13 Jur. 921; 9 E. R. 1213, H. L.; *affg.* S. C. *sub nom.* DRAKE *v.* BECKHAM (1843), 11 M. & W. 315, Ex. Ch.

Annotations:—**Refd.** Galsworthy *v.* Strutt (1848), 1 Exch. 659; Emmens *v.* Elderton (1853), 13 C. B. 495; Bailey *v.* Thurston, [1903] 1 K. B. 137. **Mentd.** Denton *v.* Williams (1839), 8 Dowl. 123; Hill *v.* Smith (1844), 13 L. J. Ex. 243; Williams *v.* Chambers (1847), 10 Q. B. 337; Bell *v.* Carey (1849), 8 C. B. 887; Wetherell *v.* Julius (1850), 10 C. B. 267; Elliot *v.* Clayton (1851), 16 Q. B. 581; Boddington *v.* Castelli (1853), 1 E. & B. 879; Stanton *v.* Collier (1854), 3 E. & B. 274; Northampton Gas Light Co. *v.* Parnell (1855), 24 L. T. O. S. 239; Robinson *v.* Rudkins (1856), 26 L. J. Ex. 56; Betts *v.* Burch (1859), 4 H. & N. 506; Bristowe *v.* Whitmore (1861), 4 L. T. 622; Richbell *v.* Alexander (1861), 30 L. J. C. P. 268; Spurr *v.* Cass, *Cass v.* Spurr (1870), L. R. 5 Q. B. 656; Calder *v.* Dobell (1871), L. R. 6 C. P. 486; Wadling *v.* Oliphant (1875), 1 Q. B. D. 145; Emden *v.* Carte (1881), 17 Ch. D. 169; Kellaway *v.* Bury (1892), 66 L. T. 599; *Re* Beyts & Craig, *Ex p.* Trustee (1894), 70 L. T. 561; Rose *v.* Buckett, [1901] 2 K. B. 449; Formby *v.* Barker, [1903] 2 Ch. 539; Wilson *v.* United Counties Bank, [1920] A. C. 102.

774. ——.]—In estimating damages for the wrongful dismissal of a servant, the jury should take into account the salary & not the commission obtained by pltf. Pltf. is not entitled to his full salary for the unexpired period of the contract for service, but that is to be reduced by the probabilities of pltf. having other employment during such period. The employer being a co. afterwards ordered to be wound up that fact also should be taken into consideration in estimating the loss sustained by pltf. through his dismissal.—HARTLAND *v.* GENERAL EXCHANGE BANK, LTD. (1866), 14 L. T. 863, N. P.

775. ——.]—Only nominal damages are recoverable for breach by the employer of a contract of hiring, if the person hired could have at once obtained other employment of a precisely similar kind which a reasonable man would have accepted. —MACDONNELL *v.* MARSTON (1884), Cab. & El. 281.

776. ——.]—Defts., a partnership consisting of four members, agreed to employ pltf. as manager of a branch of their business for a certain period. Pltf. entered into their service under the agreement, but, before the period had expired, two of the partners retired, & the business was transferred to & carried on by the other two. The continuing partners were willing to employ pltf. on the same terms as before for the remainder of the period, but he declined to serve them. In an action for wrongful dismissal:—*Held:* the dissolution of the partnership operated as a wrongful dismissal of pltf., but he was only entitled to nominal damages. —BRACE *v.* CALDER, [1895] 2 Q. B. 253; 64 L. J. Q. B. 582; 72 L. T. 829; 59 J. P. 693; 11 T. L. R. 450; 14 R. 473, C. A.

Annotations:—**Apld.** Payzu *v.* Saunders, [1919] 2 K. B. 581. **Refd.** Jaeger's Sanitary Woollen System Co. *v.* Walker (1897), 77 L. T. 180; Ogdens *v.* Nelson, Same *v.* Telford, [1903] 2 K. B. 287; Midland Counties District Bank *v.* Attwood, [1905] 1 Ch. 357.

777. Employment obtained immediately after dismissal.]—Pltf. was in the service of deft. co. under a contract which provided that his employment might be determined by six months' notice. A manager & receiver was appointed by order of the Ch. Div. at the instance of holders of debentures of the co. Pltf., by the instructions of the manager, continued for more than six months to discharge his former duties at the same salary. The business was then sold to a new co., and pltf. was dismissed without notice. In an action for wrongful dismissal:—*Held:* the appointment of a manager & receiver operated to discharge the servants of the co., & deft. could not recover.

Pltf. was employed for six months after the appointment of the manager at the same salary as before, & he is not therefore entitled to recover in this action if in fact the appointment of the manager operated to discharge him. I think it did so (LOPES, L.J.).—REID *v.* EXPLOSIVES CO. (1887), 19 Q. B. D. 264; 56 L. J. Q. B. 388; 57 L. T. 439; 35 W. R. 509; 3 T. L. R. 588, C. A.

Annotations:—**Refd.** Turner *v.* Goldsmith (1891), 60 L. J. Q. B. 217; Midland Counties District Bank *v.* Attwood, [1905] 1 Ch. 357; Measures *v.* Measures, [1910] 2 Ch. 218; Parsons *v.* Sovereign Bank of Canada, [1913] A. C. 160; *Re* Vulcaan Coal Co., Harrison *v.* Harbottle, [1922] 2 Ch. 60. **Mentd.** De Grelle *v.* Bull & Ward (1894), 10 T. L. R. 198; Robinson Printing Co. *v.* Chic, [1905] 2 Ch. 123; Whinney *v.* Moss S.S. Co., [1910] 2 K. B. 813.

778. Domestic servant—Board wages.] — GORDON *v.* POTTER, No. 584, *ante*.

779. —— —— Dismissal during notice given by servant.]—The rule that the damages recoverable by a domestic servant for wrongful dismissal are a month's wages without board wages does not

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earned under the contract less the remuneration which he has received or could receive from some other quarter.—FABERLAN *v.* M'KAY & FRASER, [1920] W. L. D. 23.—S. AF.

a. —— *Dismissal through voluntary dissolution of company.*]—GLENN *v.* RUDD (1902), 22 C. L. T. 113; 3 O. L. R. 422; 1 O. W. R. 116.—CAN.

b. —— *Counterclaim for damages for negligence.*]—TWEET *v.* SMITH (Sask.), (1921), 62 D. L. R. 659.—CAN.

PART VI. SECT. 3, SUB-SECT. 2.—B. (c) ii.

777 1. *Employment obtained immediately after dismissal.*]—COCKBURN *v.* TRUSTS & GUARANTEE CO. (1917), 38 O. L. R. 396; 33 D. L. R. 159.—CAN.

apply where the servant is wrongfully dismissed during the currency of a month's notice given by the servant to terminate the service. In that case the damages recoverable are the actual pecuniary loss sustained, & will include compensation for the loss of board & lodging during the period between the date of the wrongful dismissal & the date when the service would have terminated under the notice.—LINDSAY *v.* QUEEN'S HOTEL CO., [1919] 1 K. B. 212; 88 L. J. K. B. 535; 120 L. T. 280; 35 T. L. R. 101; 63 Sol. Jo. 136, D. C.

780. Expectation of gift on completion of contract.]—Pltf. was engaged by deft. to superintend some draining operations upon his estate, at a salary of £2 per week, & a house to live in, or £13 *per annum* in lieu of it, & was also to receive a "gift" of £20 if he remained till Lady-Day then next. Before the expiration of the term pltf. was wrongfully dismissed, & ordered to leave the house which deft. had elected to put him into, but he refused to do so, & deft. accordingly removed his goods & furniture into a barn from which pltf. might have taken them if he had chosen to do so. During the time that the goods were there, the barn was broken into, & some of the goods damaged, & £70 taken from a bureau. In a declaration containing a count for wrongful dismissal, in which special damages were claimed for loss of money & damage to goods, & also a count in trover:—*Held:* in assessing the damages the jury had a right to take into consideration the "gift" of £20 which pltf. would have earned if he had been allowed to do so, but not the sums for the damage to the goods, or the money lost from the bureau, as there was no relationship existing between the pltf. & deft. of landlord & tenant, & therefore deft. had a right to remove the goods, & could not be held liable for the damage or loss which happened either under the count for breach of the agreement or in the count in trover.

Pltf. had no estate in the house . . . & deft. had a perfect right to turn him out (ERLE, C.J.).—LAKE *v.* CAMPBELL (1862), 5 L. T. 582.

781. Expectation of commission to be earned—Remuneration by salary & commission.]—HARTLAND *v.* GENERAL EXCHANGE BANK, LTD., No. 774, *ante*.

782. — — — —.]—The right to bring an action for wrongful dismissal is a mere illustration of the general legal rule that an action will lie for unjustifiable repudiation of a contract.

In Nov. 1915, by an agreement in writing defts., a co. carrying on an establishment controlled under Munitions of War Act, 1915 (c. 54), appointed pltf. general manager of its works for three years at a fixed salary & a commission upon the net profits of the business available for dividend upon a rising scale & if the net profits for the second & third year together amounted to a certain sum the agreement was to be continued for a further period of three years upon the same terms & conditions. In Jan. 1917, defts. purported to suspend pltf. from the exercise of his duties pending an investigation as to his efficiency; they also compelled him to deliver up the badge he held as a person engaged in munition work at a controlled establishment on the ground that he was no longer indispensable & they appointed another person to take charge of the works instead of pltf., & on the following day they took from him his business keys & informed him that he must not return to the works as he was not wanted, & required him to deliver up all cash belonging to them. As a result of these acts pltf. elected to treat the contract as repudiated by defts. & claimed damages for wrongful dismissal:—*Held:* defts. had wrongfully repudiated their contract, & pltf. was therefore entitled to damages, inasmuch as defts. absolutely forbade him to fulfil any of his duties, they prevented him from exerting his opportunities as a manager to gain commission upon the net profits of the co., & they decisively ended his attendance at the premises.

To-day it is well settled that a master may dismiss his servant for many reasons, such as misconduct, substantial negligence, dishonesty, & the like (MCCARDIE, J.).—*Ite* RUBEL BRONZE & METAL CO. & VOS, [1918] 1 K. B. 315; 87 L. J. K. B. 466; *sub nom.* VOS *v.* RUBEL BRONZE & METAL CO., LTD., 118 L. T. 348; *sub nom.* RUBEL BRONZE & METAL CO. *v.* VOS, 34 T. L. R. 171.

Annotations: **Apld.** Harrison *v.* Walker, [1919] 2 K. B. 153. **Refd.** Turpin *v.* Victoria Palace (1918), 88 L. J. K. B. 569; Payzu *v.* Saunders, [1919] 2 K. B. 581; Raffy-Arnell, etc., Co. *v.* R., [1922] 1 K. B. 599.

783. — — — —.]—Pltf. was employed by deft. as a hairdresser's assistant at a weekly wage & commission on the takings. It was also an implied term of the contract that he should be at liberty to receive tips from customers. Pltf. was wrongfully dismissed without notice:—*Held:* pltf. was entitled to claim as damages for the wrongful dismissal, in addition to a week's wages in lieu of notice & commission, an amount in respect of the loss of the tips which he would have received but for the wrongful dismissal.—MANUBENS *v.* LEON, [1919] 1 K. B. 208; 88 L. J. K. B. 311; 120 L. T. 279; 35 T. L. R. 94; 63 Sol. Jo. 102, D. C.

784. — **Remuneration by commission only.**]—A co. engaged D. & G. to act as their commercial travellers for three years in a certain district at a commission upon goods ordered. Co. was wound up before the termination of the three years:—*Held:* D. & G. were entitled to compensation in respect of commission for the unexpired portion of the term, the amount to be ascertained by the chief clerk in chambers.—*Re* PATENT FLOOR CLOTH CO., DEAN & GILBERT'S CLAIM (1872), 41 L. J. Ch. 476; 26 L. T. 467.

Annotations: **Consd.** Warren *v.* Agdeshman (1922), 38 T. L. R. 588. **Refd.** Turner *v.* Goldsmith (1891), 39 W. R. 547.

Provision or continuance of opportunity of earning remuneration.]—*See* CONTRACT, Vol. XII., pp. 619 *et seq.*

785. Expectation of tips.]—MANUBENS *v.* LEON, No. 783, *ante*.

786. Subsequent liquidation of employing company.]—HARTLAND *v.* GENERAL EXCHANGE BANK, LTD., No. 774, *ante*.

787. Money paid to obtain employment.] — Defts. were a friendly society, & pltf. was one of some 1,300 persons employed by them, at a remuneration fixed by the committee of management, to collect the weekly premiums of the members of the society. It was the usual practice for a person desiring to become a collector of the society to purchase the collecting book of a collector desiring to resign, & the bargain between them for the sale & purchase of the book, though made outside the society, was recognised by the society. In accordance with the practice, pltf. purchased for £35 the collecting book of J., a collector, & paid that sum to J. with the knowledge & approval of the society's secretary, &

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780 l. *Expectation of gift on completion of contract.*]—GOULD BICYCLE CO. *v.* LAISHLEY (1903), 35 S. C. R. 184.—CAN.

781 l. *Expectation of commission to be earned—Remuneration by salary & commission.*] — CLARK *v.* CANADA WESTERN WOOLLEN MILLS CO. (B. C.), [1923] 1 D. L. R. 1159.—CAN.

ect. 3.—Action for damages: Sub-sect. 2, B. (c) ii., iii. & iv.; sub-sect. 3, A. & B.]

vas thereupon appointed a collector, in J.'s place s district. A few months afterwards, with their nowledge & approval, he purchased & paid £50 or the collecting book of K., another collector. n the first page of each book was the usual printed notice: "The collectors shall be furnished with books at the society's expense. Such books to be the society's property;" & on the back of each book, as was the usual practice, there was printed pltf.'s name, & also defts.' name. Pltf. was subsequently dismissed from his office of collector, & in an action by him, in the Liverpool Passage Ct., to recover damages from defts. for wrongful dismissal & the detention of his collecting books, the jury found that he was rightfully dismissed, & that he had an interest in the books amounting to £50, whereupon judgment was entered for defts. on the claim for wrongful dismissal, & for pltf. as to the books for £50, damages 1s. On appeal from the finding & judgment in favour of pltf.:—*Held:* the books were the property of the society, & pltf. had never any property, or any interest whatever in them, recognisable by law or giving him any right of action against defts., & the question of his interest n the books ought not to have been left to the jury.

Had pltf. been wrongfully dismissed, the fact of his having paid money for the books, a order to obtain the appointment of collector, might have been a matter to go to the jury for their consideration with regard to the amount of damages for wrongful dismissal (STEPHEN, J.).—ELLWOOD *v.* LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY (1880), 42 L. T. 694; 44 J. P. 508.

788. Injury to reputation—Musical director.]—By an agreement of Aug. 18, 1892, deft. co. engaged pltf. as musical director of their theatre until Oct. 1, 1895, upon certain terms as to salary, with a provision that pltf.'s name should be announced in certain daily newspapers, & on bills & programmes. It appeared that the most important duty of a musical director is to conduct the orchestra. Pltf. had conducted three pieces at defts.' theatre with perfect success when a piece was brought out which was conducted by the composer. Since that time pltf. had not been called on to conduct or perform the duties of his office, but his salary had been paid under the agreement, & it was common ground that he was still musical director of the theatre:—*Held:* the stipulation that pltf.'s name should appear as musical director meant, that such a state of things should exist that defts. should be in a position truly to make such an announcement; or, in other words, that they should employ him in that capacity, & pltf., though it had not been shown that his non-employment had interfered with his obtaining another post, was entitled to more than nominal damages.—BUNNING *v.* LYRIC THEATRE, LTD. (1894), 71 L. T. 396; 10 T. L. R. 583.

Annotations:—**Consd.** Turpin *v.* Victoria Palace (1918), 88 L. J. K. B. 569. **Refd.** Turner *v.* Sawdon, [1901] 2 K. B. 653.

789. —— Commercial traveller.]—A commercial traveller was engaged for a term. By the contract he was to travel in certain countries, & was to receive a salary of £500 & a fixed allowance per day as travelling expenses. During the continuance of the engagement his employers found that, owing to a fall in prices, it was no longer profitable to take orders in the countries travelled by him. They thereupon refused to send him on further journeys, & refused to pay him the allowance for travelling expenses or any part thereof, but continued to pay him his salary. He sued them for damages for the injury done to the goodwill of his trade connection by their refusal to send him on journeys, & for the loss of the proportion of his allowance for travelling expenses which by economy he was able to save when travelling:—*Held:* the action would not lie.—LAGERWALL *v.* WILKINSON, HENDERSON & CLARKE, LTD. (1899), 80 L. T. 55.

Annotation:—**Refd.** Turpin *v.* Victoria Palace (1918), 88 L. J. K. B. 569.

790. Manner of dismissal—Injury to feelings.]—Where a servant is wrongfully dismissed from his employment, the damages for the dismissal cannot include compensation for the manner of the dismissal & for his injured feelings or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment.—ADDIS *v.* GRAMOPHONE CO., LTD., [1909] A. C. 488; 78 L. J. K. B. 1122; 101 L. T. 466, H. L.

Annotations:—**Folld.** *Re* Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315. **Refd.** Quirk *v.* Thomas, [1916] 1 K. B. 516; Turpin *v.* Victoria Palace (1918), 88 L. J. K. B. 569; Wilson *v.* United Counties Bank, [1920] A. C. 102.

791. Difficulty of obtaining future employment.]—In considering damages, the jury might take into account the difficulty that pltf. would have in obtaining employment elsewhere (LORD COLERIDGE, C.J.).—MAW *v.* JONES (1890), 25 Q. B. D. 107; 59 L. J. Q. B. 542; 63 L. T. 347; 54 J. P. 727; 38 W. R. 718, D. C.

Annotations:—**Consd.** Addis *v.* Gramophone Co., [1909] A. C. 488. **Refd.** Baker *v.* Denkera Ashante Mining Corpn. (1903), 20 T. L. R. 37; Austwick *v.* Midland Ry. (1909), 25 T. L. R. 728; Chaplin *v.* Hicks, [1911] 2 K. B. 786.

792. ——.]—ADDIS *v.* GRAMOPHONE CO., LTD., No. 790, *ante*.

iii. *Where Wages Payable in lieu of Notice.*

793. Limitation of amount—To wages for period of notice.]—Defts. engaged pltf. to superintend mines in America for three years, at a salary of £600 *per annum*, to increase £50 every year, & commence from his leaving England, with a proviso, that pltf. should not be dismissed

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790 i. *Manner of dismissal—Injury to feelings.*]—In an action by a domestic servant for wrongful dismissal, the jury are not entitled to take into account, in assessing damages, the fact that the dismissal took place late at night, & under circumstances occasioning her great personal inconvenience.—BREEN *v.* COOPER (1) (1869), I. R. 3 C. L. 621.—**IR.**

791 i. *Difficulty of obtaining future employment.*]—JEYKAL *v.* NOVA SCOTIA GLASS CO. (1888), 20 N. S. R. (8 R. & G.) 388; 9 C. L. T. 60.—**CAN.**

791 ii. ——.]—BEAUCAGE *v.* WINNIPEG STONE CO. (1910), 14 W. L. R. 575.—**CAN.**

c. *Whether plaintiff has sought other employment.*]—*Semble:* pltfs. could not recover a full month's wages in lieu of notice because they had not sought other employment.—PRATT *v.* IDSARDI (1915), 31 W. L. R. 541; 21 B. C. R. 497.—**CAN.**

d. *Offer to re-employ servant.*]—The fact that deft., after the dismissal, offered to re-employ pltf. on the same terms will not disentitle pltf. to claim more than nominal damages where there were circumstances justifying pltf. in refusing the offer.—WILSON *v.* KISRI (1900), 18 N. Z. L. R. 807.—**N.Z.**

PART VI. SECT. 3, SUB-SECT. 2.—B. (c) iii.

793 i. *Limitation of amount—To wages for period of notice.*]—Under a monthly hiring a month's notice is sufficient to terminate it & damages for wrongful dismissal are limited to a month's wages.—JOHNS *v.* WINNIPEG ELECTRIC RY. CO., [1925] 3 D. L. R. 314; [1925] 2 W. W. R. 282; 35 Man. L. R. 53.—**CAN.**

793 ii. —— ——.]—Where a servant is entitled to three months' notice of dismissal the measure of damages for wrongful dismissal is three months' salary.—MACDOUGALL *v.* GEAR MEAT PRESERVING CO. (1884), 3 N. Z. L. R. 132 (S. C.).—**N.Z.**

without a twelvemonth's salary, & the reasonable expenses of his return, & that if he stayed at the mines three years, a sum should be allowed for the expense of the return of his family. Pltf. left England in Aug. 1825, & arrived at the mines in April 1826. Defts. dismissed pltf. in Sept. 1827, without giving notice or paying a year's salary, or any expenses of return. In an action for breach of contract, a verdict having been given with damages to cover a year's salary from the time of dismissal, with leave for pltf. to move to increase the damages by £320, the expense of the return of pltf.'s family, & £470, the amount of salary from the end of a year after dismissal to the end of the third year after his arrival at the mines: —*Held:* pltf. was not entitled to increase the damages by the amount of those sums.—FRENCH *v.* BROOKES (1830), 6 Bing. 354; 4 Moo. & P. 11; 8 L. J. O. S. C. P. 91; 130 E. R. 1316.

794. —— ——.] — Pltf. was hired as superintendent of works at the rate of 150 guineas a year from a day named: either party to have the option of determining the engagement by a month's notice. At the end of eighteen months pltf. was dismissed without notice, or cause assigned, eighteen months' wages being then due to him. A month after dismissal he brought an action, declaring specially on the agreement, & stating, as the breach, that deft. would not continue pltf. in his employ till the expiration of such month's notice, but discharged pltf. in the middle of a year without notice; whereby pltf. lost all the wages, profits, etc., which he might have derived from continuing in deft.'s service, & was still unemployed:—*Held:* the contract was for dismissal on a month's warning or month's wages, &, on this count, pltf. could recover only the month's wages. But he might have added a common count for work & labour, & recovered under it his wages for the eighteen months.

It appeared to me that the stipulation as to a month implied a month's warning or a month's wages (LORD DENMAN, C.J.).—HARTLEY *v.* HARMAN (1840), 11 Ad. & El. 798; 3 Per. & Dav. 567; 9 L. J. Q. B. 179; 113 E. R. 617.

Annotations:—**Followed.** Flewings *v.* Tisdal (1847), 10 L. T. O. S. 166; **Distd.** Goodman *v.* Pocock (1850), 15 Q. B. 576; Robins *v.* Power (1858), 4 Jur. N. S. 810. **Refd.** Addis *v.* Gramophone Co., [1909] A. C. 488. **Mentd.** Holford *v.* Dunnett (1840), 7 M. & W. 348.

795. —— ——.] — When the custom is shown that parties engaged upon a daily newspaper are, upon dismissal or the stoppage of the paper, entitled to a month's salary in lieu of notice, they may prove accordingly in addition to arrears of salary then actually due.—*Re* HUTTON, *Ex p.* ALLPAS, *Ex p.* CHIPCHASE (1867), 17 L. T. 179; 16 W. R. 142.

796. —— ——.] — A contract between master & workman provided that the service should not be determined without a fortnight's notice. The servant was dismissed without notice:—*Held:* the justices had power under 30 & 31 Vict. c. 141, s. 4, to award to the servant compensation for breach to the same amount as the fortnight's wages.—SHAW *v.* ALDERSON (1875), 44 L. J. M. C. 160; 32 L. T. 724; 39 J. P. 582; 23 W. R. 730.

Annotation:—**Refd.** Millett *v.* Coleman, Dawson *v.* Coleman (1875), 44 L. J. Q. B. 194.

797. —— —— **Dismissal not justified.**] — BAKER *v.* DENKERA ASHANTI MINING CORPN., LTD. (1903), 20 T. L. R. 37.

798. Right to set off wages due—In action for money had & received.]—EAST ANGLIAN RYS. CO. *v.* LYTHGOE, No. 446, *ante*.

iv. *Expenses of Journey Home.*

799. Expenses of return of family.] — FRENCH *v.* BROOKES, No. 793, *ante*.

800. ——.] — *Re* LONDON & COLONIAL CO., *Ex p.* CLARK (1869), L. R. 7 Eq. 550; 38 L. J. Ch. 562; 20 L. T. 774.

Annotation:—**Mentd.** *Re* London & Scottish Bank, *Ex p.* Logan (1870), L. R. 9 Eq. 149.

801. Agreement to pay expenses—If dismissed before end of service.]—In *assumpsit*, the first count was on an agreement whereby deft. engaged pltf. as courier for five months certain, at ten guineas a month, & agreed, in case she discharged him before the end of the five months, to pay him the fifty guineas & his expenses back to Paris or England; & the count, after averring that pltf. served deft. two months, & was ready & willing to serve for the remainder of the five months, alleged as a breach that deft. refused to continue him in her service, & dismissed him before the end of the five months, & refused to pay him the fifty guineas, or any sum towards his expenses back. There was another count for £52 10*s.* for wages as deft.'s hired servant. Deft. pleaded, (*a*) as to the first count, except as to £21, parcel, etc., that pltf. wrongfully quitted her service; (*b*) as to the first count, except as to the said sum of £21, that she dismissed him for improper conduct; (*c*) as to the second count, except as to £21, parcel, etc., *non assumpsit*; & (*d*) payment into ct. of £34 18*s.*, in the form given by the new rules for a plea of payment into ct. on the whole declaration. Replications, joining issue on the first & third pleas, *de injuria* to the second, & to the fourth damages *ultra*. At the trial, the jury found for pltf. on the first issue, & for deft. on the second & third:—*Held:* pltf. was entitled to judgment on the whole record, at least for nominal damages.—FISCHER *v.* AIDE (1838), 3 M. & W. 486; 6 Dowl. 594; 1 Horn & H. 168; 7 L. J. Ex. 229; 2 Jur. 842; 150 E. R. 1237.

Annotations:—**Mentd.** Twemlow *v.* Askey (1838), 1 Horn & H. 172; Tattersall *v.* Parkinson (1847), 16 M. & W. 752; Perren *v.* Monmouthshire Ry. (1853), 11 C. B. 855; Thames Iron Works & Ship Building Co. *v.* Royal Mail Steam Packet Co. (1861), 10 C. B. N. S. 375.

802. —— **Of journey to master's house.**]—GORDON *v.* POTTER, No. 584, *ante*.

803. Custom to pay expenses—Unless employment terminated by servant.]—READ *v.* DUNSMORE, No. 546, *ante*.

SUB-SECT. 3.—PLEADING AND PRACTICE.

A. Pleading.

Joinder of parties.]—*See* R. S. C., Ord. 16, rr. 1 & 4.

Joinder of claims.]—*See* R. S. C., Ord. 18.

B. Practice.

804. Plea of justification of dismissal—Right to begin.]—In *assumpsit* for wrongfully dismissing a teacher in a school before the expiration of the year for which he was engaged, deft. pleaded only a special plea justifying the dismissal, upon which issue was taken:—*Held:* on this issue deft. was entitled to begin.—HARNETT *v.* JOHNSON (1840), 9 C. & P. 206, N. P.

805. ——.]—MERCER *v.* WHALL, No. 499, *ante*.

806. ——.] —WISE *v.* WILSON, No. 542, *ante*.

807. Right of plaintiff to have issue decided.]—In an action for wrongful dismissal, there being a plea of justification, pltf. held entitled

Sect. 3.—*Action for damages: Sub-sect.* 3, *B. Sects.* 4 & 5.]

to have a verdict taken on that plea, even athough he would, on the declaration alone be liable to nonsuit, & deft. held to be precluded from taking advantage, on his plea of justification of an alleged special contract, which he had himself succeeded in excluding, as not being in writing.—BRETT *v.* PHILIPS (1858), 1 F. & F. 398.

808. Jurisdiction to refer to official referee—Matters of account.]—Pltf. brought an action against defts. for damages for wrongful dismissal, for balance of account for money paid to deft.'s use, & for an account of profits on sales on which pltf. claimed commission. Defts. justified the dismissal on the ground that pltf. had misconducted himself by wilfully disobeying the reasonable orders of defts., & by habitually neglecting his duties, & by converting to his own use money which he had received to the use of deft. By order of a judge at chambers the issues in the action were referred to an official referee under Jud. Act, 1873 (c. 66), s. 57, the statement of defence being amended by omitting the allegation that pltf. converted money to his own use:—*Held:* the order of the learned judge at chambers was right.—SACKER *v.* RAGOZINE & Co. (1881), 44 L. T. 308, D. C.

Annotation:—**Mentd.** Russell v. Harris (1891), 65 L. T. 752.

SECT. 4.—QUANTUM MERUIT.

See AGENCY, Vol. I., pp. 509 *et seq.*, Nos. 1754 *et seq.*; BUILDING CONTRACTS, Vol. VII., pp. 366 *et seq.*: CONTRACT, Vol. XII., pp. 115–117, 166, Nos. 752–765, 1213–1215.

809. Servant entitled to remuneration for work done.]—CUTTER *v.* POWELL, No. 649, *ante*.

810. ——.]—(1) If the contract between master & servant be the usual one for a year, determinable at a month, the servant, if turned away improperly, cannot recover on a count stating the contract to be for an entire year; (2) he cannot, on the common count for wages, recover for any further period than that during which he had served.—ARCHARD *v.* HORNOR (1828), 3 C. & P. 349, N. P.

Annotations:—*As to* (2) **Apprvd.** Smith *v.* Hayward (1837), 7 Ad. & El. 544. **Folld.** Fewings *v.* Tindal (1847), 5 Dow. & L. 196. **Distd.** Goodman *v.* Pocock (1850), 15 Q. B. 576. *Generally*, **Mentd.** Ridgway *v.* Hungerford Market Co. (1835), 3 Ad. & El. 171.

811. ——.]—An author was engaged to write for a certain sum an article to appear among others in a work called "The Juvenile Library." Before he had completed his article, & before any portion of it was published, the work in which it was to appear was discontinued:—*Held:* such reasonable sum was recoverable on a *quantum meruit* in a common count for work & labour.—PLANCHÉ *v.* COLBURN (1831), 5 C. & P. 58, N. P; *subsequent proceedings*, 8 Bing. 14.

Annotations:—**Consd.** Goodman *v.* Pocock (1850), 15 Q. B. 576. **Refd.** Prickett *v.* Badger (1856), 1 C. B. N. S. 296. **Mentd.** Cort *v.* Ambergate, etc. Ry. (1851), 17 Q. B. 127; Hochster *v.* De La Tour (1853), 2 E. & B. 678; Robins *v.* Power (1858), 4 Jur. N. S. 810; Inchbald *v.* Western Neilgherry Coffee, Tea & Cinchona Plantation Co. (1864), 17 C. B. N. S. 733; Panama & South Pacific Telegraph Co. *v.* India Rubber Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 515; Rhymney Ry. *v.* Brecon & Merthyr Tydfil Ry. (1900), 83 L. T. 111.

812. ——.]—The first count of a declaration in *assumpsit* alleged that pltf. was employed by defts. as a carman, at wages after the rate of £160 a year, & claimed damages for his discharge without just cause during the year: there was also a count for work & labour. The particulars of demand stated, that pltf. besides seeking to recover damages under the special count, also sought to recover, under the *indebitatus* count, £37, the balance of account for a quarter's work done by him for defts., commencing on June 30, & ending on Sept. 30, 1842, after giving credit for £3 paid on account thereof. It appeared in evidence that pltf. was discharged on July 30, 1842, for misconduct, which the jury found to be a sufficient cause for his dismissal; that he worked out that day, & that on the next morning deft. sent for him, & he remained working there that day also, & then left. The jury found that the value of those two days' work was 40*s.* but that he was entitled to a month's wages, & he accordingly had a verdict for £10 6*s.* 8*d.* allowing for the £3 which had been paid in advance:—*Held:* pltf. was not precluded by his particulars from recovering this sum.—HURCUM *v.* STERICKER (1842), 10 M. & W. 553; 2 Dowl. N. S. 524; 12 L. J. Ex. 17; 152 E. R. 591.

813. ——.]—(1) *Assumpsit.* The first count stated that, in consideration pltf. would enter into deft.'s employ, & serve him, as servant in husbandry, for a certain time, to wit from a day named till the service should be determined by reasonable notice on either side, at £10 10*s.* *per annum*, deft. promised to retain pltf., & pay him the wages, & continue him in the service till such determination: that pltf. entered the service, & was always ready, etc., but deft. discharged him without reasonable cause, & refused longer to retain him:—*Held:* proof that pltf. was hired generally as a labourer in husbandry did not support this count, on a plea of *non assumpsit*, such hiring being in law a hiring from year to year.

(2) To the same count deft. pleaded two justifications: first, that pltf., being ordered by deft. to reap a corn field till 8 p.m., refused to continue at the work after 4 p.m., &, wrongfully & in breach of his duty & the command, absented himself, wherefore deft. discharged him from his service: secondly, that pltf. unlawfully quitted his work

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PART VI. SECT. 4.

809 i. *Servant entitled to remuneration for work done.*]—DEAVER *v.* BRADLEY (1843), 2 Kerr, 110.—**CAN.**

809 ii. ——.]—If a servant, being engaged for a stated period, has by the terms of the hiring, a right to leave before the time is up, in a certain event, he may sue at once for the time he has worked, unless agreed to the contrary.—LAW *v.* HARDING (1880), 19 N. B. R. 590.—**CAN.**

809 iii. ——.]—FESTING *v.* HUNT (1890), 6 Man. L. R. 381.—**CAN.**

809 iv. ——.]—A servant wrongfully dismissed is entitled to recover on the *quantum meruit* for the services rendered by him in part performance of the agreement.—SWIM *v.* AMOS (1895), 33 N. B. R. 49.—**CAN.**

809 v. ——.]—GILES *v.* MCEWAN (1896), 11 Man. L. R. 150.—**CAN.**

809 vi. ——.]—ROSE *v.* WINTERS (1900), 4 Terr. L. R. 353.—**CAN.**

809 vii. ——.]—*Re* ESTATE OF ANSLEY (1907), 41 N. S. R. 527.—**CAN.**

809 viii. ——.]—NESS *v.* BARCOCK (1913), 23 W. L. R. 547; 3 W. W. R. 1141; 6 Sask. L. R. 218; 9 D. L. R. 636.—**CAN.**

809 ix. ——.]—Where a contract of hiring is not enforceable by reason of Stat. Frauds, inasmuch as it is not to be performed within a year of the making thereof, the servant is entitled to recover on a *quantum meruit* where he is dismissed without justification cause.—SMITH *v.* MILLS (1913), 23 W. L. R. 553; 10 D. L. R. 589; 6 Sask. L. R. 181; 3 W. W. R. 172, 1066.—**CAN.**

809 x. ——.]—JONES *v.* SHAW, [1921] 1 W. W. R. 293; 14 Sask. L. R. 63; 56 D. L. R. 649.—**CAN.**

809 xi. ——.]—CALHOUN *v.* LAINSON & HUBBARD CANADIAN CO., LTD., [1923] 2 D. L. R. 1170; [1923] 2 W. W. R. 721; *affg.*, 68 D. L. R. 196.—**CAN.**

809 xii. ——.]—ANDERSON *v.* MCINTYRE, [1925] 3 D. L. R. 948.—**CAN.**

before it was completed, in breach of his contract, & deft. made complaint thereof before a magistrate, who found plaintiff guilty & discharged him from the service according to 4 Geo. 4, c. 34, s. 3. Replication, *de injurid.* Pltf., at the trial, set up an excuse for quitting the work, which failed in fact; & the facts in the two pleas were proved: —*Held:* deft. was entitled to a verdict, not only on those two pleas, but on a plea of *non assumpsit* to a count in *indebitatus assumpsit* for work & labour, the evidence showing an open contract rescinded by the misbehaviour of pltf., &, therefore, no wages being due ratably. The replication to the second justification put in issue the misconduct of pltf., as alleged, as well as the magistrate's decision; & the facts proved did not support a plea to the first count denying the discharge by deft.—LILLEY *v.* ELWIN (1848), 11 Q. B. 742; 17 L. J. Q. B. 132; 11 L. T. O. S. 151; 12 J. P. 343; 12 Jur. 623; 116 E. R. 652.

Annotations:—*As to* (2) **Refd.** Moriarty *v.* Regent's Garage & Engineering Co., [1921] 1 K. B. 423. *Generally,* **Refd.** Nicoll *v.* Greaves (1864), 17 C. B. N. S. 27.

814. ——.]—Pltf.'s particulars of demand claimed "One year's salary from June 1, 1850, to June 1, 1851, at the rate of £200 *per annum*, or damages for the dismissal of pltf. before the end of the year." The jury having negatived any employment for a year:—*Held:* pltf. was entitled to recover under the above particulars, & upon a count for work & labour, for work actually done by him during the year as servant to defts.—HARRIS *v.* MONTGOMERY (1851), 11 C. B. 393; 2 L. M. & P. 425; 20 L. J. C. P. 221; 15 Jur. 757; 138 E. R. 525.

815. —— **Contract not under seal.**]—An urban district council who were building a kursaal under powers conferred upon them by a private Act, by a resolution employed pltf. as architect in connection with the proposed building. There was no contract under seal. After pltf. had done some of the work, but before it was finished, he was dismissed. In an action for damages for breach of contract, &, alternatively, on a *quantum meruit*, the jury awarded damages on the *quantum meruit* in excess of the amount claimed by pltf. in his particulars:—*Held:* deft. council having received the benefit of the work were liable to pltf. on a *quantum meruit*.—HODGE *v.* MATLOCK BATH & SCARTHIN NICK URBAN DISTRICT COUNCIL & NUTTALL (1910), 75 J. P. 65; 27 T. L. R. 129; 8 L. G. R. 1127, C. A.

Annotations:—**Mentd.** Hoare *v.* Kingsbury U. D. C. (1912), 107 L. T. 492; Baker *v.* Holme Cultram U. C. (1915), 85 L. J. K. B. 799.

816. Agreement to work without salary—Action will not lie.]—TIDMAS *v.* LEES (1832), 5 C. & P. 233.

817. Services to be paid for in goods.]—Where by the terms of a contract a service to be performed by A. for B. is to be paid for in goods, A. cannot declare in debt for the value of the service but must sue on the special contract. But if B., by his own act, render the delivery of the goods, impossible, A. may sue in debt for the value of the service.—KEYS *v.* HARWOOD (1846), 2 C. B. 905; 15 L. J. C. P. 207; 7 L. T. O. S. 161; 135 E. R. 1201.

Right to recover for balance of term.]—*See* Sect. 5, *post.*

Remuneration to be settled by employer.]—*See* Part V., Sect. 2, sub-sect. 1, B., *ante.*

Apportionment of wages.]—*See* Part V., Sect. 2, sub-sect. 1, G., *ante.*

SECT. 5.—ACTIONS FOUNDED ON CONSTRUCTIVE SERVICE.

Quantum meruit, see Sect. 4, *ante.*

818. Whether balance of wages can be recovered—Employment terminated.]—Where a servant is hired by the quarter, if he is discharged by his master without sufficient cause in the middle of a quarter, he may recover the quarter's wages under a count in *indebitatus assumpsit* for work & labour.

Having served a part of the quarter, & being willing to serve the residue, in contemplation of law he may be considered to have served the whole (LORD ELLENBOROUGH, C.J.).—GANDELL *v.* PONTIGNY (1816), 4 Camp. 375; 1 Stark. 198, N. P.

Annotations:—**Consd.** Collins *v.* Price (1828), 5 Bing. 132. **Folld.** Smith *v.* Gainsford (1836), 2 Hodg. 109. **Dbtd. & N.F.** Smith *v.* Hayward (1837), 7 Ad. & El. 544. **Distd.** Broxholm *v.* Wagstaff (1841), H. & W. 145. **Refd.** Goodman *v.* Pocock (1850), 15 Q. B. 576.

819. —— ——.]—ARCHARD *v.* HORNOR, No. 810, *ante.*

820. —— ——.]—SMITH *v.* GAINSFORD, No. 360, *ante.*

821. —— ——.]—Where a servant, under a quarterly hiring, is discharged by his master without sufficient cause in the middle of the quarter, *semble:* he cannot recover wages for the whole quarter under a count in *indebitatus assumpsit* for work & labour; although after the dismissal he tendered himself to serve through the remaining part of the quarter. But, at all events, a servant improperly dismissed in the middle of a quarter, & who tendered himself, but was not allowed, to serve through the remaining part of the quarter, cannot recover wages for such part in an action of *indebitatus assumpsit* for work & labour, commenced before the quarter ended.—SMITH *v.* HAYWARD (1837), 7 Ad. & El. 544; 2 Nev. & P. K. B. 432; Will. Woll. & Dav. 635; 7 L. J. Q. B. 3; 2 Jur. 232; 112 E. R. 575.

Annotations:—**Apld.** Broxham *v.* Wagstaff (1841), H. & W. 145. **Apprvd.** Fewings *v.* Tisdal (1847), 1 Exch. 295. **Distd.** Goodman *v.* Pocock (1850), 15 Q. B. 576.

822. —— ——.]—(1) *Semble:* the proper remedy for a servant wrongfully dismissed before the end of the term of hiring, is a special action for not permitting him to perform his contract; & he cannot, by tendering his services, put himself in the same situation as if he had performed them, & bring *indebitatus assumpsit* for work & labour.

Pltf. was employed by deft. as an assistant in his business of a chemist & druggist at a salary of £32 *per annum*. After he had been in such employment for some weeks deft. dismissed him, & offered him £6 as a compensation for the time during which he had continued in the employment, this pltf. refused, & at the same time offered to remain till the expiration of the current quarter; after the quarter expired, but before the conclusion of the year from the commencement of the hiring pltf. brought his action.

There is nothing here to show a quarterly hiring; the rule as to a month's wages or a month's

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816 i. *Agreement to work without salary—Action will not lie.*]—In order to recover under a *quantum meruit* there must be a contract, express or implied, to pay something for the services, & no such action lies upon volunteer services or on extra work rendered by a volunteer already in employment.—FABRIS *v.* SALA (1909), 11 W. L. R. 269.—**CAN.**

e. Where parties not ad idem—Recovery on quantum meruit.]—HORNER *v.* MERNER (1884), 7 O. R. 629.—**CAN.**

f. Whether principle applied to expenses.]—The principle of *quantum meruit* cannot be applied to expenses, which must be paid for according to the amount actually disbursed.—PINKERTON *v.* ADDIE (1864), 2 Macph. (Ct. of Sess.) 1271; 36 Sc. Jur. 635. —**SCOT.**

Sect. 5.—Actions founded on constructive service. Sects. 6, 7, 8 & 9: Sub-sects. 1 & 2, A.]

warning applies only to menial servants. In the absence of anything to the contrary this would be a hiring for a year (PARKE, B.).—BROXHOLM *v.* WAGSTAFF (1841), II. & W. 145; 5 Jur. 845.

Annotation:—**Refd.** Fewings *v.* Tisdal (1847), 1 Exch. 295.

823. —— ——.]—FEWINGS *v.* TISDAL, No. 571, *ante*.

824. —— ——.]—GOODMAN *v.* POCOCK, No. 745, *ante*.

825. —— ——.]—A waiter at a tavern who has contracted to serve by the week & has been dismissed without cause, after he has entered upon but before he has completed the third week of his service, cannot under the common *indebitatus* count, recover his wages for such third week. Where the wages for the week so entered upon formed part of the damages awarded by a jury, the damages were reduced by that amount.—WOOD *v.* MOYES (1853), 1 W. R. 166.

826. —— ——.]—The agreement seems to me to be clearly a contract of hiring & service. It is specified what the party is to do, & what he is not to do, for the £100, which he is to receive at the end of the year. Surely this is an agreement, on the one hand, to hire for the particular service, at a given salary, for a year at least, &, on the other, to serve in the specified matters on those terms. . . . He is said to have the election of treating the contract as continuing, & suing for damages for the breach by the discharge; or, of treating it as. & acquiescing in its being, rescinded by the wrongful act of the master, & bringing an action on the *quantum meruit* for the work actually performed; & it is added, that he may wait till the termination of the period for which he was hired, & may then, perhaps, sue in *indebitatus assumpsit* for the whole wages, relying on the doctrine of constructive service. It is clear, since the decision of *Fewings* v. *Tisdal*, No. 571, *ante*, that this last remedy cannot be maintained in the shape of *indebitatus assumpsit*; for the simple reason, that the allegation of his being indebted for work done is untrue. But that decision may be supported on the form of action; & the question is still left undecided, how far a special action of debt averring a contract to pay, a continuing readiness on the part of the servant during all the period to serve, & a dispensation from the service on the part of the master, might not be maintained (CROMPTON, J.).—EMMENS *v.* ELDERTON (1853), 13 C. B. 495; 4 H. L. Cas. 624; 22 L. T. O. S. 1; 18 Jur. 21; 138 E. R. 1292, H. L.; *affg.* S. C. *sub nom.* ELDERTON *v.* EMMENS (1848), 6 C. B. 160, Ex. Ch.

Annotations:—**Consd.** Churchward *v.* R. (1865), L. R. 1 Q. B. 173. **Expld.** Frost *v.* Knight (1870), L. R. 5 Exch. 322. **Consd.** Turner *v.* Sawdon, [1901] 2 K. B. 653; Devonald *v.* Rosser (1906), 75 L. J. K. B. 688. **Refd.** G. N. Ry. *v.* Harrison (1852), 19 L. T. O. S. 259; Rust *v.* Nottidge (1852), 1 E. & B. 99; Hochster *v.* De La Tour (1853), 2 E. & B. 678; Cuckson *v.* Stones (1858), 5 Jur. N. S. 337; Darlow *v.* Edwards (1862), 6 L. T. 905; Whittle *v.* Frankland (1862), 2 B. & S. 49; M'Intyre *v.* Belcher (1863), 14 C. B. N. S. 654; *Re* Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315. **Mentd.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579; Goodman *v.* Pocock (1850), 15 Q. B. 576; Cort *v.* Ambergate, Nottingham & Boston & Eastern Junction Ry. (1851), 17 Q. B. 127; Payne *v.* New South Wales Coal & Intercolonial Steam Navigation Co. (1854), 10 Exch. 283; Reid *v.* Hoskins (1855), 5 E. & B. 729; Worthington *v.* Sudlow (1862), 8 Jur. N. S. 668; Danube & Black Sea Railway & Kustendjie Harbour Co. *v.* Xenos, Xenos *v.* Danube & Black Sea Railway & Kustendjie Harbour Co. (1863), 13 C. B. N. S. 825; Lewin *v.* Brown (1866), 14 W. R. 640; Boston Deep Sea Fishing & Ice Co. *v.* Ansell (1888), 59 L. T. 345; Sweet *v.* Williams (1922), 128 L. T. 379.

827. —— **Where no dismissal.**]—COOK *v.* SHERWOOD, No. 737, *ante*.

SECT. 6.—INJUNCTION.

Contracts for personal service.]—*See* INJUNCTION, Vol. XXVIII., pp. 442–443, 445, Nos. 631, 635, 644, 655–663.

Contract with provision for payment on breach.]—*See* INJUNCTION, Vol. XXVIII., p. 447, Nos. 664, 665.

Express negative covenants.]—*See* INJUNCTION, Vol. XXVIII., pp. 447–451, Nos. 666–696.

Implied negative covenants.]—*See* INJUNCTION, Vol. XXVIII., p. 454, Nos. 717 *et seq.*; THEATRES; TRADE & TRADE UNIONS.

Contracts containing both positive & negative covenants.]—*See* INJUNCTION, Vol. XXVIII., pp. 451–454, Nos. 697–716.

Disclosure of confidential information.]—*See* INJUNCTION, Vol. XXVIII., p. 476, Nos. 820 *et seq.*

Contracts in restraint of trade.]—*See* TRADE & TRADE UNIONS.

Breach of contract by party seeking injunction.]—*See* INJUNCTION, Vol. XXVIII., pp. 433–435, Nos. 568–582.

Schoolmasters.]—*See* EDUCATION, Vol. XIX., pp. 603–606, 607–610, Nos. 294–311, 328–355.

Damages in lieu of or addition to injunction.]—*See* INJUNCTION, Vol. XXVIII., pp. 412 *et seq.*

SECT. 7.—SPECIFIC PERFORMANCE.

See SPECIFIC PERFORMANCE.

SECT. 8.—FORFEITURE OF WAGES.

See Part V., Sect. 2, sub-sect. 5, *ante*.

SECT. 9.—SUMMARY PROCEEDINGS.

SUB-SECT. 1.—IN COUNTY COURTS.

See, now, Employers & Workmen Act, 1875 (c. 90), ss. 3, 4.

828. Plaint for wages—Prior summons before justices dismissed—For wages & damages—Res judicata.]—(1) M. & D., journeymen painters, took out a summons returnable before a justice of the peace for the recovery of a sum of money alleged to be due to them for wages from C., claiming also a further sum as damages for the detention of such wages. The justice heard the summons under Master & Servant Act, 1867 (c. 141), s. 9, & dismissed the same upon the merits. M. & D. then issued plaints in the county ct. against C. to recover the wages alone, but judgment was given for deft. on the ground that the case was *res judicata*:—*Held:* the county ct. judge was right, & the justice of the peace having jurisdiction under ss. 4 & 9 of Master & Servant Act, 1867, & having exercised that jurisdiction, the matter was *res judicata*.

(2) Wages due from an employer to a journeyman may be summarily recovered by a summons before a justice of the peace under Master & Servant Act, 1867 (c. 141), ss. 4 & 9, & this although the servant does not make any claim for damages in respect of the non-payment of such wages, but seeks to recover the wages alone. The jurisdiction given to a justice of the peace wherever any question, difference or dispute shall arise as to the rights & liabilities of either of the parties, extends to a claim for the non-payment of wages, which may be recovered by such summary process

as compensation or damage.—MILLETT *v.* COLEMAN, DAWSON *v.* COLEMAN (1875), 44 L. J. Q. B. 194; 33 L. T. 204; 39 J. P. 805, D. C.

829. —— Judgment for servant—Subsequent summary proceedings by employers—On different matter.]—By Employers & Workmen Act, 1875 (c. 90), s. 3, in any proceeding before a county ct. in relation to any dispute between an employer & a workman arising out of or incidental to their relation as such, the ct. may adjust & set off the one against the other all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the ct. may find to be subsisting, whether such claims are liquidated or unliquidated, & are for wages, damages, or otherwise. By sect. 4, a dispute under the Act between an employer & a workman may be heard & determined by a ct. of summary jurisdiction, & such ct., for the purpose of this Act, shall be deemed to be a ct. of civil jurisdiction, & in a proceeding in relation to any such dispute, the ct. may order payment of any sum which it may find to be due as wages, or damages, or otherwise, provided that the amount claimed does not exceed £10.

Applt., who was employed as a spinner by resps., was discharged for neglecting his work, & resps. refused to pay him wages in lieu of notice. He thereupon took proceedings against them in the county ct. At the hearing, evidence was produced to show that he had been guilty of negligence, but no set-off or counter-claim was set up. A verdict was given for applt. for £3 10*s*.

Resps. subsequently took proceedings against him before justices for wrongfully & negligently damaging their materials, & the justices ordered him to pay £8 8*s*. On appeal from this order: —*Held:* the justices had power to make it; for the only question decided by the county ct. was whether he had been guilty of such negligence as would justify his dismissal without notice.—HINDLEY *v.* HASLAM (1878), 3 Q. B. D. 481; 27 W. R. 61, D. C.

Annotation:—**Expld.** Keates *v.* Lewis, Merthyr Consolidated Collieries, [1910] 2 K. B. 445.

Forfeiture of wages.]—*See* Part V., Sect. 2, subsect. 5, *ante*.

SUB-SECT. 2.—IN COURTS OF SUMMARY JURISDICTION.

A. Jurisdiction of Court.

See, now, Employers & Workmen Act, 1875 (c. 90).

830. Jurisdiction to deal with all matters in dispute.]—(1) The effect of Employers & Workmen Act, 1875 (c. 90), ss. 3, 4, is to give the widest powers to a ct. of summary jurisdiction, when a dispute between a workman & his employer comes before it, to deal not only with the strict & technical claim which one side or the other makes in the dispute, but to deal with all claims which in the course of the hearing it may turn out have been made by the workman against the master or by the master against the workman.

(2) A workman absented himself from his work for one day without leave from his employers. The employers did not dismiss but suspended him from working on the following day, whereby the workman was prevented from earning the wages he would have earned on that day had he been allowed to work, namely 6*s*. 2*d*. The workman thereupon made a claim under Employers & Workmen Act, 1875 (c. 90) before justices sitting as a ct. of summary jurisdiction for 6*s*. 2*d*. damages for wrongful dismissal:—*Held:* although upon the facts the workman's claim ought technically to gave been for damages for refusing to allow him to perform his contract of service, the justices had jurisdiction under Employers & Workmen Act, 1875 (c. 90), s. 3, 4 to adjudicate upon the claim without an amendment, & to give the workman such damages as he would have been entitled to upon the claim with any proper amendment.

(3) Although the employers might have had a right to damages against the workman they had no right to suspend him from working for the one day, inasmuch as by so doing they were taking upon themselves, after declining to dismiss the workman and electing to treat the contract as a continuing one, to assess their own damages for the workman's default at the sum of which would be represented by one day's wages. The workman was therefore entitled to be awarded under the denomination of wages or damages the sum 6*s*. 2*d*. which represented the wages he would have earned on the day he was suspended but which he did not earn owing to the employer's breach of contract.—HANLEY *v.* PEASE & PARTNERS, LTD., [1915] 1 K. B. 698; 84 L. J. K. B. 532; 112 L. T. 823; 79 J. P. 230, D. C.

Annotations:—*As to* (3) **Consd.** Wallwork *v.* Fielding, [1922] 2 K. B. 66. **Distd.** Browning *v.* Crumlin Valley Collieries, [1926] 1 K. B. 522. **Refd.** *Re* Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315.

831. In respect of what subject-matter—Adjustment & set-off.]—Upon a complaint under 20 Geo. 2, c. 19, s. 1, by an artificer against his master for nonpayment of wages, the justices may make a deduction from the wages on the ground that the work was badly done.—SHARP *v.* HAINSWORTH (1862), 3 B. & S. 139; 1 New Rep. 24; 32 L. J. M. C. 33; 7 L. T. 320; 26 J. P. 742; 9 Jur. N. S. 353; 11 W. R. 36; 122 E. R. 53.

832. —— —— Employer's claim for damages against wages due—No claim for wages made.]—A workman owed his employer money for damages for breach of contract. The employer owed the workman wages. Upon a summons by the employer against the workman claiming the damages & that the damages & the wages should be adjusted & set off, the workman contended that the ct. had no jurisdiction to set off the damages against a claim for wages which he had not made:—

PART VI. SECT. 9, SUB-SECT. 2.—A.

g. *In respect of what subject-matter—Adjustment & set-off—Employer's claim for damages against wages due.*]—BROWN *v.* CRAFT (1901), 4 Terr. L. R. 461.—**CAN.**

h. —— —— ——.]—MIKLUSKI *v.* HILLCREST COAL & COKE CO., WELLS *v.* HILLCREST COAL & COKE CO. (1908), 9 W. L. R. 425.—**CAN.**

k. —— *Non-payment of wages.*]—R. *v.* WALKER (1861), 21 U. C. R. 34.—**CAN.**

l. —— —— *No jurisdiction to order payment of additional wages.*]—GOODE *v.* DOWNING (1904), 5 Terr. L. R. 505.—**CAN.**

m. —— ——.]—Under Masters & Servants Act the servant cannot obtain from a justice of the peace a summary order for payment by the master of wages that may be due to him, if he has not performed his part of the agreement.—*Re* ANDERSON & BISSONNETTE (1911), 19 W. L. R. 73.—**CAN.**

n. —— ——.]—*Re* HALTER & CO. & GOODY (1911), 17 W. L. R. 261; 4 Sask. L. R. 161.—**CAN.**

o. —— ——]—The further amount which under Masters & Servants Act, s. 2 (5), a magistrate awarded a dismissed employee in addition to the wages due him was disallowed on appeal on the ground that the employee had made no effort for a month after his dismissal to obtain other employment.—MCLEAN *v.* ALBERTA CANADIAN MOTORS, LTD. (Alta.), [1926] 1 W. W. R. 196.—**CAN.**

p. —— *Hiring another's servant.*]—A person employed as a shopman living in his employer's house is liable to conviction under Servants' Act, 3 Will IV. c. 26, for hiring pltf.'s servant.—BRENAN *v.* MCISAAC (1857),

Sect. 9.—Summary proceedings: Sub-sect. 2, A. & B. (a) & (b).]

Held: the ct. had the jurisdiction to adjust & set off the two sums against one another by virtue of the Employers & Workmen Act, 1875 (c. 90), s. 3 (1).—KEATES *v.* LEWIS MERTHYR CONSOLIDATED COLLIERIES, LTD., [1911] A. C. 641; 80 L. J. K. B. 1318; 105 L. T. 450; 75 J. P. 505; 27 T. L. R. 550; 55 Sol. Jo. 667, H. L.; *affg.*, [1910] 2 K. B. 445, C. A.

833. —— Non-payment of wages—Contract of service not for time certain.]—The summary jurisdiction given to justices by stat. 20 Geo. 2, c. 19, s. 1, to hear complaints against masters by artificers & other labourers of non-payment of wages, & to order payment thereof, extends to cases in which the contract of service is not for any certain time.—TAYLOR *v.* CARR (1862), 2 B. & S. 335; 31 L. J. M. C. 111; 26 J. P. 420; 121 E. R. 1098; *previous proceedings* (1861), 30 L. J. M. C. 201.

Annotation:—**Mentd.** Gregson v. Watson (1876), 34 L. T. 113.

834. —— —— No claim for damages.]—MILLETT *v.* COLEMAN, DAWSON *v.* COLEMAN, No. 828, *ante*.

835. —— —— Deductions—Waiver of claim.]—By an agreement made between resps. & applt. the wages were to be at the rate of 24*s.* per week, & so in proportion for any less period than a week. The wages were to be at the rate of 24*s.* per week at the least. During the employment, owing to various causes applt. was not employed fc certain periods, & no wages were paid to him in respect of those periods, but the wages were settled up at the end of each week when the deductions were made:—*Held:* applt. could not recover the amount of these deductions at the end of the employment, as it was a claim that could be waived, being a claim for damages, & not a liquidated debt.—STODDART *v.* MITCHELL (W.), LTD. (1901), 85 L. T. 686; 66 J. P. 103, D. C.

836. —— Whether limited to claims of parties—Compensation awarded for breach—Performance only claimed.]—It is no objection to an information & complaint laid under Master & Servant Act, 1867 (c. 141), that complainant claimed therein the fulfilment of the contract of service, instead of claiming only compensation for its breach, or claiming in the alternative such compensation or fulfilment.—CRANE *v.* POWELL (1868), L. R. 4 C. P. 123; 38 L. J. M. C. 43; 20 L. T. 703; 33 J. P. 263; 17 W. R. 161.

Annotations:—**Consd.** Firth v. Mid. Ry. (1875), 32 L. T. 219. **Refd.** Banks *v.* Crossland (1874), L. R. 10 Q. B. 97.

837. —— —— Damages for refusal to allow performance—On claim for wrongful dismissal.]—HANLEY *v.* PEASE & PARTNERS, LTD., No. 830, *ante*.

838. —— Claims not exceeding ten pounds.]—JAMES *v.* EVANS & CO., No. 843, *post*.

839. Effect of Truck Act, 1896 (c. 44), s. 1.]—The jurisdiction of a ct. of summary jurisdiction under Employers & Workmen Act, 1875 (c. 90), to hear & determine a dispute under that Act between an employer & a workman is not ousted by reason of the agreement of service being one to which the provisions of above sect. apply.—BUXTON LIME FIRMS CO. *v.* HOWE, [1900] 2 Q. B. 232; 69 L. J. Q. B. 498; 82 L. T. 422; 64 J. P. 503; 48 W. R. 472; 16 T. L. R. 315; 44 Sol. Jo. 361, D. C.

Over apprentices.]—*See* Part XV., *post*.

B. When Proceedings Maintainable.

(a) In General.

See Employers & Workmen Act, 1875 (c. 90); Employers & Workmen Rules, 1886, rr. 2–9.

Jurisdiction of court.]—*See* Sub-sect. 2, A., *ante*.

840. Previous action in county court—Subject matter same.]—A servant in husbandry having been hired to serve from Aug. 1, 1858, to Martinmas next ensuing, for the wages of £5, entered the service, & continued in it till Sept. 7, 1858, when her master discharged her. Thereupon she sued him in the county ct., claiming damages for the discharge, as having been without reasonable cause. The judge of the county ct. gave a verdict for the master, deft. in the suit. Afterwards, in May, 1859, the servant took out a summons before justices against the master, to recover the £5 wages:—*Held:* the question for decision in the county ct. & by the justices being substantially the same, namely, whether the discharge of the servant was without just cause, the justices were bound to treat the decision of the county ct., a ct. of concurrent jurisdiction, upon it, as conclusive between the parties; although the form of claim in the summons varied from that made in the county ct.—ROUTLEDGE *v.* HISLOP (1860), 2 E. & E. 549; 29 L. J. M. C. 90; 2 L. T. 53; 24 J. P. 148; 6 Jur. N. S. 398; 8 W. R. 363; 121 E. R. 206.

Annotations:—**Refd.** Flitters v. Allfrey (1874), L. R. 10 C. P. 29. **Mentd.** Dover *v.* Child (1876), 34 L. T. 737.

841. —— Subject-matter different.]—HINDLEY *v.* HASLAM, No. 829, *ante*.

Res judicata as estoppel.]—*See, generally,* ESTOPPEL, Vol. XXI., pp. 159 *et seq.*

842. Previous judgment in same court—Continuing breach.]—Applt., in 1871, agreed to serve resps. as a fire-iron forger for five years. On Apr. 1, 1873, he was summoned under Master & Servant Act, 1867 (c. 141), for absenting himself from resps.' service, & was, on May 13, ordered to pay £11 8*s.* to them as compensation for the breach of contract, which sum was paid. Not having returned to his employment, applt. was again summoned, &, on July 7, ordered to fulfil his contract, & to give security for its fulfilment, & in default to be imprisoned for a term not exceeding three months. Applt. did not comply with the order, & underwent three months' imprisonment. On his liberation he continued to

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Peters Prince Edward Island Reports, 112.—**CAN.**

q. —— *Fixing rate of wages.*]—HOLNESS *v.* NIEBERGALL (1902), 5 Terr. L. R. 250.—**CAN.**

r. —— *Wages subsequent to discharge.*]—A magistrate has no jurisdiction to order payment of wages for any period after the discharge of a servant.—SWANICK *v.* KOTINSKY (1909), 14 O. W. R. 537; 19 O. L. R. 407.—**CAN.**

s. *Power of court to impose penalty for wrongful dismissal.*]—Under the Master & Servant Ordinance, a magistrate can impose a penalty for wrongful dismissal & direct as well the payment of any wages found due, notwithstanding that the complaint is for wrongful dismissal only.—*Re* MATHIE & ACME CO. (1910), 13 W. L. R. 110.—**CAN.**

PART VI. SECT. 9, SUB-SECT. 2.—B. (a).

a. *Limitation of time.*]—A conviction under Master & Servants Act was quashed on the ground *(inter alia)* that the complaint was made more than a year after the cause of it arose, the Act requiring such complaints to be made within six months from the offence charged.—MERRITT *v.* ROSSITER (1875), *Temp.* Wood, 1.—**CAN.**

b. *Necessity for relationship of master & servant.*]—MCDONALD *v.* STUCKEY (1871), 31 U. C. R. 577.—**CAN.**

c. ——.]—R. *v.* PINKIERT (Y. T.) (1905), 3 W. L. R. 88.—**CAN.**

d. ——.]—*Ex p.* COSTIGAN & MURPHY (1889), 7 Nfld. L. R. 414.—**NFLD.**

e. *Subsisting contract of service.*]—In order to support a conviction

absent himself, & was again summoned for absenting himself from resps.' service, & ordered, on Nov. 18, to pay £11 14*s.* to them as compensation: —*Held:* upon the true construction of sect. 9 of the Act, the orders of May 13 & July 7 did not annul the contract of service, & were no bar to the subsequent summons & order of Nov. 18; & that order was rightly made.—CUTLER *v.* TURNER (1874), L. R. 9 Q. B. 502; 43 L. J. M. C. 124; 30 L. T. 706; 38 J. P. 517; 22 W. R. 840, D. C.

Annotation:—**Refd.** James *v.* Evans (1897), 77 L. T. 78.

843. —— Ten pounds recovered—Second offence.]—By Employers & Workmen Act, 1875 (c. 90), s. 4, a dispute between an employer & a workman may be determined by a court of summary jurisdiction, provided that the ct. shall not exercise jurisdiction where the amount claimed exceeds £10.

On Oct. 22 resps. agreed to employ applt., & he agreed to serve them, for fifty-two weeks, at specified weekly wages. On Nov. 16 applt. left his work, & did not return. On Dec. 16 resps. took proceedings, under the Act, in a ct. of summary jurisdiction, against applt., & recovered £10 damages for his absence from Nov. 16 to 28. Afterwards resps. took further proceedings in the same ct. to recover another £10 for applt.'s absence from Nov. 30 to Dec. 12. On a case stated:—*Held:* the jurisdiction of the ct., being limited to £10, was exhausted by the judgment in the first case, & therefore resps. were not entitled to recover in the second case.—JAMES *v.* EVANS & Co., [1897] 2 Q. B. 180; 66 L. J. Q. B. 742; 77 L. T. 78; 61 J. P. 631; 45 W. R. 654; 13 T. L. R. 490, D. C.

844. Where other remedy available—Proceedings under Merchant Shipping Act, 1854 (c. 104), s. 243.]—The above sect. which enables a seaman who neglects without reasonable cause to join his ship to be punished upon proceedings before a ct. of summary jurisdiction with imprisonment & forfeiture of part of his wages—by implication takes away any other remedy against the seaman for the breach of contract, & the shipowner cannot, where the amount which he claims does not exceed £10, take proceedings for the recovery of damages under Employers & Workmen Act, 1875 (c. 90), s. 4.—GREAT NORTHERN STEAMSHIP FISHING CO. *v.* EDGEHILL (1883), 11 Q. B. D. 225, D. C.

Annotation:—**Refd.** Salt Union *v.* Wood (1893), 62 L. J. M. C. 75.

845. Limitation of time—Not limited to six months.]—CHARLES *v.* PLYMOUTH WORKS MORTGAGEES, No. 855, *post.*

——.]—*See, generally,* LIMITATION OF ACTIONS, Vol. XXXII., pp. 315 *et seq.*

846. Breach of contract by employer—Improper alteration of hours.]—M., a coal miner, was employed by W. to work on terms of fourteen days' notice to leave, & instant dismissal for breach of rules. On engagement, M. was ordered to work on a shift requiring M. to descend shaft at 11 a.m. W. afterwards gave five days' notice that the shift would be altered to 11.30 a.m., & because M. refused to go down at that hour he lost a day's wages, for which he applied under Employers & Workmen Act, 1875 (c. 90), s. 9:—*Held:* the justices were right in treating the alteration of contract as material, & W. was not justified in altering hours without a new contract.—WHITEHAVEN COLLIERY CO. *v.* M'COURT (1893), 57 J. P. 422, D. C.

847. After waiver of breach by master—Workman retained in employment—Wages paid.]—Mere continuation of a workman by a master in his service after a breach of contract, & payment of wages after such breach, for the continued service, does not preclude the master from recovering damages by summary proceedings under Employers & Workmen Act, 1875 (c. 90), for the previous breach of contract.—WYNNSTAY COLLIERIES *v.* EDWARDS (1898), 79 L. T. 378; 62 J. P. 823; 15 T. L. R. 3, D. C.

Master & apprentice.]—*See* Part XV., *post.*

(b) In respect of What Persons.

See, now, Employers & Workmen Act, 1875 (c. 90), s. 10; Employers & Workmen Rules, 1886, rr. 2–9; *see, also,* Part XIII., Sect. 2, sub-sect. 2, *post.*

848. Person engaged in manual labour—Substantial nature of employment to be regarded.]—The test of whether an employee is engaged in manual labour, within the meaning of Employers & Workmen Act, 1875 (c. 90), is, whether such labour is his real & substantial employment, or whether it is incidental & accessory to such employment.

Applt., a grocer's assistant, whose duty it was to serve customers in a shop, had also other duties involving manual labour, such as making up parcels for customers, carrying parcels from the shop to the cart at the door, & bringing up goods from the cellar to the shop:—*Held:* such occupations were incidental to his real & substantial employment as a salesman, & he was not engaged in manual labour within the meaning of the Employers & Workmen Act, 1875 (c. 90).—BOUND *v.* LAWRENCE, [1892] 1 Q. B. 226; 61 L. J. M. C. 21; 65 L. T. 844; 56 J. P. 118; 40 W. R. 1; 8 T. L. R. 1; 36 Sol. Jo. 11, C. A.

Annotations:—**Consd.** *Re* Dairymen's Foremen, *Re* Tailors' Cutters (1912), 107 L. T. 342. **Refd.** Pearce *v.* Lansdowne (1893), 62 L. J. Q. B. 441; McDonald *v.* Brown (1918), 87 L. J. K. B. 1119; Jacques *v.* Steam Tug Alexandria (1920), 90 L. J. K. B. 473. **Mentd.** Hoare *v.* Green, [1907] 2 K. B. 315; Rushbrook *v.* Grimsby Palace Theatre Co. (1908), 99 L. T. 18.

849. Potters' printer.]—GRAINGER *v.* AYNSLEY, BROMLEY *v.* TAMS, No. 851, *post.*

850. Crew of river going ship.]—A vessel registered as a British ship was used exclusively for the conveyance of salt upon the rivers Weaver & Mersey from Winsford to Liverpool, where it was transferred to ocean going vessels. So far as the voyages were on the Mersey, they were on tidal waters, but they did not extend beyond the limits of the port of Liverpool. Applts., the owners of the vessel, issued a summons against resp., one of her crew, under Employers & Workmen Act, 1875 (c. 90), for unlawfully refusing to obey their orders:—*Held:* the vessel was not a "sea going ship" within M. S. Act, 1854 (c. 120), s. 109, inasmuch as she did not, in fact, go to sea; the provisions of sect. 243 of the Act as to offences by seamen had therefore no application; & the proceedings were properly taken under Employers & Workmen Act, 1875 (c. 90).—SALT UNION, LTD. *v.* WOOD, [1893] 1 Q. B. 370; 62 L. J. M. C. 75; 68 L. T. 92; 57 J. P. 201; 41 W. R. 301; 37 Sol. Jo. 195; 7 Asp. M. L. C. 281; 5 R. 176, D. C.

851. Inventor.]—J. was employed by H. under a written agreement for seven years, at seven

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under Masters & Servants Act, 34 Vict. c. 14, by a servant against his master, the hiring or engagement must be subsisting at the time of the complaint.—FOLLANSBY *v.* MCARTHUR (1875), *Temp.* Wood, 4.—**CAN.**

f. ——.]—*Re* ROBERT & WEIR (Sask.) (1908), 8 W. L. R. 69.—**CAN.**

g. Necessity for demand for wages.]—Previous demand for wages is a condition precedent to the exercise of a magistrate's jurisdiction under the Master & Servant Ordinance.—LAWLER *v.* CITY OF EDMONTON (1914), 29 W. L. R. 661; 7 W. W. R. 291; 20 D. L. R. 710; 7 Alta. L. R. 376.—**CAN.**

Sect. 9.—*Summary proceedings: Sub-sect.* 2, *B.* (*b*), *C. & D. Sect.* 10: *Sub-sects.* 1 *& 2. Sect.* 11. *Part VII. Sects.* 1 *& 2.*]

pounds a week, as a practical working mechanic in developing inventions suitable to the business of a lace manufacturer; H. having required J. to do common work, such as repairing machines, which any workman could do, & J. having refused & absented himself, J. was summoned for damages under Employers & Workmen Act, 1875 (c. 90):—*Held:* the justices were wrong in holding that J. was bound to do such common work.—JACKSON *v.* HILL (1884), 13 Q. B. D. 618; 49 J. P. 118, D. C.

Annotation:—**Consd.** Bagnall *v.* Levinstein, [1907] 1 K. B. 531.

852. Grocer's assistant.]—BOUND *v.* LAWRENCE, No. 848, *ante.*

Persons to whom Truck Acts apply.] — *See* FACTORIES, Vol. XXIV., pp. 934 *et seq.*, Nos. 231 *et seq.*

C. The Dispute.

See Employers & Workmen Act, 1875 (c. 90).

853. What amounts to—Absence of workman—Without leave.]—Pltf., a boot manufacturer, summoned deft., a workman, before justices for absenting himself from pltf.'s employment without notice; the justices having dismissed the summons for want of jurisdiction:—*Held:* absence by a workman from his employer's service constituted a "dispute" between them within Employers & Workmen Act, 1875 (c. 90), & the decision of the justices was erroneous.—CLEMSON *v.* HUBBARD (1876), 1 Ex. D. 179; 45 L. J. M. C. 69; 33 L. T. 816; 40 J. P. 725; 24 W. R. 312, D. C.

Annotations:—**Consd.** Charles *v.* Plymouth Works Mortgagees (1890), 60 L. J. M. C. 20; Keates *v.* Lewis Merthyr Consolidated Collieries, [1910] 2 K. B. 445. **Refd.** James *v.* Evans, [1897] 2 Q. B. 180.

854. —— —— Through default of assistants.]—Resps. were earthenware manufacturers. Applt. was in their employ as a "potters' printer," & by the custom of the trade he found his own "transferrer"—that is, an assistant without whom the potters' printer was unable to perform his work. Resps. having made a reduction in the wages of persons in their employ, applt. consented to work at the reduced rate, & presented himself each day at the works ready to continue his employment but, he was unable to work owing to the absence of his transferrer, who refused to work at the reduced wages. Applt. was thereupon summoned under Employers & Workmen Act, 1875 (c. 90), for absenting himself from his employment, &, in exercise of the summary jurisdiction conferred by sect. 4, the magistrate ordered him to pay damages to resps.:—*Held:* the facts amounted to a dispute under Employers & Workmen Act, 1875 (c. 90), between an employer & a workman, applt. was a workman within the meaning of the Act, & the summons could therefore, by sect. 4, be heard & determined by a ct. of summary jurisdiction.—GRAINGER *v.* AYNSLEY, BROMLEY *v.* TAMS (1880), 6 Q. B. D. 182; 50 L. J. M. C. 48; 43 L. T. 608; 45 J. P. 142; 29 W. R. 242.

Annotation:—**Mentd.** Morgan *v.* London General Omnibus Co. (1884), 48 J. P. 503.

855. —— Claim in respect of wages—Where no action commenced.]—Upon the hearing of a summons taken out by employers against a workman under Employers & Workmen Act, 1875 (c. 90), for the adjustment by a magistrate of a dispute between employers & a workman as to the rate at which the wages of the workman were to be calculated under a certain contract, & for a rescission of such contract, the workman objected to the jurisdiction of the magistrate upon the grounds (*a*) that the contract had been determined before the date of the hearing; (*b*) that there was no existing dispute between the parties within sect. 3 (1), & sect. 4 of the Act, inasmuch as no action had been commenced; (*c*) that the dispute had not arisen within the preceding six months, & that, therefore, the jurisdiction of the magistrate was barred by Summary Jurisdiction Act, 1848 (c. 43). The magistrate having overruled these objections, subject to a case stated for the opinion of the ct.:—*Held:* there was a dispute within the Act upon which the magistrate could adjudicate, & the six months' limit prescribed by Summary Jurisdiction Act, 1848 (c. 43), did not apply to disputes under Employers & Workmen Act, 1875 (c. 90).—CHARLES *v.* PLYMOUTH WORKS MORTGAGEES (1890), 60 L. J. M. C. 20; 64 L. T. 466; 55 J. P. 469; 39 W. R. 122; 7 T. L. R. 71, D. C.

Annotation:—**Refd.** Price *v.* Webb, [1913] 2 K. B. 367.

Forfeiture of wages, *see* Part V., Sect. 2, sub-sect. 5, *ante.*

D. Other Matters.

See Employers & Workmen Act, 1875 (c. 90).

856. Agreement to abide by test case—Test case must be decided on merits—Case dismissed through equal division of parties.]—R. *v.* WARDLE, ETC. JJ. & HARTON COAL CO., *Ex p.* BURROWS (1898), 14 T. L. R. 424, D. C.

Order for payment of wages—Distress in default of compliance.] — *See* DISTRESS, Vol. XVIII., p. 432, No. 1086.

SECT. 10.—ON BANKRUPTCY AND WINDING UP.

SUB-SECT. 1.—BANKRUPTCY.

Bankruptcy of servant—Liability of master—Right of trustee to sue.]—*See* BANKRUPTCY, Vol. V., p. 975, Nos. 7984, 7985.

—— —— —— **Right of servant to sue.**] — *See* BANKRUPTCY, Vol. V., p. 999, No. 8152.

—— **Appropriation of portion of salary or wages.**] —*See* BANKRUPTCY, Vol. V., p. 927, Nos. 7594 *et seq.*

—— **Compensation for wrongful dismissal—Right of trustee to property.**]—*See* BANKRUPTCY, Vol. V., p. 727, No. 6305.

Bankruptcy of master—Priority of claim to wages or salary.]—*See* BANKRUPTCY, Vol. IV., p. 475, Nos. 4284 *et seq.*

—— **Effect of deed of arrangement.**]—*See* BANKRUPTCY, Vol. V., pp. 1145, 1146, No. 9294.

PART VI. SECT. 9, SUB-SECT. 2.— D.

h. *Right of appeal — Condition precedent—Deposit.*]—*Re* MCNEIL & SASKATCHEWAN HOTEL CO. (1911), 17 W. L. R. 7.—**CAN.**

k. ——.] — An appeal will lie from an order for payment of wages made by a police magistrate under Masters & Servants Ordinance.—FOSTER *v.* HOPE, SNIDER *v.* SAVILOFF (1915), 31 W. L. R. 697; 8 W. W. R. 997.—**CAN.**

l. ——.] — On dismissal of a complaint under Masters & Servants Act for refusal to pay wages, no question of damages against the servant having been considered, complainant has no appeal, though his claim exceeds the sum of $25 mentioned in sect. 27 of the Act.—IWASIUK *v.* SPENCE, [1921] 1 W. W. R. 378.—**CAN.**

m. ——.]—If the master is dissatisfied with a decision awarding the servant wages against the master's contention that the servant violated his contract, the master's proper course is to appeal therefrom, & not to prosecute the servant for absenting himself.—MEYERS *v.* HILKE (Sask.), [1926] 2 W. W. R. 172.—**CAN.**

SUB-SECT. 2.—WINDING UP OF COMPANIES.

Remuneration—Liability of members of company.]—*See* COMPANIES, Vol. IX., p. 537, No. 3537.

—— **Proof in winding up.**]—*See* COMPANIES, Vol. X., pp. 928, 929, 944–946, 999, 1002, 1049, 1112, Nos. 6361–6369, 6466–6477, 6935, 6958, 7336, 7829.

—— **Set-off against calls.**]—*See* COMPANIES, Vol. X., p. 1050, No. 7344.

SECT. 11.—EFFECT OF ARBITRATION CLAUSE.

See ARBITRATION, Vol. II., pp. 333, 334, 360, Nos. 148–152, 307.

Part VII.—Duties and Liabilities of Master.

SECT. 1.—PHYSICAL WELL-BEING OF SERVANT.

As to National Health Insurance, *see* WORK & LABOUR.

857. Duty to provide & care for servant during illness.]—If the servant is taken ill, by the visitation of God, it is a condition incident to humanity & is implied in all contracts. Therefore the master is bound to provide for & take care of the servant so taken ill in his service; & cannot deduct wages in proportion to the continuance of the servant's sickness (LORD MANSFIELD, C.J.).—R. *v.* CHRIST-CHURCH (INHABITANTS) (1760), Burr. S. C. 494.

Annotations:—**Consd.** R. *v.* Sutton (1794), 5 Term Rep. 657. **Distd.** R. *v.* Whitkinbury (1795), 6 Term Rep. 464. **Reld.** R. *v* Sudbrooke (1803), 4 East, 356.

858. ——.]—A master ought to maintain his servants, & take care of them in sickness; but the question now is, What is the law? There is, in point of law, no action against the master to compel him to repay the parish for the cure of his servant: no authority whatsoever has been cited; & it seems to me that it cannot be (LORD MANSFIELD, C.J.).—NEWBY *v.* WILTSHIRE (1785), 4 Doug. K. B. 284; Cald. Mag. Cas. 527; 2 Esp. 739; 99 E. R. 883. N. P.

Annotation:—**Distd.** Scarman *v.* Castell (1795), 1 Esp. 270.

859. ——.]—In the case of a hiring & service the law implies in the master the obligation of providing for a servant during illness (BAYLEY, J.). —R. *v.* TIPTON (INHABITANTS) (1829), 9 B. & C. 888; 4 Man. & Ry. K. B. 703; 2 Man. & Ry. M. C. 415; 8 L. J. O. S. M. C. 52; 109 E. R. 330.

860. —— **Agricultural labourer.**]—If a servant in husbandry is taken ill after the service has commenced, the master is bound to support him, & cannot turn him away on that account (BULLER, J.).—R. *v.* WINTERSETT (1783), Cald. Mag. Cas. 298.

861. —— **Domestic servant.**]—It seems that a master is not bound to provide a menial servant with medical attendance & medicines during sickness; but if a servant fall ill, & the master call in his own medical man to attend such servant, the master will not be allowed to deduct the charge for such medical attendance out of the servant's wages, unless there be a special contract between the master & servant that he should do so.—SELLEN *v.* NORMAN (1829), 4 C. & P. 80, N. P.

862. Medical attendance—Domestic servant.]—A master is bound to pay for medicines & attendance on his servant, while such servant remains under his roof & part of his family.—SCARMAN *v.* CASTELL (1795), 1 Esp. 270, N. P.

Annotation:—**Dbtd.** Wennall *v.* Adney (1802), 3 Bos. & P. 247.

863. —— ——.]—SIMMONS *v.* WILMOTT (1800), 3 Esp. 91, N. P.

Annotations:—**Reld.** R. *v.* St. James, Bury St. Edmunds (1808), 10 East, 25. **Mentd.** R. *v.* Radnorshire JJ. (1846), 10 Jur. 785.

864. —— —— **Attendant called in by master—Right of master to deduct charges from wages.**]—SELLEN *v.* NORMAN, No. 861, *ante*.

865. —— **Implied obligation.**]—A master is not liable upon an implied *assumpsit* to pay for medical attendance on a servant who has met with an accident in his service.—WENNALL *v.* ADNEY (1802), 3 Bos. & P. 247; 127 E. R. 137.

Annotations:—**Mentd.** Eastwood *v.* Kenyon (1840), 11 Ad. & El. 438; Roscorla *v.* Thomas (1842), 3 Q. B. 234; Veitch *v.* Russell (1842), Car. & M. 362; Beaumont *v.* Reeve (1846), 8 Q. B. 483; Earle *v.* Oliver (1848), 2 Exch. 71; Baker *v.* Bellericay Union Grdns. (1863), 9 Jur. N. S. 1201; Flight *v.* Reed (1863), 1 H. & C. 703; Evans *v.* Heathcote, [1918] 1 K. B. 418.

866. —— **Attendant called in by servant—Knowledge of employer or wife.**]—A. had several of his children residing in a house distant from his own, in the charge of B., a servant:—*Held:* (1) if an accident happened to one of the children, A. was liable to pay for its cure, although he did not know the surgeon who was called in, & although the accident might have arisen from the carelessness of the servant; (2) if B., the servant, becoming ill in consequence of the service, called in C., a surgeon, & after this A. sent his own surgeon, & the wife of A. knew of C.'s attendance, & expressed no disapprobation, A. was liable to pay C. for this attendance.

(3) A servant who hurt her foot in getting over a gate called in a surgeon, who was not the regular medical attendant of the family, without the knowledge of her master or mistress:—*Held:* the master was not liable to pay the surgeon's bill. —COOPER *v.* PHILLIPS (1831), 4 C. & P. 581, N. P.

867. ——.]—A master is not, by the general law, bound to provide medical advice for his servant; but the case is different with respect to an apprentice, & a master is bound, during the illness of his apprentice, to provide him with proper medicines.—R. *v.* SMITH (1837), 8 C. & P. 153.

SECT. 2.—SAFETY OF EMPLOYMENT.

See Part XIV., *post*.

PART VII. SECT. 1.

861 1. *Duty to provide & care for servant during illness—Domestic servant.*]—M'KEATING *v.* FRAME, [1921] S. C. 382.—SCOT.

n. *Duty to provide medical attendance—Hospital fund—No liability to attendant called in by servant.*]—STRUTHERS *v.* CANADIAN COPPER CO. (1903), 23 C. L. T. 323; 6 O. L. R. 374; 2 O. W. R. 748.—CAN.

SECT. 3.—CHARACTER OF SERVANT.

SUB-SECT. 1.—IN GENERAL.

868. Master not bound to give character.] — An action will not lie at the suit of the servant against his master for not giving him a character.—CARROL *v.* BIRD (1800), 3 Esp. 201, N. P.

SUB-SECT. 2.—PRIVILEGE.

Statements in answer to inquiries.]—*See* LIBEL & SLANDER, Vol. XXXII., pp. 119, 120, Nos. 1503–1514.

Volunteered statements.]—*See* LIBEL & SLANDER, Vol. XXXII., pp. 121, 122, Nos. 1532–1537.

Proof of malice.]—*See* LIBEL & SLANDER, Vol. XXXII., pp. 160, 161, Nos. 1936–1940.

SUB-SECT. 3.—LIABILITY OF MASTER FOR FALSE CHARACTER.

869. Civil liability — Action by new master—Necessity to prove intention to injure.]—In an action against deft. for an injury occasioned to pltf. by a servant whom pltf. has been induced to employ through the false statements & deceptious suppressions of deft., it is not necessary for pltf. to show that the falsehood of deft. was accompanied with an intention to injure pltf.—FOSTER *v.* CHARLES (1830), 7 Bing. 105; 4 Moo. & P. 741; 9 L. J. O. S. C. P. 32; 131 E. R. 40.

Annotations:—**Expld.** Crawshay *v.* Thompson (1842), 4 Man. & G. 357. **Consd.** Gibson *v.* D'Este (1843), 2 Y. & C. Ch. Cas. 542; Derry *v.* Peek (1889), 14 App. Cas. 337. **Refd.** Freeman *v.* Baker (1833), 5 B. & Ad. 797; Moens *v.* Heyworth (1842), 10 M. & W. 147. **Mentd.** Polhill *v.* Walter (1832), 3 B. & Ad. 114; Fuller *v.* Wilson (1842), 3 Q. B. 58; Wilde *v.* Gibson (1848), 1 H. L. Cas. 605.

870. —— —— Non-disclosure of dishonesty of servant—Dishonesty not cause of dismissal.]—Declaration in an action for giving a false character of P., a clerk, alleged that deft. fraudulently represented to pltf. that the reason why he had dismissed P. from his employ was, the decrease in his business, & that deft. recommended pltf. to try P., & knowingly suppressed & concealed from pltf. the fact that P. had been dismissed from his employ on account of dishonesty. It appeared at the trial, that P. had been guilty of dishonesty while in deft.'s employ, but that deft. had not mentioned that fact to pltf. when he recommended him to try P. It further appeared, however, that P. had not been dismissed from deft.'s employ on account of his dishonesty, but really for the reason which deft. had assigned to pltf.:—*Held:* this evidence did not support the declaration.—WILKIN *v.* REED (1854), 15 C. B. 192, 2 C. L. R. 796; 23 L. J. C. P. 193; 23 L. T. O. S. 160; 18 Jur. 1081; 2 W. R. 556; 139 E. R. 394.

Annotations:—**Mentd.** Tennyson *v.* O'Brien (1855), 5 E. & B. 497; Wilkinson *v.* Sharland (1855), 3 C. L. R. 619; Brennan *v.* Howard (1856), 1 H. & N. 138; Lucas *v.* Tarleton (1858), 3 H. & N. 116; Blake *v.* Done (1861), 31 L. J. Ex. 100; Garrard *v.* Giubilei (1862), 31 L. J. C. P. 131.

871. Criminal liability — False pretence made orally or by conduct—Servants' Characters Act, 1792 (c. 56).]—Where any person knowingly & wilfully pretends or falsely asserts in writing that any servant has been hired or retained or discharged from his service at any other time than that at which such servant was hired or retained or discharged, such person is guilty of an offence under above Act, even although the false pretence as to character is made orally or by conduct & not in writing.—R. *v.* COSTELLO & BISHOP, [1910] 1 K. B. 28; 79 L. J. K. B. 90; 101 L. T. 784; 54 Sol. Jo. 13; 22 Cox, C. C. 215; *sub nom.* R. *v.* CONNOLLY & COSTELLO, 74 J. P. 15; 26 T. L. R. 31; 3 Cr. App. Rep. 27, C. C. A.

SUB-SECT. 4.—PROPERTY IN WRITTEN CHARACTER.

872. Former character — Given by servant to master—Restoration to servant.]—A former character given by pltf. to deft. must be restored to the servant (HILL, J.).—GORDON *v.* POTTER (1859), 1 F. & F. 644, N. P.

Annotation:—**Refd.** Lindsay *v.* Queens Hotel Co., [1919] 1 K. B. 212.

873. —— —— Delivery to subsequent employer—Servant leaving at end of first month.]—As to the suggested custom of handing on the servant's character to the subsequent employer I agree that any such custom would be unreasonable (CHANNELL, J.).—MOULT *v.* HALLIDAY, [1898] 1 Q. B. 125; 67 L. J. Q. B. 451; 77 L. T. 794; 62 J. P. 8; 46 W. R. 318; 14 T. L. R. 109; 42 Sol. Jo. 117, D. C.

Annotation:—**Refd.** George *v.* Davies, [1911] 2 K. B. 445.

874. General testimonial.] — (1) In an action for maliciously defacing the written character of a servant by writing upon it a disparaging statement pltf. may recover substantial damages.

(2) There is a material distinction between the letters ordinarily written in answer to an inquiry as to a servant's character, which would probably be the property of the master proposing to engage the servant, & a general testimonial of good character, which is, I should think, intended to be used as a voucher for future occasions (HUDDLESTON, B.).—WENNHAK *v.* MORGAN (1888), 20 Q. B. D. 635; 57 L. J. Q. B. 241; 59 L. T. 28; 52 J. P. 470; 36 W. R. 697; 4 T. L. R. 295, D. C.

875. Letters written in answer to inquiries.]—WENNHAK *v.* MORGAN, No. 874, *ante*.

SUB-SECT. 5.—DEFACEMENT OF CHARACTER.

876. Servant's right of action—Indorsement on character—Setting out grounds of dismissal.]—If a servant, when he is taken into a service, brings a written character, & is afterwards dismissed for ill behaviour:—*Semble:* the master does no wrong, if, before he returns the character to the servant, he writes upon it that the person was afterwards in his service, & dismissed for ill behaviour.—TAYLOR *v.* ROWAN (1835), 7 C. & P. 70; 1 Mood. & R. 490.

Annotation:—**Refd.** Rogers *v.* Macnamara (1853), 17 Jur. 1166.

877. ——Malicious defacement—Right to substantial damages.]—WENNHAK *v.* MORGAN, No. 874, *ante*.

SECT. 4.—INDEMNITY TO SERVANT.

See, generally, GUARANTEE, Vol. XXVI., pp. 221 *et seq.*

878. Duty to indemnify—No duty at common law.]—There is no principle at common law entitling a servant to be indemnified by his

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PART VII. SECT. 3, SUB-SECT. 1.

868 i. *Master not bound to give character.]* — FELL *v.* ASHBURTON (LORD) (1809), 15 Fac. Coll. 446.—**SCOT.**

868 ii. ——.]—CHRISTIAN *v.* KENNEDY (LORD) (1818), 1 Murr. 427.—**SCOT.**

o. —— *Menial servant.]*—No action lies at common law against a master for refusing to give a menial servant a certificate of discharge.—HANDLEY *v.* MOFFAT (1872), 21 W. R. 231.—**IR.**

PART VII. SECT. 4.

878 i. *Duty to indemnify—No duty at common law.]*—There is no liability

employer for a loss occasioned to him in the performance of his duty.—*Re* FAMATINA DEVELOPMENT CORPN., LTD., [1914] 2 Ch. 271; 83 L. J. Ch. 712; *on appeal*, [1914] 2 Ch. 281, C. A.

Annotations:—**Mentd.** Hickman *v.* Kent or Romney Marsh Sheep-Breeders' Assocn., [1915] 1 Ch. 881; Britannia Hygienic Laundry Co. *v.* Thornycroft (1925), 94 L. J. K. B. 858.

879. —— Damages recovered against servant.]—Where one recovered in trover against a servant of the African co. equity would not relieve, because pltf. in equity might at law have defended himself; but decreed that the co. should indemnify the servant & pltf. at law, one of defts. in equity, might prosecute the decree in the servant's name.—LANGDON *v.* AFRICAN CO. (1703), Prec. Ch. 221; 2 Eq. Cas. Abr. 586; 24 E. R. 108; *on appeal, sub nom.* ROYAL AFRICAN CO. OF ENGLAND *v.* DOCKWRA & LANGDON, Colles, 327, H. L.

880. —— Act induced by fraudulent misrepresentation as to legality.]—Where a person is induced by the fraudulent misrepresentation of another [his master] to do an act which, in consequence of such misrepresentation, he believes to be neither illegal nor immoral, but which is in fact a criminal offence, he has a right of action against the person so inducing him for damages sustained by him in consequence of his having done such act.—BURROWS *v.* RHODES, [1899] 1 Q. B. 816; 68 L. J. Q. B. 545; 80 L. T. 591; 63 J. P. 532; 48 W. R. 13; 15 T. L. R. 286; 43 Sol. Jo. 351, D. C.

Annotations:—**Refd.** Leslie *v.* Reliable Advertising & Addressing Agency, [1915] 1 K. B. 652; Weld-Blundell *v.* Stephens, [1920] A. C. 956.

Indemnity to agents.]—*See* AGENCY, Vol. I., pp. 528 *et seq.*

Indemnity to servants of company.] — *See* COMPANIES, Vol. IX., pp. 463, 472–474, Vol. X., p. 930, Nos. 3007, 3093–3107, 6374.

Indemnity to master of ship.]—*See* SHIPPING & NAVIGATION.

SECT. 5.—**LIABILITIES TO THIRD PERSONS.**
See Part X., *post*.

Part VIII.—Duties and Liabilities of Servant.

SECT. 1.—DURING EMPLOYMENT.

SUB-SECT. 1.—IN GENERAL.

881. Furtherance of master's interests.] — If my bailiff by employing my moneys whereof he was the receiver might have procured to me profit & gain, but neglects it, he shall be chargeable to me in right & shall answer for it (*per* CUR.).—COLLET & ROBSTON'S CASE (1588), 2 Leon. 118; 3 Leon. 230; 74 E. R. 407, 652.

882. Duty to restore & account — Money received on sale of master's goods — Whether action for trover lies.]—Trover will not lie for money received by a servant on sale of his master's goods.—HIGGS *v.* HOLIDAY (1600), Cro. Eliz. 746; 78 E. R. 978; *revsg.* S. C. *sub nom.* HOLIDAY *v.* HICKS (1599), Cro. Eliz. 661.

Annotations:—**Refd.** R. *v.* Reed (1853), Dears. C. C. 168, 257. **Mentd.** Hartop *v.* Hoare (1743), 3 Atk. 44; Golightly *v.* Reynolds (1772), Lofft, 88; Wookey *v.* Pole (1820), 4 B. & Ald. 1; R. *v.* Central Criminal Court JJ. (1886), 55 L. J. M. C. 183; Moss *v.* Hancock, [1899] 2 Q. B. 111.

883. —— Property received from master.]—We do not question the general rule that one who has received property from another as his bailee or agent or servant must restore or account for that property to him from whom he received it (BLACKBURN, J.).—BIDDLE *v.* BOND (1865), 6 B. & S. 225; 5 New Rep. 485; 34 L. J. Q. B. 137; 12 L. T. 178; 29 J. P. 565; 11 Jur. N. S. 425; 13 W. R. 561; 122 E. R. 1179.

Annotations:—**Refd.** Leese *v.* Martin (1873), L. R. 17 Eq. 224; Rogers *v.* Lambert, [1891] 1 Q. B. 318. **Mentd.** Kingsman *v.* Kingsman (1880), 6 Q. B. D. 122; *Re* Sadler, *Ex p.* Davies (1881), 19 Ch. D. 86; Henderson *v.* Williams, [1895] 1 Q. B. 521; Ross *v.* Edwards (1895), 73 L. T. 100.

884. Exercise of care & skill — Liability for negligence.]—If a merchant's servant take his master's goods that are arrived at a port in England, & before payment of the customs land them, *per quod* the goods are forfeited to, & seized by, the King, the master may have an action of trespass or upon the case against the servant.—LEWSON *v.* KIRK (1610), Cro. Jac. 265; 79 E. R. 228; *sub nom.* LEVISON *v.* KIRK, Lane, 65.

Annotation:—**Refd.** Priestly *v.* Fowler (1837), 7 L. J. Ex. 42.

885. —— ——.] — HOPKINSON *v.* GIBSON, No. 1578, *post*.

886. —— ——.]—FRY *v.* BROMLEY (1851), 16 L. T. O. S. 343.

887. ——Accidental loss —Proof of negligence.]—If the servant of a common carrier accidentally lose goods entrusted to his master to carry, the master cannot maintain an action against him for the value, unless he can prove negligence, & has paid money to the owners.—SAVAGE *v.* WALTHEW (1707), 11 Mod. Rep. 135; 88 E. R. 947.

888. —— —— ——.]—NICKSON *v.* BROHAN, No. 955, *post*.

889. —— Protection of master's property.]—A workman for hire is not only bound to guard the thing bailed to him against ordinary hazards, but likewise to exert himself to prevent it from any unexpected danger to which it may be exposed.—LECK *v.* MAESTAER (1807), 1 Camp. 138, N. P.

890. ——.]—A servant has implied authority to make reasonable efforts to protect & preserve his master's property in cases of emergency endangering it. For acts done by the servant within the scope of that authority the master is responsible. The servant's acts may exceed the authority. Whether they do or not is a question of degree.

A carter in the employment of defts. on his way home in the middle of the day was following close behind a waggon laden with sugar in bags & being driven by one of his employers. He saw a boy walking beside the waggon with his hand upon one of the bags. Honestly & reasonably thinking that the boy was stealing sugar from the bag, he gave him a blow with his hand on the back of the neck. The boy fell & the wheel of the waggon

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on the part of the master to indemnify the servant against the consequences of a false accusation of misconduct even though the misconduct alleged was in the course of the employment.—PROCTOR *v.* SEAGRAM, [1925] 2 D. L. R. 1112; 56 O. L. R. 632.—**CAN.**

p. —— *Costs recovered against servant.*]—TYRRELL *v.* BONANZA CREEK HYDRAULIC CONCESSION (Y. T.) (1906), 4 W. L. R. 131.—**CAN.**

PART VIII. SECT. 1, SUB-SECT. 1.

884 l. *Exercise of care & skill—Liability for negligence.*]—It is the servant's duty to take proper care of such property as is entrusted to his charge, & to exercise reasonable care & skill in the discharge of his duties, & for negligence in these respects the servant may be made liable to the master in damages.—SMITH *v.* MOXHAM (1922), 25 W. A. L. R. 22.—**AUS.**

Sect. 1.—*During employment: Sub-sects.* 1 & 2.]

injured his foot:—*Held:* in the circumstances the carter had implied authority to make reasonable efforts to protect & preserve deft.'s property; the violence exerted was not so excessive as to take his act outside the scope of the authority, & defts. were liable.—POLAND *v.* PARR (JOHN) & SONS, [1927] 1 K. B. 236, C. A.

——.]—*See, further,* AGENCY, Vol. I., pp. 429 *et seq.*

891. Duty to render service—Extraordinary service.]—A servant may follow business for his master & may take money for his labour, for if I retain my servant generally he is not bound to follow my suits at law, except at his pleasure, for that is an extraordinary service (HOBART, C.J.).—GAGE *v.* JOHNSON (1622), Win. 53; 124 E. R. 45.

892. Liability in damages to master—Knowingly contriving breach of contract—Damages paid to third party by master.]—HUSSY *v.* PACY (1666), 1 Lev. 188; 83 E. R. 362; *sub nom.* HUSSEY *v.* PENSEY, 2 Keb. 88; 1 Sid. 298.

Annotations:—**Refd.** Mitchell *v.* Torup (1766), Park. 227. **Mentd.** Barker *v.* Braham (1773), 2 Wm. Bl. 866; Swinfen *v.* Chelmsford (1860), 29 L. J. Ex. 382.

893. Abstention from acts injurious to master—Soliciting business from master's customers—In contemplation of setting up on own account.]—NICHOL *v.* MARTYN, No. 1306, *post.*

894. —— Acting in breach of master's covenant with third party—Malice.]—HUSSY *v.* PACY (1666), 1 Lev. 188; 83 E. R. 362; *sub nom.* HUSSEY *v.* PENSEY, 2 Keb. 88; 1 Sid. 298.

Annotations:—**Refd.** Mitchell *v.* Torup (1766), Park. 227. **Mentd.** Barker *v.* Braham (1773), 2 Wm. Bl. 866; Swinfen *v.* Chelmsford (1860), 29 L. J. Ex. 382.

895. —— Contract between servant & third party having contract with master—Corrupt bargain.]—Where a bargain is made between one who is in the employ of another & a third-party who has contracted with the employer, which bargain is calculated to bias the mind of the employed & cause him to act to the prejudice of the employer, such bargain is corrupt, even though it do not actually bias the mind of the employed, & though no damage results to the employer.—HARRINGTON *v.* VICTORIA GRAVING DOCK CO. (1878), 3 Q. B. D. 549; 47 L. J. Q. B. 594; 39 L. T. 120; 42 J. P. 744; 26 W. R. 740.

Annotations:—**Refd.** Bartram *v.* Lloyd (1903), 88 L. T. 286. **Mentd.** R. *v.* Great Yarmouth JJ. (1882), 8 Q. B. D. 525; Grant *v.* Gold Exploration & Development Syndicate, [1900] 1 Q. B. 233; Kregor *v.* Hollins (1913), 109 L. T. 225.

896. —— Use of confidential information—Fraud by employer.]—Where the employer commits frauds in the course of his business, the ordinary rule forbidding any one employed by him in a confidential capacity from disclosing the knowledge of the transactions obtained by him in such capacity does not apply, the public superseding the private obligation.—GARTSIDE *v.* OUTRAM (1856), 26 L. J. Ch. 113; 28 L. T. O. S. 120; 3 Jur. N. S. 39; 5 W. R. 35.

Annotations:—**Refd.** R. *v.* Cox & Railton (1884), 14 Q. B. D. 153; Weld-Blundell *v.* Stephens, [1919] 1 K. B. 520.

897. —— ——.]—NATIONAL TELEPHONE CO., LTD. *v.* ANNAND (1896), 40 Sol. Jo. 741.

898. —— ——.]—LOWENADLER *v.* LEE (1924), 158 L. T. Jo. 372.

—— —— **After service.**]—*See* Sect. 2, sub-sect. 1, *post.*

—— —— **Warranty by master against disclosure.**]—*See* No. 952, *post.*

899. Obedience.]—There are reciprocal duties between masters & servants. From the servant, is due obedience & respect; from the master, protection & good treatment (LORD KENYON).—LIMLAND *v.* STEPHENS (1801), 3 Esp. 269, N. P.

900. —— To extent of risking personal safety—Reasonable apprehension.]—PRIESTLEY *v.* FOWLER, No. 1647, *post.*

901. —— Lawful commands.]—To a declaration upon an indenture of apprenticeship for a breach of covenant to instruct the apprentice in the art & trade of a chemist & druggist, & to provide him with sufficient diet, etc., deft. pleaded that the apprentice did not faithfully serve deft. or behave himself as a faithful apprentice, but, on the contrary thereof, conducted himself in so improper & unfaithful & dishonest a manner in deft.'s business, & defrauded & robbed deft., so that it became unsafe for deft. to continue the apprentice in his service, wherefore he dismissed him:—*Held:* the plea was bad, as affording no answer to the action.

In the simple relation of master & servant the servant is bound to obey all the lawful commands of his master (WATSON, B.).—PHILLIPS *v.* CLIFT (1859), 4 H. & N. 168; 28 L. J. Ex. 153; 32 L. T. O. S. 282; 23 J. P. 120; 5 Jur. N. S. 74; 7 W. R. 295; 157 E. R 801.

Annotations:—**Mentd.** Westwick *v.* Theodar (1875), 39 J. P. 646; Learoyd *v.* Brook, [1891] 1 Q. B. 431; Waterman *v.* Fryer, [1922] 1 K. B. 499.

902. Duty to wear livery.]—HUNTER *v.* BERKELEY (COUNTESS), No. 950, *post.*

903. Submission to medical examination—Suspected pregnancy.]—Pltf.'s mistress requested a doctor to examine pltf., who was a domestic servant, in order to ascertain whether she was pregnant. Pltf. objected to the examination, but undressed by the doctor's orders & submitted to be examined. The doctor examined her, & ascertained that she was not pregnant. He used no violence or threats & did nothing more than was necessary for the examination. The mistress was not present. Pltf. sued her master & mistress & the doctor for assault. At the trial the judge directed a verdict for the master & mistress, & the jury found a verdict for the doctor:—*Held:* there was no evidence against the master & mistress, the verdict in favour of the doctor was right, & a rule for a new trial was rightly discharged.

Very likely pltf. thought defts. had a right to have her examined; but the truth is she submitted to it & it is impossible to say the jury were wrong in finding that she submitted. She may have submitted under an erroneous notion of law, but it was not through fear of violence (BRAMWELL, L.J.).—LATTER *v.* BRADDELL (1881), 50 L. J. Q. B. 448; 44 L. T. 369; 45 J. P. 520; 29 W. R. 366, C. A.

Duties of officials of bank.]—*See* BANKERS, Vol. III., pp. 159 *et seq.*

Duty of officers of company.]—*See* COMPANIES, Vol. IX., pp. 533 *et seq.*

SUB-SECT. 2.—DUTY TO ACCOUNT.

904. As to what property—Money received on sale of master's goods.]—HIGGS *v.* HOLIDAY, No. 882, *ante.*

PART VIII. SECT. 1, SUB-SECT. 2.

q. *General rule.*]—While a servant cannot, in the course of his employment, & in connection with the services he has agreed to render to his master, earn for his own benefit any remuneration or profit, he can do so in connection with any collateral or independent work or business, not carried on in competition with that of the master.—JONES *v.* LINDE BRITISH REFRIGERATION CO. (1901), 21 C. L. T. 552; 2 O. L. R. 428.—CAN.

904 1. *As to what property—Money received on sale of master's goods.*]—

905. —— Property received by third person—Employed by servant.]—Where a person is employed to receive money for another, & he employs a third person to receive it for him, proof of the money having come to the hands of such third person, is sufficient to make the person who employed him liable.—MATTHEWS *v.* HAYDON (1796), 2 Esp. 509, N. P.

906. —— Property received from master.]—BIDDLE *v.* BOND, No. 883, *ante*.

907. —— Secret profits.]—Servant taking by collusion more than belongs to his office must account; so must a stranger upon a bargain with a servant, which is a fraud on the master.—EAST INDIA CO. *v.* HENCHMAN (1791), 1 Ves. 287; 30 E. R. 347, L. C.; *affd. sub nom.* HENCHMAN *v.* EAST INDIA CO. (1797), 8 Bro. Parl. Cas. 85, H. L.

Annotations:—**Mentd.** Houghton *v.* Reynolds (1843), 2 Hare, 264; Chadwick *v.* Chadwick (1854), 23 L. T. O. S. 108.

908. —— ——.]—The promoter of pltf. co. agreed with deft. that he should be employed as managing director of the intended co. for five years at a yearly salary. By the arts. of assocn. it was provided that deft. should be managing director for five years at the yearly salary mentioned in the agreement, payable quarterly. Afterwards the co. by a written instrument adopted the agreement between the promoter & deft. Deft., on behalf of the co. contracted for the construction of certain fishing smacks, &, unknown to the co., took a commission from the shipbuilders on the contract. Several months afterwards pltf. co. at an extraordinary meeting passed a resolution dismissing deft. from his office on the ground of other alleged acts of misconduct, which they were not able to substantiate in the action; being at that time ignorant of his receipt of the commission from the shipbuilders. Deft. was a shareholder in an ice co. & a fish-carrying co., which paid, in addition to the ordinary dividends, bonuses to shareholders who were owners of fishing smacks & who employed the cos. in supplying ice & carrying for them. Deft. employed these cos. in respect of pltfs.' smacks, & received bonuses as if the smacks were his own. Pltf. co. brought an action against deft. for an account of commissions & bonuses received by him, & for damages for alleged breaches of duty; & deft. counterclaimed for wrongful dismissal & for the salary for the quarter which had expired before his dismissal: *Held:* (1) the receipt of a commission from the shipbuilding co. was good ground for dismissal, although it was not discovered till after the dismissal had taken place, & although it happened several months previously, & might have been an isolated act; (2) deft. must account to pltfs. for the bonuses received from the ice & carrying cos., as they had been paid in respect of pltfs.' smacks; although pltfs. could not themselves have received the bonuses, not being shareholders of the cos.—BOSTON DEEP SEA FISHING & ICE CO. *v.* ANSELL (1888), 39 Ch. D. 339; 59 L. T. 345, C. A.

Annotations:—*As to* (1) **Apld.** Taylor *v.* Oakes, Roncoroni (1922), 127 L. T. 267; Rhodes *v.* Macalister (1923), 29 Com. Cas. 19. **Refd.** Swale *v.* Ipswich Tannery (1906), 11 Com. Cas. 88; Healey *v.* Soc. Anon. Française Rubastic, [1917] 1 K. B. 946. *As to* (2) **Consd.** Erskine, Oxenford *v.* Sachs, [1901] 2 K. B. 504. **Refd.** Costa Rica Ry. *v.* Forwood, [1901] 1 Ch. 746; Adams *v.* Morgan, [1923] 2 K. B. 234. *Generally*, **Refd.** General Billposting Co. *v.* Atkinson, [1908] 1 Ch. 537; Federal Supply & Cold Storage Co. of South Africa *v.* Angehrn & Piel (1910), 80 L. J. P. C. 1. **Mentd.** *Re* Famatina Development Corpn., [1914] 2 Ch. 271.

—— ——.]—*See, further*, AGENCY, Vol. I., pp. 475 *et seq.*

909. Who must account—Representative of deceased servant.]—Administrator of a factor in the West Indies, decreed to account.—LEE *v.* BOWLER (1674), Cas. *temp.* Finch, 125; 23 E. R. 68.

910. —— ——.]—A. being the clerk & manager of B., the sheriff of Montreal, received & paid in that capacity various sums of money on B.'s account, in the course of the business of the office. B. brought an action against the representatives of A. for an account of the receipts & application of the moneys, which passed through A.'s hands, while in B.'s office:—*Held:* in such circumstances such action would not lie against A.'s representatives.—ERMATINGER *v.* GUGY (1844), 5 Moo. P. C. C. 1; 13 E. R. 389, P. C.

911. —— ——.]—Upon the death of a clerk to a banking co., it was discovered that he had been guilty of misappropriations of money, & falsification of the accounts. The banking co. filed a bill against his administratrix & heir-at-law for an account & receiver. To this defts. demurred for want of equity.

Demurrer overruled.—WICKHAM *v.* GATRILL (1854), 2 Sm. & G. 353; 2 Eq. Rep. 805; 23 L. J. Ch. 783; 23 L. T. O. S. 252; 18 J. P. 677; 18 Jur. 768; 2 W. R. 673; 65 E. R. 433.

912. Defence to action for account—Robbery of servant.]—VERE *v.* SMYTH (1671), 2 Keb. 830; 1 Vent. 121; 84 E. R. 525.

Annotations:—**Refd.** Coggs *v.* Bernard (1703), 2 Ld. Raym. 909; Parkins *v.* Woollaston (1704), 6 Mod. Rep. 139.

913. —— ——.]—The treasurer of a benefit building society within 6 & 7 Will. 4, c. 32, & 10 Geo. 4, c. 56, having covenanted with the society's trustees that he would faithfully discharge the duties of treasurer, duly obey the directions of the trustees in relation to such duties, & punctually account to the trustees for all & every sum & sums of money, bills, notes, securities, goods & chattels, which he, in his office of treasurer, should receive on the society's account, & being bound, by the rules of the society, to pay over in a given time the same moneys which he shall receive, does not violate such obligation if, after receiving moneys, & before he has an opportunity of paying them over, he is robbed of them by irresistible violence & without fault of his own; such obligation being that only of a bailee.—WALKER *v.* BRITISH GUARANTEE ASSOCN. (1852), 18 Q. B. 277; 21 L. J. Q. B. 257; 19 L. T. O. S. 87; 16 J. P. 582; 16 Jur. 885; 118 E. R. 104.

914. —— Payment out by order of master.]—It is sufficient for a servant or apprentice to say in his answer in general, that what he received for his master was laid out again by his order.—POTTS *v.* POTTS (1683), 1 Vern. 207; 23 E. R. 418.

915. Presumption that servant has accounted—Usual course of dealing—Onus of proof.]—Where a servant is in the habit of receiving sums of money for the use of his master, & by the established course of dealing, the servant pays these over to the master from time to time, without any written vouchers passing between them, the presumption of law is, that all sums so received by the servant are regularly paid over to the master; therefore, where there has been such a course of dealing, in an action by the master against the servant for money had & received, it is not enough for the master to prove that sums have been received by

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WALKER *v.* CUNNINGHAM (1877), 3 R. & C. 1.—**CAN.**

907 i. —— *Secret profits.*]—BEARDSLEY *v.* COPELAND (1857), 3 All. 458.—**CAN.**

907 ii. —— ——.]—SHEPPARD PUBLISHING CO. *v.* HARKINS (1905), 5 O. W. R. 482; 9 O. L. R. 504.—**CAN.**

907 iii. —— ——.]—WARREN BITULITHIC PAVING CO. *v.* LOWE (1906), 1 E. L. R. 114.—**CAN.**

907 iv. —— ——.]—CANADIAN LOAN & MERCANTILE CO. *v.* LOVIN (1913), 24 W. L. R. 963; 12 D. L. R. 582; 18 B. C. R. 236.—**CAN.**

Sect. 1.—*During employment: Sub-sects.* 2, 3 & 4. *Sect.* 2: *Sub-sect.* 1.]

the servant to his use; but the *onus* lies upon him to prove by positive evidence, that the servant has not duly accounted with him.—EVANS *v.* BIRCH (1811), 3 Camp. 10, N. P.

SUB-SECT. 3.—PRODUCTION OF DOCUMENTS IN LEGAL PROCEEDINGS.

See, generally, DISCOVERY, Vol. XVIII., pp. 95 *et seq.*

916. Right to refuse production—Where no authority from master.]—On the hearing of a petition for adjudication of bkpcy., a clerk of the persons against whom the adjudication was prayed, who stated that he had no possession of their books:—*Held:* not bound to produce them.—*Re* LEIGHTON & BENETT (1866), 1 Ch. App. 331; *sub nom. Re* LEIGHTON, *Ex p.* BYRNE, 35 L. J. Bcy. 43, L. C.

Annotation:—**Mentd.** *Re* Lutscher, *Ex p.* Waddell (1877), 6 Ch. D. 328.

917. —— ——.]—The ct. refused to grant an attachment against a witness for disobedience of an order of the district prothonotary of the Ct. of Pleas at Lancaster, & of an arbitrator, which required the witness to produce before the latter in London a large number of books & documents belonging to a railway co. in Lincolnshire of which he was the secretary & solr., & which the directors, who were no parties to the reference, refused to allow him to bring.—CROWTHER *v.* APPLEBY (1873), L. R. 9 C. P. 23; 43 L. J. C. P. 7; 38 J. P. 24; *sub nom.* CROWTHER *v.* APPLEBY, *Re* SHARPLEY, 29 L. T. 580; 22 W. R. 265.

Annotations:—**Consd.** Eccles *v.* Louisville & Nashville Railroad Co., [1912] 1 K. B. 135. **Distd.** Forbes *v.* Samuel, [1913] 3 K. B. 706.

918. —— ——.]—A witness who was the manager of a branch business of a money-lender, & in whose possession certain documents were alleged to be relating to dealings which had taken place between his master & debtor, was ordered, under Bkpcy. Act, 1883 (c. 52), s. 27, to attend the ct. & produce on subpoena the documents. The witness had no authority to produce the documents, & refused to do so:—*Held:* as the witness was a mere servant, & had no authority from his master to produce the documents, he could not, under the circumstances, be ordered to do so.—*Re* HIGGS, *Ex p.* LEICESTER (1892), 66 L. T. 296; 40 W. R. 432, D. C.

919. —— ——.]—Where an order had been made under Foreign Tribunals Evidence Act, 1856 (c. 113), for the examination of a witness & the production of documents by him, & it was sought to attach him for refusing to produce material documents of which it appeared that he had possession, custody, or control only in the character of servant to a master, who was not a party to the proceedings with reference to which the order was made, or before the ct.:—*Held:* an order for attachment of the witness ought not to be made, the ct. not being satisfied that the production of the documents by the witness would not be in violation of his duty to his master, although he had not been expressly forbidden by his master to produce them, & had not asked & declined to ask for his master's permission to do so.—ECCLES & CO. *v.* LOUISVILLE & NASHVILLE RAILROAD CO., [1912] 1 K. B. 135; 81 L. J. K. B. 445; 105 L. T. 928; 28 T. L. R. 67; 56 Sol. Jo. 107, C. A.

920. —— ——.]—Deft. P. was an undischarged bkpt., & his application for his discharge was opposed by the trustee & also by pltf., who was a large creditor. Deft. N. formerly acted as solr. for pltf. Deft. P. under the belief that pltf. had written letters to deft. N. which might assist in getting rid of pltf.'s opposition, & in order to obtain the letters, caused his solrs. to serve a *subpoena duces tecum* on a clerk in the employment of deft. N. The clerk attended the ct. with the letters, & left the same with deft. P., who handed them to his solrs., who handed them back to him after taking copies, which they put with the briefs of the counsel they had retained to appear for bkpt. on his application for his discharge:—*Held:* the clerk to deft. N. had no right to hand over the originals of the letters to the deft. P., & the latter was clearly in the same position, & liable to the jurisdiction of the ct. restraining him from publishing or making use of any of the copies or information contained therein.—ASHBURTON (LORD) *v.* PAPE, [1913] 2 Ch. 469; 82 L. J. Ch. 527; 109 L. T. 381; 57 Sol. Jo. 644; *sub nom.* ASHBURTON (LORD) *v.* NOCTON, 29 T. L. R. 623, C. A.

921. —— **Where servant has lien for money—claimed—Proceedings between master & servant.**]—Where a solr. has been appointed clerk to a local board with a salary, for conducting the legal as well as the ordinary business of the board, it was held by the vice-chancellor, upon an interlocutory motion in an action for *mandamus* to compel production of papers, that, whatever claim the clerk might have against the board for payment of costs in respect of professional services, he had no right, being in the relation of servant to the board, to refuse production of the legal papers or other documents claimed by the board as belonging to them:—*Held:* as such an order would prejudice the clerk's lien, it could not be made before the trial of the action, without payment into ct. of a sum sufficient to meet the amount claimed by the clerk, upon which he was to have the same lien as upon the papers, & the ct. ordered that upon that being done the clerk should deliver up to pltfs. all books & papers claimed in the action.—NEWINGTON LOCAL BOARD *v.* ELDRIDGE (1879), 12 Ch. D. 349, C. A.

922. Administer interrogatories—To servant as to documents in his custody.]—Deft. in an action for libel being called upon to give discovery of documents made an affidavit in which he gave in a schedule a list of documents which he said were in the possession & custody of the trade union of which he was general secretary, & as to which he stated that he had no power to produce them as they belonged to the trade union. Pltf. applied for an order that he might be at liberty to interrogate deft. as to the contents of the documents scheduled to his affidavit:—*Held:* the application must be refused, inasmuch as a person in the position of a servant cannot be required to answer an interrogatory asking him to give the contents of documents in the possession of his master.—BALFOUR *v.* TILLETT (1913), 29 T. L. R. 332; 57 Sol. Jo. 356, C. A.

SUB-SECT. 4.—AS TO INVENTIONS BY SERVANT.

See PATENTS.

SECT. 2.—ON TERMINATION OF EMPLOYMENT.

SUB-SECT. 1.—DISCLOSURE OF CONFIDENTIAL INFORMATION.

923. Duty not to disclose—Confidential information acquired during service.]—Where an agent or clerk gets knowledge of the affairs of his employer, & takes copies of his books, the ct. will restrain him from disclosing the information so obtained to the injury of his employer on the ground of fraud.—TIPPING *v.* CLARKE (1847), 8 L. T. O. S. 554.

924. —— ——.]—It is part of the implied contract between the master & the servant that confidential information received by a servant to advance his master's business is not to be used to the master's disadvantage (BOWEN, L.J.).—HELMORE *v.* SMITH (2) (1886), 35 Ch. D. 449; 56 L. J. Ch. 145; 56 L. T. 72; 35 W. R. 157; 3 T. L. R. 139, C. A.

Annotations:—**Apld.** Robb *v.* Green (1895), 64 L. J. Q. B. 593. **Refd.** *Re* Gent, Gent-Davis *v.* Harris (1892), 40 W. R. 267. **Mentd.** *Re* Evelyn, *Ex p.* General Public Works & Assets Co., [1894] 2 Q. B. 302; R. *v.* Davies, [1906] 1 K. B. 32; King *v.* Dopson (1911), 56 Sol. Jo. 51; R. *v.* Daily Mail, *Ex p.* Farnsworth (1921), 10 L. J. K. B. 871

925. —— ——.]—PORTAL *v.* HINE (1888), 4 T. L. R. 330.

926. —— ——.]—Deft., upon completing a term of apprenticeship with pltfs., a firm of engine makers, was retained in their employment as a paid clerk, but he ultimately left their service for that of another firm of engine makers. Two days before leaving pltfs.' service he compiled for his own purposes, & without their knowledge or consent, a table of dimensions of various types of engines made by them, & this table he had in his possession when he entered the service of his new employers, who subsequently exposed for sale an engine of, it was said, dimensions corresponding to dimensions given in the table, though this was denied:—*Held:* in compiling & retaining the table for his own purposes, deft. had committed an abuse of the confidence ordinarily existing between a clerk & his employer, or a breach of the implied contract apparently arising from that confidence, the confidence being that a servant shall not use, except for the purposes of service, the opportunities which that service gives him of gaining information; & accordingly pltfs. were entitled to an *interim* injunction restraining deft. from publishing or communicating the table or its contents to any person.—MERRYWEATHER *v.* MOORE, [1892] 2 Ch. 518; 61 L. J. Ch. 505; 66 L. T. 719; 40 W. R. 540; 8 T. L. R. 539; 36 Sol. Jo. 488.

Annotations:—**Apld.** Robb *v.* Green (1895), 64 L. J. Q. B. 593; Measures *v.* Measures (1910), 79 L. J. Ch. 707. **Refd.** Lamb *v.* Evans (1892), 2 R. 189.

927. —— ——.]—Canvassers who had been employed by the proprietor under agreements which bound them to devote themselves in a particular district exclusively to obtaining from traders advertisements to be inserted in the directory, & to supply the blocks & materials necessary for producing such advertisements, proposed at the expiration of their agreements to assist a rival publication in procuring similar advertisements:—*Held:* they were not entitled to use for the purposes of any other publication the materials which, while in pltf.'s employment, they had obtained for the purpose of his publication.—LAMB *v.* EVANS, [1893] 1 Ch. 218; 62 L. J. Ch. 404; 68 L. T. 131; 41 W. R. 405; 9 T. L. R. 87; 2 R. 189, C. A.

Annotations:—**Apld.** Louis *v.* Smellie (1895), 73 L. T. 226; Robb *v.* Green, [1895] 2 Q. B. 315; Worthington Pumping Engine Co. *v.* Moore (1902), 19 T. L. R. 84; Lawrence & Bullen *v.* Aflalo, [1904] A. C. 17; Measures *v.* Measures, [1910] 1 Ch. 336. **Consd.** Ashburton *v.* Pape, [1913] 2 Ch. 469. **Apld.** Alperton Rubber Co. *v.* Manning (1917), 86 L. J. Ch. 377. **Mentd.** Trego *v.* Hunt, [1895] 1 Ch. 462; Walter *v.* Lane, [1900] A. C. 539; London Electric Supply Corpn. *v.* Westminster Electric Supply Corpn. (1913), 11 L. G. R. 1046; Morris *v.* Saxelby, [1915] 2 Ch. 57; Macmillan *v.* Cooper (1923), 93 L. J. P. C. 113.

928. —— ——.]—Deft., being employed by pltf. as manager of his business, surreptitiously copied from his master's order-book a list of the names & addresses of the customers, with the intention of using it for the purpose of soliciting orders from them after he had left pltf.'s service & set up a similar business on his own account. Subsequently, his service with pltf. having terminated, he did so use the list:—*Held:* it was an implied term of the contract of service that deft. would observe good faith towards his master during the existence of the confidential relation between them, & deft.'s conduct was a breach of that contract in respect of which pltf. was entitled to damages & an injunction.—ROBB *v.* GREEN, [1895] 2 Q. B. 315; 64 L. J. Q. B. 593; 73 L. T. 15; 59 J. P. 695; 44 W. R. 25; 11 T. L. R. 517; 39 Sol. Jo. 653; 14 R. 580, C. A.

Annotations:—**Apld.** Worthington Pumping Engine Co. *v.* Moore (1902), 19 T. L. R. 84. **Consd.** Kirchner *v.* Gruban, [1909] 1 Ch. 413. **Apld.** Measures *v.* Measures, [1910] 1 Ch. 336; Amber Size & Chemical Co. *v.* Menzel, [1913] 2 Ch. 239. **Refd.** Louis *v.* Smellie (1895), 73 L. T. 226; Barr *v.* Craven (1903), 89 L. T. 574. **Mentd.** London Electric Supply Corpn. & Westminster Electric Supply Corpn. (1913), 11 L. G. R. 1046.

929. —— ——.]—LOUIS *v.* SMELLIE, No. 941, *post.*

930. —— ——.]—The law is that a person in the employment of another can make use of any information he obtains except such as is confidential (CHITTY, J.).—NATIONAL TELEPHONE CO., LTD. *v.* ANNAND (1896), 40 Sol. Jo. 741.

931. —— ——.]—By an agreement in writing dated June 30, 1905, deft., a German subject, agreed with pltfs., a Leipzig firm, to act as their representative in the United Kingdom; to devote all his activity & industry exclusively to the sale of their goods; not to divulge any business matters to any one; & under a money penalty to remain in his position & not to give notice before July 1, 1910, to be three months' notice if then given. The parties agreed to submit themselves in all cases of dispute to the exclusive jurisdiction of the Leipzig Cts. & to the exclusive applicability of the German law. After the expiration of three months' previous notice to determine the agreement, deft. left pltf.'s employment on May 1, 1908, & entered the service of a rival English firm. Pltfs. then issued the writ in this action for injunction & other relief. Deft. entered a conditional appearance & applied by summons to stay proceedings on the ground that the disputes should be referred to the Leipzig Ct.:—*Held:* pltfs. were not entitled to the injunction asked, on the ground that the existence of any implied contract on the part of an employee after the determination of his service not to divulge information acquired during it necessarily involved the construction of the written contract which the ct. was precluded from construing by the express agreement of the parties, & therefore, no cause had been shown why the

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PART VIII. SECT. 2, SUB-SECT. 1.

923 I. ***Duty not to disclose—Confidential information acquired during service.***]—A person who had been agent of a friendly society was not entitled, after he had left the society's service, to give written lists of the members of the society to the officials of a rival society.—LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY *v.* HOUSTON (1900), 3 F. (Ct. of Sess.) 42.—**SCOT.**

923 II. —— ——.]—NEAL BROTHERS *v.* WRIGHT (Man.), [1923] 4 D. L. R. 998; [1923] 3 W. W. R. 1168.—**CAN.**

Sect. 2.—*On termination of employment: Sub-sects.* 1 *&* 2. *Sect.* 3: *Sub-sects.* 1 *&* 2. *Sects.* 4 *&* 5. *Part IX. Sect.* 1.]

parties should not be held to their agreement to refer all disputes to the Leipzig Ct., & an order must be made on the summons staying proceedings in the action.—KIRCHNER & Co. *v.* GRUBAN, [1909] 1 Ch. 413; 78 L. J. Ch. 117; 99 L. T. 932; 53 Sol. Jo. 151.

Annotations:—**Mentd.** The Cap Blanco, [1913] P. 130; L. C. & D. Ry. & S. E. & C. Ry.'s Managing Committee *v.* Spiers & Pond (1916), 32 T. L. R. 493; Mortimer *v.* Beckett, [1920] 1 Ch. 571; Prosperity *v.* Lloyds Bank (1923), 39 T. L. R. 372.

932. —— ——.]—Pltf. co. who manufactured & dealt in a furniture polish under the name of "Liquid Veneer" brought an action against three persons who had been in their employ & another person & a co. called the Ellvee co., which the three persons had formed for the purpose of manufacturing & dealing in furniture polish under the name of "Elve," derived from the initial letters of liquid veneer. Pltfs. claimed, stated shortly, to restrain defts. from divulging pltfs.' secret process of manufacturing Liquid Veneer; & from manufacturing "Elve" or any other substance in accordance with that process or using confidential information, & from selling or dealing in any polish not of the manufacture or merchandise of pltfs. as & for pltfs. in bottles, boxes or wrappers, which were a colour ble imitation of pltfs. & from representing in any way that pltfs. had ceased to sell their Liquid Veneer & had gone, or were intending to go out of business. Pltfs. moved for an interlocutory injunction:—*Held:* the case was one of grossest fraud, & interlocutory injunctions granted against all defts.—LIQUID VENEER Co., LTD. *v.* SCOTT (1912), 29 R. P. C. 639.

933. —— ——.]—An ex-servant who has been confidentially employed in the manufacture of an article under a secret process is under an implied obligation to his late master not to use or disclose any knowledge or information as to that secret process acquired by him during his employment. This principle applies to information acquired & retained in the servant's memory as well as to information committed to writing & existing in a tangible form.—AMBER SIZE & CHEMICAL Co., LTD. *v.* MENZEL, [1913] 2 Ch. 239; 82 L. J. Ch. 573; 109 L. T. 520; 29 T. L. R. 590; 57 Sol. Jo. 627; 30 R. P. C. 433.

Annotation:—**Refd.** Alperton Rubber Co. *v.* Manning (1917), 86 L. J. Ch. 377.

934. —— ——.]—A servant in a confidential position who has expressly or impliedly contracted that he will not disclose his master's secrets can be restrained from so doing.

The works manager of a co. manufacturing rubber goods & rubber compounds was intrusted with the care of a book of formulæ of secret processes for the purpose of carrying out his duties. On leaving the co.'s employment he took this book away with him, & shortly afterwards entered the employment of a rival co. It was ordered that he should deliver up the book of *formulæ*, & all copies or extracts therefrom, to the co.—ALPERTON RUBBER Co. *v.* MANNING (1917), 86 L. J. Ch. 377; 116 L. T. 499; 33 T. L. R. 205.

935. Information must be confidential.]—NATIONAL TELEPHONE Co., LTD. *v.* ANNAND, No. 930, *ante*.

See, further, INJUNCTION, Vol. XXVIII., pp. 476 *et seq.*

Warranty by master against disclosure.]—*See* No. 952, *post*.

SUB-SECT. 2.—COMPETITION IN BUSINESS.

As to agreements in restraint of trade generally, *see* TRADE & TRADE UNIONS.

936. Competition permitted during service.]—A solr.'s clerk, employed at a yearly salary, & who was allowed at the same time to keep his name up at a separate house in the same town as his employer & practice for himself, having had disputes with his employer, suddenly left him without notice, & set up entirely for himself at the house he had been in the habit of using as his office. A motion to restrain him from so practising was, under the circumstances, refused.—SHEPHERD *v.* NEVE (1874), 22 W. R. 725.

937. Service terminated by servant in breach of contract.]—Where in breach of an agreement by deft. to serve pltf. for fourteen years as manager of his business, which agreement contained no express negative covenants, deft. left pltf., & engaged in similar business a few doors off:—*Held:* the ct. had the power to grant an injunction but the power was discretionary, & the case was not one for its exercise.—JACKSON *v.* ASTLEY (1883), 1 Cab. & El. 181.

938. Person employed under order of court.]—*Re* IRISH, IRISH *v.* IRISH (1888), 40 Ch. D. 49; 58 L. J. Ch. 279; 60 L. T. 224; 37 W. R. 231; 5 T. L. R. 39.

Annotation:—**Refd.** Robb *v.* Green, [1895] 2 Q. B. 1.

939. Right to solicit master's customers.]—A servant is entitled, when he leaves his employment, to carry on a business of the same character as his former employer's & to obtain the custom of his former employer's customers, & to use trade wrappers & other trade papers, notwithstanding that his former employer does so, & to employ the same printer; but in exercising these rights it is especially incumbent upon him to do so in such a manner as not to represent that his business & goods are the business & goods of his former master; & if he does so represent, an injunction will be granted to restrain him from so doing.—HART *v.* COLLEY (1890), as reported in 59 L. J. Ch. 355; 6 T. L. R. 216.

940. Right to carry on business of same character—As of former employer.]—HART *v.* COLLEY, No. 939, *ante*.

941. —— ——.]—The good faith which exists between an employer & those in his employ renders it illegal, even in the absence of any stipulation to the contrary, for the persons so employed to make use after the termination of the employment of any materials or any information acquired by them while they were in that confidential relationship; & the ct. will grant an injunction to restrain such use, in addition to awarding damages.

Deft. was entitled to set up in business in the absence of a covenant [not to set up in business in opposition to his master] in rivalry with his late employer (LINDLEY, L.J.).—LOUIS *v.* SMELLIE (1895), 73 L. T. 226; 11 T. L. R. 515; 39 Sol. Jo. 654, C. A.

Annotation:—**Refd.** Robb *v.* Green (1895), 64 L. J. Q. B. 593.

PART VIII. SECT. 2, SUB-SECT. 2.

r. *No right to solicit master's customers while employment continues.*]—ICE DELIVERY Co. *v.* PEERS & CAMPBELL, [1926] 1 D. L. R. 1176; 1 W. W. R. 595; 36 B. C. R. 445.—CAN.

SECT. 3.—CRIMINAL LIABILITY.

SUB-SECT. 1.—BREACH OF CONTRACT AMOUNTING TO CRIMINAL OFFENCE.

See CRIMINAL LAW, Vol. XV., pp. 765 *et seq.*; Conspiracy & Protection of Property Act, 1875 (c. 86).

SUB-SECT. 2.—OFFENCES COMMITTED IN COURSE OF EMPLOYMENT.

NOTE.—*The references in this sub-section are to pages & numbers in Criminal Law, Vol. XV.*

Burglary.]—*See* p. 951, Nos. 10,555–10,558.

Embezzlement.]—*See* pp. 921 *et seq.*

False pretences.]—*See* p. 981, Nos. 10,989, 10,990.

Falsification of accounts.]—*See* pp. 940, 941, Nos. 10,357–10,362.

Forgery.]—*See* pp. 1041 *et seq.*

—— **Certificates of character.**]—*See* pp. 1065, 1066, Nos. 12,052–12,061.

Fraudulent conversion.]—*See* p. 937, Nos. 10,328–10,333.

Larceny.]—*See* pp. 887, 888, 890–893, 912–914, Nos. 9747–9750, 9769–9809, 10,036–10,038, 10,058–10,062.

Malicious damage to property.]—*See* p. 1041, Nos. 11,734, 11,735.

Offences relating to trade.]—*See* pp. 762 *et seq.*; Hosiery Act, 1843 (c. 40); Frauds by Workmen Act, 1777 (c. 56); MINES, &, *generally*, TRADE & TRADE UNIONS.

SECT. 4.—LIABILITIES TO THIRD PERSONS.

See Part XI., *post.*

SECT. 5.—INDEMNITY TO MASTER.

941a. Servant's negligence—Master liable to third party—Servant liable to master.]—JARVIS *v.* HAYES (1738), 2 Stra. 1083; 93 E. R. 1047.

As to evidence, *see, now*, 6 & 7 Vict. c. 85.

941b. —— —— ——.]—FRASER *v.* MARSH (1817), 2 Stark. 41, N. P.

941c. —— —— ——.]—GREEN *v.* NEW RIVER CO. (1792), 4 Term Rep. 589; 100 E. R. 1192.

Annotations:—**Mentd.** Morish *v.* Foote (1818), 2 Moore, C. P. 508; Thomas *v.* Pearse (1818), 5 Price, 549.

941d. —— —— ——.]—PRITCHARD *v.* HITCHCOCK (1843), 6 Man. & G. 151; 6 Scott, N. R. 851; 12 L. J. C. P. 322; 1 L. T. O. S. 79; 134 E. R. 844.

Annotations:—**Mentd.** Aiken *v.* Short (1856), 1 H. & N. 210; Newington *v.* Levy (1870), L. R. 5 C. P. 607; Petty *v.* Cooke (1871), L. R. 6 Q. B. 790.

Part IX.—Liability of Master to Third Persons.

SECT. 1.—IN GENERAL.

942. Liability of master.]—BOSON *v.* SANDFORD, No. 964, *post.*

943. —— **Acts done by authority.**]—A merchant consigned jewels to his factor to sell; the factor procured an agent to dispose of them, & received from him the net proceeds of the sale. The purchaser afterwards discovering that the jewels were counterfeit, arrested the agent, & recovered back the purchase-money. An action would not lie by the agent against the merchant, although the agent was ignorant of the fraud when he made the sale, especially if the jury did not find that the merchant directed the factor to employ the agent, or ordered him to conceal the fact of the jewels being counterfeit.—SOUTHERN *v.* How (1618), Cro. Jac. 468; J. Bridg. 125; Poph. 143; 2 Roll. Rep. 26; 79 E. R. 400.

Annotations:—**Mentd.** Blanchard *v.* Hill (1742), 2 Atk. 484; Grylls *v.* Davies (1831), 2 B. & Ad. 514; Crawshay *v.* Thompson (1842), 4 Man. & G. 357; Burgess *v.* Burgess (1853), 3 De G. M. & G. 896; Hall *v.* Barrows (1863), 8 L. T. 227; Hirst *v.* Denham (1872), L. R. 14 Eq. 542.

944. —— ——.]—Master liable for the neglect of his servant, not the wilful wrong.—JONES *v.* HART (1698), 2 Salk. 441; Holt, K. B. 642; 91 E. R. 382; *sub nom.* ANON., 1 Ld. Raym. 739.

945. —— ——.]—Act of a servant binds not his master, unless he acts by authority of his master, or he consents.—WARD *v.* EVANS (1704), 2 Salk. 442; 1 Com. 138; Holt, K. B. 120; 2 Ld. Raym. 928; 6 Mod. Rep. 36; 91 E. R. 383.

Annotations:—**Refd.** Thorold *v.* Smith (1706), Holt, K. B. 462; Nickson *v.* Brohan (1713), 10 Mod. Rep. 109. **Mentd.** Smith *v.* Wilson (1738), Andr. 187; Grant *v.* Vaughan (1764), 3 Burr. 1516; Tatlock *v.* Harris (1789), 3 Term Rep. 174; Hennings *v.* Rothschild (1827), 4 Bing. 315; Nicholl *v.* Thomas (1850), 2 Rob. Eccl. 157.

946. —— ——.]—In an action against the East India Co. by the holder of a forged imitation of one of their promissory notes issued by the Governor General in Council at Calcutta:—*Held:* the co. were not bound by the acknowledgment of it as genuine by a clerk in their Accountant General's office, who was authorised by the Accountant General to compare all such notes with the register, but not authorised to certify their genuineness, although it appeared that it was his practice to do so.—BANK OF BENGAL *v.* EAST INDIA CO. (1834), 2 Knapp, 245; 12 E. R. 473, P. C.

947. —— ——.]—The rule of liability, & its reason, I take to be this: I am liable for what is done for me & under my orders by the man I employ, for I may turn him off from that employ when I please; & the reason that I am liable is this, that by employing him I set the whole thing in motion; & what he does, being done for my benefit & under my direction, I am responsible for the consequences of it (LORD BROUGHAM).—

PART IX. SECT. 1.

943 i. *Liability of master—Acts done by authority.*]—FERGUSON *v.* FAIRCHILD (1892), 1 Terr. L. R. 329.—**CAN.**

943 ii. —— ——.]—Deft., owned a ranch here he kept horses & mules, when they were not required for the purposes of his other business. The action was brought to recover the price of a stallion which had, pltf. alleged, been purchased for deft. by the man who had charge of the ranch for deft.:—*Held:* express authority to purchase was not made out, & though ranching operations were important, they were only incidental to the main enterprise of deft., & therefore that there was no implied authority in the servant to pledge the credit of his master to such a large amount, & to bind the master to a purchase of such a special nature.—STOUT *v.* KENNY (1915), 30 W. L. R. 518.—**CAN.**

943 iii. —— ——.]—PAGE *v.* GREAT NORTHERN RY. CO. (1868), I. R. 2 C. L. 228.—**IR.**

943 iv. —— ——.]—MORTIMER *v.* HAMILTON (1868), 7 Macph. (Ct. of Sess.) 158; 41 Sc. Jur. 86.—**SCOT.**

Sect. 1.—*In general.* *Sect.* 2: *Sub-sects.* 1 & 2, *A.* (*a*) & (*b*), *B.*, *C.* & *D.* *Sect.* 3: *Sub-sect.* 1.]

DUNCAN *v.* FINDLATER (1839), 6 Cl. & Fin. 894; Macl. & Rob. 911; 7 E. R. 934, H. L.

Annotations:—**Refd.** Mersey Docks Trustees *v.* Gibbs (1866), 11 H. L. Cas. 687. **Mentd.** Thomson *v.* Mitchell (1840), 7 Cl. & Fin. 564; Ferguson *v.* Kinnoull (1842), 9 Cl. & Fin. 251; Heriot's Hospital *v.* Ross (1846), 12 Cl. & Fin. 507; Brunton *v.* Forrest, Edinburgh City *v.* Edinburgh (Lord Provost) (1849), 14 L. T. O. S. 121; Edwards *v.* Lowndes (1852), 1 E. & B. 81; Scott *v.* Manchester Corpn. (1857), 29 L. T. O. S. 233; Ruck *v.* Williams (1858), 3 H. & N. 308; Southampton & Itchin Bridge Co. *v.* Southampton L. B. (1858), 8 E. & B. 801; Holliday *v.* St. Leonard's Shoreditch Vestry (1861), 11 C. B. N. S. 192; Brownlow *v.* Metropolitan Board of Works & Aird (1864), 16 C. B. N. S. 546; Coe *v.* Wise (1864), 5 B. & S. 440; Olrby *v.* Ityde Comrs. (1864), 5 B. & S. 743; Tobin *v.* R. (1864), 16 C. B. N. S. 310; Harris *v.* G. W. Ry. (1876), 1 Q. B. D. 515; Jackson *v.* Watson, [1909] 2 K. B. 193.

948. —— Acts ratified.]—WARD *v.* EVANS, No. 945, *ante*.

SECT. 2.—IN CONTRACT.

SUB-SECT. 1.—IN GENERAL.

949. Money borrowed by servant—Usually employed in such capacity.]—Debt lies against a master for money borrowed by his servant.

If a servant usually employed to pawn goods for his master or to borrow money for him, borrow of me or pawn his master's goods with me for money, I shall maintain debt against the master thereupon (HOLT, C.J.).—ANON. (1701), 12 Mod. Rep. 564; 88 E. R. 1522.

950. Expenses for servants' livery—Part exchanged for plain clothes.]—(1) A. ordered of B. two suits of livery a year for her coachman; B. supplied one suit of livery, & at the desire of the coachman supplied plain clothes instead of the other:—*Held*: B. could only recover from A. the price of the livery actually supplied.

(2) B. had, on a previous bill delivered, been paid for a livery suit which he had furnished & immediately taken back from the coachman:—*Held*: A. was entitled to be allowed the amount paid for this suit on a plea of set-off for money had & received pleaded in an action for the amount of a subsequent account for clothes.

(3) The practice of servants exchanging their liveries for plain clothes is a species of fraud on the master. If a master thinks it right that his servant should have two suits of livery in the year, it is the duty of the servant to wear such livery (LORD ABINGER, C.B.).—HUNTER *v.* BERKELEY (COUNTESS) (1836), 7 C. & P. 413, N. P.

951. —— Set-off of previous payment—Under contract varied without knowledge.]—HUNTER *v.* BERKELEY (COUNTESS), No. 950, *ante*.

952. Private inquiry agent — Warranty of secrecy — Whether implied.] — Although it is essential to the proper conduct of the business of a private inquiry agent that it should be conducted with secrecy, a person carrying on such a business does not impliedly warrant to his clients, that the servants employed by him in it will not, after they have left his service, disclose to the client's prejudice information acquired by them in the service.

Qu.: whether any such warranty is to be implied with respect to disclosure made by a servant while still in the service.—EASTON *v.* HITCHCOCK, [1912] 1 K. B. 535; 81 L. J. K. B. 395; 106 L. T. 126; 28 T. L. R. 208; 56 Sol. Jo. 254, D. C.

Payment to servant—To discharge debt for goods bought on master's credit.]—*See* AGENCY, Vol. I., p. 582, Nos. 2214–2216.

Admissions made by servant.]—*See* AGENCY, Vol. I., pp. 605 *et seq.*

SUB-SECT. 2.—AUTHORITY OF SERVANT.

A. Particular Classes of Servant.

(*a*) *Agents.*

NOTE.—*The references in this sub-section are to Agency, Vol. I.*

Authority to do necessary & incidental acts.]—*See* pp. 307 *et seq.*

Authority in regard to bills of exchange & other negotiable instruments.]—*See* pp. 309 *et seq.*

Authority to borrow.]—*See* pp. 316 *et seq.*

Authority to contract.]—*See* pp. 319 *et seq.*

Authority to receive tender.]—*See* pp. 324, 325.

Authority in connection with letting of land.]—*See* pp. 325 *et seq.*

Authority to purchase.]—*See* pp. 346 *et seq.*

Authority to pledge credit.]—*See* pp. 352 *et seq.*

Authority to receive payment.]—*See* pp. 361 *et seq.*

Authority to make payment.]—*See* pp. 370 *et seq.*

Authority to sell.]—*See* pp. 373 *et seq.*

Authority to warrant.]—*See* pp. 380 *et seq.*

Authority in respect of other matters.]—*See* pp. 382 *et seq.*

Proof of authority.]—*See* pp. 386 *et seq.*

Delegation of authority.]—*See* pp. 387 *et seq.*

Ratification.]—*See* pp. 396 *et seq.*

(*b*) *Other Classes.*

Insurance agents.]—*See* INSURANCE, Vol. XXIX., pp. 55 *et seq.*

Master of ship.]—*See* SHIPPING.

Secretary of company.]—*See* COMPANIES, Vol. IX., pp. 539, 541, 542, Nos. 3547–3549, 3561–3564, 3567–3575.

Servants of banks.]—*See* BANKERS, Vol. III., pp. 159 *et seq.*

Servants of carriers.]—*See* CARRIERS, Vol. VIII., pp. 16, 30, 46, Nos. 73, 168–171, 290, 291.

B. When Authority Implied.

See, generally, AGENCY, Vol. I., pp. 307 *et seq.*

953. Custom of trade.]—THOROLD *v.* SMITH (1706), Holt, K. B. 462; 11 Mod. Rep. 87; 90 E. R. 1155.

Annotations:—**Refd.** Nickson *v.* Brohan (1713), 10 Mod. Rep. 109. **Mentd.** Williams *v.* Evans (1866), L. R. 1 Q. B. 252.

954. —— Sale on credit.]—NORTH *v.* JACKSON (1859), 2 F. & F. 198, N. P.

Annotation:—**Mentd.** Noran *v.* Pitt (1873), 21 W. R. 525.

See, generally, CUSTOM & USAGES, Vol. XVII., pp. 39 *et seq.*

955. Servant held out as having authority.]—If a master send a clerk, who has the general management of his cash concerns, with a note to a banker to receive the money, & the servant, instead of so doing, gets another person to give him a draft upon the banker for it, & the banker fails before the draft is presented, the master is liable for the loss.

A servant by transacting affairs for his master does thereby derive a general authority & credit from him (*per* CUR.).—NICKSON *v.* BROHAN (1712), 10 Mod. Rep. 109; 88 E. R. 649.

956. ——.]—PALETHORP *v.* FURNISH (1783), 2 Esp. 511, n., N. P.

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948 1. —— *Acts ratified.*]—MCKAY *v.* BOTSFORD (1863), 5 All. 550.—CAN.

957. —— Authority to buy on credit on previous occasions.]—Deft., a linen draper in Yorkshire, had in several instances employed A., as his agent, to purchase on credit goods of pltfs., linen drapers in London. A. without the authority of deft., orders goods in his name to be sent by the usual conveyance, & intercepts them to his own use :—*Held :* deft. is liable for such goods, he having by previous dealings authorised pltfs. to treat A. as his agent.—TODD *v.* ROBINSON (1825), Ry. & M. 217, N. P.

Annotation :—**Mentd.** *Re* Acraman, *Ex p.* Bushell (1844), 3 Mont. D. & De G. 615.

958. —— Housekeeper.]—A baker delivered bread from week to week, & was paid many sums by the housekeeper of his customer, & receipted weekly bills for a period of time subsequent to a time for which the housekeeper had not paid him. In an action by him to recover from his customer the amount of the unpaid bills :—*Held :* the question of negligence was not raised, & pltf. was entitled to the verdict, as deft. did not prove that he had given the housekeeper money for the purpose of paying the bills in question.—MILLER *v.* HAMILTON (1832), 5 C. & P. 433, N. P.

959. —— Secretary of company.]—Pltf. brought his action for goods supplied in 1866 to a mining co. conducted on the cost book principle, of which co. deft. was a shareholder. The last change of partners was in Dec. 1865. To prove his claim, pltf. proved an order by the purser to supply goods, gave general evidence of supply, & put in evidence accounts specifying the amount supplied, submitted by the purser to & passed by the managing committee of the co. It appeared also that payments had been made in 1866, which pltf. had appropriated to a debt incurred before Dec. 1865 :—*Held :* (1) there was evidence of the amount supplied ; (2) pltf. was justified in his appropriation.—GEAKE *v.* JACKSON (1867), 36 L. J. C. P. 108 ; 15 L. T. 509 ; 15 W. R. 338.

C. Revocation of Authority.

960. Servant with authority to pledge credit—Order to servant.]—Although, where a servant has once been held out by his master as having authority to pledge his credit, that authority cannot be withdrawn merely by orders to the servant, but there must be notice to the tradesman ; yet, without express evidence of actual notice, there may be evidence from all the circumstances ; as, lapse of time, the not sending in accounts, etc. ; from which it may be inferred that the tradesman must have known that there was no such authority, & that he did not contract on the credit of the master.—STAVELY *v.* UZIELLI (1860), 2 F. & F. 30.

961. —— Notice to third party—Necessity for express notice—Inference from circumstances.]—STAVELY *v.* UZIELLI, No. 960, *ante.*

Notice to third party.]—*See, also,* AGENCY, Vol. I., p. 618, Nos. 2444, 2447.

D. Other Cases.

See, generally, AGENCY, Vol. I., pp. 295 *et seq.*

962. Authority to pass property.]—A., on behalf of himself & certain other persons, resident in Scotland, his constituents, by deed engaged B. & C. to act as agents & managers in New South Wales, empowering them to purchase sheep, cattle & land, on behalf of A. & his constituents, for which purpose certain sums were remitted to the colony, to be invested for them & placed to their individual interest, & the proceeds of the stock, etc., were to be remitted to their respective credits. B. & C. were to receive for their trouble & expense one-third of the proceeds of the stock. With the money remitted B. & C. bought stock & lands & conducted the establishment in the colony in their own name. B. & C. afterwards became embarrassed & contracted liabilities in the management of the property, & drew bills on A. on account of the establishment, which bills were indorsed by D. & other parties in the colony ; these bills being dishonoured & B. & C. being pressed by the indorsees, executed a deed of assignment & conveyed the whole of the trust property, & some property of their own, to D., for himself & the other indorsees. D. had notice of the deed appointing B. & C. agents & managers & that there was no authority on the part of B. & C. to draw bills on behalf of their constituents, which could personally bind them. Upon a bill filed by A., & his constituents against B., C. & D., to set aside the deed of assignment, as fraudulent & void & for an account, the Supreme Ct. at Sydney held, that pltfs. were not entitled in equity to relief, & that their remedy was to sue D. at law :—*Held :* under the circumstances, B. & C. had, as such agents & managers, authority to dispose of the property entrusted to them, in discharge of the debts incurred by them on behalf of A., & his constituents, in the management of such property, & the deed of assignment was valid as against A. & his constituents, to the extent of subjecting such joint property to the payment of the debts & liabilities contracted, but null & void as to the residue, & an account directed to be taken in the ct. below, of such debts & liabilities.—BUTE (MARCHIONESS) *v.* MASON, *Ex p.* HEARD (1849), 7 Moo. P. C. C. 1 ; 13 E. R. 779, P. C.

963. Authority to give receipt—Solicitor's clerk.]—If an attorney's clerk give a receipt for money on account to a different person from that to whom he gives credit, to enable such person to deceive others, such act of the clerk will not affect the master's right to recover the remainder against such person, though, if the attorney had done it himself, it would be good ground of nonsuit.—WILLIAMS *v.* GOODWIN (1826), 2 C. & P. 257 ; 11 Moore, C. P. 342 ; 4 L. J. O. S. C. P. 141.

SECT. 3.—IN TORT.

SUB-SECT. 1.—IN GENERAL.

See, generally, AGENCY, Vol. I., pp. 594 *et seq.* ; TORT.

964. General rule—Master liable.]—Whoever employs another is answerable for him & undertakes for his care to all that make use of him (HOLT, C.J.).—BOSON *v.* SANDFORD (1689), as reported in 2 Salk. 440 ; 91 E. R. 382 ; *subsequent proceedings* (1690), 1 Show. 101.

Annotations :—**Apld.** Laugher *v.* Pointer (1826), 5 B. & C. 547. **Reld.** Blaikie *v.* Stembridge (1859), 6 C. B. N. S. 894. **Mentd.** Boucher *v.* Lawson (1735), Lee *temp.* Hard. 194 ; Abbot *v.* Smith (1774), 2 Wm. Bl. 947 ; Mitchell *v.* Tarbutt (1794), 5 Term Rep. 649 ; Govett *v.* Radnidge (1802), 3 East, 62 ; Powell *v.* Layton (1806), 2 Bos. & P. N. R. 365 ; Max *v.* Roberts (1807), 2 Bos. & P. N. R. 454 ; Corbett *v.* Packington (1827), 6 B. & C. 268 ; Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213 ; Kendall *v.* Hamilton (1879), 4 App. Cas. 504.

965. —— —.]—GREGORY *v.* PIPER, No. 1155, *post.*

PART IX. SECT. 3, SUB-SECT. 1.

964 1. *General rule—Master liable.*]—A master is liable for wrong done to third parties by his servant provided that the act is done on his behalf & with the intention of serving his purpose.—ISWAR CHUNDER SANTRA *v.* SATISH CHUNDER GIRI (1902), I. L. R. 30 Calc. 207 ; 7 C. W. N. 126.—IND

Sect. 3.—*In tort: Sub-sects.* 1 & 2, *A., B., C., D., E., F., G., H. & I.; sub-sects.* 3 & 4, *A.*]

966. —— ——.]—The master is responsible for the acts of his servant (PARKE, B.).—QUARMAN *v.* BURNETT (1840), 6 M. & W. 499; 9 L. J. Ex. 308; 4 Jur. 969; 151 E. R. 509.

Annotations:—**Apld.** Milligan *v.* Wedge (1840), 12 Ad. & El. 737. Rapson *v.* Cubitt (1842), 9 M. & W. 710. **Distd.** Martin *v.* Temperley (1843), 4 Q. B. 298. **Apld.** Burgess *v.* Gray (1845), 1 C. B. 578. **Consd.** The Eden (1846), 4 Notes of Cases 460; Reedie *v.* L. & N. W. Ry., Hobbit *v.* Same (1849), 4 Exch. 244; Mersey Docks Trustees *v.* Gibbs (1866), L. R. 1 H. L. 93. **Apld.** Jones *v.* Liverpool Corpn. (1885), 14 Q. B. D. 890; The Niobe (1888), 13 P. D. 55. **Apprvd.** Mills *v.* Armstrong, The Bernina (1888), 13 App. Cas. 1. **Distd.** Donovan *v.* Laing, Wharton & Down Construction Syndicate, [1893] 1 Q. B. 629. **Consd.** Jones *v.* Scullard, [1898] 2 Q. B. 565. **Apld.** S.S. Devonshire *v.* Barge Leslie, [1912] A. C. 634. **Refd.** M'Laughlin *v.* Pryor (1842), 4 Man. & G. 48; Allen *v.* Hayward (1845), 7 Q. B. 960; Rich *v.* Basterfield (1847), 4 C. B. 783; Machu *v.* L. & S. W. Ry. (1848), 2 Exch. 415; R. *v.* Hey (1849), 2 Car. & Kir. 983; Gayford *v.* Nicholls (1854), 2 C. L. R. 1066; Holmes *v.* Onion (1857), 2 C. B. N. S. 790; Dalyell *v.* Tyrer (1858), E. B. & E. 899; Blaikie *v.* Stembridge (1859), 6 C. B. N. S. 894; Tobin *v.* R. (1864), 16 C. B. N. S. 310; Williams *v.* Jones (1865), 3 H. & C. 602; Omoa Coal & Iron Co. *v.* Huntley (1877), 2 C. P. D. 464; River Wear Comrs. *v.* Adamson (1877), 2 App. Cas. 743; Dalton *v.* Angus (1881), 6 App. Cas. 740; Spaight *v.* Tedcastle (1881), 6 App. Cas. 217; Hughes *v.* Percival (1883), 8 App. Cas. 443; The European (1885), 10 P. D. 99; The Tasmania (1888), 13 P. D. 110; The Quickstep (1890), 15 P. D. 196; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; Dewar *v.* Tasker (1906), 95 L. T. 87; Robinson *v.* Beaconsfield R. C., [1911] 2 Ch. 188; Padbury *v.* Holliday & Greenwood (1912), 28 T. L. R. 494; Poulson *v.* Jarvis (1919), 89 L. J. K. B. 305; Jefferson *v.* Derbyshire Farmers, [1921] 2 K. B. 281. **Mentd.** Thomas *v.* Rhymney Ry. (1870), L. R. 5 Q. B. 226; White *v.* Jameson (1874), L. R. 18 Eq. 303; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539; Ilford U. D. C. *v.* Beal, [1925] 1 K. B. 671; Parker *v.* Miller (1926), 42 T. L. R. 408.

967. —— —— **Act done by express or implied authority.**]—JONES *v.* HART (1698), as reported in Holt, K. B. 642; 90 E. R. 1255.

968. —— —— ——.]—The general rule is that a master is not liable for the tortious act of his servant, unless that act be done either by an authority, express or implied, given him for that purpose by the master (POLLOCK, C.B.).—ROE *v.* BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. CO. (1851), 7 Exch. 36; 6 Ry. & Can. Cas. 795; 21 L. J. Ex. 9; 155 E. R. 845.

Annotations:—**Distd.** Goff *v.* G. N. Ry. (1861), 3 E. & E. 672. **Consd.** Bank of New South Wales *v.* Owston (1879), 4 App. Cas. 270. **Refd.** Seymour *v.* Greenwood (1861), 6 H. & N. 359; Allen *v.* L. & S. W. Ry. (1870), 19 W. R. 127; Moore *v.* Met. Ry. (1872), 42 L. J. Q. B. 23.

969. Distinguished from liability in contract.]—The act of the servant will not bind the master in actions of tort to the same extent as in actions in contracts.—HARDING *v.* GREENING (1817), Holt, N. P. 531, N. P.; *subsequent proceedings*, 8 Taunt. 42.

970. Distinguished from criminal liability.]—In a civil case masters are responsible for the acts of their servants, but I am not aware that in a criminal case that can be done (MARTIN, B.).—R. *v.* BARRY (1865), 4 F. & F. 389.

971. Liability to the public.]—Where servants are engaged in different departments of duty, an injury committed by one servant upon the other by carelessness or negligence will render the master liable in the same manner as if the injured servant were a stranger. There may be a nicety & difficulty sometimes in deciding whether common employment exists, but in general, by keeping in view what the servant must have known or expected to have been involved in the service which he undertakes, that difficulty may be got over.

For complaints by the public, the master is responsible. Thus, if a servant drives his master's carriage over a bystander; or if a gamekeeper, employed to kill game, fires at a hare so as to shoot a bystander; or if a workman, employed in building, negligently drops a stone from the scaffold, & so hurts a bystander; in all these cases the bystander is entitled to claim reparation from the master, because the master is bound to guarantee the public against all damage arising from the wrongful or careless acts of himself or of his servants.

Where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to show that the circumstances were such as to make some other person responsible. In general it is sufficient for this purpose to show that the person whose neglect caused his injury was at the time when it was occasioned acting not on his own account, but in the course of his employment as a servant in the business of a master. . . . In such a case the maxim *respondeat superior* prevails & the master is responsible (LORD CRANWORTH).—BARTONSHILL COAL CO. *v.* REID (1858), 3 Macq. 266; 31 L. T. O. S. 255; 22 J. P. 560; 4 Jur. N. S. 767; *sub nom.* BARTONSHILL COAL CO. *v.* CLARK, 6 W. R. 664, H. L.

Annotations:—**Apld.** Tebbutt *v.* Bristol & Exeter Ry. (1870), L. R. 6 Q. B. 73. **Refd.** Bartonshill Coal Co. *v.* McGuire (1858), 3 Macq. 300; Senior *v.* Ward (1859), 1 E. & E. 385; Ashworth *v.* Stanwix (1861), 3 E. & E. 701; Mellors *v.* Shaw (1861), 1 B. & S. 437; Searle *v.* Lindsay (1861), 11 C. B. N. S. 429; Clarke *v.* Holmes (1862), 7 H. & N. 937; Holmes *v.* Clarke (1862), 31 L. J. Ex. 356; Waller *v.* S. E. Ry. (1863), 2 H. & C. 102; Morgan *v.* Vale of Neath Ry. (1864), 5 B. & S. 570; Brown *v.* Accrington Cotton Co. (1865), 3 H. & C. 511; Wilson *v.* Merry (1868), L. R. 1 Sc. & Div. 326; Francis *v.* Cockerell (1870), 10 B. & S. 950; Allen *v.* New Gas Co. (1876), 1 Ex. D. 251; Wright *v.* L. & N. W. Ry. (1876), 1 Q. B. D. 252; Thomas *v.* Quartermaine (1887), 56 L. J. Q. B. 340; Butler *v.* Birnbaum (1891), 7 T. L. R. 287; Johnson *v.* Lindsay, [1891] A. C. 371; Smith *v.* Baker, [1891] A. C. 325; Hedley *v.* Pinkney S.S. Co., [1892] 1 Q. B. 58; The Petrel, [1893] P. 320; Burr *v.* Theatre Royal, Drury Lane, [1907] 1 K. B. 544; Cribb *v.* Kynoch, [1907] 2 K. B. 548; Young *v.* Hoffmann Manufacturing Co., [1907] 2 K. B. 646; Coldrick *v.* Partridge, Jones (1909), 26 T. L. R. 164; Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13; Canadian Pacific Ry. *v.* Fréchette, [1915] A. C. 871; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523; Baker *v.* James, [1921] 2 K. B. 674.

972. ——.]—(1) A master is liable for any injury or damage done to the public through the negligence or unskilfulness of servants acting in the master's employ. The reason is, that every act done by the servant in the course of his duty is regarded as done by his master's orders, & consequently is the same as if it were the master's own act, according to the maxim, *qui facit per alium facit per se.*

(2) Although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment (LORD CHELMSFORD, C.).—BARTONSHILL COAL CO. *v.* MCGUIRE (1858), 3 Macq. 300; 31 L. T. O. S. 258; 4 Jur. N. S. 772; *sub nom.* BARTONSHILL COAL CO. *v.* STEWART, 6 W. R. 697, H. L.

Annotations:—*As to* (1) **Consd.** Smith *v.* Baker, [1891] A. C. 325. **Refd.** Brown *v.* Accrington Co-operative Cotton Spinning & Manufacturing Co. (1865), 13 L. T. 94; Abbott *v.* Isham (1921), 124 L. T. 734. *As to* (2) **Consd.** Waller *v.* S. E. Ry. (1863), 2 H. & C. 102; Morgan *v.* Vale of Neath Ry. (1864), 5 B. & S. 570. **Apld.** Coldrick *v.* Partridge, Jones, [1910] A. C. 77. **Refd.** The Petrel, [1893] P. 320. *Generally*, **Refd.** Cribb *v.* Kynock (1907), 76 L. J. K. B. 948.

Liability of corporation.]—*See* CORPORATIONS, Vol. XIII., pp. 398 *et seq.*

SUB-SECT. 2.—LIABILITY OF PARTICULAR CLASSES OF MASTERS.

A. Bankers.

See BANKERS, Vol. III., pp. 160, 161, 163, 166, Nos. 235, 238–240, 250–254, 261.

B. Carriers.

Loss by act of servant.]—*See* CARRIERS, Vol. VIII., pp. 10–12, 41, 42, 53, Nos. 42–47, 244–249, 352–355.

—— **Loss or damage to luggage.**]—*See* CARRIERS, Vol. VIII., pp. 119 *et seq.*

Damage or injury to passengers.]—*See* CARRIERS, Vol. VIII., pp. 72, 75, 80–84, 91–93, 105, 106, 113–117, Nos. 483–487, 507–512, 554–583, 618–630, 698–702, 764–770.

C. Companies and Corporations.

Companies—For acts of officers & agents.]—*See* COMPANIES, Vols. IX. & X., pp. 251–256, 289, 531, 537, 538, 541, 542, 545, 1176, Nos. 1566–1589, 1793, 1794, 3507, 3539, 3540, 3567–3575, 3601–3603, 8345.

Corporations—For acts of servants.]—*See* CORPORATIONS, Vol. XIII., pp. 286, 287, 403–406, 427, Nos. 179–181, 1252–1277, 1505.

Gas-work undertakers.]—*See* GAS, Vol. XXV., p. 482, Nos. 73–80.

D. Highway Authorities.

See HIGHWAYS, Vol. XXVI., pp. 408, 409, Nos. 1292–1299.

E. Innkeepers and Lodging House Keepers.

Liability of innkeepers.]—*See* INNS & INNKEEPERS, Vol. XXIX., pp. 12, 15, Nos. 149, 188.

Liability of lodging house keepers.]—*See* LANDLORD & TENANT, Vol. XXX., p. 518, Nos. 1728, 1729.

F. Proprietors of Hackney Carriages.

See Sub-sect. 13, B. (*a*), *post.*

G. Railway Companies.

973. General rule.]—Railway cos. are liable for damage caused by a want of care on the part of their servants. Where, in starting a train from a station, the engine driver blew off steam at a level crossing, &, in consequence of the noise so caused, a pair of horses which were standing on the public road close by, & waiting to cross the line, became unmanageable, & ran against a wall:—*Held:* there was want of care on the part of the servant, & the co. was liable for the damage thus occasioned to the horses & carriage.—MANCHESTER SOUTH JUNCTION & ALTRINCHAM RY. CO. *v.* FULLARTON (1863), 14 C. B. N. S. 54; 2 New Rep. 78; 11 W. R. 754; 143 E. R. 364.

See, further, RAILWAYS.

Liability as carriers.]—*See* CARRIERS, Vol. VIII., pp. 5 *et seq.*

H. Ship Owners.

See SHIPPING.

I. Other Classes.

Landlord—For acts of bailiff.]—*See* DISTRESS, Vol. XVIII., pp. 330, 332, 333, Nos. 632, 663 *et seq.*

Education authority.]—*See* EDUCATION, Vol. XIX., pp. 556, 557, 563, Nos. 17–24, 50–52.

Sheriffs & bailiffs.]—*See* EXECUTION, Vol. XXI., pp. 545–547, Nos. 1205–1225.

Guardians—For acts of relieving officers, etc.]—*See* POOR LAW.

Solicitors.]—*See* SOLICITORS.

Trade unions.]—*See* TRADE & TRADE UNIONS.

SUB-SECT. 3.—EXPRESS AUTHORITY.

974. Master liable.]—The condition of an obligation was that whereas M. had sold certain lands to pltf., if pltf. peaceably & quietly enjoyed the lands against M., etc. A servant of M. had entered, & cut down five elms, & that in the presence of M., his master, & by his commandment:—*Held:* the condition was broken, & the master was the principal trespasser.—SEAMAN & BROWNING'S CASE (1588), 4 Leon. 123; 74 E. R. 771.

Annotation:—**Refd** Boson *v.* Sandford (1690), 3 Mod. Rep. 321.

975. ——.]—The taking of cattle by a bailiff for his master & at his command is a taking by the master.—HYNDE *v.* WAINMAN (1610), 1 Brownl. 176; 123 E. R. 739.

976. ——.]—SHARROD *v.* LONDON & NORTH WESTERN RY. CO., No. 1070, *post.*

977. Act naturally resulting in tort.]—An action lies against one who sends his coachman to break in horses in Lincoln's Inn Fields, & thereby causes damage to pltf., though the coachman was guilty of no negligence.—MICHELL *v.* ALLESTRY (1676), 3 Keb. 650; 2 Lev. 172; 84 E. R. 932; *sub nom.* MITCHIL *v.* ALESTREE, 1 Vent. 295.

Annotations:—**Consd.** Perkins *v.* Smith (1752), Say. 40. **Expld.** Bush *v.* Steinman (1799), 1 Bos. & P. 404. **Distd.** Manzoni *v.* Douglas (1880), 6 Q. B. D. 145. **Refd.** Scott *v.* Shepherd (1773), 2 Wm. Bl. 892; McManus *v.* Crickett (1800), 1 East, 106; Leame *v.* Bray (1803), 3 East, 593; Whitamore *v.* Waterhouse (1830), 4 C. & P. 383; Lyons *v.* Martin (1838), 3 Nev. & P. K. B. 509. **Mentd.** Piggot *v.* Eastern Counties Ry. (1846), 3 C. B. 229; Hammack *v.* White (1862), 31 L. J. C. P. 129.

978. ——.]—GREGORY *v.* PIPER, No. 1155, *post.*

979. ——.]—An action of trespass will not lie against a master for an unlawful act done by his servants, unless he has directed the doing of such unlawful act, or unless he has ordered some other thing to be done from which the act complained of followed as a physical consequence.

If it had been proved that deft. said to his men: "Raise a weight of 20 tons on this crane, but do not break it," he would have been liable in trespass if it had broken (ROLFE, B.).—GORDON *v.* ROLT (1849), 4 Exch. 365; 7 Dow. & L. 87; 18 L. J. Ex. 432; 13 L. T. O. S. 285; 154 E. R. 1253.

Annotation:—**Refd.** Sharrod *v.* L. & N. W. Ry. (1849), 4 Exch. 580.

980. ——.]—SHARROD *v.* LONDON & NORTH WESTERN RY. CO., No. 1070, *post.*

SUB-SECT. 4.—ACTS WITHIN SCOPE OF AUTHORITY AND COURSE OF EMPLOYMENT.

A. General Rule.

981. Master liable.]—A master is responsible for all acts done by his servant in the course of his employment, though without particular directions.—TURBERVILL *v.* STAMP (1697), Carth.

PART IX. SECT. 3, SUB-SECT. 4.—A.

981 i. *Master liable.*]—A master is not liable for the wrongful act of a servant, though intended to promote the master's interest, if it is an act outside the scope of the servant's employment & authority, & is one which the master himself could not legally do.—COLL *v.* TORONTO RY. CO. (1898), 25 A. R. 55.—**CAN.**

981 ii. ——.]—The doctrine of the liability of a master for his servant's negligence applies in the case of the implied relationship of master & servant sometimes existing between parent & child, but as in the case of master & servant so in that of parent & child there is no liability if at the

Sect. 3.—*In tort: Sub-sect.* 4, *A.*]

425; 1 Com. 32; Comb. 459; Holt, K. B. 9; 1 Ld. Raym. 264; 12 Mod. Rep. 152; 1 Salk. 13; Skin. 681; 91 E. R. 1072.

Annotations:—**Distd.** McManus *v.* Crickett (1800), 1 East, 106. **Consd.** Canterbury *v.* R. (1843), 4 State Tr. N. S. 767. **Apld.** Patten *v.* Rea (1857), 2 C. B. N. S. 606. **Expld.** Williams *v.* Jones (1865), 13 L. T. 300. **Refd.** Huzzey *v.* Field (1835), 2 Cr. M. & R. 432; Lyons *v.* Martin (1838), 1 Will. Woll. & H. 500; Filliter *v.* Phippard (1847), 11 Q. B. 347; Limpus *v.* London General Omnibus Co. (1862), 1 H. & C. 526; R. *v.* Stephens (1866), 7 B. & S. 710; Burns *v.* Poulson (1873), 29 L. T. 329; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489. **Mentd.** Brucker *v.* Fromont (1796), 6 Term Rep. 659; Philpot *v.* Page (1825), 6 Dow. & Ry. K. B. 281; Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468; Rose *v.* Groves (1843), 5 Man. & G. 613; Smith *v.* Kenrick (1849), 7 C. B. 515; Vaughan *v.* Taff Vale Ry. (1860), 2 L. T. 394; Jones *v.* Festiniog Ry. (1868), L. R. 3 Q. B. 733; Crowhurst *v.* Amersham Burial Board (1878), 4 Ex. D. 5; Musgrove *v.* Pandelis, [1919] 2 K. B. 43.

982. ——.] — The liability of a master for ignorance, neglect, or want of honesty in the conduct of his servant, while within the proper scope of his employment, is a rule universally recognised, & indeed essential to the protection of mankind in the transaction of their affairs. Nevertheless, it does appear to me exceedingly difficult, if not impossible, to define with exactness the meaning of the phrase "within the scope of their employment." The present case, it has been contended, affords a clear exception to the general rule of the liability of the master for the acts of his servant, for in this case the injury inflicted on another party was the effect of wilful & malicious conduct on the part of the servant (DR. LUSHINGTON).—THE DRUID (1842), 1 Wm. Rob. 391; 1 Notes of Cases, 444; 6 Jur. 441; 166 E. R. 619.

Annotations:—**Expld.** The Seine (1859), Sw. 411. **Consd.** The Tasmania (1888), 13 P. D. 110. **Refd.** The Bold Buccleugh (1850), 3 Wm. Rob. 220; The James Seddon (1866), 35 L. J. Adm. 117; The Ripon City, [1897] P. 226. **Mentd.** The Ida (1860), Lush. 6; The Charkieh (1873), L. R. 4 A. & E. 59; The Lemington (1874), 32 L. T. 69; The Leon (1881), 6 P. D. 148; The Longford (1889), 60 L. T. 373; Morgan *v.* Castlegate S.S. Co., The Castlegate, [1893] A. C. 38; The Sylvan Arrow, [1923] P. 220.

983. ——.] — Carters were employed by a contractor by the day to take rubbish from certain works to his dump & to tip it there, & were strictly forbidden to tip it anywhere else. Some of the carters, without the knowledge of the contractor, & in contravention of their orders, took the rubbish to a piece of unfenced land, the property of pltfs., & tipped it there. They did this for their own convenience & for a purpose of their own. The unfenced land was nearer to the works than the dump of the contractor. In an action by pltfs. against the contractor for an injunction:—*Held:* the illegal acts complained of were not within the sphere of the carters' employment, & consequently the contractor was not liable for them.—RAND *v.* CRAIG, [1919] 1 Ch. 1; *sub nom.* RANK (JOSEPH), LTD. *v.* CRAIG, 88 L. J. Ch. 45; 119 L. T. 751; 35 T. L. R. 8; 63 Sol. Jo. 39, C. A.

Annotation:—**Refd.** Performing Right Soc. *v.* Mitchell & Booker (Palais De Danse), [1924] 1 K. B. 762.

984. —— **Servant selected voluntarily.**]—Upon general principle, a man is answerable for the acts of his servants, for injuries done by them to others within the scope of their employment; & why? Because he selects them, & the selection is voluntary. But if a man is compelled to employ another, the principle upon which liability depends wholly fails (DR. LUSHINGTON).—THE MARIA (1830), 1 Wm. Rob. 95; 166 E. R. 508.

Annotations:—**Consd.** The Annapolis, The Johanna Stoll (1861), Lush. 295. **Expld.** Beechgrove S.S. Co. *v.* Akt. Fjord of Kristiania, [1916] 1 A. C. 364. **Refd.** The Agricola (1843), 2 Wm. Rob. 10; Martin *v.* Temperley (1843), 4 Q. B. 298; The Bilbao (1860), Lush. 149; The Penrith Castle, [1918] P. 142. **Mentd.** The Arbutus (1864), 11 L. T. 208; The Lion (1869), L. R. 2 P. C. 525.

985. —— **Servant acting for master's benefit.**]—Where the owner of a boat which was accustomed to ply for hire, & to carry passengers across a haven, employed a servant for that purpose, & the servant on one occasion received a passenger on board, & carried him across the haven near the line of an ancient ferry, & paid the fare over to his master:—*Held:* the servant was acting at the time in the course of his master's service &

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time the negligent act is committed the child is engaged in his own affairs & not on the parent's behalf.—FILE *v.* UNGER (1900), 27 A. R. 468.—**CAN.**

981 iii. ——.]—HAMMOND *v.* GRAND TRUNK RY. CO. (1904), 4 O. W. R. 530; 25 C. L. T. 35; 9 O. L. R. 64.—**CAN.**

981 iv. ——.]—A master is liable for an injury caused by the wrongful act of his servant within the scope of his authority, although the master has expressly forbidden the servant to do the act from which the injury resulted.—READ *v.* MCGIVNEY (1904), 36 N. B. R. 513.—**CAN.**

981 v. ——.]—FORSYTHE *v.* CANADIAN PACIFIC RY. CO. (1905), 6 O. W. R. 242; 10 O. L. R. 73.—**CAN.**

981 vi. ——.]—SHEPPARD PUBLISHING CO. *v.* PRESS PUBLISHING CO. (1905), 5 O. W. R. 775; 10 O. L. R. 243.—**CAN.**

981 vii. ——.]—MALCOLM *v.* MCNICHOL (1906), 16 Man. L. R. 411; 39 S. C. R. 265.—**CAN.**

981 viii. ——.]—Where owing to a fog defts. co.'s trams were not running according to the time table, & the tram on which pltf. was stopped & the conductor told pltf. to change to another tram ahead which would also take pltf. to her destination, & in making the change pltf. fell & was injured, it must be assumed, in the absence of evidence to the contrary, that the conductor had authority to use his discretion as to the best means of bringing the passengers to their destinations.—SCHNELL *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (1910), 15 B. C. R. 378.—**CAN.**

981 ix. ——.]—To make the master liable for an injury caused by the negligence of his servant, the latter must have been acting at the time in the course of his employment, & if, at the time when the injury took place, he was engaged, not on his master's business, but on his own, the relation of master & servant did not then exist, & the master is not liable to third persons for the manner in which that business is performed.—HALPARIN *v.* BULLING (1914), 28 W. L. R. 187; 5 W. W. R. 37; 20 D. L. R. 598; 24 Man. L. R. 235; 50 S. C. R. 471.—**CAN.**

981 x. ——.]—The owners of a motor boat engaged in connection with certain construction work are not responsible for an accident causing the death of a passenger who is being carried gratuitously & at his own request, where the person employed in connection with the operation of the motor boat has no authority from the owners to carry passengers, &, in giving his assent to deceased becoming a passenger, was acting outside the scope of his employment.—DONALDSON *v.* ACADIA SUGAR REFINING CO. (1915), 48 N. S. R. 451.—**CAN.**

981 xi. ——.]—BYRNE *v.* LONDONDERRY TRAMWAY CO., [1902] 2 I. R. 457.—**IR.**

981 xii. ——.]—POWELL *v.* M'GLYNN & BRADLAW, [1902] 2 I. R. 154.—**IR.**

981 xiii. ——.]—DOWLING *v.* ROBINSON (1909), 43 I. L. T. 210.—**IR.**

981 xiv. ——.]—Except, possibly, in cases of fraud, the tortious act of a servant cannot be within the scope of *any implied authority, unless the act* of the servant was one which the master might legally have done.—M'NAMARA *v.* BROWN, [1918] 2 I. R. 215.—**IR.**

981 xv. ——.]—Although a master may be liable for an act of his servant done against his orders, this can only be where the act is done in the course of the master's service & for the master's benefit.—HARDIE SHAW *v.* TOMLINSON (1905), 25 N. Z. L. R. 612.—**N.Z.**

981 xvi. ——.]—M'LAREN *v.* RAE (1827), 4 Murr. 384.—**SCOT.**

981 xvii. ——.]—By the Scottish law, the master is liable for the consequence of any act done negligently by the servant, within the scope or in the discharge of his general or prescribed duty.—MACKENZIE *v.* MACLEOD (1834), 3 L. J. C. P. 79.—**SCOT.**

981 xviii. ——.]—BOWIE'S TRUSTEES *v.* WATSON, [1913] S. C. 326.—**SCOT.**

981 xix. ——.]—Whoever appoints a person to any function is answerable for the wrongs & neglects which his agent may commit in the exercise of the functions to which he is appointed.—MKIZE *v.* MARTENS, [1914] App. D. 382.—**S. AF.**

981 xx. ——.]—A master is liable for the torts of his servant committed in the course of his employment.—MBARA *v.* LANDREY, [1917] C. P. D. 599.—**S. AF.**

for his master's benefit, & the master was answerable for his act, & would have been liable in an action on the case for such act, if it had been distinctly proved to have amounted to an invasion of the ferry.—HUZZEY *v.* FIELD (1835), 2 Cr. M. & R. 432; 1 Gale, 165; 5 Tyr. 855; 4 L. J. Ex. 239; 150 E. R. 186.

Annotations:—**Expld.** Limpus *v.* London General Omnibus Co. (1862), 1 H. & C. 526. **Refd.** Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489. **Mentd.** Pim *v.* Curell (1840), 6 M. & W. 231; Cory *v.* Yarmouth & Norwich Ry. (1844), 3 Hare, 593; North & South Shields Ferry Co. *v.* Barker (1848), 2 Exch. 136; Blacketer *v.* Gillett (1850), 14 L. T. O. S. 351; Matthews *v.* Peache (1855), 20 J. P. 244; Newton *v.* Cubitt (1862), 12 C. B. N. S. 32; Hopkins *v.* G. N. Ry. (1877), 2 Q. B. D. 224; A.-G. *v.* Simpson, [1901] 2 Ch. 671; Cowes U. D. C. *v.* Southampton, Isle of Wight & South of England Royal Mail Steam Packet Co., [1905] 2 K. B. 287; General Estates Co. *v.* Beaver, [1914] 3 K. B. 918; Hammerton *v.* Dysart, [1916] 1 A. C. 57.

986. —— ——.]—Where a servant or agent commits a wrong within the scope of his employment, & in the interests, or supposed interests, of the master or principal, & not for his own private & fraudulent purposes, the master or principal is liable. On the other hand, if the wrong is committed by a servant or agent, not for his master's or principal's purposes or interests, but to carry out the servant's own private ends, the master or principal is not liable.—MALCOLM, BRUNKER & CO., LTD. *v.* WATERHOUSE & SONS (1908), 24 T. L. R. 854.

987. —— —— **No express command or privity of master proved.**]—The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service & for the master's benefit, though no express command or privity of the master be proved (WILLES, J.).—BARWICK *v.* ENGLISH JOINT STOCK BANK (1867), L. R. 2 Exch. 259; 36 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877, Ex. Ch.

Annotations:—**Folld.** Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394. **Consd.** Bolingbroke *v.* Swindon L. B. (1874), L. R. 9 C. P. 575; Weir *v.* Bell (1878), 3 Ex. D. 238; Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317; British Mutual Banking Co. *v.* Charnwood Forest Ry. (1887), 18 Q. B. D. 714. **Expld.** Thorne *v.* Heard, [1894] 1 Ch. 599. **Consd.** Whitechurch *v.* Cavanagh, [1902] A. C. 117; Hambro *v.* Burnand, [1903] 2 K. B. 399. **Expld.** Hamlyn *v.* Houston, [1903] 1 K. B. 81. **Apld.** Giblan *v.* National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; Ruben *v.* Great Fingall Consolidated, [1906] A. C. 439. **Consd.** Malcolm, Brunker *v.* Waterhouse (1908), 24 T. L. R. 854. **Distd.** Wake *v.* Dyer (1911), 104 L. T. 448. **Consd.** Lloyd *v.* Grace, Smith, [1912] A. C. 716. **Refd.** The Thetis (1869), L. R. 2 A. & E. 365; Edwards *v.* L. & N. W. Ry. (1870), L. R. 5 C. P. 445; Swire *v.* Francis (1877), 3 App. Cas. 106; Baldry *v.* Bates (1885), 1 T. L. R. 311; Spooner *v.* Browning, Todd & Whish (1897), 77 L. T. 685; Ormerod *v.* Rochdale Corpn. (1898), 62 J. P. 153; Taff Vale Ry. *v.* Amalgamated Soc. of Ry. Servants, [1901] A. C. 426; Pearson *v.* Dublin Corpn., [1907] A. C. 351; Burdett *v.* Horne (1911), 27 T. L. R. 402. Janvier *v.* Sweeney, [1919] 2 K. B. 316. **Mentd.** Swift *v.* Jewsbury (1874), L. R. 9 Q. B. 301; Dixon *v.* Reuter's Telegram Co. (1877), 41 J. P. 167; *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807; Chapleo *v.* Brunswick Benefit Bldg. Soc. (1881), 6 Q. B. D. 696; Mullens *v.* Miller (1882), 31 W. R. 559; Marsh *v.* Joseph (1896), 66 L. J. Ch. 128; Dunlop Pneumatic Tyre Co. *v.* Maison Talbot, Shrewsbury & Talbot & Weigel, Clipper Pneumatic Tyre Co. *v.* Maison Talbot, Shrewsbury & Talbot & Weigel (1903), 52 W. R. 254; Citizens' Life Assco. *v.* Brown, [1904] A. C. 423; Kettlewell *v.* Refuge Assce., [1908] 1 K. B. 545; Watkins *v.* Naval Colliery Co. (1912), 107 L. T. 321; Mair *v.* Rio Grande Rubber Estates, [1913] A. C. 853; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244.

988. —— —— ——.]—A master is answerable for every such wrong of his servant or agent as is committed in the course of the service & for the master's benefit, though no express command or privity of the master be proved; & there is no distinction between the case of fraud & the case of any other wrong.—MACKAY *v.* COMMERCIAL BANK OF NEW BRUNSWICK (1874), L. R. 5 P. C. 394; 43 L. J. P. C. 31; 30 L. T. 180; 38 J. P. 296; 22 W. R. 473, P. C.

Annotations:—**Consd.** Weir *v.* Barnett (1878), 38 L. T. 929; Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317. **Expld.** Chapleo *v.* Brunswick Benefit Bldg. Soc. (1881), 6 Q. B. D. 696. **Consd.** British Mutual Banking Co. *v.* Charnwood Forest Ry. (1887), 18 Q. B. D. 714; Hambro *v.* Burnand, [1903] 2 K. B. 399; Lloyd *v.* Grace, Smith, [1912] A. C. 716. **Refd.** Bolingbroke *v.* Swindon L. B. (1874), L. R. 9 C. P. 575; Hogarth *v.* Wherley (1875), 32 L. T. 800; Swire *v.* Francis (1877), 3 App. Cas. 106; Bank of New South Wales *v.* Owston (1879), 4 App. Cas. 270; Ludgater *v.* Love (1881), 44 L. T. 694; Spooner *v.* Browning, Todd & Whish (1897), 77 L. T. 685; Citizens' Life Assco. Co. *v.* Brown, [1904] A. C. 423; Kettlewell *v.* Refuge Assco. Co. (1907), 24 T. L. R. 216. **Mentd.** Mullens *v.* Miller (1882), 31 W. R. 559; *Re* Mutual Aid Permanent Benefit Bldg. Soc., *Ex p.* James (1883), 49 L. T. 530; Hirst *v.* West Riding Union Banking Co. (1901), 70 L. J. K. B. 828.

989. —— —— **Though contrary to instructions.**]—The driver of an omnibus belonging to defts., in order to prevent a rival omnibus passing him, drew his omnibus across the road, & striking against the horses of the rival omnibus, caused it to be upset:—*Held:* deft. was responsible for the act of his servant in so doing, notwithstanding the driver purposely drew across the road with a view of obstructing the other omnibus & defts. in printed instructions required their drivers not to interfere with other omnibuses if he considered that what he was doing was to the interest of his employers.—LIMPUS *v.* LONDON GENERAL OMNIBUS CO. (1862), 1 H. & C. 526; 32 L. J. Ex. 34; 7 L. T. 641; 27 J. P. 147; 11 W. R. 149; 158 E. R. 993; *sub nom.* GENERAL OMNIBUS CO., LTD. *v.* LIMPUS, 9 Jur. N. S. 333, Ex. Ch.; *previous proceedings, sub nom.* LIMPUS *v.* LONDON GENERAL OMNIBUS CO. (1861), 2 F. & F. 640, N. P.

Annotations:—**Consd.** Poulton *v.* L. & S. W. Ry. (1867), L. R. 2 Q. B. 534; Wigan Borough Case (1869), 1 O'M. & H. 188. **Distd.** Vickery *v.* G. E. Ry. (1898), 79 L. T. 121. **Apld.** Giblan *v.* National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600. **Consd.** Boyle *v.* Smith (1905), 94 L. T. 30. **Distd.** Harris *v.* Fiat Motors (1906), 22 T. L. R. 556. **Consd.** Rand *v.* Craig, [1919] 1 Ch. 1; Performing Right Soc. *v.* Mitchell & Booker (Palais De Danse), [1924] 1 K. B. 762. **Refd.** Splents *v.* Lefevre (1864), 11 L. T. 111; Tobin *v.* R. (1864), 16 C. B. N. S. 310; Williams *v.* Jones (1865), 3 H. & C. 256; Grill *v.* General Iron Screw Collier Co. (1866), 12 Jur. N. S. 727; Burns *v.* Poulsom (1873), L. R. 8 C. P. 563; British Mutual Banking Co. *v.* Charnwood Forest Ry. (1887), 18 Q. B. D. 714; Harding *v.* Barker (1888), 53 J. P. 308; Flood *v.* Jackson, [1895] 2 Q. B. 21; Whitechurch *v.* Cavanagh, [1902] A. C. 117; Ruben *v.* Great Fingall Consolidated, [1906] A. C. 439; Malcolm, Brunker *v.* Waterhouse (1908), 24 T. L. R. 854; Smith *v.* Martin & Kingston-upon-Hull Corpn., [1911] 2 K. B. 775; Lloyd *v.* Grace, Smith, [1912] A. C. 716; Janvier *v.* Sweeney (1919), 35 T. L. R. 226; Soanes *v.* L. & S. W. Ry. (1919), 88 L. J. K. B. 524. **Mentd.** Submarine Telegraph Co. *v.* Dickson (1864), 33 L. J. C. P. 139; Ward *v.* General Omnibus Co. (1873), 42 L. J. C. P. 265; Brown *v.* Foot (1892), 66 L. T. 649; Dyer *v.* Munday, [1895] 1 Q. B. 742; Anglo American Oil Co. *v.* Manning, [1908] 1 K. B. 536.

990. —— —— ——.]—GRIERSON, OLDHAM & CO., LTD. *v.* BIRMINGHAM HOTEL & RESTAURANT CO., LTD., No. 1062, *post.*

991. —— —— —— **Benefit resulting to master immaterial.**]—A principal must be liable for the fraud of his agent committed in the course of his agent's employment & not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not (LORD MACNAGHTEN).—LLOYD *v.* GRACE, SMITH & CO., [1912] A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 28 T. L. R. 547; 56 Sol. Jo. 723, H. L.; *revsg.*, [1911] 2 K. B. 489, C. A.

Annotations:—**Distd.** Radley *v.* L. C. C. (1913), 109 L. T. 162. **Consd.** Rand *v.* Craig, [1919] 1 Ch. 1. **Expld.** Mintz *v.* Silverton (1920), 36 T. L. R. 399; Underwood *v.* Bank of Liverpool & Martins, Underwood *v.* Barclays Bank, [1924] 1 K. B. 775. **Refd.** Mair *v.* Rio Grande Rubber Estates, [1913] A. C. 853; Armstrong *v.* Jackson, [1917] 2 K. B. 822; Janvier *v.* Sweeney (1919), 35 T. L. R. 226; Percy *v.* Glasgow Corpn., [1922] 2 A. C. 299. **Mentd.**

Sect. 3.—*In tort: Sub-sect.* 4, *A., B., C., D. & E.; sub-sect.* 5.]

Smith *v.* Martin & Kingston-upon-Hull Corpn., [1911] 2 K. B. 775; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244.

992. ——— **Acts done in protection of master's property.**]—POLAND *v.* PARR (JOHN) & SONS, No. 890, *ante.*

Liability of corporation.]—*See* CORPORATIONS, Vol. XIII., pp. 403, 404, Nos. 1253–1256.

Liability of company.]—*See* COMPANIES, Vol. IX., pp. 624 *et seq.*

B. Meaning of Scope of Authority and Course of Employment.

993. Not capable of precise definition.]—THE DRUID, No. 982, *ante.*

994. Servant doing what master employed him to do.]—STOREY *v.* ASHTON, No. 1093, *post.*

995. ———.]—GILLSON *v.* LONDON & INDIA DOCKS JOINT COMMITTEE (1892), 8 T. L. R. 702, C. A.

996. Equivalent terms—Extending master's liability—Beyond actual authority given.]—Deft. employed a person to manage a branch of his business, which was the sale of furniture on the hire-purchase system. The manager sold a piece of furniture to a person who was lodging in pltf.'s house, & on one of the instalments being in arrear, went to the house & removed the furniture. While so doing he assaulted pltf. For the assault he was summoned, convicted & fined, & he paid the fine. In an action against deft. in respect of the assault the jury found that the manager committed the assault in the course of his employment: —*Held:* the mere fact that the assault was a criminal offence, & not only a tortious act, & the release of the servant, under Offences against the Person Act, 1861 (c. 100), s. 45, from civil proceedings for the assault, did not release deft. from liability.

If the expression scope of authority means authority, the case would be different; but it seems to me that it has exactly the same meaning as the expression course of employment, & the act complained of must be done in the course of the employment of the person doing it, though it may be beyond any authority actually given to him (RIGBY, L.J.).—DYER *v.* MUNDAY, [1895] 1 Q. B. 742; 64 L. J. Q. B. 448; 72 L. T. 448; 59 J. P. 276; 43 W. R. 440; 11 T. L. R. 282; 14 R. 306, C. A.

Annotations:—**Consd.** Radley *v.* L. C. C. (1913), 109 L. T. 162; Jefferies & Alkey *v.* Derbyshire Farmers (1920), 36 T. L. R. 825. **Mentd.** Hamlyn *v.* Houston (1902), 87 L. T. 500.

C. Question for Jury.

997. General rule.]—WOOLLEY *v.* CURLING (*circa* 1873), cited in L. R. 8 C. P. at p. 565.

Annotation:—**Refd.** Burns *v.* Poulsom (1873), L. R. 8 C. P. 563.

998. ———.]—GOODMAN *v.* KENNELL, No. 1124, *post.*

999. ———.]—By the law of Scotland, the tenant is liable to his landlord, if premises are burnt down by negligence or misconduct of the tenant's servant, in the ordinary scope of employment. Deft.'s servant burnt down a house demised to deft. in Scotland, by lighting furze & straw with a view to cleanse a chimney which smoked, although she had been cautioned against the danger of such a proceeding. In an action brought against deft. by his landlord for this injury:—*Held:* it was properly left to the jury to say, whether the servant was acting within the general scope of her duty; & the jury having found for deft., the ct. refused to grant a new trial. —MCKENZIE *v.* MCLEOD (1834), 10 Bing. 385; 4 Moo. & S. 249; 3 L. J. C. P. 79; 131 E. R. 953.

Annotations:—**Distd.** Bayley *v.* M. S. & L. Ry. (1873), L. R. 8 C. P. 148. **Refd.** Williams *v.* Jones (1865), 3 H. & C. 256. **Mentd.** *Ite* Skingley (1851), 3 Mac. & G. 221.

1000. ———.]—Deft., a contractor under a district board, was engaged in constructing a sewer, & employed men with horses & carts. The men so employed were allowed an hour for dinner, but were not permitted to go home to dine or to leave their horses & carts. One of the men went home about a quarter of a mile out of the direct line of his work to his dinner, & left his horse unattended in the street before his door. The horse ran away & damaged certain railings belonging to pltf.:—*Held:* it was properly left to the jury to say whether the driver was acting within the scope of his employment, & they were justified in finding that he was.—WHATMAN *v.* PEARSON (1868), L. R. 3 C. P. 422; *sub nom.* WHITMAN *v.* PEARSON, 37 L. J. C. P. 156; 18 L. T. 290; 16 W. R. 649.

Annotations:—**Consd.** Burns *v.* Poulsom (1873), L. R. 8 C. P. 563. **Refd.** Sanderson *v.* Collins (1904), 73 L. J. K. B. 358; Rand *v.* Craig, [1919] 1 Ch. 1. **Mentd.** Edwards *v.* St. Mary, Islington, Vestry (1889), 22 Q. B. D. 338; Bradley *v.* Wallaces, [1913] 3 K. B. 629; Myers *v.* Bradford Corpn. (1913), 110 L. T. 254.

1001. ———.]—One, W., being employed to cart certain iron to a wharf, & deft., a stevedore, to ship it on board a ship alongside, deft.'s foreman, who was acting for him, being dissatisfied with the uncarting of the iron by W.'s carters, got into the cart, threw out some iron, & in so doing injured pltf. Two of pltf.'s witnesses said it was the duty of W.'s carters to put the iron on the ground, & of the stevedore then to take it, & this was the only evidence as to the duty of deft. & his servants: —*Held:* it was a question for the jury whether, in the particular case, the foreman was acting within the scope of his employment.—BURNS *v.* POULSOM (1873), L. R. 8 C. P. 563; 42 L. J. C. P. 302; 29 L. T. 329; 37 J. P. 776; 22 W. R. 20.

1002. ———.]—The owner of a dog known by him to be savage entrusted it to the care of a servant, who incited it to attack pltf., & thereupon the dog bit pltf., who brought an action against the owner in the county ct. for damages. The county ct. judge having nonsuited pltf.:—*Held:* the action must go down for new trial on the ground that the question whether the servant was acting within the scope of his employment ought to have been left to the jury.—BAKER *v.* SNELL, [1908] 2 K. B. 825; 77 L. J. K. B. 1090; 99 L. T. 753; 24 T. L. R. 811; 52 Sol. Jo. 681; 21 Cox, C. C. 716, C. A.

Annotations:—**Mentd.** Lowery *v.* Walker (1909), 78 L. J. K. B. 874; Clinton *v.* Lyons, [1912] 3 K. B. 198.

PART IX. SECT. 3, SUB-SECT. 4.—B.

993 i. *Not capable of precise definition.*]—The expression "scope of authority" in its relevant sense may be wider than the limits of the "authority" itself.—BUGGE *v.* BROWN, [1919] V. L. R. 264.—**AUS.**

994 i. *Servant doing what master employed him to do.*]—A tradesman's teamster, sent out to deliver parcels, went to his supper before completing the delivery. He afterwards started to finish his work, & in doing so ran over & injured a child:—*Held:* from the moment he had started to complete the business in which he had been engaged he was in his master's employ just as if he had returned to his master's store & made a fresh start.—MERRITT *v.* HERENSTAL (1895), 25 S. C. R. 150. —**CAN.**

PART IX. SECT. 3, SUB-SECT. 4.—C.

997 i. *General rule.*]—WARD *v.* ROY W. SANDFORD, LTD. (1919), 19 N. S. W. L. R. 172; 36 N. S. W. W. N. 71. —**AUS.**

997 ii. ———.]—The question whether the act of a servant is done in the course of his employment is for the jury.—BERNSTEIN *v.* LYNCH (1913), 28 O. L. R. 435; 4 O. W. N. 1005. —**CAN.**

1003. ——.]—Applt. hailed a tramcar belonging to resps., but it did not stop & he ran after it & ultimately caught it & complained to the conductor with regard to the car not having stopped. The conductor then asked applt. for the fare, & as applt. was putting his hand in his pocket to get the money the conductor ejected him from the car. In an action by applt. against resps. for assault, the judge held that there was no case to go to the jury, & this decision was affirmed by the Ct. of Appeal :—*Held :* there was evidence that the conductor thought he was acting within the scope of his authority, & the case ought to have been left to the jury.—HUTCHINS *v.* LONDON COUNTY COUNCIL (1915), 85 L. J. K. B. 1177 ; 114 L. T. 377 ; 80 J. P. 193 ; 32 T. L. R. 179 ; 60 Sol. Jo. 156 ; 14 L. G. R. 313, H. L.

Annotation :—**Refd.** Whittaker *v.* L. C. C., [1915] 2 K. B. 676.

D. Effect of Knowledge of Servant.

See, generally, AGENCY, Vol. I., pp. 610 *et seq.*

1004. Whether binding on master—Railway company—Traveller with pass made out in another's name.]—In an action against a railway co., the declaration stated that pltf. was lawfully in a carriage on a public highway, & then alleged an injury sustained through the negligence of deft.'s servants. Defts. pleaded that pltf. was unlawfully, & not lawfully, in the carriage as alleged. The evidence was, that pltf. was travelling on defts.' railway with a pass ticket made out in the name of a person other than pltf., & which contained on the face of it a memorandum stating that it was not transferable, & that other person using it would be liable to some penalties, or be liable to pay the fare ; but which of these liabilities it specified was not distinctly proved :—*Held :* the pass ticket was not so clear as to render other circumstances immaterial, & therefore that evidence to show that other persons had often travelled with similar tickets not bearing the names of those who used them, & that some of those persons were personally known to some of the officers or servants of defts., & that in the present instance one of defts.' servants saw & examined pltf.'s pass, & then put him into the carriage, although there was no proof that pltf. himself was known to the person who placed him in the carriage, might be left for the consideration of the jury as some evidence that pltf. was lawfully in the carriage on the highway as alleged.—GREAT NORTHERN RY. CO. *v.* HARRISON (1854), 10 Exch. 376 ; 2 C. L. R. 1136 ; 23 L. J. Ex. 308 ; 23 L. T. O. S. 247 ; 18 Jur. 792 ; 2 W. R. 626 ; 156 E. R. 489, Ex. Ch.

Annotations :—**Refd.** Alton *v.* Mid. Ry. (1865), 13 W. R. 918 ; Grand Trunk Ry. of Canada *v.* Barnett, [1911] A. C. 361. **Mentd.** Sutton *v.* G. W. Ry. (1865), 3 H. & C. 800.

1005. —— —— **Child playing on railway.**]—A railway co. kept a turntable unlocked (& therefore dangerous for children) on their land close to a public road. The co.'s servants knew that children were in the habit of trespassing & playing with the turntable, to which they obtained easy access through a well worn gap in a fence which the railway co. were bound by statute to maintain. A child between four & five years old playing with other children on the turntable having been seriously injured :—*Held :* there was evidence for a jury of actionable negligence on the part of the ry. co.—COOKE *v.* MIDLAND GREAT WESTERN RY. OF IRELAND, [1909] A. C. 229 ; 78 L. J. P. C. 76 ; 100 L. T. 626 ; 25 T. L. R. 375 ; 53 Sol. Jo. 319, H. L.

Annotations :—**Distd.** Schofield *v.* Bolton Corpn. (1909), 26 T. L. R. 230 ; Jenkins *v.* G. W. Ry., [1912] 1 K. B. 525 ; Hardy *v.* C. L. Ry., [1920] 3 K. B. 459. **Refd.** Latham *v.* Johnson, [1913] 1 K. B. 398 ; Crane *v.* South Suburban Gas Co., [1916] 1 K. B. 33 ; Glasgow Corpn. *v.* Taylor, [1922] 1 A. C. 44. **Mentd.** Lowery *v.* Walker, [1910] 1 K. B. 173 ; Barker *v.* Herbert, [1911] 2 K. B. 633 ; Clinton *v.* Lyons, [1912] 3 K. B. 198 ; Rickards *v.* Lothian, [1913] A. C. 263 ; Wheeler *v.* Morris (1915), 113 L. T. 644 ; Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253.

1006. —— —— ——.]—**An infant two & a half years old, whose parents lived in a house close to defts.'** line, went on the main line of the railway & was injured. The jury found that the child got on the line through a fence separating the railway from a high road ; that some of the railway servants knew that children were in the habit of playing on a pile of sleepers inside the fence, but did not know they were in the habit of getting on the main line ; that the fence was not reasonably fit for separating the railway from the high road, having regard to the proximity of the houses ; & that the children were in the habit of getting on to the pile of sleepers by the leave or licence of defts. :—*Held :* the leave & licence found by the jury did not extend to make defts. liable for what happened to a child going beyond the pile of sleepers on to the line, & judgment was rightly entered for defts.

It is not sufficient to say that some servant of the railway co. must have known of this. It depends what servant. The knowledge of an errand boy employed by the railway co. is not knowledge of the co., & to have a vague finding that some of defts.' servants must have known of this, & to deduce from that knowledge which must be imputed to the co., & thereby a licence imputed from the co. to the children to play on these sleepers, appears to me to be a series of very dangerous steps (FLETCHER MOULTON, L.J.).—JENKINS *v.* GREAT WESTERN RY. CO., [1912] 1 K. B. 525 ; 81 L. J. K. B. 378 ; 105 L. T. 882, C. A.

Annotations :— **Refd.** Latham *v.* Johnson, [1913] 1 K. B. 398. **Mentd.** Clinton *v.* Lyons, [1912] 3 K. B. 198.

—— **Ferocity of animal.**]—*See* ANIMALS, Vol. II., pp. 245, 246, Nos. 291–296.

—— **Corporation.**]—*See* CORPORATIONS, Vol. XIII., p. 407, No. 1278.

E. Particular Torts.

See Sub-sects. 8–16, *post.*

SUB-SECT. 5.—RATIFICATION BY MASTER.

See, generally, AGENCY, Vol. I., pp. 396 *et seq.*

1007. General rule—Master liable.]—A. acted as the owner of premises, & made a contract with a water co. to supply the premises with water at a certain height. In his absence his man, to the injury of the co., fixed the pipe at a higher level. After it was done, A. knew of it. A. was not in fact the owner of the premises :—*Held :* he was liable in an action on the case brought by the co.

A man is answerable for acts of his servants if he adopts those acts (LORD TENTERDEN, C.J.).—WEST MIDDLESEX WATERWORKS CO. *v.* SUWERKROP (1829), 4 C. & P. 87 ; Mood. & M. 408, N. P.

Annotations :—**Mentd.** Church *v.* Imperial Gas Light & Coke Co. (1837), 6 Ad. & El. 846 ; Gurr *v.* Scudds (1855), 11 Exch. 190.

PART IX. SECT. 3, SUB-SECT. 5.

1007 1. *General rule—Master liable.*]—A person may by ratifying the tortious acts of his subordinate become responsible for the consequences of such acts.—WHITTAKER *v.* ROOS, MORANT *v.* ROOS, [1912] App. D. 92.—S. AF.

Sect. 3.—*In tort: Sub-sects.* 5 *&* 6, *A., B., C. & D.*]

1008. Act must be done on master's behalf—& for his benefit.]—(1) Pltf., a railway passenger, was leaving defts.' station at the end of his journey when he got mixed up in a scuffle in the station yard between some railway servants & passengers, the scuffle being caused by the wanton & aggressive act of a railway policeman. After it was over, & as pltf. was walking away in the public street, the railway policeman gave him in custody to a metropolitan constable, in contravention of his instructions from defts. In an action against the railway co. for assault & false imprisonment:—*Held:* they were not responsible for the acts of their policeman which were complained of, since they were beyond the scope of his employment.

(2) After being taken in custody, pltf. was prosecuted before a magistrate by defts.' attorney for assaulting the policeman in the execution of his duty:—*Held:* this was no ratification by defts. of their policeman's acts, for they could not ratify them unless they were done on their behalf or for their benefit; (3) if they were so done, the mere appearance of the attorney to prosecute would not be sufficient evidence of ratification.—WALKER *v.* SOUTH EASTERN RY. CO., SMITH *v.* SOUTH EASTERN RY. CO. (1870), L. R. 5 C. P. 640; 39 L. J. C. P. 346; 23 L. T. 14; 18 W. R. 1032.

Annotations:—*As to* (1) **Refd.** Boyle *v.* Smith (1905), 70 J. P. 115. *As to* (2) **Refd.** Lambert *v* G. E. Ry., [1909] 2 K. B. 776. *Generally*, **Mentd.** Braeshaw *v.* Waterlow (1915), 113 L. T. 1101.

1009. What amounts to ratification—Arrest by servant—Attendance of attorney to prosecute.]—WALKER *v.* SOUTH EASTERN RY. CO., SMITH *v.* SOUTH EASTERN RY. CO., No. 1008, *ante.*

1010. —— —— Master giving evidence at hearing.]—Pltf., a workman employed in defts.' factory, was discharged with others in consequence of slackness of work. He carried away, with his own tools, one belonging to defts., which, when he found inquiry was made for it, he returned to the foreman of the factory. When he afterwards called about it at the factory, a detective was present, who asked the foreman if he gave pltf. in charge for stealing the tool, to which the foreman replied he must see defts.' managing director first. Pltf. & the detective went together to the police station, & the foreman afterwards appeared, charged pltf., & signed the charge sheet. The next morning, pltf. having been locked up all night, defts.' managing director gave evidence against pltf., but the charge was dismissed. Upon that, the managing director made a remark impugning the magistrate's decision, for which he was called to order. Pltf. brought this action in a county ct. for false imprisonment; at the end of pltf.'s case the judge refused to nonsuit; & the jury found a verdict of £50 for pltf.:—*Held:* (1) these facts afforded no evidence that the managing director ratified the foreman's action in the matter; & a nonsuit must be entered; (2) under the circumstances, the managing director had no power to render defts. liable in this action.—ROWE *v.* LONDON PIANOFORTE CO., LTD. (1876), 34 L. T. 450; 13 Cox, C. C. 211, D. C.

—— Illegal distress.]—*See* DISTRESS, Vol. XVIII., pp. 332, 410, Nos. 664–666, 1498.

1011. When ratification presumed—Servants' conduct causing suspicion—Master failing to make inquiry.]—Ratification of the acts of a dishonest servant must be presumed when the master has had cause to suspect the servant's honesty & has refrained from making full inquiry into the facts.—MORISON *v.* LONDON, COUNTY & WESTMINSTER BANK, LTD., [1914] 3 K. B. 356; 83 L. J. K. B. 1202; 111 L. T. 114; 30 T. L. R. 481; 58 Sol. Jo. 453; 19 Com. Cas. 273, C. A.

Annotations:—**Refd.** John *v.* Dodwell, [1918] A. C. 563. **Mentd.** Crumplin *v.* London Joint Stock Bank (1913), 109 L. T. 856; Taxation Comrs. *v.* English, Scottish & Australian Bank, [1920] A. C. 683; Goldman *v.* Cox (1924), 40 T. L. R. 423; Underwood *v.* Bank of Liverpool & Martins, Underwood *v.* Barclays Bank, [1924] 1 K. B. 775; Australian Bank of Commerce *v.* Perel, [1926] A. C. 737; Jones *v.* Waring & Gillow, [1926] A. C. 670.

Effect of ratification—Limited to act ratified.]—*See* AGENCY, Vol. I., p. 420, No. 1141.

SUB-SECT. 6.—EXEMPTION FROM LIABILITY.

A. Criminal Act of Servant.

1012. Liability of master.]—R. *v.* BARRY, No. 970, *ante.*

——.]—*See, also*, Sect. 4, *post.*

1013. Theft by servant—Negligence of master.]—Deft., a messenger attached to certain lists of comrs. of bkpt. in London, & by them appointed provisional assignee of the estate of a bkpt., sent an agent or servant to take possession of bkpt.'s effects. The agent received a considerable sum of money, & absconded:—*Held:* deft. was not liable for the amount in an action for money had & received, no negligence or want of proper caution being attributable to him.—RAW *v.* CUTTEN (1832), 9 Bing. 96; 2 Moo. & S. 123; 1 L. J. C. P. 171; 131 E. R. 551.

Annotations:—**Refd.** Jobson *v.* Palmer, [1893] 1 Ch. 71. **Mentd.** *Re* Williams (1852), 18 L. T. O. S. 350.

1014. ——.]—In the absence of negligence a pawnbroker is not liable for the theft of a pledge by his servant.—ARMFIELD *v.* MERCER (1886), 2 T. L. R. 764, D. C.

—— —— Servant of bailee.]—*See* BAILMENT, Vol. III., pp. 72, 73, 88, 99, Nos. 133–135, 218, 270.

1015. —— No holding out of authority.]—Pltf., a wholesale silversmith, hired from deft., a jobmaster, a brougham, horse, & coachman for the purpose of driving pltf.'s traveller about London with samples of pltf.'s wares to be shown to customers. It was known to deft. that, in the course of business, occasions would arise when the traveller would have to leave the brougham with samples in it in charge of the coachman. On one of such occasions the coachman, in pursuance of an arrangement made with confederates, drove the brougham to a place where a great portion of the samples in it was stolen by them. In an action brought by pltf. against deft. to recover the value of the goods so stolen:—*Held:* deft. was not responsible in respect of the criminal act of his servant, the same not having been done within the scope of his employment.—CHESHIRE *v.* BAILEY, [1905] 1 K. B. 237; 74 L. J. K. B. 176;

1008 i. *Act must be done on master's behalf—& for his benefit.*]—MCCLEAVE *v.* MONCTON (1900), 35 N. B. R. 296.—**CAN.**

i. *What amounts to ratification—Arrest by servant.*]—WOODFORDE *v.* CHATHAM CORPN. (1904), 37 N. B. R. 21.—**CAN.**

PART IX. SECT. 3, SUB-SECT. 6.—A.

1012 i. *Liability of master.*]—EMERSON *v.* NIAGARA NAVIGATION CO. (1883), 2 O. R. 528.—**CAN.**

1012 ii. ——.]—The rule of law with regard to the liability of the master for misconduct of the servant is that a master is liable for the fraud of his servant committed in the course of his service & for the master's benefit, though it is not necessary that the benefit should accrue to the master; & that a master is not liable for the misappropriation of funds by the servant committed for the servant's own private benefit.—GOPAL CHANDRA BHATTACHARJEE *v.* SECRETARY OF STATE FOR INDIA (1909), I. L. R. 36 Calc. 647.—**IND.**

92 L. T. 142 ; 53 W. R. 322 ; 21 T. L. R. 130 ; 49 Sol. Jo. 134, C. A.

Annotations :—**Consd.** Malcolm, Brunker *v.* Waterhouse (1908), 24 T. L. R. 854. **Followed.** Mintz *v.* Silverton (1920), 36 T. L. R. 399. **Refd.** Lloyd *v.* Grace, Smith, [1912] A. C. 716 ; Williams *v.* Curzon Syndicate (1919), 35 T. L. R. 475.

1016. —— ——.]—Pltfs. employed deft. to convey their goods in vans, & deft.'s driver stole the goods. Deft. had not been guilty of any negligence in selecting the driver :—*Held :* as deft. had not held out the driver as having authority to do the act which caused the loss, deft. was not liable.—MINTZ *v.* SILVERTON (1920), 36 T. L. R. 399.

1017. —— **Evidence of criminality—Disappearance of servant.**]—The K. co. sent a parcel containing money above £10 from W. to U., & the railway guard when at U. delivered the parcel to a railway porter. The parcel was lost. In action against the railway co. it was proposed to prove that the morning after the parcel was delivered a railway porter at U. absconded, & the station master stated to a constable that he was suspected of stealing the parcel :—*Held :* such evidence was admissible to show that the loss was caused by the felonious act of the co.'s servant.—KIRKSTALL BREWERY CO. *v.* FURNESS RY. CO. (1874), L. R. 9 Q. B. 468 ; 43 L. J. Q. B. 142 ; 30 L. T. 783 ; 38 J. P. 567 ; 22 W. R. 876.

Annotation :—**Refd.** Johnson *v.* Lindsay (1889), 53 J. P. 599.

Criminal liability of master for acts of servant.]—*See* Sect. 4, *post.*

B. Express Conditions.

1018. General rule.]—A man is not to excuse himself for the wrongful act of his own servants unless he does so in unambiguous language, & if the language is ambiguous it is to be construed against him (PICKFORD, J.).—MARRIOTT *v.* YEOWARD BROTHERS, [1909] 2 K. B. 987 ; 79 L. J. K. B. 114 ; 101 L. T. 394 ; 25 T. L. R. 755 ; 53 Sol. Jo. 790 ; 11 Asp. M. L. C. 306 ; 14 Com. Cas. 279.

Annotations :—**Refd.** The Luna, [1920] P. 22 ; Ehinger *v.* S. E. & C. Ry. & Pullman Car Co. (1922), 38 T. L. R. 678.

1019. Conditions to be brought to notice of third party.]—Pltf.'s foot was injured by a piece of broken glass at the bottom of a bath in deft.'s premises. One of the regulations hung up in the hall & in the bathrooms was to the effect that the proprietor was not to be responsible for any injury which might happen to any person whilst on the premises, even when caused by the negligence of the proprietor's servants "or howsoever otherwise." Upon the ticket which pltf. received it was printed that pltf. should be bound by the regulations exhibited in the hall. In an action to recover damages for the injury sustained it was held that there was a case to go to the jury, the question for them being whether deft. took reasonable means to bring the regulations to pltf.'s notice.—BONHAM *v.* HERRIOTT (1890), 7 T. L. R. 104.

Contracts of bailment.]—*See* BAILMENT, Vol. III., pp. 72 *et seq.*

Bills of lading.]—*See* SHIPPING.

Carriers.]—*See* CARRIERS, Vol. VIII., pp. 38 *et seq.* ; RAILWAYS.

C. Injury Resulting from Accident.

1020. Runaway horses—Driver endeavouring to avoid accident.]—To maintain an action for injury to the person the injurious act must be wilful or the result of negligence.

Deft.'s horses, while being driven by his servant in the public highway, ran away, & became so unmanageable that the servant could not stop them, but could, to some extent, guide them. Deft., who sat beside his servant, was requested by him not to interfere with the driving, & complied. While unsuccessfully trying to turn a corner safely, the servant guided them so that, without his intending it, they knocked down & injured pltf., who was in the highway. Pltf. having sued deft. for negligence & in trespass, the jury found that there was no negligence in any one :—*Held :* even assuming deft. to be as much responsible as his servant, no action was maintainable ; for since the servant had done his best under the circumstances, the act of alleged trespass in giving the horses the direction towards pltf. was not a wrongful act. *Qu. :* whether if an action would have lain against the servant, it would also have lain against deft.—HOLMES *v.* MATHER (1875), L. R. 10 Exch. 261 ; 44 L. J. Ex. 176 ; 33 L. T. 361 ; 39 J. P. 567 ; 23 W. R. 869.

Annotations :—**Refd.** Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539 ; Gayler & Pope *v.* Davies, [1924] 2 K. B. 75. **Mentd.** Sadler *v.* South Staffordshire & Birmingham District Steam Tram. Co. (1889), 23 Q. B. D. 17 ; Stanley *v.* Powell, [1891] 1 Q. B. 86 ; Dulieu *v.* White, [1901] 2 K. B. 669 ; Admiralty Comrs. *v.* S.S. America, [1917] A. C. 38 ; Manton *v.* Brocklebank, [1923] 2 K. B. 212.

1021. —— ——.]—A horse drawing a brougham under the care of deft.'s coachman in a public street, suddenly & without any explainable cause bolted, &, notwithstanding the utmost efforts of the driver to control him, swerved on to the footway & injured pltf. :—*Held :* (1) no evidence of negligence to go to a jury ; (2) the fact that the horse had cast a shoe shortly after he bolted, & that the driver did not under the circumstances in which he was placed call out or give any warning, did not alter the case.—MANZONI *v.* DOUGLAS (1880), 6 Q. B. D. 145 ; 50 L. J. Q. B. 289 ; 45 J. P. 391 ; 29 W. R. 425.

Annotations :—*As to* (1) **Consd.** Gayler & Pope *v.* Davies, [1924] 2 K. B. 75. *Generally,* **Mentd.** Manton *v.* Brocklebank, [1923] 2 K. B. 212.

1022. Ox straying into shop—Drover exercising reasonable care.]—An ox belonging to deft. & while being driven by his servants through the streets of a country town entered pltf.'s shop, which adjoined the street, through the open doorway & damaged his goods. No negligence on the part of the persons in charge of the ox was proved : —*Held :* deft. was not liable.—TILLETT *v.* WARD (1882), 10 Q. B. D. 17 ; 52 L. J. Q. B. 61 ; 47 L. T. 546 ; 47 J. P. 438 ; 31 W. R. 197, D. C.

Annotations :—**Consd.** Gayler & Pope *v.* Davies, [1924] 2 K. B. 75. **Mentd.** Manton *v.* Brocklebank, [1923] 2 K. B. 212.

Accident to stage coach.]—*See* CARRIERS, Vol. VIII., p. 72, Nos. 483–487.

D. Wilful Act of Servant.

1023. General rule—Master not liable.]—JONES *v.* HART, No. 944, *ante.*

1024. —— ——.]—THE DRUID, No. 982, *ante.*

1025. —— ——.]—If the blow given to the horse by the driver was a mere wanton act on his part defts. would not be responsible (CRESWELL, J.). —FELLMAN *v.* MOSES, FARMER *v.* MOSES (1843), 2 L. T. O. S. 213, N. P.

1026. —— —— **Act outside scope of authority.**]—COLEMAN *v.* RICHES, No. 1056, *post.*

1027. —— —— **Act without direction or assent of master.**]—A master is not liable in trespass for the wilful act of his servant, as by driving his master's carriage against another, done without the direction or assent of the master. But he is liable to answer for any damage arising to another from the negligence or unskilfulness of his servant

Sect. 3.—*In tort: Sub-sect.* 6, *D.; sub sects.* 7, 8 & 9, *A. & B.*]

acting in his employ.—M'MANUS *v.* CRICKETT (1800), 1 East, 106; 102 E. R. 43.

Annotations:—**Consd.** The Druid (1842), 1 Wm. Rob. 391. **Refd.** Leame *v.* Bray (1803), 3 East, 593; Sleath *v.* Wilson (1839), 9 C. & P. 607; M'Laughlin *v.* Pryor (1842), 4 Man. & G. 48; Seymour *v.* Greenwood (1861), 6 H. & N. 359. **Mentd.** Bostock *v.* Floyer (1865), 35 L. J. Ch. 23.

1028. —— —— ——.]—(1) If one of a ship's crew does a wilful act of injury to another ship, without any direction from or privity of the master, trespass cannot be maintained against the master, although he was on board at the time.

(2) The master of a ship is not discharged of his responsibility for the acts of his crew, although done under the direction of a pilot, who, by the regulations of a statute, supersedes the master for the time in the government of his ship.—BOWCHER *v.* NOIDSTROM (1809), 1 Taunt. 568; 127 E. R. 954.

Annotations:—*As to* (1) **Consd.** The Druid (1842), 1 Wm. Rob. 391. *As to* (2) **Refd.** Hall *v.* Smith (1824), 2 Bing. 156; The Maria (1839), 1 Wm. Rob. 95.

1029. —— —— ——.]—CROFT *v.* ALISON, No. 1122, *post.*

1030. —— —— **Where act contrary to orders.**]—A master is not liable for the wilful act of his servant done contrary to his orders.—GREEN *v.* MACNAMARA (1859), 1 L. T. 9.

1031. —— —— **Where act done for servant's own purposes.**]—RAND *v.* CRAIG, No. 983, *ante.*

SUB-SECT. 7.—LEGAL PROCEEDINGS.

See, generally, ACTION, Vol. I., pp. 43 *et seq.*

1032. Right to sue master or servant—Trespass to land.]—WILSON *v.* WEDDELL (1608), Yelv. 144; 1 Brownl. 143; 80 E. R. 97.

Annotations:—**Mentd.** Doe d. Tofield *v.* Tofield (1809), 11 East, 246; Wainewright *v.* Elwell (1816), 1 Madd. 627; Right d. Taylor *v.* Banks (1832), 3 B. & Ad. 664; King *v.* Turner (1833), 1 My. & K. 456.

1033. —— **Negligence.**]—HOLMES *v.* MATHER, No. 1020, *ante.*

1034. —— ——.]—How far an action of trover will not lie against a servant, but only against the master.

Trover brought against deft. in the right of his wife for a box with £80 in it, which was delivered to her as bookkeeper to her brother, who was a carrier, which £80 was lost. It was objected that an action would not lie against her, but that it ought to have been brought against the brother. *Contra* it was submitted that it would, as it was founded on a tort. However, the judge was of a contrary opinion; accordingly pltf. was non-suited.—HARVEY *v.* SYLIARD (1732), 2 Barn. K. B. 234; 94 E. R. 470.

1035. —— **Misappropriation of money—Trover for goods lost.**]—Where money is paid to the servant & he misapplies it, the party has his remedy against the master or servant at election.—CARY *v.* WEBSTER (1721), 1 Stra. 480; 93 E. R. 647.

Annotation:—**Mentd.** Admiralty Comrs. *v.* National Provincial & Union Bank of England (1922), 127 L. T. 452.

—— **Torts of underservants.**]—*See* AGENCY, Vol. I., p. 683, Nos. 2924, 2925.

1036. Joinder of parties—Several masters.]—WILSON *v.* WEDDELL (1608), Yelv. 144; 1 Brownl. 143; 80 E. R. 97.

Annotations:—**Mentd.** Doe d. Tofield *v.* Tofield (1809), 11 East, 246; Wainewright *v.* Elwell (1816), 1 Madd. 627; Right d. Taylor *v.* Banks (1832), 3 B. & Ad. 664; King *v.* Turner (1833), 1 My. & K. 456.

1037. —— **Master & servant.**]—In an action on the case against stage coach proprietors for an injury done by the mismanagement of the coach, whereby a person was struck by the luggage on the coach. *Semble:* in such an action the proprietors & the coachman may be sued jointly.—WHITAMORE *v.* WATERHOUSE (1830), 4 C. & P. 383.

1038. Who may sue—Damage to goods—Person having qualified property in goods.]—(1) If one, being the owner of a shop & goods, allow A. to be at this shop, &, in his own name, to sell & dispose of the goods as he pleases, & a portion of these goods be destroyed by the negligent driving of the coachman of B. while the servant of A. is carrying them; A. has such a qualified property in these goods as will entitle him to maintain an action on the case against B.

(2) In an action for the negligent driving of deft.'s coach, pltf. gave evidence of the goods destroyed being in the possession of his servant. The witness who proved this was cross-examined with a view of showing the goods to be the property of P., & deft. called witnesses to prove them the property of P.:—*Semble:* P. may be called as a witness in reply to prove that the goods were not his.—WHITTINGHAM *v.* BLOXHAM (1831), 4 C. & P. 597.

1039. Evidence—Disputed ownership of goods damaged.]—WHITTINGHAM *v.* BLOXHAM, No. 1038, *ante.*

1040. —— **Admission by servant—Admissibility against master.**]—*Semble:* in tort committed, in the course of his duty, by a servant, what is said by him subsequent to the tort is evidence against the master.—BARING *v.* PRIESTLEY (1854), 23 L. T. O. S. 325.

—— ——.]—*See* AGENCY, Vol. I., pp. 605 *et seq.*

1041. Injunction—Against master—Passing-off by servant.]—W.'s manager, without the personal knowledge of W., affixed tickets with T.'s name printed thereon to certain goods of inferior quality to T.'s & made by another manufacturer. On T.'s complaining of this, W. offered to give an undertaking that he would not use such tickets again, & to pay a certain sum, but declined to make a public admission that he had used the tickets in order to defraud T.:—*Held:* notwithstanding W.'s offer, T. was entitled to an injunction with costs, & also to an inquiry as to damages at his own risk.—TONGE *v.* WARD (1869), 21 L. T. 480.

1042. —— —— **Acts done without master's knowledge.**]—It has been suggested that the master ought to be treated in exactly the same way, whether a thing like this has been done by his servants or by himself. I agree that that would be so with regard to damages, but to say that a master threatens & intends to do acts which are directly in disobedience of his orders, which he admits ought never to be done, which he is willing to undertake never to do, & which it is not suggested he ever knew had been done—to say that such a master is to be put in the position of having an injunction granted by the ct. against his doing in future that which he has done his best not to have done, is a proposition to which I decline to assent (FLETCHER MOULTON, L.J.).—LEVER BROTHERS, LTD. *v.* MASBRO' EQUITABLE PIONEER SOCIETY, LTD. (1912), 106 L. T. 472; 28 T. L. R. 294; 29 R. P. C. 225, C. A.

Annotation:—**Mentd.** Goddard *v.* Watford Co-op. Soc. (1924), 41 R. P. C. 218.

—— **Against servant.**]—*See* INJUNCTION, Vol. XXVIII., p. 436, Nos. 586–589.

1043. Award of compensation—Against driver of hackney carriage—Bar to action against master.]—(1) An award of compensation by a magistrate

against the driver of a hackney or metropolitan stage carriage upon an information for furious driving, under London Hackney Carriages Act, 1843 (c. 86), s. 28, is a bar to a subsequent action against such driver's employers by the party injured in respect of his injuries.

(2) If the party injured accepts such compensation he is barred from further proceedings, even where he did not lay the information or, in the first instance, request the magistrate to award compensation.—WRIGHT *v.* LONDON GENERAL OMNIBUS CO. (1877), 2 Q. B. D. 271; 46 L. J. Q. B. 429; 36 L. T. 590; 41 J. P. 486; 25 W. R. 647.

Annotations:—Generally, **Mentd.** Vallance *v.* Falle (1884), 53 L. J. Q. B. 459; Birmingham Corpn. *v.* Allsop (1918), 88 L. J. K. B. 549.

SUB-SECT. 8.—CONVERSION, MISAPPROPRIATION AND FAILURE TO DELIVER GOODS.

Conversion of client's property by solicitor's clerk.]—*See* AGENCY, Vol. I., p. 596, No. 2292.

Misappropriation of money by servant.]—*See* AGENCY, Vol. I., pp. 597, 598, Nos. 2293, 2295, 2299–2303.

Servant's refusal to deliver goods.]—*See* AGENCY, Vol. I., pp. 599, 600, Nos. 2310–2315.

Property received by sub-agent.]—*See* AGENCY, Vol. I., pp. 395, 396, Nos. 976–983.

SUB-SECT. 9.—FALSE IMPRISONMENT.

A. In General.

See, also, AGENCY, Vol. I., pp. 602, 603; *See, generally,* MALICIOUS PROSECUTION, Vol. XXXIII., pp. 463 *et seq.*; TRESPASS.

1044. Power to arrest optional.] — The high bailiff of a county ct., under 9 & 10 Vict. c. 95, received a warrant for the commitment of T., which he delivered to his underbailiff to execute. The latter broke into pltf.'s factory to search for T., & during the search was assaulted by pltf. He then left the factory, & returned with a policeman, & took pltf. into custody for the assault:—*Held:* (1) the high bailiff was liable for the trespass, committed by his underbailiff in breaking into pltf.'s factory to execute the warrant; (2) he was not liable for the assault & false imprisonment committed by his underbailiff in giving pltf into custody, as the underbailiff in so doing acted not under colour of the warrant, but under 9 & 10 Vict. c. 95, s. 114; & the power to arrest thereby conferred is not compulsory, but optional.—SMITH *v.* PRITCHARD (1849), 8 C. B. 565; Rob. L. & W. 154; COX, M. & H. 272; 19 L. J. C. P. 53; 14 L. T. O. S. 179; 13 J. P. 764; 14 Jur. 224; 137 E. R. 629.

Annotation:—**Mentd.** Moore *v.* Brompton County Court (1893), 69 L. T. 140.

1045. Arrest arising out of quarrel—Between servant & person arrested.]—A quarrel having arisen on the premises of a railway co. between a servant of the co. & a number of persons, amongst whom was A., the co.'s servant gave A. into custody on a charge of assaulting him & obstructing him in the discharge of his duty. In an action brought by A. against the co. for assault & false imprisonment:—*Held:* the co. could not be made responsible for this act of their servant.—LUMSDEN *v.* LONDON & SOUTH WESTERN RY. CO. (1867), 16 L. T. 609.

1046. Arrest by railway constable—On charge of assault—Limitation of authority by master.]—WALKER *v.* SOUTH EASTERN RY. CO., SMITH *v.* SAME, No. 1008, *ante.*

Arrest by inspector of society—Illtreatment of animal.]—*See* AGENCY, Vol. I., p. 603. No. 2328.

Arrest by manager of restaurant.]—*See* AGENCY, Vol. I., p. 603, Nos. 2329, 2330.

Servant of corporation.]—*See* CORPORATIONS, Vol. XIII., pp. 404, 405, Nos. 1261, 1262, 1265.

Arrest & detention of passengers.]—*See* CARRIERS, Vol. VIII., pp. 115–117, Nos. 771–783.

B. Arrest not Necessary for Protection of Master's Property.

See, generally, MALICIOUS PROSECUTION, Vol. XXXIII., pp. 463 *et seq.*; TRESPASS.

1047. General rule—Master not liable.]—A servant has only an implied authority to give a person into custody when it is necessary to take such a step to protect his master's property. If, therefore, the servant should give a person into custody when no such danger exists, the master will not be liable in an action for false imprisonment.—STEVENS *v.* HINSHELWOOD (1891), 55 J. P. 341, C. A.

1048. Arrest by railway clerk—After suspected attempt to rob till.]—A clerk in the service of a railway co., whose duty it is to issue tickets to passengers, & receive the money, & keep it in a till under his charge, has no implied authority from the co. to give into custody a person whom he suspects has attempted to rob the till, after the attempt has ceased; as such arrest could not be necessary for the protection of the co.'s property; & the co. is therefore not liable for the act of the clerk.—ALLEN *v.* LONDON & SOUTH WESTERN RY. CO. (1870), L. R. 6 Q. B. 65; 40 L. J. Q. B. 55; 23 L. T. 612; 35 J. P. 308; 19 W. R. 127; 11 Cox, C. C. 621.

Annotations:—**Distd.** Bank of New South Wales *v.* Owston (1879), 4 App. Cas. 270. **Apld.** Abrahams *v.* Deakin, [1891] 1 Q. B. 516; Stevens *v.* Hinshelwood (1891), 55 J. P. 341. **Consd.** Knight *v.* North Metropolitan Tram. Co. (1898), 78 L. T. 227. **Reld.** Mulkern *v.* Met. Ry. (1892), 8 T. L. R. 232; Radley *v.* L. C. C. (1913), 109 L. T. 162.

1049. Arrest by manager of public-house—After attempt to pass false coin.]—Pltf. & a friend went into deft.'s public-house, & pltf.'s friend tendered in payment for some refreshment which they had a German gold ten mark piece by mistake for a half-sovereign, & asked the barman for change. The barman went to fetch the change; but before giving it he observed that the coin was a foreign one, & took it back to pltf.'s friend, who gave him a half-sovereign instead of it, & the barman thereupon gave him the change. Pltf. & his friend then left the house. A person who was acting as manager of the bar in the absence of deft. followed them into the street, & gave them into the custody of a policeman on a charge of attempting to pass bad money. In an action for false imprisonment:—*Held:* deft. was not liable, for the manager had no implied authority by reason of his position to arrest pltf., inasmuch as his master's property was no longer in any danger & the arrest was made only for the purpose of

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PART IX. SECT. 3, SUB-SECT. 9.—A.

a. *Detention by station master — Master liable.*]—FARRY *v.* GREAT NORTHERN RY. CO., [1898] 2 I. R. 352. —IR.

b. *Detention by hotel manager.*] — MACKENZIE *v.* CLUNY HILL HYDRO CO., LTD., [1908] S. C. 200; 45 Sc. L. R. 139; 15 S. L. T. 518.—SCOT.

PART IX. SECT. 3, SUB-SECT. 9.—B.

1047 i. *General rule — Master not liable.*]—BARRY *v.* DUBLIN TRAMWAYS CO. (1890), 26 L. R. Ir. 150.—IR.

c. *Arrest by railway clerk.*]—VAN DEN EYNDE *v.* ULSTER RY. (1870). I. R. 5 C. L. 6; *affd. on appeal,* I. R. 5 C. L. 328.—IR.

Sect. 3.—*In tort: Sub-sect.* 9, *B. & C.; sub-sects.* 10, 11, 12 & 13, *A.*]

vindicating the law by punishing pltf. for a criminal offence which he was supposed to have already committed.—ABRAHAMS *v.* DEAKIN, [1891] 1 Q. B. 516; 60 L. J. Q. B. 238; 63 L. T. 690; 55 J. P. 212; 39 W. R. 183; 7 T. L. R. 117, C. A.

Annotations:—**Apld.** Stedman *v.* Baker (1896), 12 T. L. R. 451. **Consd.** Radley *v.* L. C. C. (1913), 109 L. T. 162. **Refd.** Hanson *v.* Waller, [1901] 1 K. B. 390.

1050. —— Suspicion of theft.]—JONES *v.* DUCK (1900), *Times*, Mar. 16, C. A.

Annotation:—**Folld.** Hanson *v.* Waller, [1901] 1 K. B. 390.

1051. —— ——.]—Pltf. was head barman & cellarman in a public-house of which deft. was owner; deft. took no part in the management of the house though he visited it nearly every day, the manager on behalf of deft. being M., who had the general management of the house. While pltf. was superintending the operation of bringing mineral waters into the cellar, the manager acting under the mistaken impression that whisky was being removed from the cellar, sent for a policeman & gave pltf. into custody on a charge of stealing whisky. Before reaching the police station the manager admitted that he had made a mistake & on arrival at the police station pltf. was released by the inspector. In an action for false imprisonment:—*Held:* there was no evidence that the manager had an implied authority from deft. to give pltf. into custody, the act not being reasonably necessary for the protection of his master's property, & deft. was therefore not liable.—HANSON *v.* WALLER, [1901] 1 K. B. 390; 70 L. J. Q. B. 231; 84 L. T. 91; 49 W. R. 445; 17 T. L. R. 162; 45 Sol. Jo. 166, D. C.

See, also, C., *post.*

Liability of servant to third party.]—*See* Part XI., Sect. 2, sub-sect. 5, *post.*

C. Arrest on Suspicion of Felony.

See, generally, MALICIOUS PROSECUTION, Vol. XXXIII., pp. 463 *et seq.*; TRESPASS.

1052. Constable—Servant sworn as constable.]—Although, where servants sworn in to act as constables on their own responsibility arrest a person on suspicion of felony without precedent, authority or subsequent sanction for the particular act, their employer is not liable; it is otherwise where there is such sanction to the act.—MAHONEY *v.* BESLEY (1865), 4 F. & F. 544, N. P.

Annotation:—**Refd.** Walker *v.* S. E. Ry., Smith *v.* Same (1869), 21 L. T. 301.

1053. —— Dock constable—Appointed under private Act.]—GRAHAM *v.* EAST INDIA DOCK CO. (1865), 29 J. P. Jo. 52.

1054. —— Special railway constable.]—A special constable of a railway co. is the servant of the co., & if in the course of his employment he arrests a person on suspicion of felony without having any reasonable grounds for his suspicion an action for false imprisonment will lie against the co.—LAMBERT *v.* GREAT EASTERN RY. CO., [1909] 2 K. B. 776; 79 L. J. K. B. 32; 101 L. T. 408; 73 J. P. 445; 25 T. L. R. 734; 53 Sol. Jo. 732; 22 Cox, C. C. 165, C. A.

1055. Railway porter in charge of station—In absence of station master.]—A foreman porter in the service of a railway co., who, in the absence of the station master, is in charge of a station, has no implied authority to give in charge a person whom he suspects to be stealing the co.'s property; &, if he gives in charge on such suspicion an innocent person, the co. are not liable.—EDWARDS *v.* LONDON & NORTH WESTERN RY. CO. (1870), L. R. 5 C. P. 445; 39 L. J. C. P. 241; 22 L. T. 656; 18 W. R. 834.

Annotations:—**Apld.** Allen *v.* L. & S. W. Ry. (1870), L. R. 6 Q. B. 65. **Distd.** Furlong *v.* South London Tram. Co. (1884), 48 J. P. 329. **Refd.** Bank of New South Wales *v.* Owston (1879), 4 App. Cas. 270; Knight *v.* North Metropolitan Tram. Co. (1898), 78 L. T. 227.

Arrest not for protection of master's property.]—*See* Sub-sect. 9, B., *ante.*

SUB-SECT. 10.—LIBEL.

Publication of—By servant or agent.]—*See* LIBEL & SLANDER, Vol. XXXII., pp. 82 *et seq.*

Libel by servant of corporation.]—*See* CORPORATIONS, Vol. XIII., p. 405, Nos. 1263, 1264.

SUB-SECT. 11.—MALICIOUS PROSECUTION.

See AGENCY, Vol. I., pp. 602 *et seq.* & *generally*, MALICIOUS PROSECUTION, Vol. XXXIII., pp. 463 *et seq.*; TRESPASS.

Bank manager.]—*See* BANKERS, Vol. III., p. 161, No. 238.

SUB-SECT. 12.—MISREPRESENTATION AND FRAUD.

1056. General rule—Master liable.]—A master is civilly responsible for the fraud or negligence of his servant acting in the course of his employment; but not for an act of wilful fraud or negligence done by him out of the scope of his authority, or inconsistent with the course of his employment. Therefore, where A., the servant of a wharfinger, fraudulently signed a receipt purporting to be an acknowledgment that certain wheat had been delivered at his employer's wharf, to be shipped to the order of C., no such wheat having in fact been delivered & thereby wilfully induced C. to pay the price thereof to the pretended vendor:—*Held:* the wharfinger was not liable, although it was proved that C.'s course of dealing was to pay for all wheat delivered for him at the wharf on the production by the vendor of the wharfinger's receipt, & the latter knew it. *Semble:* it would have been otherwise if there had been any evidence of an understanding or agreement between C., & the wharfinger to the effect above stated.—COLEMAN *v.* RICHES (1855), 16 C. B. 104; 3 C. L. R. 795; 24 L. J. C. P. 125; 25 L. T. O. S. 55, 85; 1 Jur. N. S. 596; 3 W. R. 453; 139 E. R. 695.

Annotations:—**Refd.** Udell *v.* Atherton (1861), 7 H. & N. 172; Whitechurch *v.* Cavanagh, [1902] A. C. 117. **Mentd.** Ludgater *v.* Love (1881), 44 L. T. 694.

1057. Misrepresentation—As to quality of goods sold.]—ANON. (1430), Y. B. 9 Hen. 6, fo. 53, pl. 37.

Annotations:—**Refd.** Southern *v.* How (1616), J. Bridg. 125; Lane *v.* Cotton (1701), 1 Ld. Raym. 646. **Mentd.** Goddard's Case, Goddard *v.* Denton (1584), 2 Co. Rep. 4 b; Cospey *v.* Turner (1600), Cro. Eliz. 800; Chandelor *v.* Lopus (1603), Cro. Jac. 4; Roswell *v.* Vaughan (1607), Cro. Jac. 196; Mackalley's Case (1611), 9 Co. Rep. 65 b; Thoroughgood's Case (1612), 9 Co. Rep. 136 b; Foster *v.* Jackson (1615), Hob. 52; Chichesley *v.* Thomson & Ely (Bp.) (1628), Cro. Car. 104; Burnby *v.* Bollett (1847), 16 M. & W. 644.

d. *Constable—Alleged breaking into freight van.*]—THOMAS *v.* CANADIAN PACIFIC RY. CO., BUSH *v.* CANADIAN PACIFIC RY. CO. (1906), 8 O. W. R. 93; 14 O. L. R. 55.—CAN.

1058. ——— ———.]—SOUTHERN *v.* HOW, No. 943, *ante*.

1059. ——— **For servant's private ends.**]—A master is not liable for the misrepresentation of his servant made without his authority & without benefit to the master, but to serve the private ends of the servant.—BRITISH MUTUAL BANKING CO., LTD. *v.* CHARNWOOD FOREST RY. CO. (1887), 18 Q. B. D. 714; 56 L. J. Q. B. 449; 57 L. T. 833; 52 J. P. 150; 35 W. R. 590, C. A.

Annotations:—**Distd.** Trott *v.* National Discount Co. (1900), 17 T. L. R. 37. **Consd.** Ruben *v.* Great Fingall Consolidated, [1904] 2 K. B. 712. **Apld.** Anglo-American Oil Co. *v.* Manning, [1908] 1 K. B. 536. **Refd.** Crapp *v.* East Stonehouse L. B. (1889), 5 T. L. R. 501; Thorne *v.* Heard, [1894] 1 Ch. 599; Spooner *v.* Browning, Todd & Whish (1897), 77 L. T. 685; Whitechurch *v.* Cavanagh, [1902] A. C. 117; Hambro *v.* Burnand, [1903] 2 K. B. 399; Malcolm, Brunker *v.* Waterhouse (1908), 24 T. L. R. 854; Lloyd *v.* Grace, Smith, [1912] A. C. 716. **Mentd.** Bishop *v.* Balkis Consolidated Co. (1890), 25 Q. B. D. 512; Tomkinson *v.* Balkis Consolidated Co. (1891), 60 L. J. Q. B. 558; Moss S.S. Co. *v.* Whinney, [1912] A. C. 254; *Re* Jubilee Cotton Mills, [1923] 1 Ch. 1.

1060. False receipt.]—COLEMAN *v.* RICHES, No. 1056, *ante*.

1061. Passing off—Injunction against master.]—TONGE *v.* WARD, No. 1041, *ante*.

1062. ——— **Act expressly forbidden by master.**]—Pltf. co.'s wine & no other being known as "Big Tree Brand" they brought an action against an hotel co. for an injunction to restrain them from offering for sale or selling other wine as "Big Tree Brand." It was proved that defts.' waiters on many occasions when "Big Tree Brand" wine was ordered at defts.' restaurants tendered other wines, & when the question was raised asserted that they were that brand:—*Held:* it was no defence that the waiters had been told that they should not do anything of the sort, & that they were acting contrary to their order; deft. corpn. was responsible for the misrepresentations of its waiters; & an injunction was granted.—GRIERSON, OLDHAM & CO., LTD. *v.* BIRMINGHAM HOTEL & RESTAURANT CO., LTD. (1901), 18 R. P. C. 158.

See, further, TRADE MARKS.

By agent.]—*See* AGENCY, Vol. I., pp. 587 *et seq.*

By secretary of company.]—*See* COMPANIES, Vol. IX., pp. 289, 541, 542, Nos. 1793, 1794, 3569, 3571–3576.

By apprentice.]—*See* No. 4398, *post*.

SUB-SECT. 13.—NEGLIGENCE.

A. General Rules.

Negligence generally, *see* NEGLIGENCE.

1063. Foundation of liability—Freedom of master to choose servant—Compulsory employment of servant.]—By the common law no person is responsible for the negligent acts of a party in the performance of any work, when by law he is compelled to employ that party to do such work.—THE AGRICOLA (1843), 2 Wm. Rob. 10; 2 Notes of Cases, 113; 4 L. T. 742; 7 Jur. 157; 166 E. R. 659.

Annotations:—**Mentd.** The Eden (1846), 4 Notes of Cases, 460; The Gipsey King (1847), 2 Wm. Rob. 537; The John Mowlem *v.* The Lloyd's (or Sea Queen) (1863), 2 New Rep. 497; The Lion (1869), L. R. 2 P. C. 525; Courtney *v.* Cole (1887), 19 Q. B. D. 447; The Winestead, [1895] P. 170; The Glanystwyth, [1899] P. 118; Phillips *v.* Born (1905), 93 L. T. 634.

1064. ——— ———.]—According to the principles of English law the responsibility of a master for the negligence of his servant is founded on the presumption that the owner chooses his servant, & gives him orders which he is bound to obey.—THE HALLEY (1868), L. R. 2 P. C. 193; *sub nom.* LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION CO., LTD. *v.* BENHAM, THE HALLEY, 5 Moo. P. C. C. N. S. 262; 37 L. J. Adm. 33; 18 L. T. 879; 16 W. R. 998; 3 Mar. L. C. 131; 16 E. R. 514, P. C.

Annotations:—**Refd.** The Mystery, [1902] P. 115; S.S. Beechgrove Co. *v.* Akt. Fjord of Kristiania, [1916] 1 A. C. 364. **Mentd.** The Mali Ivo (1869), L. R. 2 A. & E. 356; Phillips *v.* Eyre (1870), L. R. 6 Q. B. 1; Redpath *v.* Allan, The Hibernian (1872), L. R. 4 P. C. 511; The Magnet, The Duke of Sutherland, The Fanny M. Carvill (1875), 32 L. T. 129; The M. Moxham (1876), 1 P. D. 107; The Star of India (1876), 1 P. D. 466; The Guy Mannering (1882), 51 L. J. P. 57; The Augusta (1887), 57 L. T. 326; The Tasmania (1888), 13 P. D. 110; The Munster (1896), 12 T. L. R. 264; Machado *v.* Fontes (1897), 76 L. T. 588; The Dallington, [1903] P. 77; The Penrith Castle, [1918] P. 142; The Arum, [1921] P. 12.

1065. ——— **Relationship of master & servant must exist.**]—In order to make a person liable for the negligence of a wrongdoer, it must be shown that the relationship of master & servant exists between them, & that the wrongdoer is within the power & control of the person whom it is sought to make liable.—JUGGINS *v.* GREAT WESTERN RY. CO. (1885), 1 T. L. R. 393.

1066. ——— ———.]—In a place where a drover of cattle does not require to have a licence he is the servant of the person employing him to drive cattle along the highway & is not an independent contractor, & therefore the employer is liable for the drover's negligence.—TURNBULL *v.* WIELAND (1916), 33 T. L. R. 143.

1067. Extent of liability.]—JONES *v.* HART, No. 944, *ante*.

1068. ——— **Servant acting in course of employment.**]—M'MANUS *v.* CRICKETT, No. 1027, *ante*.

1069. ——— ———.]—A van was standing at the door of A., from which A.'s goods were unloading, & A.'s gig was standing behind the van. B.'s coachman, who was driving B.'s carriage, came up, & there not being room for the carriage to pass, the coachman got off his box & laid hold of the van horse's head; this caused the van to move, & thereby a packing case fell out of the van upon the shafts of the gig, & broke them:—*Held:* B. was not liable for this, as the coachman was not acting in the employ of B. at the time this matter occurred.—LAMB *v.* PALK (LADY) (1840), 9 C. & P. 629, N. P.

Annotation:—**N.F.** Page *v.* Defries (1866), 7 B. & S. 137.

1070. ——— ———.]—In trespass against a railway co. for running over pltf.'s sheep & killing them, it appeared that the sheep got on the line by reason of the defect in the co.'s fences, & were run over by an engine of the co., driven by their servant. The engine was going at the rate directed by the co., & could not be stopped so as to avoid the accident:—*Held:* the co. were not liable in trespass; if the sheep were wrongdoers, there was no misconduct for which defts. were responsible; if the sheep had escaped through defect of defts.' fences, the sheep were not wrongdoers, & the damage would be consequent on defts.' wrong, & the co. would be liable in an action on the case.

In all cases where a master gives the direction & control over a carriage or animal to a rational agent, the master is only responsible in an action on the case for want of skill or care of the agent.

Whenever the injury done to pltf. results from

PART IX. SECT. 3, SUB-SECT. 13.—A.

* *Foundation of liability—Whether incompetence of servants.*]—MEHNER *v.* WINNIPEG ELECTRIC RY. CO. (1911), 8 W. W. R. 517; 25 Man. L. R. 384.—CAN.

Sect. 3.—*In tort: Sub-sect.* 13, *A. & B.* (*a*) *& (b).*]

the immediate force of deft., himself whethe intentionally or not, pltf. may bring an action of trespass; & on the other, if the act be that of the servant, & be negligent not wilful, case is the only remedy against the master. The master is liable for all the negligent acts of the servant in the course of his employment; but that liability does not make the direct act of the servant the direct act of the master. Case will lie against a master for, in effect, employing a careless servant, but not trespass, unless the act was done by his command, that is, unless either the particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it, or some act which leads by a physical necessity to the act complained of (PARKE, B.).—SHARROD *v.* LONDON & NORTH WESTERN RY. CO. (1849), 4 Exch. 580; 7 Dow. & L. 213; 6 Ry. & Can. Cas. 239; 20 L. J. Ex. 185; 14 Jur. 23; 154 E. R. 1345.

Annotations:—**Distd.** Fawcett *v.* York & North Midland Ry. (1851), 16 Q. B. 610. **Refd.** Ricketts *v.* East & West India Docks Ry. (1852), 12 C. B. 160; Holmes *v.* Mather (1875), L. R. 10 Exch. 261.

1071. ——— ———.]—BARTONSHILL COAL CO. *v.* MCGUIRE, No. 972, *ante.*

1072. ——— ———.]—BARTONSHILL COAL CO. *v.* REID, No. 971, *ante.*

1073. ——— ———.]—The owner of a private way passing by his warehouses is liable for injury to persons lawfully using the way if caused by the negligence of his servants, *e.g.*, by negligently lowering goods from the warehouses.—GALLAGHER *v.* HUMPHREY (1862), 6 L. T. 684; 27 J. P. 5; 10 W. R. 664.

Annotations:—**Mentd.** Scott *v.* London & St. Katharine Docks Co. (1865), 13 L. T. 148; Murley *v.* Grove (1882), 46 J. P. 360; Lowery *v.* Walker, [1910] 1 K. B. 173; Wilson *v.* Barry Ry. (1916), 116 L. T. 71; Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272; Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253.

1074. ——— ———.]—Defts. sent a barge under the management of their lighterman to a wharf for the purpose of being loaded; he was unable to get up to it in consequence of a barge belonging to pltfs. lying in the way without any one in charge of it; the foreman of the wharf told him to shove the other barge away as it had no business there, & to bring his alongside; he then moved pltfs.' barge from the wharf, & made it fast to a pile in the river. When the tide went down pltfs.' barge settled upon a projection in the bed of the river, & was injured:—*Held:* defts. were responsible, as the lighterman, in doing the act complained of, was acting as their servant.—PAGE *v.* DEFRIES (1866), 7 B. & S. 137.

1075. ——— ———.]—FORSYTH *v.* MANCHESTER CORPN., No. 1151, *post.*

1076. ——— ——— **Directions given by third party.**]—Some bales of cotton, sent by deft. to a warehouse & packed there carelessly by his servants under the direction of the warehouse keeper, afterwards fell on pltf., a servant of the owner of the warehouse, who was passing by in the course of his duty:—*Held:* deft. was not responsible.—MURPHEY *v.* CARALLI (1864), 3 H. & C. 462; 34 L. J. Ex. 14; 29 J. P. 118; 10 Jur. N. S. 1207; 13 W. R. 165; 159 E. R. 611.

Annotations:—**Refd.** Murray *v.* Currie (1870), L. R. 6 C. P. 24; Manning *v.* Adams (1883), 32 W. R. 430.

1077. ——— ——— **For master's benefit.**]—Deft. bought some boards from pltf., & at deft.'s request pltf. gave him permission to use his shed for the purpose of making a signboard. Deft. employed D., a carpenter, to make the signboard at a fixed price, & D. used the shed for that purpose, with pltf.'s knowledge. D., while so working, lighted a pipe from a match with a shaving, which he accidentally dropped, & the shed was burned down:—*Held:* the act of D., not being a negligent act within the scope of his employment, deft. was not liable.—WILLIAMS *v.* JONES (1865), 3 H. & C. 602; 13 L. T. 300; 29 J. P. 644; 11 Jur. N. S. 843; 13 W. R. 1023; 159 E. R. 668, Ex. Ch.

Annotations:—**Distd.** Jefferson *v.* Derbyshire Farmers, [1921] 2 K. B. 281. **Refd.** Whitmore *v.* Pearson (1868), 16 W. R. 649.

1078. ——— ——— **Act lawful.**]—A master is answerable in trespass for damage occasioned by his servant's negligence in doing a lawful act in the course of his service; but not so if the act is in itself unlawful & is not proved to have been authorised by the master. As if a servant, authorised merely to distrain cattle damage feasant, drives cattle from the highway into his master's close & there distrains them.—LYONS *v.* MARTIN (1838), 8 Ad. & El. 512; 3 Nev. & P. K. B. 509; 1 Will. Woll. & H. 500; 7 L. J. Q. B. 214; 112 E. R. 932.

Annotations:—**Apld.** The Druid (1842), 1 Wm. Rob. 391. **Distd.** Bayley *v.* M. S. & L. Ry. (1872), L. R. 7 C. P. 415. **Refd.** Limpus *v.* London General Omnibus Co. (1862), 1 H. & C. 526; Dyer *v.* Munday (1895), 64 L. J. Q. B. 448.

1079. ——— ——— **Act involving unauthorised trespass.**]—An employer is responsible for damage caused by the negligent act of his servant in carrying out work which he is employed to do, even if the act incidentally involves a trespass which the employer has not authorised.—GOH CHOON SENG *v.* LEE KIM SOO, [1925] A. C. 550; 94 L. J. P. C. 129; 133 L. T. 65, P. C.

1080. ——— **Master deriving no profit from servant's labour.**]—The London Dock co. is liable for the negligence of its servants in unloading goods, although the co. derives no profit from their labour.—GIBSON *v.* INGLIS (1814), 4 Camp. 72, N. P.

1081. ——— **Effect of directions by master.**]—A master is responsible for an act of negligence on the part of his servant notwithstanding what directions he may have given him (MARTIN, B.).—NORWICH BOROUGH ELECTION CASE, TILLETT *v.* STRACEY, HARDIMENT'S CASE (1869), 1 O'M. & H. 8; 19 L. T. 615.

Annotations:—**Refd.** Taunton Borough Case (1874), 2 O'M. & H. 66. **Mentd.** Dublin Case (1869), 1 O'M. & H. 270; Londonderry City Petn. (1869), 21 L. T. 709; *Re* Parliamentary Elections Act, 1868, Galway County Petn., Trench *v.* Nolan (1872), 20 W. R. 833; Drinkwater *v.* Deakin (1874), L. R. 9 C. P. 626; Stroud Case (1874), 3 O'M. & H. 7; Malcolm *v.* Parry (1875), L. R. 10 C. P. 168.

1082. ——— **Damage by third party—Through negligence of servant.**]—ENGELHART *v.* FARRANT & CO., No. 1112, *post.*

Liability of corporation.]—*See* CORPORATIONS, Vol. XIII., p. 406, Nos. 1274 *et seq.*

B. Negligent Driving.

(*a*) *In General.*

1083. Master liable.]—ANON. (1698), 1 Ld. Raym. 739; 91 E. R. 1394; *sub nom.* JONES *v.* HART, Holt, K. B. 642; 2 Salk. 441.

PART IX. SECT. 3, SUB-SECT. 13.—B. (a).

1083 1. *Master liable.*]—Deft.'s servant, while engaged in his master's business, was driving at a rapid rate down hill. The horse was a wild one, hard in the mouth & difficult to control or check suddenly. Pltf.'s two children aged respectively two & ten years were playing on the road some distance ahead. The driver saw the children but supposed that there was sufficient space to pass between them, & made no attempt to pull up

1084. ——.]—A declaration which charges deft. with having negligently driven his cart against pltf.'s horse is supported by evidence that deft.'s servant drove the cart.—BRUCKER *v.* FROMONT (1796), 6 Term Rep. 659; 101 E. R. 758.

Annotations:—**Refd.** M'Manus *v.* Crickett (1800), 1 East, 106; Leame *v.* Bray (1803), 3 East, 593; Lyons *v.* Martin (1838), 8 Ad. & El. 512; The Druid (1842), 1 Wm. Rob. 391; Patten *v.* Rea (1857), 2 C. B. N. S. 606; Limpus *v.* London General Omnibus Co. (1862), 1 H. & C. 526.

1085. ——.]—If horses are hired out to draw a private carriage, but are driven by the servant of the person who hires them, he shall be liable for any injury done by them.—SAMMELL *v.* WRIGHT (1805), 5 Esp. 263, N. P.

Annotation:—**Refd.** Laughor *v.* Pointer (1826), 5 B. & C. 547.

1086. —— **Servant employed on master's business.**]—Trespass lies against a master for the act of his servant, where while the servant drives his master in a gig, the horse runs away & does damage.—CHANDLER *v.* BROUGHTON (1832), 1 Cr. & M. 29; 3 Tyr. 220; 2 L. J. Ex. 25; 149 E. R. 301.

Annotations:—**Apld.** M'Laughlin *v.* Pryor (1842), 4 Man. & G. 48. **Mentd.** Pratt *v.* Patrick, [1924] 1 K. B. 488.

1087. —— ——.]—HUTCHINSON *v.* YORK, NEWCASTLE & BERWICK RY. CO., No. 1697, *post*.

1088. —— ——.]—A master is responsible for an injury resulting from the negligence of his servant whilst driving his cart or carriage, provided the servant is at the time engaged in his master's business, even though the accident happens in a place to which his master's business did not call him; but, if the journey upon which the servant starts be solely for his own purposes, & undertaken without the knowledge or consent of his master, the latter is not responsible.

Defts.' carman, having finished the business of the day, returned to their shop with their horse & cart, & obtained the key of the stable, which was close at hand; but, instead of going there at once, & putting up the horse, as it was his duty to do, he, without his masters' knowledge or consent, drove a fellow-workman to Euston, &, on his way back, ran over & injured pltf. & his wife: —*Held:* (1) inasmuch as the carman was not at the time of the accident engaged in the business of his masters, they were not responsible for the consequences of his unauthorised act.

The declaration alleged that defts. were possessed of a certain cart & horse, which was being driven by & under the care & direction of their servant, not saying, at the time of the grievance complained of; & that, whilst pltf. was crossing a certain street, etc., defts., by their servant, so negligently & improperly drove & directed the cart & horse along the street, that pltf. was knocked down & injured:—*Held:* (2) under not guilty, defts. might show that the driver was not at the time of the accident acting as their servant.—MITCHELL *v.* CRASSWELLER (1853), 13 C. B. 237; 22 L. J. C. P. 100; 20 L. T. O. S. 237; 17 Jur. 716; 1 W. R. 153; 138 E. R. 1189.

Annotations:—*As to* (1) **Consd.** Storey *v.* Ashton (1869), L. R. 4 Q. B. 476. **Refd.** Green *v.* London General Omnibus Co. (1859), 7 C. B. N. S. 290; Seymour *v.* Greenwood (1861), 6 H. & N. 359; Tobin *v.* R. (1864), 16 C. B. N. S. 310; Williams *v.* Jones (1865), 13 L. T. 300; Burns *v.* Poulsom (1873), L. R. 8 C. P. 563; Stevens *v.* Woodward (1881), 6 Q. B. D. 318.

1089. —— —— **Vehicle also used for private business.**]—A master is responsible for an injury occasioned by the negligent driving of his servant, where he is acting at the time in his service & in a manner impliedly sanctioned by him.

A., the general manager of deft., the proprietor of a horse repository, was possessed of a horse & gig, which were kept for him upon deft.'s premises free of charge, & were used by A. in the conduct of deft.'s business. In going, with the knowledge of deft., upon deft.'s business, with the horse & gig, A. drove against & killed pltf.'s horse:—*Held:* deft. was responsible; & it was immaterial that A. was also going on private business of his own.—PATTEN *v.* REA (1857), 2 C. B. N. S. 606; 26 L. J. C. P. 235; 29 L. T. O. S. 161; 21 J. P. 647; 3 Jur. N. S. 892; 5 W. R. 689; 140 E. R. 554.

(b) Driver Making Detour for Other Purposes.

1090. Whether master liable.]—If a servant driving his master's cart, on his master's business, make a detour from the direct road for some purpose of his own, his master will be answerable in damages for any injury occasioned by his careless driving while so out of his road. But if a servant take his master's cart without leave, at a time when it is not wanted for the purposes of business, & drive it about solely for his own purposes, the master will not be answerable for any injury he may do.—JOEL *v.* MORISON (1834), 6 C. & P. 501, N. P.

Annotations:—**Folld.** Sleath *v.* Wilson (1839), 9 C. & P. 607. **Consd.** Burns *v.* Poulsom (1873), L. R. 8 C. P. 563. **Refd.** Mitchell *v.* Crassweller (1853), 13 C. B. 237; Whatman *v.* Pearson (1868), L. R. 3 C. P. 422; Stevens *v.* Woodward (1881), 50 L. J. Q. B. 231.

1091. ——.]—If a servant without his master's knowledge take his master's carriage out of the coach house, & with it commit an injury, the master is not liable; because he has not in such case entrusted the servant with the carriage. But whenever the master has entrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it; but the master in such case will be

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the horse until it was too late to do so. Both children were run over & injured:—*Held:* the servant had failed to exercise the degree of care that was requisite in the circumstances, & deft. was liable.—TURNER *v.* ISNOR (1893), 25 N. S. R. 428.—**CAN.**

1083 ii. ——.]—The rule of the common law is that the owner of a vehicle whose driver is negligent & causes damages to another person is not liable *qua* owner, but only if the driver is his servant acting within the scope of his employment.—B. & R. CO., LTD. *v.* MCLEOD (1912), 22 W. L. R. 274; 5 Alta. L. R. 176; 2 W. W. R. 1093.—**CAN.**

1083 iii. ——.]—Pltf. was injured while driving in a taxicab hired from defts.:—*Held:* the injury was caused by the negligence of the driver, the servant of defts., & pltf. was entitled to recover.—HUGHES *v.* EXCHANGE TAXICAB & AUTO-LIVERY (1913), 24 W. L. R. 174; 4 W. W. R. 556; 11 D. L. R. 514.—**CAN.**

1083 iv. ——.]—LANE *v.* CRANDELL (1913), 23 W. L. R. 869; 10 D. L. R. 763; 4 W. W. R. 165; 5 Alta. L. R. 42.—**CAN.**

1083 v. ——.]—AMUNDSEN *v.* WARD (1913), 24 W. L. R. 280; 4 W. W. R. 572; 11 D. L. R. 167; 6 Alta. L. R. 46.—**CAN.**

1083 vi. ——.]—HIRSHMAN *v.* BEAL (1916), 38 O. L. R. 40.—**CAN.**

1083 vii. ——.]—MCKAY *v.* DRYSDALE, [1921] 2 W. W. R. 592.—**CAN.**

1083 viii. ——.]—CORMACK *v.* DIGBY (1876), I. R. 9 C. L. 557.—**IR.**

1083 ix. ——.]—WILSON *v.* OWENS (1885), 16 L. R. Ir. 225.—**IR.**

1083 x. ——.]—GRACEY *v.* BELFAST TRAMWAY CO., [1901] 2 I. R. 322.—**IR.**

1083 xi. ——.]—BROWN *v.* M'GREGOR (1813), 17 Fac. Coll. 232.—**SCOT.**

1086 i. —— *Servant employed on master's business.*]—MERRITT *v.* HEPENSTAL (1895), 25 S. C. R. 150.—**CAN.**

PART IX. SECT. 3, SUB-SECT. 13.—B. (b).

1090 i. *Whether master liable.*]—The driver of defts.' ice-waggon, after delivering their ice along his prescribed route, instead of returning to the co.'s barns, got drunk, & some hours after he was due to return, & while driving out of his homeward course, ran over pltf., causing injury:—*Held:* defts. were not liable, as the driver was not acting in the course of his employment at the time of the accident.—WILLS *v.* BELLE EWART ICE CO. (1906), 12 O. L. R. 526; 8 O. W. R. 331.—**CAN.**

1090 ii. ——.]—MATTEI *v.* GILLIES (1908), 16 O. L. R. 558; 11 O. W. R. 1083.—**CAN.**

Sect. 3.—*In tort: Sub-sect.* 13, *B.* (*b*), (*c*), (*d*) & (*e*).]

liable, because he has put it in the servant's power to mismanage the carriage, by entrusting him with it. Therefore, where a servant, having set his master down was directed by him to put up in Leicester Square, but instead of so doing went to deliver a parcel of his own in the Old Street Road, & in returning along it drove against an old woman & injured her:—*Held:* the master was responsible for his servant's act.—SLEATH *v.* WILSON (1839), 9 C. & P. 607; *sub nom.* HEATH *v.* WILSON, 2 Mood. & R. 181, N. P.

Annotation:—**N.F.** Storey *v.* Ashton (1869), L. R. 4 Q. B. 476.

1092. ——.]—MITCHELL *v.* CRASSWELLER, No. 1088, *ante*.

1093. ——.]—Deft., a wine merchant, sent his carman & clerk with a horse & cart to deliver some wine, & bring back some empty bottles; on their return, when about a quarter of a mile from deft.'s offices, the carman, instead of performing his duty, & driving to deft.'s offices, depositing the bottles, & taking the horse & cart to the stables in the neighbourhood, was induced by the clerk, it being after business hours, to drive in quite another direction on business of the clerk's; & while they were thus driving pltf. was run over, owing to the negligence of the carman:—*Held:* deft. was not liable: for the carman was not doing the act, in doing which he had been guilty of negligence, in the course of his employment as servant.

The question in all such cases as the present is whether the servant was doing that which the master employed him to do (LUSH, J.).—STOREY *v.* ASHTON (1869), L. R. 4 Q. B. 476; 10 B. & S. 337; 38 L. J. Q. B. 223; 33 J. P. 676; 17 W. R. 727.

Annotations:—**Refd.** Burns *v.* Poulson (1873), L. R. 8 C. P. 563; Venables *v.* Smith (1877), 2 Q. B. D. 279; Stevens *v.* Woodward (1881), 6 Q. B. D. 318; Coupé Co. *v.* Maddick, [1891] 2 Q. B. 413; Gillson *v.* London & India Docks Joint Committee (1892), 8 T. L. R. 702; Sanderson *v.* Collins (1904), 90 L. T. 243.

1094. ——.]—Deft. hired a carriage & horse from pltfs. Deft.'s coachman, instead of taking them, as was his duty, to the stable, drove for his own purposes in another direction. While he was thus engaged, the carriage & horse were injured owing to his negligent driving:—*Held:* there had been a breach of deft.'s contract as bailee for which he was liable.—COUPÉ CO. *v.* MADDICK, [1891] 2 Q. B. 413; 60 L. J. Q. B. 676; 65 L. T. 489; 56 J. P. 39, D. C.

Annotations:—**Consd.** Sanderson *v.* Collins, [1904] 1 K. B. 628. **Refd.** Cheshire *v.* Bailey (1904), 74 L. J. K. B. 176.

1095. ——.]—HATCH *v.* LONDON & NORTH WESTERN RY. Co. (1899), 15 T. L. R. 246, C. A.

(*c*) *Driver Taking Out Vehicle for Other Purposes.*

1096. General rule—Master not liable.]—JOEL *v.* MORISON, No. 1090, *ante*.

1097. —— ——.]—SLEATH *v.* WILSON, No. 1091, *ante*.

1098. —— ——.]—MITCHELL *v.* CRASSWELLER, No. 1088, *ante*.

1099. —— ——.]—Deft.'s carman, without his master's permission, & for a purpose of his own wholly unconnected with his master's business, took out deft.'s horse & cart, & on his way home negligently ran against pltf.'s cab & damaged it. The course of the employment of the carman was, that with deft.'s horse & cart he took out beer to customers of deft., a brewer, & in returning to the brewery he called for empty casks wherever they would be likely to be collected, for which he received from deft. a gratuity of 1*d.* each. At the time of the accident the carman had with him two casks which he had picked up on his return journey at a public-house which his master supplied, & for which he afterwards received the customary 1*d.*:—*Held:* the carman had not re-entered upon his ordinary duties at the time of the accident, & therefore the master was not liable.—RAYNER *v.* MITCHELL (1877), 2 C. P. D. 357; 25 W. R. 633.

1100. —— ——.]—Deft. sent his carriage to be repaired by pltf. who was a coach builder. Pltf. sent a carriage of his own to deft. for use while the repairs were going on. The coachman of deft. without his knowledge, took pltf.'s carriage out for his own purposes, & while he was driving the carriage it was injured through his negligence. In an action to recover the cost of repairing it:—*Held:* as the coachman at the time when the injury was done to the carriage was not acting in the course of his employment, deft. was not liable.—SANDERSON *v.* COLLINS, [1904] 1 K. B. 628; 73 L. J. K. B. 358; 90 L. T. 243; 20 T. L. R. 249; *sub nom.* SAUNDERSON *v.* COLLINS, 52 W. R. 354; 48 Sol. Jo. 259, C. A.

Annotation:—**Consd.** Cheshire *v.* Bailey, [1905] 1 K. B. 237.

(*d*) *Hackney Carriage Drivers.*

See, generally, STREET & AERIAL TRAFFIC.

Whether driver a servant of proprietor.]—*See* Part II., Sect. 4, *ante*.

1101. Liability of proprietor — Driver acting within scope of employment—If relationship of master & servant subsists.]—A cab plying in the streets in London, in the ordinary way, was hired by P. to carry his luggage. The luggage was lost by the fault of the driver. On the cab was the name of H. as proprietor of it, which he in fact was. Y., a licenced driver, was actually driving at the time. P. sued H. on a contract to carry his luggage. It appeared that Y. each day paid

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PART IX. SECT. 3, SUB-SECT. 13.—B. (c).

1096 i. *General rule—Master not liable.*]—In an action for damages for injury caused by negligent driving, it appeared that a servant of defts. on his way for a wrench, for which he had been sent for the purpose of shutting off the water from a street hydrant which had burst, without the knowledge or consent of defts. wrongfully took possession of a horse & buggy belonging to defts.' city comr. & therewith ran pltf. down, causing the injury complained of:—*Held:* defts. were not liable.—STRETTON *v.* CITY OF TORONTO (1887), 13 O. R. 139.—**CAN.**

1096 ii. —— ——.]—WITSOE *v.* ARNOLD (1914), 27 W. L. R. 259; 6 W. W. R. 4; 15 D. L. R. 915.—**CAN.**

1096 iii. —— ——.]—Where a chauffeur, who was taking his master's car to a workshop for repairs, finding the lane leading to it impassable, left the car in charge of the cleaner, who, though forbidden, drove it & broke a municipal lamp post:—*Held:* the master was not liable for the cleaner's act, since it was outside the scope of his employment.—NALINI RANJAN SEN GUPTA *v.* CALCUTTA CORPN. (1925), I. L. R. 52 Calc. 983.—**IND.**

f. Exception to rule.]—Applt.'s servant while driving applt.'s car missed his overcoat, which he had used in the course of his employment earlier in the day. While, without appellant's instructions, driving the car to where he believed he had left it, he injured resp.:—*Held:* the overcoat being part of the servant's equipment, his going to recover it was reasonably incidental to his employment & applt. was liable.—NIGHTINGALE *v.* COCKEO, [1917] N. Z. L. R. 433.—**N.Z.**

PART IX. SECT. 3, SUB-SECT. 13.—B. (d).

1101 i. *Liability of proprietor—Driver acting within scope of employment—If relationship of master & servant subsists.*]—The owner of a horse & car is not liable for the negligent driving of some other person, even though he had knowledge of such driving, & the person driving had authority from the owner to drive, unless such driving was upon the business of the owner, or the relation of master & servant exists.—HUNTER *v.* HANNAY (1892), 26 I. L. T. 129.—**IR.**

1101 ii. —— —— ——.]—PRIESTLY *v.* DUMEYER (1898), 15 S. C. 393.—**S. AF.**

a sum of money to H. for the use of a cab & two horses for the day, depositing his licence with H. before he took the cab out, in compliance with London Hackney Carriage Acts; & Y. made what he could by the use of the cab & horses:—*Held:* taking into consideration the provisions of those Acts, the driver must be taken to be the agent of the proprietor with authority to make contracts for the employment of the cab on his account; &, consequently, the action was rightly brought against the proprietor.—POWLES *v.* HIDER (1856), 6 E. & B. 207; 25 L. J. Q. B. 331; 27 L. T. O. S. 77; 21 J. P. 4; 2 Jur. N. S. 472; 4 W. R. 492; 119 E. R. 841.

Annotations:—**Distd.** Fowler *v.* Lock (1872), L. R. 7 C. P. 272. **Followed.** Venables *v.* Smith (1877), 2 Q. B. D. 279. **Consd.** King *v.* Spurr (1881), 8 Q. B. D. 104. **Distd.** King *v.* London Improved Cab Co. (1889), 23 Q. B. D. 281. **Followed.** Keen *v.* Henry, [1894] 1 Q. B. 292. **Consd.** Gates *v.* Bill, [1902] 2 K. B. 38. **Distd.** Kemp *v.* Elisha, [1918] 1 K. B. 228. **Refd.** Smith *v.* General Motor Cab Co. (1911), 105 L. T. 113; Bygraves *v.* Dicker, [1923] 2 K. B. 585. **Mentd.** Steel *v.* Lester (1877), 3 C. P. D. 121; Doggett *v.* Waterloo Taxicab Co. (1910), 79 L. J. K. B. 1085.

1102. ——— ——— ———.]—Pltf. was run over & sustained injuries through furious driving on the part of a cab driver, & brought his action for such injuries against the proprietor of the cab. The arrangement between the proprietor & the driver was that the horse & cab were entrusted by the former to the latter for the day, to be used entirely at the driver's discretion during the day, for the purpose of plying for hire. The driver was to pay 16*s.* for the cab; all that he made above that sum was his perquisite for his labour & any deficiency he had to make good afterwards. There was no particular time fixed for going out or returning with the cab. On the day when the accident occurred the driver was on his way back with the cab to the stables of the proprietor intending to return the cab. When he came to the end of the mews in which the stables were, he went on with the cab to a tobacconist's a little way off & purchased some snuff & on his way back to the stables the accident happened:—*Held:* the proprietor was liable for the acts of the driver while acting within the scope of the purposes for which the cab was entrusted to him, as a master for the acts of his servant, & the driver was at the time of the accident so acting.

Independently of Acts of Parliament relating to this subject, the relation between them would be that of bailor & bailee, not that of master & servant (COCKBURN, C.J.).—VENABLES *v.* SMITH (1877), 2 Q. B. D. 279; 46 L. J. Q. B. 470; 36 L. T. 509; 41 J. P. 551; 25 W. R. 584, D. C.

Annotations:—**Consd.** Steel *v.* Lester (1877), 3 C. P. D. 121; King *v.* Spurr (1881), 8 Q. B. D. 104. **Apprvd.** King *v.* London Improved Cab Co. (1889), 23 Q. B. D. 281. **Followed.** Keen *v.* Henry, [1894] 1 Q. B. 292. **Consd.** Gates *v.* Bill, [1902] 2 K. B. 38. **Apprvd.** Smith *v.* General Motor Cab Co., [1911] A. C. 188. **Distd.** Kemp *v.* Elisha, [1918] 1 K. B. 228. **Refd.** Doggett *v.* Waterloo Taxi Cab Co., [1910] 2 K. B. 336; Bygraves *v.* Dicker, [1923] 2 K. B. 585.

1103. ——— ——— ———.]—A proprietor of a hackney carriage is liable for the acts of his driver while acting within the scope of his employment.—PLAYLE *v.* KEW (1886), 2 T. L. R. 849, N. P.

1104. ——— ——— ———.]—Under London Hackney Carriages Act, 1843 (c. 86), so far as the public is concerned, the proprietor of a hackney carriage is responsible for the acts of the driver whilst plying for hire, as if the relationship of master & servant existed between them.—KING *v.* LONDON IMPROVED CAB CO. (1889), 23 Q. B. D. 281; 58 L. J. Q. B. 456; 61 L. T. 34; 53 J. P. 788; 37 W. R. 737; 5 T. L. R. 591, C. A.

Annotations:—**Followed.** Keen *v.* Henry, [1894] 1 Q. B. 292. **Consd.** Gates *v.* Bill, [1902] 2 K. B. 38. **Apprvd.** Smith *v.* General Motor Cab Co., [1911] A. C. 188. **Distd.** Kemp *v.* Elisha, [1918] 1 K. B. 228. **Refd.** Doggett *v.* Waterloo Taxi-Cab Co., [1910] 2 K. B. 336. **Mentd.** Smith *v.* Bailey, [1891] 2 Q. B. 403.

1105. ——— ——— ———.]—Under London Hackney Carriages Act, 1843 (c. 86), so far as the public is concerned the registered proprietor of a hackney carriage, is responsible for the acts of the driver whilst he is plying for hire, as if the relationship of master & servant existed between them, even though it does not in fact exist.—KEEN *v.* HENRY, [1894] 1 Q. B. 292; 63 L. J. Q. B. 211; 69 L. T. 671; 58 J. P. 262; 42 W. R. 214; 10 T. L. R. 96; 38 Sol. Jo. 77; 9 R. 102, C. A.

Annotations:—**Consd.** Gates *v.* Bill, [1902] 2 K. B. 38. **Distd.** Kemp *v.* Elisha, [1918] 1 K. B. 228. **Apld.** Bygraves *v.* Dicker, [1923] 2 K. B. 585. **Refd.** Doggett *v.* Waterloo Taxi-Cab Co., [1910] 2 K. B. 336.

1106. ——— ——— ———.]—A taxicab driver occasionally took a cab out for the day from the owners' yard. He paid them 75 *per cent.* of his receipts, & accepted certain conditions as to the use of a uniform & the purchase of petrol. There was little or no control exercised over him, though the words servant & dismissal occurred on notices issued by the owners to the drivers & the public:—*Held:* the question whether or not he was a workman, was one of fact, & there was evidence that the contract between the parties was not a contract of service.

It may well be that though the relation between the taxicab owner & his driver *inter se* be that of bailor & bailee, the driver may still *quoad* third parties be treated as the agent of the proprietor authorised to ply for hire in the streets for reward to the proprietor, & the latter be thereby rendered liable for those acts of the driver which were within the scope of the latter's authority (LORD ATKINSON).—SMITH *v.* GENERAL MOTOR CAB CO., LTD., [1911] A. C. 188; 80 L. J. K. B. 839; 105 L. T. 113; 27 T. L. R. 370; *sub nom.* BATES-SMITH *v.* GENERAL MOTOR CAB CO., LTD., 55 Sol. Jo. 439; 4 B. W. C. C. 249, H. L.

Annotations:—**Refd.** Kemp *v.* Elisha, [1918] 1 K. B. 228. **Mentd** R. *v.* Messer (1911), 82 L. J. K. B. 913; Curtis *v.* Plumptre (1913), 6 B. W. C. C. 87; Wilmerson *v.* Lynn & Hamburg S.S. Co., [1913] 3 K. B. 931.

1107. ——— ——— **Cab appropriated to customer's use—Driven for other purposes on manager's orders.**]—IRWIN *v.* WATERLOO TAXI-CAB CO., LTD., No. 1131, *post.*

1108. ——— **Carriage hired from proprietor by driver—Daily hire.**]—The licenced driver of a cab licenced to deft. is a servant of deft., for whose trespass when driving the cab deft. is liable, although the driver hire the cab at a sum certain each day, by a bargain having reference to that day only; such an agreement being merely the mode of paying deft.'s wages.—MORLEY *v.* DUNSCOMBE (1848), 11 L. T. O. S. 199.

Annotations:—**Followed.** Powles *v.* Hider (1856), 6 E. & B. 207. **Mentd.** Fowler *v.* Lock (1872), L. R. 7 C. P. 272.

1109. ——— ——— ———.]—POWLES *v.* HIDER, No. 1101, *ante.*

1110. Award against driver bars action against master.]—WRIGHT *v.* LONDON GENERAL OMNIBUS CO., No. 1013, *ante.*

(*e*) *Servant or Third Party Acting for Driver.*

See, generally, AGENCY, Vol. I., pp. 387 *et seq.*

1111. Servant—By order of foreman.]—In an action to recover damages for injury caused by deft.'s servant in driving a cart against pltf.'s cab, it appeared that the servant who was driving the cart was not usually employed for that purpose, but as a porter, nor did the cart or horse belong to deft. Deft. usually hired cart, horse & driver

Sect. 3.—*In tort: Sub-sect.* 13, *B.* (*e*) *&* (*f*).]

for the purpose of taking out his goods, & the porter usually went in the cart to superintend their delivery; but, on the occasion in question, the usual driver was not able to go, & deft.'s foreman sent the porter alone with the goods, & saw him drive away from deft.'s shop:—*Held:* this was sufficient evidence to go to the jury that deft. had employed the porter to drive, & rendered himself liable for his acts in the course of that service.—WOOD *v.* WILLIAMS (1846), 8 L. T. O. S. 89.

1112. —— Vehicle left contrary to express orders.]—There is no rule of law to prevent a master being liable for negligence of his servant whereby opportunity was given for a third person to commit a wrongful or negligent act immediately producing the damage complained of. Whether the original negligence was an effective cause of the damage is a question of fact in each case.

Deft. employed a man to drive a cart, with instructions not to leave it, & a lad, who had nothing to do with the driving, to go in the cart & deliver parcels to the customers of defts. The driver left the cart, in which the lad was, & went into a house. While the driver was absent the lad drove on & came into collision with pltf.'s carriage. In an action to recover for the damage caused by the collision:—*Held:* the negligence of the driver in so leaving the cart was the effective cause of the damage, & deft. was liable.—ENGELHART *v.* FARRANT & Co., [1897] 1 Q. B. 240; 66 L. J. Q. B. 122; 75 L. T. 617; 45 W. R. 179; *sub nom.* ENGELHART *v.* FARRANT & Co. & LIPTON, 13 T. L. R. 81, C. A.

Annotations:—**Apld.** McDowall *v.* G. W. Ry., [1903] 2 K. B. 331. **Consd.** Ricketts *v.* Tilling, [1915] 1 K. B. 644. **Refd.** Harris *v.* Fiat Motors (1906), 22 T. L. R. 556; Weld-Blundell *v.* Stephens, [1920] A. C. 956. **Mentd.** Latham *v.* Johnson, [1913] 1 K. B. 398; Norman *v.* G. W. Ry., [1914] 2 K. B. 153; Jefferies & Atkey *v.* Derbyshire Farmers (1920), 36 T. L. R. 825.

1113. —— Omnibus driven by conductor.]—At the end of a journey the conductor of an omnibus belonging to defts., in the absence of the driver, & apparently for the purpose of turning the omnibus in the right direction for the next journey, drove it through some by-streets at a considerable pace, & while so doing negligently ran into & injured pltf. Pltf. gave no evidence that the conductor was authorised by defts. to drive the omnibus in the absence of the driver:—*Held:* pltf. had not discharged himself from the burden cast upon him of showing that the injury was due to the negligence of a servant of defts. acting within the scope of his employment, & defts. were entitled to judgment.—BEARD *v.* LONDON GENERAL OMNIBUS Co., [1900] 2 Q. B. 530; 69 L. J. Q. B. 895; 83 L. T. 362; 48 W. R. 658; 16 T. L. R. 499, C. A.

Annotations:—**Distd.** Ricketts *v.* Tilling, [1915] 1 K. B. 644. **Refd.** Whitehead *v.* Reader, [1901] 2 K. B. 48. **Mentd.** Prager *v.* Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566.

1114. —— ——.]—At the end of a journey the conductor of an omnibus belonging to deft., in the presence of the driver, who was seated beside him, for the purpose of turning the omnibus in the right direction for the next journey, drove it through some by-streets so negligently that it mounted the foot pavement & knocked down & seriously injured pltf., who was standing there. At the trial the judge, upon the authority of *Beard* v. *London General Omnibus Co.*, No. 1113, *ante*, held there was no evidence that the conductor had any authority from defts. to drive the omnibus & entered judgment for defts.:—*Held:* there was evidence of negligence on the part of the driver in allowing the omnibus to be negligently driven by the conductor, & there must therefore be a new trial.—RICKETTS *v.* TILLING (THOS.), LTD., [1915] 1 K. B. 644; 84 L. J. K. B. 342; 112 L. T. 137; 31 T. L. R. 17, C. A.

1115. Third party—With consent of driver.]—In an action on the case for damage done to pltf.'s cabriolet, from the negligence with which deft.'s cart was driven, deft., will be liable, although it should appear that deft.'s servant was not driving at the time of the accident, but had entrusted the reins to a stranger who was riding with him, & who was not in the service of deft.—BOOTH *v.* MISTER (1835), 7 C. & P. 66, N. P.

Annotations:—**N.F.** Harris *v.* Fiat Motors (1906), 22 T. L. R. 556 (*See* 23 T. L. R. 504). **Refd.** Pratt *v.* Patrick, [1924] 1 K. B. 488.

1116. —— When servant is drunk.]—In an action for personal injuries against a cab proprietor it appeared that pltf. was knocked down & injured by a cab belonging to deft., the licenced driver being inside drunk & the vehicle being driven by an unlicenced man, also drunk, but not the servant of deft. Pltf. was non-suited:—*Held:* the non-suit was right.—MANN *v.* WARD (1892), 8 T. L. R. 699, C. A.

Annotation:—**Dbtd.** Englehart *v.* Farrant, [1897] 1 Q. B. 240.

1117. —— ——.]—While defts.' omnibus was being driven by defts.' servant, a policeman, thinking that the driver was drunk, ordered him to discontinue driving, the omnibus being then only a quarter of a mile from defts.' yard. The driver & the conductor of the omnibus thereupon authorised a person who happened to be standing by to drive the omnibus home. That person through his negligence while so driving the omnibus home injured pltf.:—*Held:* as defts. might have been communicated with, there was no necessity for their servants to employ another person to drive the omnibus home, & defts. were not liable for the negligence of the person so employed.

Qu.: whether, if there had been such a necessity, defts. would have been liable.—GWILLIAM *v.* TWIST, [1895] 2 Q. B. 84; 64 L. J. Q. B. 474; 72 L. T. 579; 59 J. P. 484; 43 W. R. 566; 11 T. L. R. 415; 14 R. 461, C. A.

Annotations:—**Folld.** Harris *v.* Fiat Motors (1906), 22 T. L. R. 556 (*See* 23 T. L. R. 504). **Distd.** Ricketts *v.* Tilling, [1915] 1 K. B. 644. **Consd.** Prager *v.* Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566. **Refd.** Beard *v.* London General Omnibus Co., [1900] 2 Q. B. 530.

1118. —— In absence of necessity.]—GWILLIAM *v.* TWIST, No. 1117, *ante*.

1119. —— ——.]—A motor car, after having been repaired by defts., was sent back to the owner under the charge of a driver who was in the employment of defts. The driver received instructions from defts. not to give up the driving to any one. At one stage of the journey a man not in the employment of defts. accompanied the driver, who hearing a noise at the back of the car entrusted the driving to his companion while he himself

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PART IX. SECT. 3, SUB-SECT. 13.—B. (e).

1115 i. *Third party—With consent of driver.*]—MCGUIRE *v.* HEMBLING, [1925] 1 D. L. R. 883; [1925] 1 W. W. R. 536. —**CAN.**

1115 ii. —— ——.]—Defts. hired a motor car to T. The chauffeur of the car in violation of his instructions allowed T. to drive. While T. was driving pltf. was knocked down & injured:—*Held:* in allowing T. to drive the chauffeur was acting outside the scope of his authority & defts. were not liable.—COOGAN *v.* DUBLIN MOTOR CO. (1914), 49 I. L. T. 24.—**IR.**

1116 i. —— *When servant is drunk.*]—MARTIN *v.* WARDS (1887), 14 R. (Ct. of Sess.) 814; 24 Sc. L. R. 586.—**SCOT.**

went to see the cause of the noise. While his companion was driving he negligently drove the car against pltf.'s van:—*Held:* as there was no necessity for keeping the car going while the driver examined the machinery, & therefore for entrusting the driving to the driver's companion, defts. were not liable for the negligence of the latter.—HARRIS *v.* FIAT MOTORS, LTD. (1906), 22 T. L. R. 556, D. C.; *revsd.* on other grounds (1907), 23 T. L. R. 504, C. A.

Annotations:—**Mentd.** Ricketts *v.* Tilling, [1915] 1 K. B. 644; Prager *v.* Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566.

(f) Other Cases.

1120. Partnership business—Joint liability of masters.]—A. & B. are partners in the business of public carriers; by a contract between them, A. finds horses & drivers for certain stages, & B. supplies them for the remaining stages. They are, notwithstanding this division of the concern between them, responsible for the misconduct & negligence of their drivers & servants throughout the whole distance, & it is no defence to B. that the servant, by whom an injury is committed, was the special servant of A. & hired & paid by A. alone.—WEYLAND *v.* ELKINS (1816), Holt, N. P. 227; *sub nom.* WALAND *v.* ELKINS, 1 Stark. 272, N. P.

1121. —— ——.]—Case against three defts., proprietors of a stage coach. The declaration stated that defts. so carelessly managed their coach & horses, that the coach ran against pltf. & broke his leg. It appeared in evidence that one of defts. was driving at the time when the accident happened, & the jury found that it happened through his negligent driving:—*Held:* pltf. might maintain case against all the proprietors, although he might perhaps have been entitled to bring trespass against the one that drove the coach.—MORETON *v.* HARDERN (1825), 4 B. & C. 223; 6 Dow. & Ry. K. B. 275; 107 E. R. 1042.

Annotations:—**Consd.** Williams *v.* Holland (1833), 10 Bing. 112. **Refd.** Ashworth *v.* Stanwix (1861), 3 E. & E. 701. **Mentd.** Wells *v.* Ody (1836), 1 M. & W. 452.

1122. Servant striking another horse.]—Where pltfs. hired a chariot for the day, appointed the coachman, & furnished the horses:—*Held:* (1) they were properly described as owners & proprietors of it, in a declaration against deft. for an accident arising from his servant's negligence in driving against the chariot; (2) where deft.'s servant wantonly, & not in order to execute his master's orders, struck pltfs.' horses, & thereby produced the accident, his master was not liable; but where, in the course of his employment, he so struck, although injudiciously, his master is liable.—CROFT *v.* ALISON (1821), 4 B. & Ald. 590; 106 E. R. 1052.

Annotations:—*As to* (1) **Refd.** Laugher *v.* Pointer (1826), 5 B. & C. 547. *As to* (2) **Apld.** Limpus *v.* London General Omnibus Co. (1862), 1 H. & C. 526. **Refd.** Freeman *v.* Rosher (1849), 18 L. J. Q. B. 340; Seymour *v.* Greenwood (1861), 7 H. & N. 355; Udell *v.* Atherton (1861), 7 H. & N. 172.

1123. ——.]—FELLMAN *v.* MOSES, FARMER *v.* MOSES (1843), 2 L. T. O. S. 213, N. P.

1124. Servant occasionally employed by one master—Riding horse belonging to another master.]—A person occasionally employed by deft. as his servant, being sent out by him on his business, took the horse of another person, in whose service he also worked, &, in going, rode over pltf. At the trial, it was left to the jury to say, whether or not the horse was taken by the servant with the implied consent or authority of deft.; & they having found a verdict for pltf., the ct. refused to grant a new trial.—GOODMAN *v.* KENNELL (1828), 3 C. & P. 167; 1 Moo. & P. 241; 6 L. J. O. S. C. P. 61.

1125. Servant driving hired vehicle—Where hired driver provided.]—A. employs B. to deliver parcels, B. finding horse & cart & driver; & also employs C. to superintend their delivery; C. drives a cart containing carpeting, A. being a draper, against pltf.'s cab. *Semble:* this evidence does not establish even a *primâ facie* case of liability against A.—POOLE *v.* WILLIAMS (1845), 6 L. T. O. S. 191.

1126. Servant leaving vehicle unattended.]—WHATMAN *v.* PEARSON, No. 1000, *ante*.

1127. Servant driving own horse—Kept for purposes of master's business.]—PATTEN *v.* REA, No. 1089, *ante*.

1128. Groom causing horse to kick.]—Pltf. was driving a waggon with three horses along a highway, walking in the usual way at the head of the leading horse, on his proper side of the road. Deft. & his groom were riding by at a foot pace, meeting the waggon on the wrong side, when just as he passed pltf., the groom touched his horse with a spur, & the horse kicked out & struck pltf.:—*Held:* the act of using the spur when so near pltf. was such an improper act on the part of the groom as to justify the jury in finding deft. to have been guilty of negligence.—NORTH *v.* SMITH (1861), 10 C. B. N. S. 572; 4 L. T. 407; 142 E. R. 576.

Annotation:—**Refd.** Hammack *v.* White (1862), 11 C. B. N. S. 588.

1129. Driver obstructing rival omnibus—Contrary to express orders.]—LIMPUS *v.* LONDON GENERAL OMNIBUS CO., No. 989, *ante*.

1130. Servant inviting person into cart—Emergency.]—Pltf. at the request of a servant of deft. got into deft.'s cart, which was then in the charge of the servant, in order to render assistance to another servant of deft. who had been rendered unconscious by an accident. Pltf. fell out of the cart & was injured through the negligence of the servant in charge of the cart in causing the horse to start. In an action against deft. for damages for the injuries sustained by pltf.:—*Held:* the existence of an emergency gave no implied authority to the servant to invite pltf. into the cart, & deft. was not liable to pltf.—HOUGHTON *v.* PILKINGTON, [1912] 3 K. B. 308; 82 L. J. K. B. 79; 107 L. T. 235; 28 T. L. R. 492; 56 Sol. Jo. 633, D. C.

1131. Servant driving cab—Appropriated to customer's exclusive use—By order of garage manager.]—Defts. were the proprietors of taxicabs which they let out on hire. By an agreement with one of their customers one of their cabs was appropriated to his exclusive use. A driver in their employment, by the order of their general manager, whose orders it was the duty of the driver to obey, drove him in that cab upon his private business. The general manager had no authority to use the cab for that purpose, but the driver had no reason to suppose that his order was an improper one. Pltf. was injured by the negligence of the driver while driving the cab:—*Held:* the driver was acting within the scope of his employment while so driving the cab, & defts. were liable for his negligence.—IRWIN *v.* WATERLOO TAXI-CAB CO., LTD., [1912] 3 K. B. 588; 81 L. J. K. B. 998; 107 L. T. 288; 28 T. L. R. 567; 56 Sol. Jo. 720, C. A.

PART IX. SECT. 3, SUB-SECT. 13.—B. (f).

g. Servant driving own car—On firm's business—Contrary to orders.]—MAZZOLA *v.* TURNBULL & JONES, LTD., [1926] N. Z. L. R. 380.—**N.Z.**

Sect. 3.—In tort: Sub-sect. 13, B. (f), C., D. & E.]

Damage to street lamp.]—*See* GAS, Vol. XXV., p. 480, Nos. 58–61.

C. Damage by Fire or Water.

1132. By fire.]—The common law liability of a master for the negligence of his servants in dealing with a fire is not altered by Fire Prevention Act, 1774 (c. 78), s. 86, which applies only to the consequences of fires that "accidentally begin," & not to the consequences of fires that have been intentionally, though not maliciously lighted.—FILLITER *v.* PHIPPARD (1847), 11 Q. B. 347; 17 L. J. Q. B. 89; 10 L. T. O. S. 225; 11 J. P. 903; 12 Jur. 202; 116 E. R. 506.

Annotations:—**Mentd.** *Re* Barker, *Ex p.* Gorely (1864), 4 De G. J. & Sm. 477; Grill *v.* General Iron Screw Collier Co. (1866), 35 L. J. C. P. 321; Musgrove *v.* Pandelis, [1919] 2 K. B. 43.

1133. —— Servant smoking.]—WILLIAMS *v.* JONES, No. 1077, *ante*.

1134. —— ——.]—The owner of a motor garage leased it to a firm of motor engineers, who agreed with defts. to give them the use of it as a garage for motor lorries. A youth employed by defts. in the garage, while drawing motor spirit from a drum into a tin, struck a match, lit a cigarette, & then threw the match on the floor. This set light to some oil & petrol lying about the floor; the fire spread to the motor spirit flowing from the drum, & the garage & its contents were consumed. In an action by the owner & the lessees of the garage against defts. for the negligence of their servant:—*Held:* the servant being engaged in an act which was within the scope of his employment, & required special caution, & having failed to exercise caution, was guilty of negligence in the course of his employment, & defts. were liable for the resulting damage.—JEFFERSON *v.* DERBYSHIRE FARMERS, LTD., [1921] 2 K. B. 281; 90 L. J. K. B. 1361; 124 L. T. 775, C. A.; *affg.* S. C. *sub nom.* JEFFERIES & ATKEY (A. R.) & CO., LTD. *v.* DERBYSHIRE FARMERS, LTD. (1920), 36 T. L. R. 825.

1135. By water—Overflow.]—Pltfs. occupied premises beneath the offices of defts., who were solrs. One of defts. had a room of the offices, & in it was a lavatory for his own use exclusively, & his orders to his clerks were that no clerk should come into his room after he had left. A clerk went into the room to wash his hands at the lavatory after his employers had left, turned the water tap, & negligently left it so that the water flowed from it into pltf.'s premises & damaged them. In an action for negligence:—*Held:* the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment & there was no evidence of negligence for which defts. were liable.—STEVENS *v.* WOODWARD (1881), 6 Q. B. D. 318; 50 L. J. Q. B. 231; 44 L. T. 153; 45 J. P. 603; 29 W. R. 506, D. C.

Annotation:—**Expld. & Distd.** Ruddiman *v.* Smith (1889), 60 L. T. 708.

1136. —— ——.]—Defts. sublet to pltfs. the lower rooms of their house, while they retained the upper rooms for carrying on their own business. In these upper rooms there was a lavatory for the use of defts.' clerks, the key of which was kept by defts.' foreman. This foreman, leaving off work at 7 p.m., went at 7.10 p.m. to the lavatory to wash his hands. Turning on the tap, & finding no water, he went away without turning the tap off. When the water was turned on next morning it overflowed, went through the floor, & damaged pltfs.' goods in the room below. The jury found that the damage was caused by the negligence of the clerk in leaving the tap open:—*Held:* defts. were liable for the damage so caused by the negligence of their clerk, upon the ground that, whether the use of the lavatory by the clerk was or was not within the scope of his authority, it was at all events an incident to his employment, so as to render his employer liable for the damage resulting from his negligence in such use.—RUDDIMAN & CO. *v.* SMITH (1889), 60 L. T. 708; 53 J. P. 518; 37 W. R. 528; 5 T. L. R. 417, D. C.

D. Damage to Ship.

See SHIPPING.

E. Other Cases.

1137. Employment of drunken servant—Servant drunk to master's knowledge.]—WANSTALL *v.* POOLEY (1841), 6 Cl. & Fin. 910, n.; 7 E. R. 940.

1138. Vehicle left unattended.]—Pltf. is not necessarily deprived of his right of action for an injury occasioned by the negligence of deft., even although he has contributed to the injury, by placing himself unlawfully in such a situation as to become liable to the accident, if the circumstances are such as to exclude the possibility of want of ordinary caution on his part.

Deft.'s servant left his cart & horse standing in a street thronged with children. Pltf., a child of six, or seven years old, was climbing up & down the wheel of the empty cart. Other children drove the horse on, & pltf. was thrown down, & the wheel went over his leg:—*Held:* on this evidence the judge rightly left it to the jury to say whether there was negligence on the part of deft.'s servant; for if there was the action was maintainable.—LYNCH *v.* NURDIN (1841), 1 Q. B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L. J. Q. B. 73; 5 J. P. 319; 5 Jur. 797; 113 E. R. 1041.

Annotations:—**Distd.** Mann *v.* Ward (1892), 8 T. L. R. 699. **Refd.** Degg *v.* Mid. Ry. (1857), 1 H. & N. 773; Engelhart *v.* Farrant, [1897] 1 Q. B. 240; Ruoff *v.* Long (1915), 114 L. T. 186. **Mentd.** Davis *v.* Mann (1842), 7 J. P. 53; Barnes *v.* Ward (1850), 9 C. B. 392; Lygo *v.* Newbolt

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PART IX. SECT. 3, SUB-SECT. 13.—C.

1132 i. *By fire.*]—BUGGE *v.* BROWN (1919), 26 C. L. R. 110.—**AUS.**

1132 ii. ——.]—Where a servant has authority to light a fire upon his master's land in the event only of a certain emergency arising, the question whether that emergency had or had not arisen is irrelevant in determining the liability of the master for damage caused to another person by a fire lit by the servant on the master's land & by the servant's negligence escaping on to that other person's land.—WHITFIELD *v.* TURNER (1920), 28 C. L. R. 97.—**AUS.**

1132 iii. ——.]—CANADA SOUTHERN RY. CO. *v.* PHELPS (1884), 14 S. C. R. 132.—**CAN.**

1132 iv. ——.]—*Held:* deft. was responsible for the act of his servants in setting out fire which spread to pltf.'s land & destroyed his property—the act being for deft.'s benefit.—DERBY *v.* ELLISON (1912), 20 W. L. R. 794; 2 W. W. R. 99.—**CAN.**

1132 v. ——.]—Farm labourers hired to do anything that may require to be done upon well-wooded farms are acting within the scope of their employment in setting out fires, even if such setting out at the particular season of the year were contrary to the express orders of the employer, & therefore the employer will be liable to parties whose lands are injured by the fire.—GALLON *v.* ELLISON (1914), 20 B. C. R. 504.—**CAN.**

1132 vi. ——.]—PERCY *v.* BUTLER & JERRETT (1887), 7 Nfld. L. R. 237.—**NFLD.**

1132 vii. ——.]—REID *v.* BOUVERIE (1914), 35 N. L. R. 203.—**S. AF.**

1135 i. *By water—Overflow.*]—HALLENSTEIN BROTHERS, LTD. *v.* LEWIS & CO., [1917] N. Z. L. R. 592.—**N.Z.**

PART IX. SECT. 3, SUB-SECT. 13.—E.

1138 i. *Vehicle left unattended.*]—VARS *v.* GRAND TRUNK RY. CO. (1873), 23 C. P. 143.—**CAN.**

1138 ii. ——.]—MORRISON *v.* M'ARA (1896), 23 R. (Ct. of Sess.) 564; 33 Sc. L. R. 384; 3 S. L. T. 300.—**SCOT.**

h. *Injury caused by third party—Baggage man.*]—CUNNINGHAM *v.* GRAND

(1854), 9 Exch. 302; Caswell *v.* Worth (1856), 5 E. & B. 849; Alsop *v.* Yates (1858), 27 L. J. Ex. 156; Singleton *v.* Eastern Counties Ry. (1859), 7 C. B. N. S. 287; Waite *v.* N. E. Ry. (1859), E. B. & E. 728; Hughes *v.* Macfie, Abbott *v.* Macfie (1863), 3 New Rep. 394; Mangan *v.* Atterton (1866), 4 H. & C. 388; Francis *v.* Cockerell (1870), 10 B. & S. 950; Clark *v.* Chambers (1878), 3 Q. B. D. 327; Ponting *v.* Noakes, [1894] 2 Q. B. 281; Harrold *v.* Watney, [1898] 2 Q. B. 320; McDowall *v.* G. W. Ry., [1902] 1 K. B. 618; Cooke *v.* Mid. G. W. Ry. of Ireland, [1909] A. C. 229; Lowery *v.* Walker (1909), 79 L. J. K. B. 297; Barker *v.* Herbert, [1911] 2 K. B. 633; Latham *v.* Johnson, [1913] 1 K. B. 398; Rickards *v.* Lothian, [1913] A. C. 263; Crane *v.* South Suburban Gas Co., [1916] 1 K. B. 33; Hardy *v.* C. L. Ry., [1920] 3 K. B. 459; Weld-Blundell *v.* Stephens, [1920] A. C. 956; Glasgow Corpn. *v.* Taylor, [1922] 1 A. C. 44.

1139. —— Theft of goods therefrom.]—A manufacturing jeweller hired from a jobmaster a carriage with a horse & driver at an agreed weekly sum for the express purpose of sending his traveller with a stock of jewels to go round to his customers. One day while making his rounds the traveller went into an hotel & left the carriage, with a stock of jewels inside it, in the charge of the driver. Before leaving the carriage the traveller locked the door. The driver then went into a coffee house, leaving the carriage unattended in the street. A thief drove the carriage away & stole the jewels. The jeweller brought an action against the jobmaster to recover the value of the stolen jewels:—*Held:* it was the duty of deft. to provide a driver who should take ordinary care of the carriage during the temporary absence of the traveller, & the theft of the jewels was the natural & ordinary result of a breach of such duty, so as to make deft. liable for the loss suffered by pltf.—ABRAHAM *v.* BULLOCK (1902), 86 L. T. 796; 50 W. R. 626; 18 T. L. R. 701, C. A.

Annotation:—**Distd.** Cheshire *v.* Bailey, [1905] 1 K. B. 237.

1140. Improper levy of fine—Appointee of clerk of peace—Liability of sheriff.]—The duty of the sheriff, with respect to the roll of fines sent to him by the clerk of the peace, pursuant to Levy of Fines Act, 1822 (c. 46), is not purely ministerial, & the sheriff is not justified in levying a fine stated in the roll to be unpaid, when the amount has been paid to the sheriff himself before receiving the roll. The duty clerk of the peace is authorised to receive the amount of fines imposed at quarter sessions; & if he receives the money & omits to notify the receipt in the roll, & damage accrues in consequence to the party fined, the latter may maintain an action against the deputy clerk of the peace for negligence.

Qu.: whether the deputy clerk of the peace is liable for acts of negligence of the assistant whom he appoints, pursuant to 59 Geo. 3, c. 28, to record the proceedings of the justices sitting in a second ct. at quarter sessions.—WILDES *v.* MORRIS (1852), 22 L. J. M. C. 4; 20 L. T. O. S. 140; 16 Jur. 1115; *sub nom.* MORRIS *v.* WILDES, 17 J. P. 119.

1141. Misdelivery of package—Neglect of consignor's order.]—Pltf. delivered at a station on defts.' railway a package, addressed "S. & Co., East India Docks, passenger ship Melbourne, Australia," & paid one sum for the carriage to London. By the practice of defts., goods delivered at that station for London are carried by their own line to Birmingham, & thence by the L. & N. W. Ry. to London. Before the package reached London, pltf. gave the clerk at the London station of the L. & N. W. Ry. co. an order, written across the receipt which had been given for the package, to send it to "S. & Co. Bell Wharf, Ratcliffe, London"; which order the clerk promised to obey, saying there was no extra charge. The package was, however, delivered according to the first address, & consequently lost:—*Held:* defts.' contract was to deliver according to pltf.'s directions; pltf. had a right to countermand his original direction; the clerk was the agent of defts. to carry out their contract, & therefore to receive the countermand; & defts. were liable for the loss consequent on the countermand having been disobeyed.

The power to receive the countermand was part of the contract itself. It was incidental to the employment of the clerk, that he should do all that defts. themselves would have been bound to do in performance of the original contract. Defts. were bound to act on a reasonable countermand; & the clerk was, therefore, their agent to receive it (PLATT, B.).—SCOTHORN *v.* SOUTH STAFFORDSHIRE RY. CO. (1853), 8 Exch. 341; 7 Ry. & Can. Cas. 810; 22 L. J. Ex. 121; 20 L. T. O. S. 225; 17 Jur. 214; 1 W. R. 154; 155 E. R. 1378.

Annotations:—**Mentd.** Giles *v.* Taff Vale Ry. (1853), 2 E. & B. 822; Crouch *v.* G. W. Ry. (1857), 2 H. & N. 491; Bristol & Exeter Ry. *v.* Collins (1859), 7 H. L. Cas. 195.

1142. Neglect of statutory duty by servant—Injury not result of neglect.]—The mere neglect by a servant of a duty imposed upon him by statute in his master's business, will not support an action against the master, where the injury is not shown to have resulted from the servant's neglect of the duty.

An Act of Parliament authorised regulations, for any breach of which the master or other person having charge of any vessel, or the owner, if it appeared that he was in fault, was made liable to penalties, & one of these regulations required that a bright light should be exhibited at the mast head. A declaration against an owner, after setting forth these facts, alleged that deft.'s servants, in charge of the vessel, neglected to exhibit the light at the mast head, & that pltf.'s vessel, through the carelessness & neglect of deft.'s servants in not exhibiting such light, ran foul of deft.'s vessel:—*Held:* bad on demurrer, as not disclosing any injury arising from the negligence of deft.'s servants nor any breach of duty on his part for which he would be liable civilly or criminally.—GENERAL STEAM NAVIGATION CO. *v.* MORRISON (1853), 13 C. B. 581; 1 C. L. R. 103; 22 L. J. C. P. 178; 21 L. T. O. S. 76; 17 Jur. 673; 1 W. R. 330; 138 E. R. 1327.

1143. Road left in dangerous condition—Servant employed to repair drains.]—Deft., with the consent of the owner of the soil & the surveyor of the district, employed P., who was a labourer, but a person particularly skilled in the construction of drains, to cleanse a drain which ran from deft.'s garden under the public road, & paid P. 5*s.* for the job. Deft. had never before employed P., & did not in any way interfere with or direct him in doing the job:—*Held:* the relationship of master & servant was established between deft. & P., so as to render deft. liable for an injury occasioned to pltf., whilst riding on the public road, by reason of the negligent manner in which P. had left the soil of the road over the drain.—SADLER *v.* HENLOCK (1855), 4 E. & B. 570; 3 C. L. R. 760; 24

TRUNK RY. CO. (1871), 31 U. C. R. 350.—**CAN.**

k. *Wrongful advice of defendant's servant.*]—STOTT *v.* GRAND TRUNK RY. CO. (1874), 24 C. P. 347.—**CAN.**

l. *Elevator shaft left open — Negligence of boy in charge—Causing injury.*]—STEPHENS *v.* CHAUSSÉ (1888), 15 S. C. R. 379.—**CAN.**

m. *Damage by steam — Negligence of caretaker of house.*]—MCNICHOL *v.* MALCOLM (1907), 39 S. C. R. 265.—**CAN.**

n. *Negligent coupling of engine & train.*]—WALKER *v.* CANADIAN NORTHERN RY. CO. (1913), 24 W. L. R. 158; 4 W. W. R. 451; 11 D. L. R. 363.—**CAN.**

Sect. 3.—*In tort: Sub-sect.* 13, *E.; sub-sects.* 14, 15, 16, 17 & 18.]

L. J. Q. B. 138; 24 L. T. O. S. 233; 1 Jur. N. S. 677; 3 W. R. 181; 119 E. R. 209.

Annotations:—**Consd.** Turner *v.* G. E. Ity. (1875), 33 L. T. 431. **Refd.** Wiggett *v.* Fox (1856), 11 Exch. 832; Abraham *v.* Reynolds (1860), 5 H. & N. 143; Johnson *v.* Lindsay (1889), 23 Q. B. D. 508; Donovan *v.* Laing Wharton & Down Construction Syndicate, [1893] 1 Q. B. 629; Soc. Maritime Francaise *v.* Shanghai Dock & Engineering Co. (1920), 90 L. J. P. C. 85. **Mentd.** Arthy *v.* Coleman (1857), 6 W. R. 34; Bargewell *v.* Daniel (1907), 98 L. T. 257; Simmons *v.* Heath Laundry Co., [1910] 1 K. B. 543; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762.

1144. —— Open coal shoot.]—Pltf. was injured by falling into a hole in the foot pavement of a street formed by the raising of the plate of a coal shoot belonging to a house. This had been negligently left open by the carter of deft., a coal merchant, who was delivering coal at the house, & did not warn pltf. of the danger:—*Held:* deft. was properly sued, & was liable for injuries resulting from the negligence of the carman, who was acting as his servant in the delivery of the coals.—WHITELEY *v.* PEPPER (1877), 2 Q. B. D. 276; 46 L. J. Q. B. 436; 36 L. T. 588; 41 J. P. 424; 25 W. R. 607.

Annotations:—**Refd.** Duke *v.* Courage (1882), 46 J. P. 453.

1145. Negligent workmanship of servant.]—Deft. engaged the services of S., a thatcher, for a certain period, at weekly wages, for the purpose of hiring him out to do thatching work for his profit. S. having during the period thatched some stacks of wheat, etc., for pltf., for which work deft. claimed & received payment:—*Held:* deft. was responsible to pltf. for injury to the wheat, etc., occasioned by the negligent manner in which S. did the work.—HOLMES *v.* ONION (1857), 2 C. B. N. S. 790; 26 L. J. C. P. 261; 22 J. P. 23; 140 E. R. 627.

1146. —— Work by local authority in default of owner.]—The owner of a house was duly required by an urban sanitary authority to make a covered drain from his house emptying into one of the sewers. The owner failed to do the work & the urban authority under Public Health Act, 1875 (c. 55), s. 23, thereupon themselves did it, & their servants negligently undermined the wall of a mill belonging to it:—*Held:* H. had a right of action against the urban authority for the negligence of their servants.—HALL *v.* BATLEY CORPN. (1877), 47 L. J. Q. B. 148; 37 L. T. 710; 42 J. P. 151.

1147. Railway clerk acting as porter.]—M. was a cloakroom clerk in defts.' employ, & assisted at the parcels' office; he used to take up parcels for passengers from the cloakroom to the train, when there was no porter there, & that was a regular thing for him to do. A passenger had asked him to take a parcel to the train, which he did, &, as he was running back, he ran against another porter, who in turn came against the ticket collector, & the ticket collector upset pltf.'s wife, causing injuries which resulted in her death. The judge non-suited pltf., holding that there was no evidence to go to the jury of any negligence on the part of defts. or their servants, & that there was no evidence that, at the time of the accident, M. was acting within the scope of his employment. It was agreed at the trial that, if the ct. should be of opinion that the nonsuit was wrong, judgment should be entered for pltf. for £236 & costs:—*Held:* there was evidence to go to the jury that at the time of the accident M. was acting within the scope of his employment, the nonsuit was wrong, & judgment should be entered for pltf. as agreed.—MILNER *v.* GREAT NORTHERN RY. CO. (1884), 50 L. T. 367.

1148. Damage to musical instrument—While stored in concert hall.]—A committee hired defts.' concert hall. The memorandum of letting for an evening concert contained no mention of a rehearsal, but a rehearsal was held in the hall on the same afternoon without objection. When it had ended pltf., without request or notice to the hallkeeper, placed his double bass violin safely in a small room attached to the concert hall, but in the way of the gas bracket. The hallkeeper was defts.' servant, & his duties were to prepare & clean the rooms, open & shut the doors & attend to the gas. In order to light the gas in the small room the hallkeeper moved the violin in such a way that it fell & was broken:—*Held:* there had been no such negligence on the part of the hallkeeper in the discharge of his duty towards defts. as to render them liable to pltf. for the damage to his violin.—NEUWITH *v.* OVER DARWEN INDUSTRIAL CO-OPERATIVE SOCIETY (1894), 63 L. J. Q. B. 290; 70 L. T. 374; 10 T. L. R. 282; 10 R. 588, D. C.

1149. Injury to pupil — While carrying out teacher's orders.]—Pltf., a girl of fourteen years of age, a pupil at a public elementary school, was sent by her teacher to poke the fire & draw out the damper in a room used by the teachers for their own convenience. In the course of obeying this order her pinafore caught fire, & she was burnt & injured. In an action brought by her against the teacher & deft. corpn., who were the local education authority, claiming damages in respect of her injuries, the jury awarded pltf. £300 damages:—*Held:* the teacher was liable, & the relation of the education authority to the teacher was that of master & servant so that the principle *qui facit per alium facit per se*, upon which the master is made responsible for the act or omission of his servant, was applicable, & further, the direction given by the teacher to pltf. was not outside the scope of her employment, so that the education authority were responsible for the direction given by her.—SMITH *v.* MARTIN & KINGSTON-UPON-HULL CORPN., [1911] 2 K. B. 775; 80 L. J. K. B. 1256; 105 L. T. 281; 27 T. L. R. 468; 55 Sol. Jo. 535; *sub nom.* SMITH *v.* HULL CORPN. & MARTIN, 75 J. P. 433; *sub nom.* MARTIN *v.* SMITH, SMITH *v.* MARTIN & HULL CORPN., 9 L. G. R. 780, C. A.

Annotations:—**Mentd.** Gillow *v.* Durham County Council, [1911] 2 K. B. 1074; Smith *v.* Macnally, [1912] 1 Ch. 816.

1150. —— In conveyance provided by education authority.]—A person who provides anything for the use of another is bound to provide a thing reasonably safe for the purpose for which it is intended, even though the person using it uses it only by the permission or consent of the person providing it & has no legal claim to the use of it.

Therefore, where an education authority, in pursuance of their statutory powers, provided a vehicle to convey certain children, who lived at a distance, to & from their school, & a child who lived nearer to the school, & was not one of those for whom the vehicle was provided, was conveyed in it with the consent of the education authority, &, while getting out of it, fell & was injured in consequence of there being no second person in addition to the driver to help the children to get in & out:—*Held:* there was evidence of negligence on the part of the education authority, & they were liable for the injury so caused to the child.—SHRIMPTON *v.* HERTFORDSHIRE COUNTY COUNCIL (1911), 104 L. T. 145; 75 J. P. 201; 27 T. L. R. 251; 55 Sol. Jo. 270; 9 L. G. R. 397, H. L.

Annotation:—**Refd.** Smith *v.* Martin & Kingston-upon-Hull Corpn., [1911] 2 K. B. 775.

1151. Repair of gas meter—Child playing with repairing tool.]—An automatic gas meter, leased by defts. to pltf.'s father, having got out of order, pltf.'s nurse, seeing in the street F., who was a gas fittings inspector employed by defts., asked him to mend the meter. After attempting to mend it, F. left his knife lying about open. Pltf., aged four years, picked up the knife & injured his eye:—*Held:* there was no evidence that F. was negligent, or that he was acting within the scope of his employment.—FORSYTH *v.* MANCHESTER CORPN. (1912), 107 L. T. 600; 76 J. P. 465; 29 T. L. R. 15, C. A.

1152. Injury resulting from effort to protect master's property—Suspicion of theft.]—POLAND *v.* PARR (JOHN) & SONS, No. 890, *ante*.

SUB-SECT. 14.—NUISANCE.

See NUISANCE.

SUB-SECT. 15.—PASSING-OFF.

See Nos. 1061, 1062, *ante*; TRADE MARKS.

SUB-SECT. 16.—INFRINGEMENT OF PATENTS.

See PATENTS.

SUB-SECT. 17.—TORTIOUS ACTS AMOUNTING TO CRIME.

1153. General rule—Master liable.]—DYER *v.* MUNDAY, No. 996, *ante*.

1154. Conviction of servant—Effect on liability.]—DYER *v.* MUNDAY, No. 996, *ante*.

See, also, Sect. 4, *post*.

Criminal liability of master.]—*See* Sect. 4, *post*.

SUB-SECT. 18.—TRESPASS.

See, generally, TRESPASS.

1155. General rule.]—A master is liable in trespass for any act done by his servant in the course of executing his orders with ordinary care; & therefore, where a master ordered a servant to lay down a quantity of rubbish near his neighbour's wall, but so that it might not touch the same, & the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall:—*Held:* the master was liable in trespass.—GREGORY *v.* PIPER (1829), 9 B. & C. 591; 4 Man. & Ry. K. B. 500; 109 E. R. 220.

Annotations:—**Apld.** M'Laughlin *v.* Pryor (1842), 4 Man. & G. 48. **Distd.** Sharrod *v.* L. & N. W. Ry. (1849), 4 Exch. 580. **Mentd.** Fletcher *v.* Rylands (1866), L. R. 1 Exch. 265; Peacock *v.* Young (1869), 21 L. T. 527; Kynoch *v.* Rowlands, [1912] 1 Ch. 527.

1156. ——.]—LYONS *v.* MARTIN, No. 1078 *ante*.

1157. On land—By servant of pretended owner.]—WILSON *v.* WEDDELL (1608), Yelv. 144; 1 Brownl. 143; 80 E. R. 97.

Annotations:—**Mentd.** Doe d. Tofield *v.* Tofield (1809), 11 East, 246; Wainright *v.* Elwell (1816), 1 Madd. 627; Right *v.* Banks (1832), 3 B. & Ad. 664; King *v.* Turner (1833), 1 My. & K. 456.

1158. —— Breaking into factory—To execute warrant.]—SMITH *v.* PRITCHARD, No. 1044, *ante*.

1159. —— Management of farm—Trespass on neighbouring land.]—A local board of health, being in occupation of a sewage farm, had given plenary powers for the management of such farm in the most beneficial manner to B. A ditch ran between the farm & the land of pltf. With a view to rendering such ditch more capable of carrying off the drainage from the farm, B. wrongfully went upon pltf.'s land & pared away his side of the ditch, & cut down so much brushwood & underwood on pltf.'s side, as impeded the flow of drainage along the ditch:—*Held:* the acts so done by B. were not within the scope of his employment; & consequently the local board were not liable for them at the suit of pltf., there being no implied authority from the board to do them.—BOLINGBROKE (LORD) *v.* SWINDON LOCAL BOARD (1874), L. R. 9 C. P. 575; 43 L. J. C. P. 287; 30 L. T. 723; 23 W. R. 47.

Annotations:—**Distd.** Goh Choon Seng *v.* Lee Kim Soo, [1925] A. C. 550. **Refd.** Flood *v.* Jackson, [1895] 2 Q. B. 21.

1160. —— Acts not in course of employment—Contrary to orders.]—RAND *v.* CRAIG, No. 983, *ante*.

1161. —— Trespass incidental to lawful & authorised acts.]—GOH CHOON SENG *v.* LEE KIM SOO, No. 1079, *ante*.

—— Liability of corporation.]—*See* CORPORATIONS, Vol. XIII., p. 404, Nos. 1258, 1259.

1162. To person—Trespasser—Ejection—Excess of force.]—KINGSTON *v.* BOOTH (1685), Skin. 228; 90 E. R. 105.

1163. —— —— —— ——.]—A person who requests another, his servant in that behalf, to remove one making a disturbance in his house, is not responsible for excess of force or violence in carrying out his command. *Semble:* he may be answerable for a negligent performance of his order.—PIDGEON *v.* LEGG (1857), 29 L. T. O. S. 166; 21 J. P. 743; 5 W. R. 649.

1164. —— —— Assault by shop assistant on customer—Shop owner not present.]—A. kept a shop in the window of which goods were ticketed at certain prices. B. entered the shop & demanded one of the articles at the price marked, which the shopman refused to let him have, & desired him to leave the shop. B. refused, & the shopman struck him. Upon this A. came into the shop, & gave B. into custody:—*Held:* (1) B. was a trespasser in remaining in the shop after he had been told to leave it by the agent of the owner; (2) A. was

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PART IX. SECT. 3, SUB-SECT. 17.

1153 i. *General rule—Master liable.*]—In an action for damages as compensation for damages for loss of the horse:—*Held:* in protecting his master's property applt.'s servant had proceeded with unnecessary violence amounting to a criminal act, being an excess for which, nevertheless, the master was responsible.—HUNTER *v.* MCRAE (1897), 15 N. Z. L. R. 701.—**N.Z.**

PART IX. SECT 3, SUB-SECT. 18.

1155 i. *General rule.*]—A master is liable in an action for trespass for the acts of his servants done within the course of the servant's employment & for the benefit of the master, though without his express authority or direction.—MCALARY *v.* STAFFORD (1902), 3 S. R. N. S. W. 386; 19 N. S. W. W. N. 294.—**AUS.**

1155 ii. ——.]—If a servant of a co. commits a trespass in the course of his employment & for the benefit of his employer, whether by his direct orders or not, the employer is liable, even if the act was unknown to or actually forbidden by him.—HARRIS *v.* BRUNETTE SAW MILL CO. (1893), 3 B. C. R. 172.—**CAN.**

o. *On land — Diseased cattle.*]—RIDDIFORD *v.* NORMAN (1897), 15 N. Z. L. R. 508.—**N.Z.**

p. —— *Cutting trees.*]—HILL *v.* MERRICKS (1813), Hume, 397.—**SCOT.**

q. *To person—Assault.*]—FERGUSON *v.* ROBLIN (1888), 17 O. R. 167.—**CAN.**

r. —— ——.]—Where a railway conductor at the moment of taking up a passenger's ticket wantonly assaulted him without justification or excuse, the reasonable inference as to the cause for the conductor's conduct being that he took a sudden dislike to the passenger & resented the

Sect. 3.—*In tort: Sub-sects.* 18 & 19. *Sect.* 4: *Sub-sect.* 1.]

not liable for the assault committed by the shopman before he came into the shop.—TIMOTHY *v.* SIMPSON (1834), 6 C. & P. 499, N. P.

Annotations:—*Generally*, **Mentd.** Cohen *v.* Huskisson (1837), Murp. & H. 150; Baillie *v.* Kell (1838), 4 Bing. N. C. 638; Baynes *v.* Brewster (1841), 2 Q. B. 375; Price *v.* Seeley (1843), 10 Cl. & Fin. 28; R. *v.* Walker (1854), Dears. C. C. 358; R. *v.* Light (1857), 27 L. J. M. C. 1; Trebeck *v.* Croudace, [1918] 1 K. B. 158.

1165. —— Tram conductor leaving tram—To punish persons riding in unauthorised manner.]—An action was brought on behalf of pltf., a boy nine years of age, to recover damages from defts. for an assault committed upon him by a tramway conductor in their employment. Defts. were the owners of a horse tramway system, & it was proved at the trial that boys were in the habit of taking advantage of the absence of the conductor on the top of the tram to ride on the step without paying any fares, leaving the tram before the conductor had come down to his platform. Defts.' bye-laws provided that unauthorised persons were not to travel on the steps or platforms of the trams, & also directed the conductor to enforce or prevent the breach of the bye-laws to the best of his ability. Upon the day in question the conductor on coming down from the top of the tram left the car & ran after some boys whom he thought had been riding on the steps of the tram. He caught pltf., who had not in fact been riding on the tram or otherwise offending against the bye-laws, & committed the assault complained of. The act of the conductor was not done for the purpose of preventing pltf. from riding on the tram nor for the purpose of preventing other boys from doing so at that particular time, but for the purpose of punishing either pltf. or other boys who had broken the bye-law, with a view to preventing them from doing so in the future. The learned deputy judge non-suited pltf. upon the ground that there was no evidence that the conductor in assaulting pltf. was acting in the course of his employment & within the scope of his authority:—*Held:* the decision of the learned deputy judge was right.—RADLEY *v.* LONDON COUNTY COUNCIL (1913), 109 L. T. 162; 29 T. L. R. 680; 11 L. G. R. 1035, D. C.

—— **Removal of passenger.**]—*See* CARRIERS, Vol. VIII., pp. 113–115, Nos. 764–770.

—— **False imprisonment.**]—*See* Sub-sect. 9, *ante*.

—— **Liability of corporation.**]—*See* CORPORATIONS, Vol. XIII., p. 404, Nos. 1258–1260.

—— .]—*See, also*, AGENCY, Vol. I., pp. 603, 604, Nos. 2333–2336.

To goods—Improper distress.]—*See* DISTRESS, Vol. XVIII., pp. 386 *et seq.*

—— **Liability of corporation.**]—*See* CORPORATIONS, Vol. XIII., p. 404, Nos. 1257–1259.

SUB-SECT. 19.—OTHER TORTS.

1166. Infringement of ferry rights.]—HUZZEY *v.* FIELD, No. 985, *ante*.

1167. Misdelivery of goods—By auctioneer's servant.]—An auctioneer is liable in trover for the misdelivery of an article by his servant, sent to him to be sold.—HARRIS *v.* RICHARDS (1847), 8 L. T. O. S. 451.

1168. Servant sent to fetch goods—Taking goods of another—Although mistake pointed out.]—MARTIN *v.* BARWICK (1880), De Colyar's County Court Cases 149, D. C.

1169. Nuisance in public street—Salvation Army band.]—A horse belonging to pltfs. was injured by another horse which became restive owing to the noise of the music played by a detachment of the Salvation Army in a public street. In an action brought by pltfs. against deft. as head of the Salvation Army to recover damages for such injury:—*Held:* in the absence of evidence to show what the relationship was between the particular members of the army & deft., it could not be inferred that such members were the servants of deft. or were acting under his authority.—LONDON GENERAL OMNIBUS CO. *v.* BOOTH (1893), 63 L. J. Q. B. 244; 10 T. L. R. 34, D. C.

1170. Slander by tax-collector—Allegation of tampering with receipt.]—In an action of damages for slander against a municipal corpn., pursuer averred that G., who was in the service of defenders as a tax-collector, & whose duties included the collection of the police assessments payable by pursuer's husband & the granting of receipts therefor & for instalments thereof, while in the exercise of his duty as police tax-collector in the employment of defenders called at pursuer's house & demanded payment of the police taxes. Pursuer tendered the balance due, which G. declined to accept as correct & asked to see the receipts for previous payments, & then left the house. That when he did call again on the same day he accused pursuer of having altered a receipt for 7*s.* 6*d.* from the sum of 4*s.* 6*d.*, for which it had been truly made out, for the purpose of defrauding defenders of the sum of 3*s.*; that the receipt bore no marks of having been altered; that when she denied the charge G. became violent & threatened to lodge information with the police authorities which would result in her being put in gaol for three months for forgery; & that he repeated the slander in the house of a neighbour:—*Held:* the averments disclosed no ground of action against defenders, for there was nothing on the face of them to show expressly or by implication that the expression of any opinion by G. as to the genuineness of any receipt which might be produced to him for payment of taxes was within the scope of his employment.—GLASGOW CORPN. *v.* LORIMER, [1911] A. C. 209; 80 L. J. P. C. 175; *sub nom.* GLASGOW CORPN. *v.* RIDDELL, 104 L. T. 354, H. L.

Annotations:—**Refd.** Lloyd *v.* Grace, Smith (1912), 107 L. T. 531. **Mentd.** Pratt *v* British Medical Assocn., [1919] 1 K. B. 244.

1171. Private detective using threats—To obtain information.]—Defts. were two private detectives. One of them was designing to inspect certain letters, to which he believed pltf., a maidservant, had means of access. He instructed the other deft., who was his assistant, to induce pltf. to show him the letters, telling him that pltf. would be remunerated for this service. The assistant endeavoured to persuade pltf. by false statements & threats, as the result of which pltf. fell ill from a nervous shock. In an action by pltf. against defts. for damages:—*Held:* the assistant was acting within the scope of his employment & both

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fact that the letter called his attention to his omission to take up the ticket, the co. was held liable.—JENNINGS *v.* CANADIAN NORTHERN RY. CO., [1925] 2 D. L. R. 630; [1925] 1 W. W. R. 918; 30 Can. Ry. Cas. 219; 35 B. C. R. 16; *revsg.*, [1924] 3 D. L. R. 301; [1924] 2 W. W. R. 874; 30 Can. Ry. Cas. 214; 33 B. C. R. 516.—**CAN.**

t. To animals—Bullocks.]—KEARNS *v.* WILSON (1885), 19 S. A. L. R. 28.—**AUS.**

PART IX. SECT. 3, SUB-SECT. 19.

a. Horse suffering from glanders—Infecting cattle.]—BAIRD *v.* GRAHAM (1852), 14 Dunl. (Ct. of Sess.) 615; 24 Sc. Jur. 313; 1 Stuart, 578.—**SCOT.**

defts. were liable.—JANVIER *v.* SWEENEY, [1919] 2 K. B. 316; 88 L. J. K. B. 1231; 121 L. T. 179; 35 T. L. R. 360; 63 Sol. Jo. 430, C. A.

Annotation:—**Mentd.** Hambrook *v.* Stokes, [1925] 1 K. B. 141.

1172. Infringement of copyright.]—Defts., who were the occupiers of a dancing hall, engaged, on the terms of a written agreement, a band to provide music therein. The agreement provided that the band should not, in the music played, infringe any copyright, & should be liable for damages & costs caused by any infringement. There was also a notice posted in the hall that "only such music as may be played without fee or licence is allowed to be played in this hall." On one occasion the band played certain music, the copyright of which belonged to pltfs., without pltfs.' licence; but defts. did not know, & had no reasonable ground for suspecting, that this infringement would take place. In an action by pltfs. for damages & an injunction:—*Held:* on its true construction, the agreement between defts. & the band constituted the latter the servants of defts., & not independent contractors; the band on the occasion in question were acting in the course of their employment; defts. were liable under Copyright Act, 1911 (c. 46), s. 2, for the infringement of copyright; & pltfs. were entitled to damages & an injunction.—PERFORMING RIGHT SOCIETY, LTD. *v.* MITCHELL & BOOKER (PALAIS DE DANSE), LTD., [1924] 1 K. B. 762; 93 L. J. K. B. 306; 131 L. T. 243; 40 T. L. R. 308; 68 Sol. Jo. 539.

Annotations:—**Mentd.** Evans *v.* Hulton (1924), 131 L. T. 534; Falcon *v.* Famous Players Film Co., [1926] 1 K. B. 393.

SECT. 4.—CRIMINAL LIABILITY.

SUB-SECT. 1.—IN GENERAL.

1173. Whether liable—General rule.]—R. *v.* WILLMETT, No. 1187, *post.*

1174. —— ——.]—R. *v.* BARRY, No. 970, *ante.*

1175. —— ——.]—At the trial of a criminal information against defts. for a libel published in a newspaper of which they were proprietors, it appeared that each of them managed a different department of the newspaper, but that the duty of editing what was called the literary department was left by them entirely to an editor whom they had appointed named G. The libel in question was inserted in the paper by G. without the express authority, consent, or knowledge of defts. The judge having directed a verdict of guilty against defts.:—*Held:* there must be a new trial, for upon the true construction of Libel Act, 1843 (c. 96), s. 7, the libel was published without defts.' authority, consent, or knowledge, & it was a question for the jury whether the publication arose from any want of due care & caution on their part.

It is an undoubted principle of law in general that a man can only be made criminally responsible for an act which he has committed himself, or through the agency of another, either actually or constructively . . . but it is not, in my opinion, to be inferred that his employer has given him authority to commit crime, because he has employed him in the conduct of his business (COCKBURN, C.J.).—R. *v.* HOLBROOK (1877), 3 Q. B. D. 60; 47 L. J. Q. B. 35; 37 L. T. 530; 42 J. P. 53; 26 W. R. 144; 13 Cox, C. C. 650; *subsequent proceedings* (1878), 4 Q. B. D. 42.

Annotations:—**Consd.** R. *v.* Bradlaugh (1883), 15 Cox, C. C. 217; R. *v.* Ramsay & Foote (1883), 48 L. T. 733; R. *v.* Key (1908), 1 Cr. App. Rep. 135. **Refd.** R. *v.* Tibbits, [1902] 1 K. B. 77.

1176. —— ——.]—As to the last question whether for the act of a servant the master would be liable, the ct. could only say that the general law on that subject, that a master was *primâ facie* not liable criminally for the act of his servant was not altered in this Act [Merchandise Marks Act, 1887 (c. 28)], except as to the *onus* of proof if the use of a false description was proved (POLLOCK, B.).—BUDD *v.* LUCAS, [1891] 1 Q. B. 408; 60 L. J. M. C. 95; 64 L. T. 292; 55 J. P. 550; 39 W. R. 350; 7 T. L. R. 243; 17 Cox, C. C. 248, D. C.

Annotations:—**Consd.** Coppen *v.* Moore (No. 2), [1898] 2 Q. B. 306. **Refd.** Coppen *v.* Moore (No. 1), [1898] 2 Q. B. 300.

1177. —— **Authorisation or adoption of act—Express order.**]—A baker who sells bread containing alum in a shape which renders it noxious, is guilty of an indictable offence, if he ordered the alum to be introduced into the bread, although he gave directions for mixing it up in a manner which would have rendered it harmless.—R. *v.* DIXON (1814), 3 M. & S. 11; 105 E. R. 516; *previous proceedings*, 4 Camp. 12, N. P.

Annotations:—**Apld.** A.-G. *v.* Siddon (1830), 1 Cr. & J. 220. **Refd.** Coleman *v.* Riches (1855), 16 C. B. 104. **Mentd.** R. *v.* Hicklin (1868), L. R. 3 Q. B. 360; R. *v.* Aspinall (1876), 2 Q. B. D. 48; R. *v.* Brailsford, [1905] 2 K. B. 730.

1178. —— ——.]—If the keeper of a place of public resort instructs his servant to manage it in such a way as to be a violation of Metropolitan Police Act, 1839 (c. 47), s. 44, & the servant does so, the master is guilty of an offence within that Act, & the servant is guilty as aiding & abetting him within Summary Jurisdiction Act, 1848 (c. 43), s. 5.—WILSON *v.* STEWART (1863), 3 B. & S. 913; 2 New Rep. 115; 32 L. J. M. C. 198; 8 L. T. 277; 27 J. P. 661; 9 Jur. N. S. 1130; 11 W. R. 640; 9 Cox, C. C. 354; 122 E. R. 341.

1179. —— —— **Participation in profits.**]—An information at the suit of the Crown for penalties under 3 & 4 Will. 4, c. 53, charged deft. with illegally unshipping goods before they had paid the full duty, & with harbouring & receiving the same so unshipped. At the trial, it was proved, that the goods in question had been illegally unshipped & removed to the warehouse of deft. by his head clerk & a custom house officer:—*Held:* though there was no evidence whatever to connect deft. personally with the perpetration of the fraud or a knowledge of the fact, yet, in the absence of any attempt at explanation on his part by way of evidence that the full duties had been paid by the firm to the clerk, the jury were correctly directed that they might infer that deft. participated in the profits of the fraud, &, as a consequence, that he was cognisant of its commission.—A.-G. *v.* DEANE (1843), 2 L. T. O. S. 102; 7 J. P. 771.

1180. —— —— **Failure to interfere—To prevent act known to be unlawful.**]—By a special rule for the regulation of coalmines under 23 & 24 Vict. c. 151, the banksman is directed to take care that the persons descending or ascending the pit shall in no case exceed the number of eight men & boys. A breach of these rules is by sect. 22 punishable on summary conviction by fine & imprisonment. A., the charter master of a pit, who by the rules is declared to be the responsible manager of the pit under his charge, was close to the pit & was cognisant that more than eight men were being lowered down at one time & had power to prevent the banksman, who is his servant, from so doing & did not interfere:—*Held:* A. was properly convicted of a breach of the regulations as being a person aiding & abetting or procuring the commission of the offence within Summary Jurisdiction Act, 1848 (c. 43), s. 5.—HOWELLS *v.*

Sect. 4.—Criminal liability: Sub-sects. 1, 2 & 3.]

WYNNE (1863), 15 C. B. N. S. 3; 32 L. J. M. C. 241; 9 Jur. N. S. 1041; 143 E. R. 682.

1181. —— —— Actual or constructive.]—R. *v.* HOLBROOK, No. 1175, *ante*.

1182. —— —— Whether inferred from fact of employment.]—R. *v.* HOLBROOK, No. 1175, *ante*.

1183. —— —— Onus of proof—Merchandise Marks Act, 1887 (c. 28).]—BUDD *v.* LUCAS, No. 1176, *ante*.

—— ——.]—*See, also*, CRIMINAL LAW, Vol. XIV., p. 39, Nos. 83–94.

1184. —— Protection by servant of smuggled goods concealed by master.]—The liability of a master for the act of his servant, results not only from the doing of the act by his express authority, but arises equally where the act done may be consistent with, & within the scope of the probable authority given for carrying on the general purposes for which the servant was employed. Thus, where upon the premises, & as it appeared, with the knowledge, of the master, a tobacconist, unlicenced tobacco was discovered concealed, & with a view to its protection, a servant, who was acting in the absence of the master, procured an accommodation permit, whereby a penalty of £500 was incurred:—*Held:* that act was one for which the master was responsible: & it was no justification as to him, that the act arose from a surprise or sudden thought *ex re nata*, on the part of the servant:—A.-G. *v.* SIDDON (1830), 1 Cr. & J. 220; 2 Man. & Ry. K. B. 533; 1 Tyr. 41; 148 E. R. 1400; *sub nom.* R. *v.* SIDDON, 9 L. J. O. S. Ex. 7.

Annotations:—**Expld. & Distd.** Lyons *v.* Martin (1838), 7 L. J. Q. B. 214; Newman *v.* Jones (1886), 17 Q. B. D. 132. **Refd.** A.-G. *v.* Riddell (1832), 2 Tyr. 523; Dewhirst *v.* Pearson (1833), 1 Cr. & M. 365; Coleman *v.* Riches (1855), 16 C. B. 104; Harrison *v.* Leaper (1862), 26 J. P. 373; Searle *v.* Reynolds (1866), 7 B. & S. 704; Inland Revenue *v.* Cardiff Conservative Club Co. (1894), 58 J. P. 120.

—— **Act of servant unauthorised.]** — *See* CRIMINAL LAW, Vol. XIV., pp. 40 *et seq.*

—— **Servant acting within scope of authority.]**—*See* CRIMINAL LAW, Vol. XIV., pp. 43 *et seq.*

—— **Where servant innocent.]**—*See* CRIMINAL LAW, Vol. XIV., pp. 76 *et seq.*

—— **Liability for breach of injunction.]**—*See* INJUNCTION, Vol. XXVIII., p. 529, Nos. 1367–1370.

—— **Nuisance.]**—*See* NUISANCE.

—— **Statutory offences.]**—*See* Sub-sect. 3, *post*.

Liability in tort for criminal acts of servant.]—*See* Sect. 3, sub-sect. 6, A.; sub-sect. 17, *ante*.

SUB-SECT. 2.—PUBLIC NUISANCE.

See NUISANCE.

SUB-SECT. 3.—PARTICULAR STATUTORY OFFENCES.

1185. Crown defrauded of excise duties.]—A.-G. *v.* STRANYFORTH (1721), Bunb. 97; 145 E. R. 608.

1186. Importation of tea—12 Car. 2, c. 4.]—A ship importing 221 pounds weight of tea, put on board in Norway by mariners on their own account, without the privity of the master, mate or owners, is forfeited, by above Act.—MITCHELL *v.* TORUP (1766), Park. 227; 145 E. R. 764.

Annotation:—**Mentd** *Re* Aaron, *Ex p.* Lowe (1832), 1 L. J. Bcy. 54.

1187. Receiving government property—9 & 10 Will. 3, c. 41.]—Deft. charged with the possession of two lots of marked naval stores produced at his trial two certificates in respect of the different lots, signed respectively by the commodore superintendent of the Woolwich Dockyard & the secretary to the Board of Ordnance; the former having been granted to the person of whom deft. purchased, the latter to deft. himself:—*Held:* these certificates, though not strictly in accordance with above Act, ss. 2, 4, were, nevertheless, an answer to the charge.

A man is not criminally responsible for the acts of his servants, & if his servants improperly receive into his warehouse articles marked with the broad arrow, without his knowledge, he is not responsible. If deft. himself purchased any of these articles, to which the certificates do not apply, knowing them to be marked with the broad arrow, then he is liable to be convicted, but not otherwise (COLTMAN, J.).—R. *v.* WILLMETT (1848), 11 L. T. O. S. 495; 3 Cox, C. C. 281.

Annotations:—**Refd.** R. *v.* Cohen (1858), 8 Cox, C. C. 41; R. *v.* Sleep (1861), 8 Cox, C. C. 472. **Mentd.** R. *v.* Tolson (1889), 23 Q. B. D. 168.

1188. Breach of mine regulations—5 & 6 Vict. c. 99.]—To make a contractor for working a mine liable to a conviction for allowing females to have charge of the machinery or tackle by means of which persons are brought up or passed down a vertical shaft of a mine, contrary to above Act, ss. 8, 13, knowledge of, or acquiescence in their being so employed must be brought home to him.—R. *v.* HANDLEY (1864), 9 L. T. 827.

1189. Offences in relation to licensed premises—Sale during prohibited hours.]—Eight persons went to a refreshment room at a railway station, which room was attached to & formed part of deft.'s hotel, on Sunday at 11.10 a.m., & six of them had a glass of beer & the other two a glass of sherry each, standing at the counter. Four of the men were residents in the town within half a mile of the station; the other four were strangers. A train was due at 11.13 a.m. The strangers & three of the residents went by the train, & the fourth, who had been to see his son off, returned home. Two of the three residents who went by the train were seen walking in the town between 2 & 3 p.m. of the same day. There was a printed notice hung up in a conspicuous part of the refreshment room intimating that refreshments were supplied during the time of divine service on Sundays only to travellers, & that those who improperly obtained them would subject themselves to penalties; & it was proved that deft. had given directions to his servants to inquire, before supplying any refreshment, whether or not the person asking for it was a traveller.

PART IX. SECT. 4, SUB-SECT. 3.

b. *General rule.*] — Where an act is made illegal by a statute which absolutely prohibits the act, an employer is criminally responsible for a commission of that act by his servants in the course of their employment.—R. *v.* DEDUSAY, [1919] C. P. D. 211.—**S. AF.**

1185 i. *Crown defrauded of excise duties.*] — MINISTER OF INLAND REVENUE *v.* NAIRN (Ont.) (1917), 28 Can. Crim. Cas. 1.—**CAN.**

1189 i. *Offences in relation to licensed premises—Sale during prohibited hours.*] —R. *v.* BELL (1907), 1 Sask. L. R. 1.—**CAN.**

1189 ii. —— ——.]—An order of a board, acting under statutory authority, made it a criminal offence involving a maximum penalty of six months' imprisonment with hard labour, for a publican, either himself or "by any servant," to supply liquor after certain hours:—*Held:* the order was not *ultra vires*, although it imposed a severe penalty on one who was not the actual wrongdoer.—MACKENNA *v.* SIM, [1916] S. C. (J.) 24.—**SCOT.**

c. ——.]—*Ex p.* MCCLEAVE (1889), 28 N. B. R. 222.—**CAN.**

d. ——.] — ADVOCATE-GENERAL *v.* GRANTS (1853), 15 Dunl. (Ct. of Sess.) 980.—**SCOT.**

e. *Crown defrauded of custom's*

The magistrates found that the four residents were not "travellers," but did not in terms find that deft. knew it; & they convicted him in a penalty.

The ct. quashed the conviction, on the ground that the *onus* of proving knowledge in deft. rested on the informer; & intimated that, inasmuch as this rule had been so repeatedly laid down by the ct., they would in future, when a conviction was quashed for want of such proof, consider it right to impose costs.—COPLEY *v.* BURTON (1870), L. R. 5 C. P. 489; 39 L. J. M. C. 141; 22 L. T. 888.

Annotation:—**Refd.** Roberts *v.* Humphreys (1873), L. R. 8 Q. B. 483.

1190. —— Sale at unlicensed place.]—The keeper of a restaurant, carrying on business in premises not licensed for the sale of intoxicating liquors, was also a partner in a wine dealer's business carried on upon duly licensed premises in the neighbourhood. A customer, taking a meal in the restaurant, ordered a pint of claret from a waiter & gave him the money for it; the waiter went to the licensed premises, & there bought & paid for a pint bottle of claret which he brought back to the restaurant, where the customer consumed it. Upon the hearing of a summons against the keeper of the restaurant for selling wine without a license, a magistrate found that there had been a sale at the restaurant of the wine by deft.'s waiter to the customer, & convicted deft.:—*Held:* there was evidence upon which the magistrate might properly hold that the sale was at the restaurant, & the conviction was right.—PASQUIER *v.* NEALE, [1902] 2 K. B. 287; 71 L. J. K. B. 835; 87 L. T. 230; 67 J. P. 49; 51 W. R. 92; 18 T. L. R. 704; 46 Sol. Jo. 616; 20 Cox, C. C. 350, D. C.

1191. —— ——.]—Applts. were brewers, & by the system in use in connection with their business each of their draymen had a book called an order & delivery book which he took out each day, in which it was his duty to enter, when received, orders for beer, & hand in each evening to applts.' clerk at their office. Each evening the drayman entered on a load ticket the orders for next day's delivery, which would be handed with the order & delivery book to applts.' clerk. From these the loads for the next day's deliveries were made up, & it was the duty of a foreman & certain clerks to see that only a sufficient amount of beer was loaded to satisfy such day's orders. One of applts.' draymen on May 1, 1908, gave in his order & delivery book, which contained the names of three persons, W., L., & F., the order for each being one crate of bottled beer. On May 2, the drayman went out with a horse & van containing crates & bottled beer of applts. None of the goods bore the name of any customer for whom the goods were intended, & there was no appropriation or identifying marks upon any of the bottles or crates. The drayman delivered a crate of F., two bottles to one B., one bottle to L., & one bottle to W. There was no entry in the book of a single bottle as the order of W. & L. The quantities delivered were paid for on delivery, & the money was duly accounted for to applts. at the end of the day. Draymen were warned not to deliver beer unless an order for same had first been taken to the licensed premises. The drayman having been convicted of selling beer without being duly licensed, applts. were subsequently charged, & convicted of aiding & abetting him in the commission of that offence, the justices having come to the conclusion that no sufficient appropriation of the bottles of beer had taken place before they left the licensed premises:—*Held:* the conviction was right.—STANSFIELD & CO. *v.* ANDREWS (1909), 100 L. T. 529; 73 J. P. 167; 25 T. L. R. 259; 22 Cox, C. C. 84, D. C.

1192. —— Permitting drunkenness on licensed premises.]—A guest arrived at an hotel after the closing hour & engaged a bedroom. At the time of his doing so he was drunk to the knowledge of the hotel manager. He was shortly afterwards found drunk upon the premises by a constable:—*Held:* by Licensing Act, 1872 (c. 94), s. 18, a licensed person may refuse to admit to & may turn out of the premises any person who is drunk, the hotel proprietor was liable to be convicted under sect. 13 of permitting drunkenness upon his premises, he being unable under the circumstances to discharge the *onus* cast upon him by Licensing Act, 1902 (c. 28), s. 4, of showing that he took all reasonable steps for preventing drunkenness upon the premises.—THOMPSON *v.* MCKENZIE, [1908] 1 K. B. 905; 77 L. J. K. B. 605; 98 L. T. 896; 72 J. P. 150; 24 T. L. R. 330; 52 Sol. Jo. 302; 21 Cox, C. C. 620, D. C.

Annotations:—**Refd.** Young *v.* Gentle, [1915] 2 K. B. 661. **Mentd.** Lawson *v.* Edminson, [1908] 2 K. B. 952.

1193. —— Defence of Realm Regulations—Breach of local trading order.]—The Central Control Board, Liquor Traffic, for the London area made a regulation that no person shall either by himself or by any servant or agent supply any intoxicating liquor to any person on licensed premises to be consumed thereon unless such liquor is ordered & paid for by the person who is so supplied:—*Held:* the supply of liquor by the servant of the licensee to a person who did not order & pay for the liquor so supplied was an offence against the regulation, not merely by the licensee, but also by his servant.—KNAPP *v.* BEDWELL (1916), 85 L. J. K. B. 1507; 115 L. T. 486; 80 J. P. 336; 32 T. L. R. 704; 14 L. G. R. 985, D. C.

1194. —— —— Sale of liquor at above maximum price.]—Applts., who were brewers, owned a fully licensed public-house, the license being held by their servant, the manager of the premises. The manager resided in the house & received a salary & was supplied by applts. with spirits for the business & with instructions & price lists showing what was to be charged for the spirits. He had to keep books & to render to applts. weekly returns, & applts. received the whole of the profits. The manager was allowed to engage & dismiss suitable barmaids, & it was his duty to instruct them as to their duties. One of the barmaids sold rum in the public bar at a price above the maximum fixed by the Spirits (Prices & Description) Order, 1919, as amended by Order No. 788 of 1919. On an information against applts. for selling spirits at a price exceeding the maximum, the magistrate found that applts. had sold the spirits by their servant or agent & were liable for such sale under the order, & he convicted them:—*Held:* the fact that applts. were not the holders of the license did not save them from criminal liability, & the conviction was right.—HOLT BREWERY CO., LTD.

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duties.]—R. & MINISTER FOR CUSTOMS *v.* AUSTRALASIAN FILMS, LTD. (1921), 29 C. L. R. 195.—**AUS.**

f. Selling crude opium — For other than medicinal purposes.]—Where a drug clerk, contrary to instructions, sold crude opium for other than medicinal purposes:—*Held:* the master could not be convicted of the statutory offence.—R. *v.* A. & N. (1909), 15 O. W. R. 339; 16 Can. Crim. Cas. 381.—**CAN.**

g. Food & Drugs Act—Obstruction

Sect. 4.—Criminal liability: Sub-sect. 3. Sect. 5: Sub-sects. 1, 2, 3, 4 & 5, A.]

v. THOMPSON (1920), 123 L. T. 56; 84 J. P. 127; 36 T. L. R. 519; 18 L. G. R. 464, D. C.

See, further, INTOXICATING LIQUOR, Vol. XXX., pp. 77, 78, 89, Nos. 608–616, 688–690; GAMING & WAGERING, Vol. XXV., pp. 430, 431, Nos. 301–304.

1195. Offences in relation to animals—Ill-treatment—Prevention of cruelty to Animals Act, 1849 (c. 92).]—In a colliery certain horses were worked while suffering from raw wounds. T. was an owner, & S. was the certificated manager, but neither was proved to be present or to have any notice or knowledge of the state of the horses:—*Held:* the justices were wrong in convicting S. of ill-treating the horses under above Act, s. 2, merely because he was certificated manager, & some knowledge of the matter was an essential ingredient of that offence.—SMALL *v.* WARR (1882), 47 J. P. 20, D. C.

——.]—*See, also*, ANIMALS, Vol. II., pp. 299, 302, Nos. 687, 705.

1196. Neglect to place lights on tramway engine—Board of Trade regulation under local bye-law.]—A tramway co. were convicted before justices of the breach of a regulation of the Board of Trade, made under a local Act, relative to lamps being placed and lighted in a conspicuous position on the front of a tramway engine:—*Held:* the regulation was not invalid as a regulation, & its subject matter need not have been dealt with by a bye-law; the offence being stated in the words of the regulation was sufficiently described, & the co. were responsible for the personal neglect of their engine driver.—ST. HELEN'S DISTRICT TRAMWAYS CO. *v.* WOOD (1891), 60 L. J. M. C. 141; 56 J. P. 70, D. C.; *subsequent proceedings*, 56 J. P. 71, D. C.

1197. Grogging spirit—Finance Act, 1898 (c. 10), s. 4.]—R. *v.* MUGFORD (1900), 44 Sol. Jo. 409.

1198. Allowing young person near machinery—Factory & Workshop Act, 1895 (c. 37), s. 9.]—A young person who was employed in a factory by a person in charge of a self-acting machine, was ordered by the person in charge of the machine to clean a part of the machine, & for this purpose the boy was obliged to go into the space between the fixed & traversing portions of the machine. When the order was given the machine was properly stopped; but while the boy was still in this space the person in charge of the machine, thinking the boy was clear of the space, started the machine, whereby the boy received injuries from which he died:—*Held:* as the person in starting the machine was acting under the belief that the boy was clear of the space, the boy was not allowed by him to be in the prohibited space at the time of the accident, within the meaning of above Act, sub-sects. 2, 3, & the employers, the occupiers of the factory, were not liable in consequence thereof to a fine under Factory & Workshop Act, 1878 (c. 16), s. 83, though such occupiers would have been liable for an allowance by their servant.—CRABTREE *v.* FERN SPINNING CO., LTD. (1901), 85 L. T. 549; 66 J. P. 181; 50 W. R. 167; 18 T. L. R. 91; 46 Sol. Jo. 87; 20 Cox, C. C. 82, D. C.

1199. Possession of false measures—Weights & Measures Act, 1878 (c. 49), s. 25.]—Applts. owned oil depots, from which a number of tank-waggons were sent out in charge of drivers, each driver being supplied with two five-gallon measures for the purpose of measuring oil sold & delivered to applts.' customers from the tankwaggon.

At all the depots an engineer was employed to examine all measures used by the tankwaggon drivers, & if a measure was found in any way faulty or unjust, its use was at once discontinued, it was put into a separate part of applts.' premises, & a new measure without any defects issued in its place. In the ordinary course of business measures withdrawn from use were attended to & their faults or defects rectified. On Mar. 15, 1907, two measures were supplied to one of applts.' drivers for use during that day. Each measure was examined by applts.' engineer & found to be absolutely correct. Measures set aside for repair were accessible to the driver. Resp., an inspector of weights & measures, found the driver in Bermondsey on that day in charge of a tankwaggon belonging to applts. containing oil, & having in his possession two five-gallon measures, one of which was correct, but the other was found to have in the angle formed by the side & bottom thereof, & at the bottom of the measure itself, a quantity of soap, the effect of which was to render it false & unjust to the extent of three & a half pints. The unjust measure belonged to applts. One of the correct measures supplied by applts. to the driver on the morning of Mar. 15, 1907, could not be traced. The quantity of oil contained in the tankwaggon was measured & booked out against the driver every morning, & similarly checked on his return in the evening of the same day; & the driver did not, either on Mar. 15, 1907, or any previous day, bring back in his tankwaggon more oil than his deliveries during the day accounted for. It was not proved that applts. were cognisant of the driver's conduct, or that they gave their sanction or approval to the use by him of the unjust measure.

On an information preferred by resp. against applts. for that they on Mar. 15, 1907, did, whilst hawking oil from a van in Bermondsey, unlawfully have in their possession for use for trade a false or unjust measure contrary to above sect.:—*Held:* the ct. was at liberty so far to apply the principle which is well settled in reference to civil liability for torts, that an employer is not liable for fraudulent acts of his servant when committed not in the interest of the employer, but for the individual purposes of profit of the fraudulent servant, as to say that as the fraudulent driver had the fraudulent measure in his own physical possession for his own fraudulent purposes as distinguished from the interests of his employers, his possession must be deemed to be his own possession, & not the possession of his employers, &, therefore, the offence with which applts. were charged had not been made out.—ANGLO-AMERICAN OIL CO., LTD. *v.* MANNING, [1908] 1 K. B. 536; 77 L. J. K. B. 205; 98 L. T. 570; 72 J. P. 35; 24 T. L. R. 215; 6 L. G. R. 299, D. C.

Annotation:—**Expld. & Distd.** Buckingham *v.* Duck (1918), 120 L. T. 84.

1200. Failure of shop assistant to take half holiday—Shops Act, 1912 (c. 3).]—The owners of a bookstall, who were alleged to be the occupiers of a shop within the meaning of above Act, had given notice to the clerk in charge of the bookstall requiring him to take his weekly half holiday & had, so far as they were able, insisted upon his

of inspector.]—TAYLOR *v.* NIXON, [1910] 2 I. R. 94.—IR.

h. —— *Adulterated milk.*]—WILSON *v.* FLEMING (1913), 51 Sc. L. R. 72.—SCOT.

k. *Weeds & Agricultural Seeds (Ireland) Act, 1909—False name & address given.*]—AGRICULTURE & TECHNICAL INSTRUCTION DEPARTMENT *v.* BURKE, [1915] 2 I. R. 128.—IR.

taking it. They had in pursuance of above Act, sect. 1 (2), fixed & specified by notice in the bookstall in the prescribed form a certain day of the week on which the clerk was not employed after 1.30 p.m. It made no pecuniary difference to him whether he took the weekly half holiday or not. In a certain week in disobedience to his orders he took no weekly half holiday & persisted in working in the bookstall after 1.30 p.m. on the day specified. On an information laid against the alleged occupiers:—*Held:* assuming the bookstall to be a shop, then an offence had been committed under above Act, sect. 1 (2), & the proper course for the occupiers was to lay an information against the clerk & bring him before the ct. under above Act, sect. 14 (3).—WARD *v.* SMITH (W. H.) & SON, [1913] 3 K. B. 154; 82 L. J. K. B. 941; 109 L. T. 439; 77 J. P. 370; 29 T. L. R. 536; 11 L. G. R. 741; 23 Cox, C. C. 562, D. C.

Annotations:—**Refd.** George *v.* James (1913), 78 J. P. 156; L. C. C. *v.* Wettman, [1922] 1 K. B. 153. **Mentd.** Melluish *v.* L. C. C. (1914), 12 L. G. R. 1086.

1201. Taking water without permit—Breach of Water Works Clauses Act, 1847 (c. 17), s. 59.]—Applt.'s servant, who was driving a steam wagon belonging to applt., drew water for the wagon in the course of his employment from a street hydrant communicating with a water-main belonging to a city corpn., who were the undertakers under above Act, which was in force in the city. Applt., who was a carrier, had not agreed to be supplied with water by the undertakers, whose practice was to grant annual permits to take water for steam wagons on payment, each permit being attached to a particular wagon & being available for any employee of the owner of the wagon. Applt. was summoned for unlawfully taking water for the wagon, contrary to above sect. The justices convicted applt. on the ground that he was liable for the act of his servant:—*Held:* as the act of applt.'s servant was done within the scope of the servant's employment, applt. was criminally liable under above sect. in respect thereof.—BURNS *v.* SCHOLFIELD (1922), 128 L. T. 382; 87 J. P. 54; 21 L. G. R. 39; 27 Cox, C. C. 378, D. C.

1202. Breach of road vehicle regulations—Carrying unauthorised number.]—A motor car belonging to resps., who were the holders of a limited trade licence in respect of it, was driven on a public road by one of their servants, & more than two persons were in the car in addition to the driver, this being without the knowledge, & contrary to the express orders, of resps., who had taken all reasonable precautions to prevent a contravention of Road Vehicles (Trade Licences) Regulations, 1922:—*Held:* *mens rea* was not an essential ingredient of the offence in respect of a contravention of the Regulations, & resps. were liable to the penalty imposed by Roads Act, 1920 (c. 72), s. 12.—GRIFFITHS *v.* STUDEBAKERS, LTD., [1924] 1 K. B. 102; 93 L. J. K. B. 50; 130 L. T. 215; 87 J. P. 199; 40 T. L. R. 26; 68 Sol. Jo. 118; 21 L. G. R. 796; 27 Cox, C. C. 565, D. C.

Breach of Food & Drugs Act, 1875 (c. 63).]—*See* FOOD & DRUGS, Vol. XXV., pp. 81, 82, 92, 134, 135, 136, Nos. 102–108, 172, 173, 532, 541, 542.

SECT. 5.—EXEMPTIONS FROM LIABILITY.

SUB-SECT. 1.—THE CROWN AND CROWN SERVANTS.

See AGENCY, Vol. I., pp. 654 *et seq.*; CONSTITUTIONAL LAW, Vol. XI., pp. 523 *et seq.*; PUBLIC AUTHORITIES.

SUB-SECT. 2.—PILOTS.

See SHIPPING.

SUB-SECT. 3.—PUBLIC AUTHORITIES.

See PUBLIC AUTHORITIES.

SUB-SECT. 4.—TRADE UNIONS.

See Trade Disputes Act, 1906 (c. 47), s. 4 (1); TRADE & TRADE UNIONS.

SUB-SECT. 5.—TRUSTEES.

A. Public Trusts.

See PUBLIC AUTHORITIES.

1203. Whether liable—Trustees acting gratuitously.]—An action on the case will not lie against comrs. appointed under Acts of Parliament, who act gratuitously for the benefit of the public, for injuries occasioned by the neglect of workmen in their employ; nor where by local Acts, actions against such comrs. are directed to be brought against their clerk, will such action lie against him, he not being personally a party to the cause of such injury. The remedy of the party injured is against the agents by whose negligence the injury was occasioned. Thus in an action against the clerks of the comrs. acting under a local Act for paving & lighting the town of Birmingham, & their surveyor & workmen the ct. permitted a verdict found for pltfs., to stand against two of defts.; but held clearly that it could not be sustained against the clerks of the comrs.—HALL *v.* SMITH (1824), 2 Bing. 156; 9 Moore, C. P. 226; 2 L. J. O. S. C. P. 113; 130 E. R. 265.

Annotations:—**Apld.** Humphreys *v.* Mears (1827), 1 Man. & Ry. K. B. 187. **Apprvd.** Duncan *v.* Findlater (1839), 6 Cl. & Fin. 894. **Distd.** Scott *v.* Manchester Corpn. (1857), 2 H. & N. 204. **Apld.** Holliday *v.* St. Leonard Shoreditch Vestry (1861), 11 C. B. N. S. 192; Coe *v.* Wise (1864), 5 B. & S. 440. **Consd.** Mersey Dock Trustees *v.* Gibbs (1866), L. R. 1 H. L. 93.

1204. —— ——.]—Public bodies bound to discharge a public duty without reward & without funds, are responsible for the negligence of those whom they employ.—COE *v.* WISE (1866), L. R. 1 Q. B. 711; 7 B. & S. 831; 37 L. J. Q. B. 262; 14 L. T. 891; 30 J. P. 484; 14 W. R. 865, Ex. Ch.; *revsg.* (1864), 5 B. & S. 440.

Annotations: **Consd.** Mersey Dock Trustees *v.* Gibbs, Mersey Dock Trustees *v.* Penhallow (1866), L. R. 1 H. L. 93. **Apld.** Worral Waterworks Co. *v.* Lloyd (1866), L. R. 1 C. P. 719. **Refd.** Wilson *v.* Halifax Corpn. (1868), L. R. 3 Exch. 114; Tozeland *v.* West Ham Union Grdns., [1907] 1 K. B. 920; Boynton *v.* Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213. **Mentd.** Harrison *v.* G. N. Ry. (1864), 3 H. & C. 231; Birch *v.* St. Marylebone Vestry (1869), 20 L. T. 697; Holborn Union Grdns. *v.* St. Leonard Shoreditch Vestry (1876), 2 Q. B. D. 145; River Wear Comrs. *v.* Adamson (1877), 37 L. T. 543; Colley *v.* L. & N. W. Ry. & G. W. Ry. (1880), 42 L. T. 807; Gibraltar Sanitary Comrs. *v.* Orfila (1890), 15 App. Cas. 400; Jersey *v.* Uxbridge R. S. A., [1891] 3 Ch. 183; Liebig's Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Nelson, [1918] 2 K. B. 381.

1205. —— ——.]—A vestry elected under Metropolis Management Act, 1855 (c. 120), which requires such vestry to execute the office of surveyor of highways within its parish, is not responsible for an injury occasioned to a passenger by the negligence of workmen employed by the surveyor of such vestry in paving a street in such parish, when the vestry has not given any direction for doing the work.—HOLLIDAY *v.* ST. LEONARD, SHOREDITCH VESTRY (1861), 11 C. B. N. S. 192;

Sect. 5.—Exemptions from liability: Sub-sect. 5, A. & B.; sub-sect. 6. Sect. 6: Sub-sects. 1 & 2, A.]

30 L. J. C. P. 361; 4 L. T. 406; 26 J. P. 135; 8 Jur. N. S. 79; 9 W. R. 694; 142 E. R. 769.

Annotations:—**Apld.** Coe *v.* Wise (1864), 5 B. & S. 440. **Overd.** Mersey Dock Trustees *v.* Gibbs, Mersey Dock Trustees, Penhallow (1866), L. R. 1 H. L. 93. **N.F.** Foreman *v.* Canterbury Corpn. (1871), L. R. 6 Q. B. 214. **Refd.** Brownlow *v.* Metropolitan Board of Works & Aird (1864), 16 C. B. N. S. 546; Ohrby *v.* Ryde Comrs. (1864), 5 B. & S. 743; Hillyer *v.* St. Bartholomew's Hospital, [1909] 2 K. B. 820.

1206. —— ——.]—MERSEY DOCKS TRUSTEES *v.* GIBBS, MERSEY DOCKS TRUSTEES *v.* PENHALLOW, No. 1231, *post.*

1207. —— —— **Act complained of not in breach of duty imposed.**]—Defts. were an unpaid body of trustees created by statute conservators of the Lee, an ancient navigable river, & were "authorised & empowered from time to time at their discretion to cleanse, scour, deepen, enlarge or straighten the channel or course of the said river, & also to set out, open, make & maintain" certain new cuts or canals thereinafter specified, to communicate with the river & to be used for the navigation, " & also to remove all obstructions & impediments whatsoever to the said navigation." Defts. were also by statute empowered to levy rates or tolls for the use of certain locks & artificial cuts, but were expressly forbidden to receive any toll in respect of such part of the navigation as was between Bow Creek & Old Ford Lock, which part of the navigation was an ancient highway, & was by statute declared to be for ever free from toll. Pltfs.' barge, while navigating a part of the river between Bow Creek & Old Ford Lock, struck upon one of several submerged piles & was injured. Pltfs. having brought an action for damages, the jury found that the piles were dangerous; that defts. ought to have been aware of the danger, & had neglected their duty:—*Held:* the action could not be maintained, since defts. were unpaid trustees appointed for public purposes in aid of the common law right of navigating an ancient highway, & the duty of removing obstructions imposed by the statute was discretionary & not compulsory.—FORBES *v.* LEE CONSERVANCY BOARD (1879), 4 Ex. D. 116; 48 L. J. Q. B. 402; 27 W. R. 688.

Annotations:—**Refd.** Boynton *v.* Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213. **Mentd.** The Burlington (1895), 72 L. T. 602.

1208. —— **Trustees having no knowledge of wrongful act.**]—By a local Act certain trustees were appointed for carrying out the Act. The trustees acted gratuitously; the property in the harbour was vested in them, & they were empowered to elect a harbour master, & other officers & servants connected with the harbour, with power also to discharge them. The harbour master was empowered to direct the situation in which a vessel entering the harbour was to be moored. The trustees were also empowered to make bye-laws as to the management of the harbour, & to impose tonnage rates upon vessels using it, & borrow money on such rates, & to apply the proceeds in payment of the interest of the money borrowed, & of the costs & expenses attending the carrying into execution the purposes of the Act connected with the harbour, & also in the reduction of the capital borrowed:—*Held:* the trustees were not liable, either for the acts of the harbour master in directing a vessel to be moored in an improper place, whereby it received damage, or, for an injury occasioned to a vessel by an accumulation of rubbish in the harbour.—METCALFE *v.* HETHERINGTON (1855), 11 Exch. 257; 24 L. J. Ex. 314; 3 L. T. 448.

Annotations:—**Dbtd.** Ohrby *v.* Ryde Comrs. (1864), 5 B. & S. 743. **Consd.** Mersey Dock Trustees *v.* Gibbs, Mersey Dock Trustees *v.* Penhallow (1866), L. R. 1 H. L. 93. **Refd.** Whitehouse *v.* Fellowes (1861), 10 C. B. N. S. 765; Brownlow *v.* Metropolitan Board of Works & Aird (1863), 13 C. B. N. S. 768; Hartnall *v.* Ryde Comrs. (1863), 4 B. & S. 361.

1209. —— ——.]—A local Act for better preserving the harbour of Maryport, & for lighting & otherwise improving the township of Maryport, sect. 7, appoints trustees to carry the Act into execution. By sect. 21, they may elect a harbour master, who, by sect. 47, may direct any person having the command of any vessel entering into or being within the harbour to anchor & place the same in such situation within the harbour as he shall direct. After the passing of the Act some coals were shot into a berth in the harbour which rendered it dangerous. The trustees at a board meeting having had notice of the state of the berth, gave directions to their clerk to have the coals removed, & the coals were accordingly partly, but not sufficiently removed at their expense. After this, the harbour master, without the knowledge of the trustees, directed pltf. to place his vessel in the berth. He did so, & the vessel while lying there sustained damage in consequence of the berth being unsafe. The harbour master knew that the berth had been unsafe, & what had been done to it, but neither he nor the trustees knew that the berth continued unsafe when he directed pltf. to place his vessel in it.—*Held:* there was no evidence to warrant a verdict against the trustees.—METCALFE *v.* HETHERINGTON (1860), 5 H. & N. 719; 2 L. T. 806; 24 J. P. 788; 8 W. R. 475; 157 E. R. 1367, Ex. Ch.

Annotations:—**Consd.** Mersey Dock Trustees *v.* Gibbs, Mersey Dock Trustees *v.* Penhallow (1866), L. R. 1 H. L. 93. **Refd.** Ruck *v.* Williams (1858), 3 H. & N. 308.

1210. —— ——.]—MERSEY DOCKS TRUSTEES *v.* GIBBS, MERSEY DOCKS TRUSTEES *v.* PENHALLOW, No. 1231, *post.*

B. Private Trusts.

See, generally, TRUSTS & TRUSTEES.

1211. Liability of trustee—For felonious acts of servant—Trustee for remuneration.]—A trustee for remuneration is not, in the absence of negligence on his part, liable for losses of the trust property sustained through the felonious acts of his servant, but is, in this respect, upon the same footing as an unpaid trustee.

Deft., who was the paid trustee of a creditors' trust deed, employed L. to manage & deal with part of the trust property. The employment of L. was justifiable, & deft. was not guilty of any negligence in the matter, but certain chattels comprised in the trust estate having been stolen by L., & their value having thus been lost, it was sought to make deft. liable:—*Held:* no liability attached to deft.—JOBSON *v.* PALMER, [1893] 1 Ch. 71; 62 L. J. Ch. 180; 67 L. T. 797; 41 W. R. 264; 9 T. L. R. 106; 3 R. 173.

Annotation:—**Mentd.** Shepherd *v.* Harris, [1905] 2 Ch. 310.

1212. —— **In contract—Servant acting with authority.**]—Where trustees who are carrying on a business permit one of their number to go into the market & purchase the goods required for carrying on the business, the trustee who is armed with authority to purchase the goods for the purpose of carrying on the business is also armed with authority to pledge the credit of the other trustees for that purpose.

Defts., mother & son, as trustees under a will, were joint owners of a business which, by the trusts

of the will, was carried on by the mother as agent for the trustees. The mother employed the son to purchase goods for the purposes of the business, which were paid for by the son, at the time of purchase by cheques bearing the signatures of the mother & son as drawers. In an action for the price of goods sold & delivered by a person who on previous occasions had received these cheques in payment:—*Held:* there was evidence that the son was held out by the mother as having authority to pledge their joint credit.—BRAZIER *v.* CAMP (1894), 63 L. J. Q. B. 257; 9 R. 852, C. A.

1213. Right of indemnity out of estate.]—A trustee in the due execution of his trust directed the bailiff employed on the settled estate to have certain trees felled. . . . The bailiff ordered the woodcutters usually employed on the estate to fell the trees. In doing so they allowed a bough to fall on a passer by, who brought an action against the trustee & recovered heavy damages:—*Held:* the trustee was entitled to indemnity out of the trust estate.—BENETT *v.* WYNDHAM (1862), 4 De G. F. & J. 259; 45 E. R. 1183, L. JJ.

Annotations:—**Folld.** *Re* Raybould, Raybould *v.* Turner, [1900] 1 Ch. 199. **Mentd.** *Re* Allan, Havelock *v.* Havelock (1881), 17 Ch. D. 807; *Re* Tyrell, Tyrell *v.* Woodhouse (1900), 82 L. T. 675.

1214. Right of party injured to be paid direct out of trust estate—Subrogated to rights of trustee.]—Trustee carried on his estator's colliery business, & in so doing let down the surface of the land & injured the buildings of an adjoining owner, who recovered damages against the trustee personally for £1,092, & costs. The adjoining owner then claimed to be entitled to be paid direct out of testator's estate the amount so recovered:—*Held:* as the injury had been occasioned by the trustee in the reasonable management & working of his testator's estate, he was entitled to be indemnified out of the assets, &, consequently, the adjoining owner was entitled to stand in the place of the trustee & to claim the benefit of this right to indemnity so as to obtain payment of the damages & costs so recovered direct out of testator's estate.—*Re* RAYBOULD, RAYBOULD *v.* TURNER, [1900] 1 Ch. 199; 69 L. J. Ch. 249; 82 L. T. 46; 48 W. R. 301.

Annotation:—**Mentd.** *Re* Tyrell, Tyrell *v.* Woodhouse (1900), 82 L. T. 675.

SUB-SECT. 6.—SELECTION OF SERVANTS RESTRICTED.

1215. Master prohibited from doing the work himself.]—The owner of a barge on the Thames is liable for injury done by it, although by 7 & 8 Geo. 4, c. lxxv, vessels must be navigated by freemen or apprentices to freemen, & the owner, not being himself a freemen or apprentice, had intrusted the navigation of his vessel to a person qualified under the Act.—MARTIN *v.* TEMPERLEY (1843), 4 Q. B. 298; 3 Gal. & Dav. 497; 12 L. J. Q. B. 129; 7 J. P. 145; 7 Jur. 150; 114 E. R. 912.

Annotations:—**Refd.** The Eden (1846), 2 Wm. Rob. 442; Turnbull *v.* Wieland (1916), 33 T. L. R. 143. **Mentd.** Wilmerson *v.* Lynn & Hamburg S.S. Co. (1913), 109 L. T. 53.

SECT. 6.—ACTS OF CONTRACTORS AND THEIR SERVANTS.

SUB-SECT. 1.—IN GENERAL.

Factors determining relationship.]—*See, generally,* Part I., Sect. 2, *ante.*

Whether relationship of master & servant constituted—Between servant of contractor & master.]—*See* Part I., Sect. 2, sub-sect. 1, B., *ante.*

—— Comparison with relationship of master & servant.]—*See* Part I., Sect. 3, sub-sect. 4, *ante.*

SUB-SECT. 2.—LIABILITY OF EMPLOYER.

A. General Rule.

1216. Employer not liable.]—Where bricklayers, employed by Comrs. of Sewers to repair a public sewer, perform the work in such a manner as to occasion a damage to a neighbouring house:—*Held:* the bricklayers are liable to an action though the work itself appears to be performed in a skilful manner.—JONES *v.* BIRD (1822), 5 B. & Ald. 837; 1 Dow. & Ry. K. B. 497; 106 E. R. 1397.

Annotations:—**Consd.** Hall *v.* Smith (1824), 2 Bing. 156; Mersey Docks & Harbour Board Trustees *v.* Gibbs, Mersey Docks & Harbour Board Trustees *v.* Penhallow (1866), L. R. 1 H. L. 93. **Refd.** Boulton *v.* Crowther (1824), 2 B. & C. 703; Stainton *v.* Woolrych, Stainton *v.* Metropolitan Board of Works & Lewisham District Board of Works (1857), 23 Beav. 225; White *v.* Peto (1888), 58 L. T. 710. **Mentd.** Partridge *v.* Scott (1838), 3 M. & W. 220; R. *v.* Eastern Counties Ry. (1841), 2 Ry. & Can. Cas. 736; Martins *v.* Upcher (1842), 3 Q. B. 662; Wilkinson *v.* Gray (1844), 2 L. T. O. S. 348; Smith *v.* West Derby L. B. (1878), 3 C. P. D. 423.

1217. ——.]—Where deft., a builder, contracted to make certain alterations in a clubhouse, together with necessary gas fittings & employed a gas fitter for the latter purpose under a sub-contract; & during the progress of the work, the gas, through the negligence of the gas fitter, exploded, & injured pltf., a servant in the clubhouse:—*Held:* no action for the injury could be maintained against deft. for the negligence of the gas fitter, he being a sub-contractor, & not the servant of deft.—RAPSON *v.* CUBITT (1842), 9 M. & W. 710; 11 L. J. Ex. 271; 6 Jur. 606; 152 E. R. 301; *previous proceedings* (1841), Car. & M. 64, N. P.

Annotations:—**Expld.** Allen *v.* Hayward (1845), 7 Q. B. 960. **Distd.** Machu *v.* L. & S. W. Ry. (1848), 2 Exch 415. **Expld.** Parry *v.* Smith (1879), 4 C. P. D. 325. **Consd.** Padbury *v.* Holliday & Greenwood (1912), 28 T. L. R. 494. **Refd.** Reedie *v.* L. & N. W. Ry., Hobbit *v.* L. & N. W. Ry. (1849), 4 Exch. 244; Overton *v.* Freeman (1852), 11 C. B. 867; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762.

PART IX. SECT. 6, SUB-SECT. 2.—A.

1216 i. *Employer not liable.*]—A railway co. is not responsible for damages occasioned by the negligence of sub-contractors in making the road, where such damage was occasioned by said sub-contractors doing acts which they were not required by their contract to do.—WOODHILL *v.* GREAT WESTERN RY. CO. (1855), 4 C. P. 449.—**CAN.**

1216 ii. ——.]—To sustain an action against the employer for damages occasioned in the performance of a contract, it must be shown that the contractor is the authorised agent of the parties sought to be charged, or at all events that they subsequently ratified or adopted the work as their own.—CARROLL *v.* PLYMPTON CORPN. (1860), 9 C. P. 345.—**CAN.**

1216 iii. ——.]—CITY OF HALIFAX *v.* LORDLY (1892), 20 S. C. R. 505.—**CAN.**

1216 iv. ——.]—PATTON *v.* ALBERTA RAILWAY & COAL CO. (1897), 2 Terr. L. R. 438.—**CAN.**

1216 v. ——.]—EDMONTON VINEGAR CO. *v.* FRIEDRICHS (1913), 23 W. L. R. 572; 3 W. W. R. 1043; 5 Alta. L. R. 460; 9 D. L. R. 445.—**CAN.**

1216 vi. ——.]—Deft. hired a horse & waggon from a livery man, who also supplied the driver. The driver, who sat alongside deft.'s foreman, was directed by the latter when to stop & drive on; the driver also assisted in the work the waggon was doing, under the foreman's orders. The liveryman paid the driver's wages. Pltf. suffered damage by reason of the reckless driving of the waggon:—*Held:* deft. was not liable.—BALFOUR *v.* BELL TELEPHONE CO. OF CANADA (1915), 8 O. W. N. 472; 34 O. L. R. 149; 24 D. L. R. 395.—**CAN.**

1216 vii. ——.]—KERR (OR AINSLIE) *v.* LEITH HARBOUR & DOCKS COMRS., [1919] S. C. 676.—**SCOT.**

Sect. 6.—*Acts of contractors and their servants: Subsect.* 2, *A.*]

1218. ——.]—In the construction of work, B., the contractor, had occasion to move back a bank, which he re-erected of insufficient materials. Water was prematurely admitted, which sunk the bank, & went over it into pltf.'s land:—*Held:* the contract, & work done under it, were acts done by the comrs. for which they might properly be sued in the name of their clerk, but the injury having arisen from the imperfect construction of the bank, which was part of the work specified in the contract, the contractor, & not the comrs. was liable for the damage.—ALLEN *v.* HAYWARD (1845), 7 Q. B. 960; 4 Ry. & Can. Cas. 104; 15 L. J. Q. B. 99; 5 L. T. O. S. 409; 10 Jur. 92; 115 E. R. 749.

Annotations:—**Refd.** Reedie *v.* L. & N. W. Ry., Hobbit *v.* L. & N. W. Ry. (1849), 4 Exch. 244; Ruck *v.* Williams (1858), 3 H. & N. 308; Hole *v.* Sittingbourne & Sheerness Ry. (1861), 6 H. & N. 488. **Mentd.** Rich *v.* Basterfield (1847), 16 L. J. C. P. 273; Brownlow *v.* Metropolitan Board of Works & Aird (1862), 8 Jur. N. S. 891.

1219. ——.]—A railway co. is not liable in trover for posts & rails taken & converted by workmen employed in constructing the railway.

These persons were servants of the contractor, but if they were the servants of the co., there was no adoption of their act by the co. You cannot make the corpn. liable, unless you show an authority either express or implied (PARKE, B.).—GLOVER *v.* LONDON & NORTH WESTERN RY. CO. (1850), 5 Exch. 66; 19 L. J. Ex. 172; 14 L. T. O. S. 468; 155 E. R. 29.

1220. ——.]—A. contracted with parish officers to pave a certain district, & entered into a subcontract with B. under which the latter was to lay down the paving of a street, the materials being supplied by A. & brought to the spot in his carts. Preparatory to the paving, the stones were laid, by labourers employed by B. on the pathway, & there left unguarded at night, in such a manner as to obstruct same, & C. fell over them, & broke his leg:—*Held:* B. was responsible for this negligence, & not A.—OVERTON *v.* FREEMAN (1852), 11 C. B. 867; 21 L. J. C. P. 52; 18 L. T. O. S. 224; 16 Jur. 65; 138 E. R. 717; *previous proceedings* (1851), 3 Car. & Kir. 49, N. P.

Annotations:—**Distd.** Ellis *v.* Sheffield Gas Consumers Co. (1853), 2 E. & B. 767. **Folld.** Peachey *v.* Rowland (1853), 13 C. B. 182. **Refd.** Sadler *v.* Henlock (1855), 3 C. L. R. 760; Blake *v.* Thirst (1863), 2 H. & C. 20.

1221. ——.]—If one employs another to do an act which may be done in a lawful manner, & the latter in doing it unnecessarily commits a public nuisance, whereby injury results to a third person, the employer is not responsible. A. employed B. to construct a drain in a public highway; B. employed C. to fill in the earth over the brickwork, & to carry away the surplus; C. in performing his work, left the earth raised so much above the level of the road, that D., driving by in the dark, was thereby upset, & sustained injury:—*Held:* A. was not responsible for the negligence of C.—PEACHEY *v.* ROWLAND (1853), 13 C. B. 182; 22 L. J. C. P. 81; 20 L. T. O. S. 208; 17 Jur. 764; 138 E. R. 1167.

Annotations:—**Consd.** Sadler *v.* Henlock (1855), 4 E. & B. 570. **Refd.** Ellis *v.* Sheffield Gas Consumers Co. (1853), 23 L. J. Q. B. 42.

1222. ——.]—Pltf. was the owner of certain land, & of certain modern buildings, abutting upon land in the occupation of deft. Deft. contracted with C. to erect certain buildings upon the border of his, deft.'s, premises, & C.'s workmen in excavating the soil shook & damaged pltf.'s buildings. C.'s workmen also carried away some bricks & other materials belonging to pltf.'s buildings, but without deft.'s sanction or authority:—*Held:* deft. was not liable for the tortious acts of the contractor's workmen in carrying away pltf.'s materials without deft.'s authority; & the mere fact of the workmen being upon deft.'s land by his permission did not render him responsible for such acts of theirs.—GAYFORD *v.* NICHOLLS (1854), 9 Exch. 702; 2 C. L. R. 1066; 23 L. J. Ex. 205; 18 J. P. 441; 156 E. R. 301; *sub nom.* NICHOLLS *v.* GAYFORD, Saund. & M. 30; 23 L. T. O. S. 96; 2 W. R. 453.

Annotations:—**Refd.** Clothier *v.* Webster (1862), 12 C. B. N. S. 790. **Mentd.** Dalton *v.* Angus (1881), 6 App. Cas. 740.

1223. ——.]—CREED *v.* RIGBY (1854), 23 L. T. O. S. 97; *previous proceedings*, 22 L. T. O. S. 262.

1224. ——.]—The master of a ship, chartered by the owner to another person by a charterparty containing a stipulation that the stevedore should be appointed by the charterer, & used by the charterers as a general ship, is not, in the absence of personal contract or negligence, liable to a person delivering goods on board to be carried, for injury done to the goods by the negligence of the stevedore.

The ship *Gundreda* was chartered by the owner to G. for a cargo from London to Port Louis & back. The cargo was to be taken in at the charterer's expense. The stevedore for outward cargo was to be appointed by the charterer, but to be paid by & act under the orders of the captain. L. was appointed stevedore by G., & went on board for the purpose of loading the vessel. The mate was in charge of the vessel. Neither master nor crew was on board, & the master gave no orders to the stevedore. B. & S. delivered alongside some sugar evaporating pans to be carried. Injury was done to the goods through the negligence of the stevedore:—*Held:* in the absence of any contract between the owner of the goods & the master, & of any interference by him, the master was not liable for the act of the stevedore.—BLAIKIE *v.* STEMBRIDGE (1859), 6 C. B. N. S. 894; 5 Jur. N. S. 1128; 141 E. R. 703; *sub nom.* BLAKIE *v.* STEMBRIDGE, 28 L. J. C. P. 329; 33 L. T. O. S. 345; 8 W. R. 24; *affd. sub nom.* BLAKIE *v.* STEMBRIDGE (1860), 29 L. J. C. P. 212, Ex. Ch.

Annotations:—**Consd.** The Storm Queen, Denyssen *v.* Macfie (1860), 3 L. T. 25; The Catharine Chalmers (1874), 32 L. T. 847. **Refd.** Roberts *v.* Shaw (1863), 4 B. & S. 44; Sanderman *v.* Scurr (1866), L. R. 2 Q. B. 86; British Columbia & Vancouver's Island Spar, Lumber & Saw Mill Co. *v.* Nettleship (1868), 37 L. J. C. P. 235. **Mentd.** Sack *v.* Ford (1862), 13 C. B. N. S. 90; Ohrloff *v.* Briscall, The Helene (1866), L. R. 1 P. C. 231.

1225. ——.]—PICKARD *v.* SMITH, No. 1264, *post.*

1226. ——.]—Where a person employs another to do a lawful act, it must be presumed, in the absence of evidence to the contrary, that he employs him to do it in a careful & proper manner; & unless the relation of master & servant exists between them, the employer is not responsible for the negligent manner in which the act is done.

Therefore, where pltf. & deft. were owners of adjoining ancient houses, & an architect employed by deft. to superintend the repairs of his house, having considered it necessary to pull down & rebuild the front wall, agreed with a contractor to do the work for an estimated price, & the workmen of the contractor in pulling down the wall removed a brest-summer which was inserted in the party wall between deft.'s & pltf.'s house, without taking any precautions by shoring or otherwise, in consequence of which the front wall of pltf.'s house fell:—*Held:* there was no evidence for the jury of any liability on the part of deft.—BUTLER *v.* HUNTER

(1862), 7 H. & N. 826; 31 L. J. Ex. 214; 10 W. R. 214; 158 E. R. 702.

Annotations:—**Consd.** Dalton *v.* Angus (1881), 6 App. Cas. 740. **Dbtd.** Hughes *v.* Percival (1883), 8 App. Cas. 443. **Reld.** Lemaitre *v.* Davis (1881), 19 Ch. D. 281; Kiddle *v.* Lovett (1885), 16 Q. B. D. 605; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335. **Mentd.** Lawrence *v.* Jenkins (1873), L. R. 8 Q. B. 274.

1227. ——.]—Declaration, that defts. were possessed of a shoot & were discharging sulphur; that pltf. was lawfully receiving the sulphur into a lighter, & that defts. by their servants, negligently managed their shoot that the same fell upon pltf. while he was in the lighter & injured him. The action was against the lessees of the Victoria Docks, who admitted that they were the proper parties to be sued in respect of claims arising in the working of the docks.

A ship was being discharged of a cargo of sulphur, which was received into lighters of pltf. through the "shoot" referred to, which was erected by the men who actually did the work. Defts. were paid by the merchant for discharging his ship; & the case for pltf. was, that it was to be inferred from this fact that the men who did the work & erected the "shoot" were in the employ of defts.:—*Held:* this was not a legitimate inference, whether of law or fact; & the above fact was not sufficient evidence to support it, for the work might have been done by the men under some sub-contract.—WOODWARD *v.* PETO (1862), 3 F. & F. 389.

Annotation:—**Reld.** Innocent *v.* Peto (1864), 4 F. & F. 8.

1228. ——.]—A contractor was employed to make a drain in the metropolis, & reinstated the street so negligently that pltf. was injured:—*Held:* the contractor, & not the owner of the premises, was liable according to the usual rule, which was not altered by Metropolis Management Act, 1855 (c. 120), ss. 77, 110, 111.—DRAY *v.* PULLEN & HUBBLE (1863), 8 L. T. 201; 27 J. P. 487.

1229. — —.]—The unloading of a cargo of corn, for which defts. were paid by the owner, being done by men engaged & paid by a ganger or contractor, with whom defts. contracted, they having no control over the men:—*Held:* not liable for an injury caused by their negligence to a corn meter in the service of the city of London engaged in measuring cargo.—INNOCENT *v.* PETO (1864), 4 F. & F. 8.

1230. ——.]—Where defts., zinc manufacturers, contracted with a builder for the roofing of a building, & they employed a zinc worker to do the work, at so much a yard, he employing men to do it, & paying them wages:—*Held:* defts. were not liable for a death caused by negligence of one of the workmen.—NORMILE *v.* BRABY (1866), 4 F. & F. 962.

1231. ——.]—Trustees appointed by statute for public purposes, with power to levy tolls, but not deriving any personal benefit are liable in their corporate capacity for damage sustained by reason of the default of their servants, or agents, to the same extent as absolute owners levying tolls for their own profit although there is no improper conduct on the part of such trustees.

No action could have lain against them unless they stood in the relation of master to the parties actually guilty of negligence (BLACKBURN, J.).—MERSEY DOCKS TRUSTEES *v.* GIBBS, MERSEY DOCKS TRUSTEES *v.* PENHALLOW (1866), L. R. 1 H. L. 93; 11 H. L. Cas. 686; 35 L. J. Ex. 225; 14 L. T. 677; 30 J. P. 467; 12 Jur. N. S. 571; 14 W. R. 872; 2 Mar. L. C. 353; 11 E. R. 1500, H. L.; *affg.* S. C. *sub nom.* GIBBS *v.* LIVERPOOL DOCKS TRUSTEES (1858), 3 H. & N. 164, Ex. Ch.

Annotations:—**Folld.** Coe *v.* Wise (1866), L. R. 1 Q. B. 711. **Apld.** Worral Waterworks Co. *v.* Lloyd (1866), L. R. 1 C. P. 719; A.-G. *v.* Colney Hatch Lunatic Asylum (1868), 4 Ch. App. 146; A.-G. & Dommes *v.* Basingstoke Corpn. (1876), 24 W. R. 817; Dormont *v.* Furness Ry. (1883), 11 Q. B. D. 496; R. *v.* Williams (1884), 9 App. Cas. 418. **Consd.** Lowther *v.* Curwen (1887), 58 L. T. 168; Gibraltar Sanitary Comrs. *v.* Orfila (1890), 15 App. Cas. 400. **Apld.** Taff Vale Ry. *v.* Amalgamated Soc. of Railway Servants, [1901] A. C. 426; Crossfield *v.* Manchester Ship Canal Co. (1903), 19 T. L. R. 398; The Bearn, [1906] P. 48; Queens of the River S.S. Co. *v.* Easton, Gibb & River Thames Conservators (1907), 96 L. T. 901. **Consd.** Bede S.S. Co. *v.* River Wear Comrs., [1907] 1 K. B. 310. **Distd.** Tozeland *v.* West Ham Union, [1907] 1 K. B. 920. **Consd.** Liebig's Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Walter Nelson, [1918] 2 K. B. 381. **Apld.** The Devon (1923), 130 L. T. 448. **Reld.** Ruck *v.* Williams (1858), 3 H. & N. 308; Southampton & Itchin Bridge Co. *v.* Southampton L. B. (1858), 8 E. & B. 801; Metcalfe *v.* Hetherington (1860), 5 H. & N. 719; Holliday *v.* St. Leonard, Shoreditch Vestry (1861), 11 C. B. N. S. 192; Waller *v.* S. E. Ry. Co. (1863), 32 L. J. Ex. 205; Ohrby *v.* Ryde Comrs. (1864), 5 B. & S. 743; Stiles *v.* Cardiff Steam Navigation Co. (1864), 33 L. J. Q. B. 310; Foreman *v.* Canterbury Corpn. (1871), L. R. 6 Q. B. 214; White *v.* Hindley L. B. (1875), L. R. 10 Q. B. 219; Harris *v.* G. W. Ry. (1876), 1 Q. B. D. 515; Tucker *v.* Axbridge Highway Board (1888), 53 J. P. 87; Hackney Corpn. *v.* Lee Conservancy Board, [1904] 2 K. B. 541; Hillyer *v.* St. Bartholomew's Hospital, [1909] 2 K. B. 820; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899; Baker *v.* James, [1921] 2 K. B. 674. **Mentd.** Walker *v.* Goe (1859), 4 H. & N. 350; Whitehouse *v.* Fellowes (1861), 10 C. B. N. S. 765; Thompson *v.* N. E. Ry. Co. (1862), 2 B. & S. 119; Brownlow *v.* Metropolitan Board of Works & Aird (1863), 13 C. B. N. S. 768; Birch *v.* Marylebone Vestry (1869), 17 W. R. 1014; Clowes *v.* Staffordshire Potteries Waterworks Co. (1872), 8 Ch. App. 123; Winch *v.* Thames Conservators (1874), L. R. 9 C. P. 378; Goslin *v.* Agricultural Hall Co. (1876), 1 C. P. D. 482; Holborn Union Grdns. *v.* St. Leonard Shoreditch Vestry (1876), 2 Q. B. D. 145; Weir *v.* Barnett (1878), 38 L. T. 929; Forbes *v.* Lee Conservancy Board (1879), 4 Ex. D. 116; Hill *v.* Metropolitan Asylum District Managers (1879), 4 Q. B. D. 433; Fleming *v.* Manchester Corpn. (1881), 44 L. T. 517; The Moorcock (1889), 14 P. D. 64; Jersey *v.* Uxbridge R. S. A., [1891] 3 Ch. 183; R. *v.* Selby Dam Drainage Comrs., [1892] 1 Q. B. 348; McClelland *v.* Manchester Corpn., [1912] 1 K. B. 118; Papworth *v.* Battersea Corpn. (1914), 79 J. P. 105; Pyman S.S. Co. *v.* Hull & Barnsley Ry., [1914] 2 K. B. 788; The Ella, [1915] P. 111; Boynton *v.* Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213; Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746; British Petroleum Co. *v.* A.-G. for Ceylon, [1926] A. C. 147.

1232. ——.]—By agreement between the Smithfield Club & defts., who were proprietors of a building & premises at Islington called the Agricultural Hall, the club were to have the exclusive use of the Hall during the period of their annual show of stock, etc., defts. providing & paying a sufficient staff, who were to be under the sole control of the secretary & stewards of the club, to receive, take care of, & re-deliver the stock, etc., exhibited, & also paying the club £1,000; in consideration of which defts. were to receive certain fees or admission money from the visitors. The stock & articles to be exhibited were received at the gate of defts.' premises by one Sharman, upon orders signed by the secretary of the Smithfield Club, who contracted with defts. for a lump sum, amongst other things, to receive them & to re-deliver them at the end of the show upon like orders; defts. in no way interfering. S., who exhibited a pen of three sheep at the show in 1873, sold them to pltf., & upon pltf.'s drover producing an order for their removal signed by S., Sharman or one of his men delivered him by mistake sheep from another pen. These pltf. rejected, & he brought this action against defts. for converting his sheep:—*Held:* defts. were not responsible in the circumstances for the acts or defaults of Sharman or his men.—GOSLIN *v.* AGRICULTURAL HALL CO., LTD. (1876), 1 C. P. D. 482; 45 L. J. Q. B. 348; 35 L. T. 92, C. A.

1233. ——.]—Defts. were builders & contractors who, after the outside of a house was finished, had removed the outer hoarding & had employed a sub-contractor to do the internal plastering. One of the men employed by the sub-contractor,

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in walking, shook a plank which caused a tool to fall out of a window of the house, & the tool in falling injured pltf. who was passing along the highway. The jury found that the hoarding had been properly removed, but that the injury was caused by the negligence of defts. in not providing some other protection for the public:—*Held:* defts. were entitled to judgment, for there was no evidence that the falling of the tool was a probable accident which might reasonably have been foreseen, so as to make it the duty of defts. to provide against it. If it was the duty of any one to supply protection against the consequences of the falling of the tool, it was the duty of the sub-contractor & not of defts.—PEARSON *v.* COX (1877), 2 C. P. D. 369; 36 L. T. 495; 42 J. P. 117, C. A.

Annotation:- **Refd.** Watkins *v.* G. W. Ry. (1877), 46 L. J. Q. B. 817.

1234. ——.]—A person who employs another to do something which has cast upon him a duty, is not relieved from liability for the consequence of a neglect of that duty by the person whom he employs.

A person employing a contractor to do work is not liable for the negligence of the contractor or his servants (LORD BLACKBURN, C.).- DALTON *v.* ANGUS (1881), 6 App. Cas. 740; 50 L. J. Q. B. 689; 44 L. T. 844; 46 J. P. 132; 30 W. R. 191, H. L.; *affg.* S. C. *sub nom.* ANGUS *v.* DALTON (1878), 4 Q. B. D. 162, C. A.

Annotations:—**Apld.** Lemaitre *v.* Davis (1881), 19 Ch. D. 281. **Consd.** Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335. **Apld.** Robinson *v.* Beaconsfield R. D. C., [1911] 2 Ch. 188. **Refd.** Duke *v.* Courage (1882), 46 J. P. 453; Hughes *v.* Percival (1883), 8 App. Cas. 443; Crawford *v.* Consett L. B. (1891), 55 J. P. Jo. 218; Penny *v.* Wimbledon U. C. (1899), 68 L. J. Q. B. 704; Cribb *v.* Kynoch, [1907] 2 K. B. 548; Padbury *v.* Holliday & Greenwood (1912), 28 T. L. R. 494; Hurlstone *v.* L. Elec. Ry. (1913), 30 T. L. R. 398; Cox *v.* Coulson, [1916] 2 K. B. 177. **Mentd.** Rivers *v.* Adams, Rivers *v.* Isaacs, Rivers *v.* Ferrett (1878), 3 Ex. D. 361; Sturges *v.* Bridgman (1879), 11 Ch. D. 852; Norfolk *v.* Arbuthnot (1880), 5 C. P. D. 390; Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633; Bell *v.* Love (1883), 10 Q. B. D. 547; Tone *v.* Preston (1883), 24 Ch. D. 739; Esdaile *v.* Payne (No. 2) (1885), 53 L. T. 21; Russell *v.* Watts (1885), 55 L. J. Ch. 158; Harris *v.* De Pinna (1886), 33 Ch. D. 238; Bass *v.* Gregory (1890), 25 Q. B. D. 481; Dicker *v.* Popham, Radford (1890), 63 L. T. 379; Perry *v.* Eames, Salaman *v.* Eames, Mercers' Co. *v.* Eames, [1891] 1 Ch. 658; Corbett *v.* Jonas, [1892] 3 Ch. 137; Haigh *v.* West (1893), 62 L. J. Q. B. 532; Wheaton *v.* Maple Co., [1893] 3 Ch. 48; Chastey *v.* Ackland (1895), 72 L. T. 845; Greenwell *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165; Simpson *v.* Godmanchester Corpn., [1897] A. C. 696; Blake *v.* Woolf, [1898] 2 Q. B. 426; Southwark & Vauxhall Water Co. *v.* Wandsworth Board of Works, [1898] 2 Ch. 603; Jordeson *v.* Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217; Gardner *v.* Hodgson's Kingston Breweries Co., [1900] 1 Ch. 592; Smith *v.* Baxter, [1900] 2 Ch. 138; G. N. Ry. *v.* L. R. Comrs., [1901] 1 K. B. 416; Edinburgh & District Water Trustees *v.* Clippens Oil Co. (1902), 87 L. T. 275; Union Lighterage Co. *v.* London Graving Dock Co., [1902] 2 Ch. 557; A.-G. *v.* Antrobus (1905), 74 L. J. Ch. 599; King *v.* Jolly, [1905] 1 Ch. 480; Cable *v.* Bryant, [1908] 1 Ch. 259; Hyman *v.* Van Den Bergh, [1908] 1 Ch. 167; A.-G. *v.* Horner (No. 2), [1913] 2 Ch. 140; Howley Park Coal & Cannel Co. *v.* L. & N. W. Ry., [1913] A. C. 11; Kirby *v.* Chessum (1913), 30 T. L. R. 15; Hall *v.* Manchester Corpn. (1914), 111 L. T. 182; Lyell *v.* Hothfield, [1914] 3 K. B. 911; Pwllbach Colliery Co. *v.* Woodman, [1915] A. C. 634; Schwann *v.* Cotton & Hayles (1916), 85 L. J. Ch. 689; Selby *v.* Whitbread, [1917] 1 K. B. 736; Cory *v.* Davies, [1923] 2 Ch. 95; Sack *v.* Jones, [1925] Ch. 235.

1235. ——.]—HOBBS *v.* TUNBRIDGE WELLS LOCAL BOARD (1885), 49 J. P. 679.

Annotation:—**Refd.** Kent County Council *v.* Gerard (1896), 66 L. J. Q. B. 251.

1236. ——.]—The maxim *respondeat superior* does not absolve the inferior, if by his negligence a loss has been sustained. If, in doing the act, he is guilty of negligence whereby loss & damage are occasioned to another, he is personally liable.—WHITE *v.* PETO BROTHERS (1888), 58 L. T. 710; 4 T. L. R. 446.

1237. ——.]—Where a person uses his land for any purpose for which it may in the ordinary course of the enjoyment of land be used & without any default or negligence on his part damage happens to his neighbour's premises, no liability attaches to him. Further, if a person claiming to be compensated for damage caused by dangerous matter upon his neighbour's land has consented to such dangerous matter being brought upon his neighbour's land, he cannot recover. Therefore, where a landlord of premises lets a part of them, & at the time the tenant takes such part, a water supply has been laid on to the premises by the landlord, the landlord is not, in the absence of contractual obligation, liable to the tenant for injury to goods of the latter, upon that portion of the premises occupied by him, caused by an overflow of water by reason of defective work to the landlord's water supply by a contractor employed by him, provided that the contractor is competent to do the work & was employed by the landlord upon receipt of notice of the defect in the water supply.—BLAKE *v.* WOOLF, [1898] 2 Q. B. 426; 67 L. J. Q. B. 813; 79 L. T. 188; 62 J. P. 659; 47 W. R. 8; 42 Sol. Jo. 688, D. C.

Annotations:—**Consd.** Rickards *v.* Lothian, [1913] A. C. 263; Cockburn *v.* Smith, [1924] 2 K. B. 119. **Refd.** Charing Cross, West-End & City Electricity Supply Co. *v.* London Hydraulic Power Co., [1913] 3 K. B. 442; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762; Noble *v.* Harrison, [1926] 2 K. B. 332.

1238. ——.]—BENNETT *v.* CASTLE & SONS (1898), 14 T. L. R. 288, C. A.

1239. ——.]—Defts., a local authority provided for the use of the inhabitants of their district a hospital for the reception of persons suffering from infectious diseases. A visiting physician, who was a competent medical practitioner, was appointed to the hospital, & acted under the general directions of the hospitals committee of defts., the rules providing (*inter alia*) that he should be responsible for "the treatment of the patients from the beginning to the end of their stay, & also for their freedom from infection when discharged." A son of pltf. was treated in the hospital while suffering from a mild attack of scarlet fever, & was ultimately discharged by the visiting physician while still in an infectious condition, & under circumstances which a jury found to amount to a want of reasonable skill & care on his part in & about the discharge; after the boy had returned home, he communicated the disease to three other children of pltf. Pltf. then sued defts. to recover the expense to which he had been put in regard to the illness of his other children owing to the premature discharge of his son from the hospital by the visiting physician:—*Held:* pltf. was not entitled to recover, for the legal obligation of defts. extended only to the provision of reasonably skilled & competent medical attendance for the patients, which they had discharged, & there was no absolute undertaking or obligation on their part that no patient should be discharged by the visiting physician while still in a condition which might cause infection.—EVANS *v.* LIVERPOOL CORPN., [1906] 1 K. B. 160; 74 L. J. K. B. 742; 69 J. P. 263; 21 T. L. R. 558; 3 L. G. R. 868.

Annotations:—**Apprvd. & Folld.** Hillyer *v.* St. Bartholomew's Hospital, [1909] 2 K. B. 820. **Distd.** Smith *v.* Martin & Kingston-upon-Hull Corpn., [1911] 2 K. B. 775. **Mentd.** University of London Press *v.* University Tutorial Press, [1916] 2 Ch. 601.

1240. ——.]—The only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care & skill in selecting their medical & nursing staff. The physicians & surgeons who give their services at the hospital are employed to exercise their profession to the best of their abilities, according to their own discretion, but in exercising it they are in no way under the orders, or bound to obey the directions, of the governors. Although the nurses employed at the hospital are servants of the governors for general purposes, they are not so for the purposes of operations conducted by the medical staff. Pltf. sued defts. to recover damages for injuries which he alleged he had sustained through the negligent conduct of an operation at the hospital. The operation was conducted by a consulting surgeon who was attached to the hospital but was not under the control of defts. During the operation he was assisted by members of the surgical & nursing staff:—*Held:* the action was not maintainable against defts.—HILLYER *v.* ST. BARTHOLOMEW'S HOSPITAL (GOVERNORS), [1909] 2 K. B. 820; 78 L. J. K. B. 958; 101 L. T. 368; 73 J. P. 501; 25 T. L. R. 762; 53 Sol. Jo. 714, C. A.

Annotations:—**Expld.** Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305. **Distd.** Smith *v.* Martin & Kingston-upon-Hull Corpn., [1911] 2 K. B. 775. **Refd.** Scottish Insce. Comrs. *v.* Edinburgh Royal Infirmary (1913), 6 B. W. C. C. N. 120.

1241. ——.]—Where an education authority under the Education Acts, 1907 & 1909, enter into an agreement with a medical assocn. in regard to the performance of operations on schoolchildren, the education authority are not liable for the negligence, if any, of the persons performing the operation, provided that they engage competent professional persons to perform it.—DAVIS *v.* LONDON COUNTY COUNCIL (1914), 30 T. L. R. 275; 78 J. P. Jo. 64, N. P.

1242. ——.]—A brewery co. employed an independent contractor to deliver some beer to a tied house which abutted on to the highway & the cellar flaps of which occupied the greater part of the pavement. The beer, at the request of the occupier of the licensed premises, was delivered by the carman into the cellar, the flaps of which were turned back by the carman. Pltf., who was passing along the pavement, was tripped by the flaps & fell into the cellar, & was injured:—*Held:* the brewery co. were not liable to pltf., as they had not employed the contractor to do work on the highway which was dangerous to the public, nor to interfere with the surface of the highway, & therefore they were not liable for the negligent acts of the contractor.—WILSON *v.* HODGSON'S KINGSTON BREWERY CO. (1915), 85 L. J. K. B. 270; 113 L. T. 1112; 80 J. P. 39; 32 T. L. R. 60; 60 Sol. Jo. 142, D. C.

1243. —— **Employer retaining right of dismissal.**]—A co. empowered by Act of Parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, & by the contract reserved to themselves the power of dismissing any of the contractors' workmen for incompetence. The workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him:—*Held:* in an action against the co. by the administratrix of deceased, they were not liable; &, in such case the terms of the contract in question did not make any difference.—REEDIE *v.* LONDON & NORTH WESTERN RY. CO., HOBBIT *v.* LONDON & NORTH WESTERN RY. CO. (1849), 4 Exch. 244; 6 Ry. & Can. Cas. 184; 20 L. J. Ex. 65; 13 Jur. 659; 154 E. R. 1201.

Annotations:—**Apld.** Overton *v.* Freeman (1852), 11 C. B. 867; Peachey *v.* Rowland (1853), 13 C. B. 182. **Folld.** Butler *v.* Hunter (1862), 7 H. & N. 826. **Expld. & Distd.** Jones *v.* Liverpool Corpn. (1885), 14 Q. B. D. 890; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335. **Refd.** Knight *v.* Fox (1850), 20 L. J. Ex. 9; Ellis *v.* Sheffield Gas Consumers Co. (1853), 23 L. J. Q. B. 42; Tobin *v.* R. (1864), 16 C. B. N. S. 310; The Halley (1867), L. R. 2 A. & E. 3; John *v.* Bacon (1870), 39 L. J. C. P. 365; The Bernina (2) (1887), 12 P. D. 58; Greenwell *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165; Holliday *v.* National Telephone Co., [1899] 1 Q. B. 221; Maxwell *v.* British Thomson Houston Co. (1902), 18 T. L. R. 278; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762. **Mentd.** Gayford *v.* Nicholls (1854), 9 Exch. 702; MacCarthy *v.* Young (1861), 6 H. & N. 329.

1244. —— **Though contractor servant for other purposes.**]—The contractor for works is the party liable for any injury caused by negligence in not properly causing such works to be guarded by lights or otherwise as may be requisite; although the contractor was at the time of the contract & performance of the works servant to another, the contract being the contract of the servant personally, & not as such servant.—KNIGHT *v.* FOX (1850), 5 Exch. 721; 20 L. J. Ex. 9; 16 L. T. O. S. 128; 14 J. P. 721; 14 Jur. 963; 155 E. R. 316.

Annotations:—**Apld.** Overton *v.* Freeman (1852), 11 C. B. 867; Peachey *v.* Rowland (1853), 13 C. B. 182. **Consd.** Ellis *v.* Sheffield Gas Consumers Co. (1853), 2 E. & B. 767; Sadler *v.* Henlock (1855), 24 L. T. O. S. 233.

1245. —— **Act done contrary to directions.**]—Where one is employed by another to do work for him under the superintendence of his own servant, & the person employed does something contrary to the directions of the superintendent & thereby causes an injury, the employer is not liable.—STEEL *v.* SOUTH-EASTERN RY. CO. (1855), 16 C. B. 550; 25 L. T. O. S. 129; 139 E. R. 875.

Annotations:—**Distd.** Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335. **Refd.** Hole *v.* Sittingbourne & Sheerness Ry. (1861), 30 L. J. Ex. 81; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762.

1246. —— **Negligence collateral act.**]—Defts. were employed to erect certain premises, & the contract involved the employment by defts. of sub-contractors to execute the special work of putting metallic casements into the windows. While one of these casements was being put in, an iron tool was placed by a servant of the sub-contractor on the window sill; & the casement having been blown to by the wind, the tool fell & struck pltf., who was passing along the street. The tool was not placed on the window sill in the normal course of doing the work which the sub-contractors were employed to do. Pltf. sued defts. claiming damages in respect of his injuries:—*Held:* the injuries were caused to pltf. by an act of collateral negligence on the part of a workman who was a servant of the sub-contractors & not of defts., & the latter were therefore not liable for the consequences of that negligence.—PADBURY *v.* HOLLIDAY & GREENWOOD, LTD. (1912), 28 T. L. R. 494, C. A.

1247. —— **Though employer receives benefit.**]—Resps. respectively held a patent & a lease from the Crown of mining lands in Ontario. Under Mines Act, R. S. O., 1897 (c. 36), ss. 39 & 40, the property in all pine trees on lands the subject of a patent or a lease is reserved to the Crown, who may grant licences to cut them, the patentee or lessee having, however, the right to cut them for use for mining purposes & in clearing the ground for cultivation. Applts. who had a licence from the Crown to cut timber upon specified lands, not including the lands held by resps., contracted with

Sect. 6.—Acts of contractors and their servants: Sub-sect. 2, A. & B. (a), (b) i. & ii., & (c) i.]

a firm of cutters to cut timber upon the lands so specified, to manufacture it into railway ties, & to deliver the ties in performance of a contract which applts. held. The firm, without the knowledge of applts., wrongfully entered upon resps.' lands, cut pine trees thereon, manufactured ties, & proceeded to deliver them according to their contract. When ordered by the Crown Timber Agent to desist, they had removed all but a few of the ties. Later, the Crown gave permission to applts. to remove the remaining ties, & subsequently charged them the usual dues in respect of all timber cut by the firm, including the pine trees cut upon resps.' lands. Resps. did not demand the return of the ties:—*Held:* the firm were not the servants or agents of applts. & the latter were not by reason of having received the benefit of the pine trees cut liable in trespass for the acts committed by them.—EASTERN CONSTRUCTION CO., LTD. *v.* NATIONAL TRUST CO., LTD. & SCHMIDT, [1914] A. C. 197; 83 L. J. P. C. 122; 110 L. T. 321, P. C.

B. Exceptions to General Rule.

(a) Relationship of Master and Servant.

See Nos. 1219, 1226, 1231, *ante.*

(b) Personal Interference.

i. *In General.*

1248. Liability of employer.]—If a person employs a tradesman to do any work for him, & in the execution of it the tradesman, or his servants, by their negligence cause an injury to any one, the person employing is liable for the injury arising from such neglect. Defts. was the person who gave the order . . . & the injury had arisen from the execution of it, & he was bound to take care that in doing what was a lawful act, it should be done so as not to be injurious to the public (LORD ELLENBOROUGH). SLY *v.* EDGLEY (1806), 6 Esp. 6, N. P.

Annotations: **Expld.** Laugher *v.* Pointer (1826), 5 B. & C. 547; Quarman *v.* Burnett (1840), 6 M. & W. 499. **Consd.** Rapson *v.* Cubitt (1842), 9 M. & W. 710.

1249. ——.]—Trustees of a turnpike road are not liable in damages for an injury occasioned by the negligence of contractors, or others, employed under them, in the performance of public works on the road; unless they personally interfere in the management of the works.

Defts. lived within 200 yards of the spot where the work was going on, & where the accident happened; he was generally on the spot, overlooking the progress of the work, twice in every week; he had occasionally given some directions respecting the work; & he had been heard to tell the workmen to use every precaution, so as to make the road safe for the public:—*Held:* defts. was not liable; the evidence of his interference was far too slight to take this case out of the general rule.—HUMPHREYS *v.* MEARS (1827), 1 Man. & Ry. K. B. 187; 1 Man. & Ry. M. C. 30; 6 L. J. O. S. K. B. 89.

Annotations:—**Folld.** Holliday *v.* St. Leonard, Shoreditch Vestry (1861), 11 C. B. N. S. 192. **Refd.** Duncan *v.* Findlater (1839), 6 Cl. & Fin. 894.

ii. *What Amounts to Interference.*

1250. Question for jury.]—A well was let from year to year, neither landlord nor tenant being bound to repair the steining. The well being out of repair the tenant complained to defts., the landlords, who sent in men to repair it. The well was destroyed by the negligence of the workmen employed. An action having been brought by the tenant to recover damages for the injury sustained by him:—*Held:* defts. were not necessarily responsible, but it was a question of fact for the jury what was the nature of the obligation incurred by them by reason of their interference.—MILLS *v.* HOLTON (1857), 2 H. & N. 14; 157 E. R. 6.

1251. General superintendence.]—HUMPHREYS *v.* MEARS, No. 1249, *ante.*

1252. ——.]—DALTON *v.* BACHELOR (1858), 1 F. & F. 15.

1253. ——.]—Deft., a builder, contracted in writing with local comrs. to make a sewer. He verbally underlet to N. the excavation & brickwork at a fixed price per yard, including fencing, watching & lighting, deft. supplying the bricks in his own carts & removing the surplus clay from the cutting. N. employed men under him by the day. Deft.'s name as contractor was over the door of an office near the works, but the comrs. employed the clerk of the works. Deft. stated that if the work were not done to his satisfaction he should have dismissed N. Owing to the insufficient lighting, pltf. fell into an unfenced part of the excavated trench, & was injured. After the accident N. put up a fence & a light:—*Held:* on these facts deft. was liable.—BLAKE *v.* THIRST (1863), 2 H. & C. 20; 2 New Rep. 80; 32 L. J. Ex. 188; 8 L. T. 251; 11 W. R. 1034; 159 E. R. 9.

1254. ——.]—Deft. was a surveyor of highways, appointed by the vestry of a parish at a salary. By a resolution of the committee of management for the highways, appointed by the vestry, it was ordered that about 150 yards of a road should be raised, & deft., as surveyor, was directed to carry out the resolution. Deft. contracted with G. to do the labour at 3½*d.* per yard, the vestry finding stones & materials. G. worked himself, & employed & paid his own men, & deft., as surveyor, employed men to cart materials to the ground. Deft. set the work out, & determined the levels, but had nothing to do with the paving himself, except superintending on behalf of the committee. The work was carried out by raising one-half of the width of the road about a foot, leaving the other half at its old level; & a considerable length of road was so left without light or fencing at night; &, in consequence of this, the dogcart of pltf., which he was driving along the road, was upset & he was injured. Deft. had been

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PART IX. SECT. 6, SUB-SECT. 2.—B. (b) ii.

1251 i. *General superintendence.*]—GRASSICK *v.* CITY OF TORONTO (1876), 39 U. C. R. 306.—**CAN.**

1251 ii. ——.]—While, as a general rule, the negligence of a contractor prudently selected is not the negligence of those who employ him, this principle is subject to two exceptions, (1) where by the terms of the contract, control or supervision of the work with power to direct changes in its execution, is reserved to the employer, so that the work may be regarded in a sense as the joint operation of both; (2) where the other principle applies whereby the employer is obliged, both by common law & statute, to have his works suitable for the operation to be carried on in them with reasonable safety.—MCKEEGAN *v.* CAPE BRETON COAL, ETC. CO. (1906), 40 N. S. R. 566.—**CAN.**

1251 iii. ——.]—Where by virtue of the terms of the contract, defts. had control only over the construction of the work & not over the prior operations of procuring & taking out material for use in the said work:—*Held:* defts. were not liable for the casual negligence of the contractor or his servants.—ROMANIUK *v.* GRAND TRUNK PACIFIC RY. CO. (1914), 29 W. L. R. 766; 7 W. W. R. 399; 24 Man. L. R. 797; 20 D. L. R. 301.—**CAN.**

previously warned of the dangerous condition of the road. The jury found that leaving the road in its then state, without light or warning was negligence; but that deft. did not personally interfere in doing the work, or directing the road to be left as it was:—*Held:* the ct. having power to draw inferences of fact, deft. was liable.—PENDLEBURY *v.* GREENHALGH (1875), 1 Q. B. D. 36; 45 L. J. Q. B. 3; 33 L. T. 372; 40 J. P. 36; 24 W. R. 98, C. A.

Annotations:—**Refd.** Tucker *v.* Axbridge Highway Board (1888), 53 J. P. 87. **Mentd.** Holborn Grdns. *v.* St. Leonard's, Shoreditch Vestry (1876), 41 J. P. 38; Robinson *v.* Beaconsfield R. C., [1911] 2 Ch. 188.

1255. ——.]—A district council, being about to construct a sewer under their statutory powers, employed a contractor to construct it for them. In consequence of his negligence in carrying out the work a gas-main was broken, & the gas escaped from it into the house in which pltfs., husband & wife, resided, & an explosion took place, by which the wife was injured, & the husband's furniture was damaged.

In my judgment the relation of master & servant did not exist between the council & T. [the contractor] but the true relation was that of principal & contractor. It is true that the district council had the right of fully superintending the execution of the works & giving directions in relation thereto, but *Steel* v. *S. E. Ry. Co.*, No. 1245, *ante*, & *Reedie* v. *L. & N. W. Ry. Co.*, No. 56, *ante*, show that these circumstances do not of themselves render a principal liable for the negligent act of his contractor, unless it was brought about by the order of the inspector (A. L. SMITH, L.J.).—HARDAKER *v.* IDLE DISTRICT COUNCIL, [1896] 1 Q. B. 335; 65 L. J. Q. B. 363; 74 L. T. 69; 60 J. P. 196; 44 W. R. 323; 12 T. L. R. 207; 40 Sol. Jo. 273, C. A.

Annotations:—**Refd.** Penny *v.* Wimbledon U. C., [1899] 2 Q. B. 72; The Snark, [1900] P. 105; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762. **Mentd.** Blake *v.* Woolf (1898), 67 L. J. Q. B. 813; Groves *v.* Wimborne, [1898] 2 Q. B. 402; Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1898] 2 Ch. 614; Holliday *v.* National Telephone Co., [1899] 1 Q. B. 221; Maxwell *v.* British Thomson Houston Co., Blackwell, Third Parties (1902), 18 T. L. R. 278; The Devonshire (1911), 106 L. T. 241; Robinson *v.* Beaconsfield R. C., [1911] 2 Ch. 188; Hurlstone *v.* L. Elec. Ry. (1914), 30 T. L. R. 398.

1256. Direct order.]—GORDON *v.* ROLT, No. 979, *ante*.

(c) *Injurious Consequences Likely to result from Work.*

i. *In General.*

1257. General rule—Liability of employer.]—The employers of a contractor are liable for the injurious acts of the contractor which flow out of the fulfilment of the contract, but where the injurious acts flow out of a matter foreign to the contract, the contractor is personally liable.—PITTS *v.* KINGSBRIDGE HIGHWAY BOARD (1871), 25 L. T. 195; 19 W. R. 884.

1258. —— ——.]—BOWER *v.* PEATE, No. 1275, *post*.

1259. —— ——.]—ANGUS *v.* DALTON, No. 1276, *post*.

1260. —— ——.]—When a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, & he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take these precautions (ROMER, L.J.).—PENNY *v.* WIMBLEDON URBAN COUNCIL, [1899] as reported in 2 Q. B. 72; 68 L. J. Q. B. 704; 80 L. T. 615; 47 W. R. 565, C. A.; *affg.*, [1898] 2 Q. B. 212.

Annotations:—**Consd.** Holliday *v.* National Telephone Co., [1899] 1 Q. B. 221. **Folld.** The Snark, [1900] P. 105. **Consd.** Wilson *v.* Hodgson's Kingston Brewery Co. (1915), 85 L. J. K. B. 270. **Refd.** Hill *v.* Tottenham U. D. C. (1898), 79 L. T. 495; Milcham *v.* Marylebone Corpn. & Latter (1903), 67 J. P. 110; Hurlstone *v.* L. Elec. Ry. (1913), 29 T. L. R. 514; Rainham Chemical Works *v.* Belvedere Fish Guano Co., [1921] 2 A. C. 465. **Mentd.** Robinson *v.* Beaconsfield R. C., [1911] 2 Ch. 188; Padbury *v.* Holliday & Greenwood (1912), 28 T. L. R. 494; Kimber *v.* Gas Light & Coke Co., [1918] 1 K. B. 439; British Thomson-Houston Co. *v.* Sterling Accessories; British Thomson-Houston Co. *v.* Crowther & Osborn, [1924] 2 Ch. 33.

1261. Lowering goods from warehouse.]—A warehouseman at L. employed a master porter to remove a barrel from his warehouse. The master porter employed his own men & tackle; &, through the negligence of the men, the tackle failed, & the barrel fell & injured pltf.:—*Held:* the warehouseman was liable in case for the injury.—RANDLESON *v.* MURRAY (1838), 8 Ad. & El. 109; 3 Nev. & P. K. B. 239; 1 Will. Woll. & H. 149; 7 L. J. Q. B. 132; 2 Jur. 324; 112 E. R. 777.

Annotations:—**Dbtd.** Reedie *v.* N. W. Ry., Hobbit *v.* N. W. Ry. (1849), 13 Jur. 659. **Distd.** Peachey *v.* Rowland (1853), 13 C. B. 182. **Refd.** Milligan *v.* Wedge (1840), 12 Ad. & El. 737; Quarman *v.* Burnett (1840), 6 M. & W. 499; Rapson *v.* Cubitt (1842), 9 M. & W. 710; Allen *v.* Hayward (1845), 7 Q. B. 960; Pickard *v.* Smith (1861), 10 C. B. N. S. 470; Murphy *v.* Caralli (1864), 3 H. & C. 462. **Mentd.** Rich *v.* Basterfield (1847), 4 C. B. 783; Barker *v.* Herbert, [1911] 2 K. B. 633.

1262. Construction of railway bridge.]—In an action by a passenger against a railway co. for compensation on account of injuries sustained by the breaking down of a bridge on the line, alleged to have been improperly made, but which had been constructed under the superintendence of a competent engineer, the judge directed the jury, that the question for them to consider was, whether the bridge had been constructed & maintained with sufficient care & skill, & of reasonably proper strength with regard to the purposes for which it was made:—*Held:* the direction was right.

Semble: in such case, the mere employment of a competent engineer would not exonerate defts. unless he had used reasonable care & proper materials in the construction of the works.—GROTE *v.* CHESTER & HOLYHEAD RY. CO. (1848), 2 Exch. 251; 5 Ry. & Can. Cas. 649; 154 E. R. 485.

Annotations:—**Consd.** Francis *v.* Cockrell (1870), L. R. 5 Q. B. 501. **Refd.** Readhead *v.* Mid. Ry. (1869), L. R. 4 Q. B. 379. **Mentd.** East Anglian Ry. *v.* Eastern Counties Ry. (1851), 7 Ry. & Can. Cas. 150; R. *v.* Mid. Ry. (1867), 31 J. P. 661; Thomas *v.* Rhymney Ry. (1870), L. R. 5 Q. B. 226; Norman *v.* G. W. Ry., [1914] 2 K. B. 153.

1256 i. *Direct order.*]—CRAM *v.* RYAN (1894), 25 O. R. 524.—CAN.

PART IX. SECT. 6, SUB-SECT. 2.—B. (c) i.

1257 i. *General rule—Liability of employer.*]—When a contractor employs a sub-contractor to do work of a dangerous character which is liable to result in damage to third persons if due precautions are not taken, if the sub-contractor is guilty of negligence in the performance of the work, such negligence not being casual or collateral to such performance, & one of his workmen is injured in consequence of such negligence, the workman has the same right of action against the principal contractor as he has against the sub-contractor, & he may sue either, or both.—LONGMORE *v.* MCARTHUR (1910), 19 Man. L. R. 641; *affd.*, 43 S. C. R. 640.—CAN.

1257 ii. ——.]—Apart from special contract the managers of a public hospital are not responsible to the patients whom they receive (whether paying or non-paying) for unskilful or negligent medical treatment, provided they have exercised due care in the selection of a competent staff.—FOOTE *v.* SHAW STEWART, [1912] S. C. 69.—SCOT.

1257 iii. —— ——.]—STEWART *v.* ADAMS, [1920] S. C. 129; 57 Sc. L. R. 83.—SCOT.

Sect. 6.—Acts of contractors and their servants: Sub-sect. 2, B. (c) i., ii. & iii.]

1263. ——.]—Defts., a railway co., were empowered by Act of Parliament, to construct an opening bridge over a navigable river, & were forbidden to detain any vessel navigating the river for a longer space of time than would be sufficient to allow trains ready to traverse the bridge to pass, & for opening the bridge; & in case the co., or any one acting under them, should detain any such vessel for more than ten minutes, the co. were to be liable to a penalty, in addition to any claim for damages sustained by reason of such detention. Defts. employed a contractor to build the bridge in conformity with the Act. While the bridge was unfinished & in the hands of the contractor, from some defect in the machinery it could not be opened, & pltf.'s vessels were thereby prevented from navigating the river:—*Held:* defts. were liable.

Where the mischief arises directly from the act ordered to be done, there the person giving the order is responsible; but where it arises from something collateral & incidental to the act ordered to be done, he is not responsible. Where a person employs another to do an act which the employer has a right to do, it is the duty of the employer to see that the act is properly done; & he will therefore be responsible for any mischief arising from the improper performance of the act by the person employed.—HOLE *v.* SITTINGBOURNE & SHEERNESS RY. CO. (1861), 6 H. & N. 488; 30 L. J. Ex. 81; 3 L. T. 750; 9 W. R. 274; 158 E. R. 201.

Annotations:—**Distd.** Gray *v.* Pullen (1864), 5 B. & S. 970. **Refd.** Pickard *v.* Smith (1861), 4 L. T. 470; Butler *v.* Hunter (1862), 7 H. & N. 826; Clothier *v.* Webster (1862), 12 C. B. N. S. 790; Blake *v.* Thirst (1863), 2 H. & C. 20; Dalton *v.* Angus (1881), 6 App. Cas. 740; Lapthorn *v.* Harvey (1885), 49 J. P. 709; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; Holliday *v.* National Telephone Co. (1899), 81 L. T. 252; Penny *v.* Wimbledon U. D. C. (1899), 80 L. T. 615; Maxwell *v.* British Thomson Houston Co., Blackwell, Third Parties (1902), 18 T. L. R. 278; Rainham Chemical Works *v.* Belvedere Fish Guano Co., [1921] 2 A. C. 465. **Mentd.** Sérandat *v.* Salsse (1866), L. R. 1 P. C. 152.

1264. Delivery of coal to railway refreshment rooms—Cellar opening on platform.]—Refreshment rooms & a coal cellar at a railway station were let by the co. to one S., the opening for putting coals into the cellar being on the arrival platform. A train coming in whilst the servants of a coal merchant were shooting coals into the cellar for S., pltf., a passenger, whilst passing, as the jury found, in the usual way out of the station, without any fault of his own, fell into the cellar opening, which the coal merchants had negligently left insufficiently guarded:—*Held:* S., the occupier of the refreshment rooms & cellar, was responsible for this negligence, &, *Semble:* the railway co. also would be liable, but not the coal merchant.

If an independent contractor is employed to do a lawful act & in the course of the work he or his servants commit some casual act of wrong or negligence the employer is not answerable (WILLIAMS, J.).—PICKARD *v.* SMITH (1861), 10 C. B. N. S. 470; 4 L. T. 470; 142 E. R. 535.

Annotations:—**Consd.** Mersey Docks Trustees *v.* Gibbs (1866), L. R. 1 H. L. 93. **Apld.** John *v.* Bacon (1870), L. R. 5 C. P. 437. **Consd.** Bower *v.* Peate (1876), 1 Q. B. D. 321; Whiteley *v.* Pepper (1876), 2 Q. B. D. 276; Rainham Chemical Works *v.* Belvedere Fish Guano Co., [1921] 2 A. C. 465. **Refd.** Clothier *v.* Webster (1862), 12 C. B. N. S. 790; Gray *v.* Pullen (1864), 5 B. & S. 970; Goslin *v.* Agricultural Hall Co. (1876), 1 C. P. D. 482; Dalton *v.* Angus (1881), 6 App. Cas. 740; Duke *v.* Courage (1882), 46 J. P. 453; Hughes *v.* Percival (1883), 8 App. Cas. 443; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; Penny *v.* Wimbledon U. C., [1899] 2 Q. B. 72; The Snark, [1900] P. 105; Cribb *v.* Kynock, [1907] 2 K. B. 548; Cox *v.* Coulson, [1916] 2 K. B. 177. **Mentd.** Fletcher *v.* Rylands (1866), L. R. 1 Exch. 265; Welfare *v.* L. & B. Ry. (1869), L. R. 4 Q. B. 693.

1265. Removing grain from brewery.]—During the removal of refuse grains from a brewery, in pursuance of a contract, & under the superintendence of the foreman of the brewers, so far as the removal inside the brewery was concerned, some of the grains were spilt upon the footpath in front of the brewery. Pltf., while passing the brewery, slipped upon the grains & fell, & sustained injuries. In an action for damages against the brewers:—*Held:* it was no answer on their part to say that the accident arose through the negligence of the contractors' men.—DUKE *v.* COURAGE & Co. (1882), 46 J. P. 453.

1266. Fire spreading to adjoining land—Contractor disregarding stipulations in contract.]—*Held:* deft. co. was liable in damages for the act of its contractor in negligently & improperly lighting a fire on its land, & permitting it to spread to pltf.'s lands; even though such contractor in so doing disregarded special stipulations contained in such contract relative to the time at which such fire should be lit.

To escape liability deft. must show that the act of the contractor was that of a trespasser, & was not within the scope of his contract.—BLACK *v.* CHRISTCHURCH FINANCE Co., [1894] A. C. 48; 63 L. J. P. C. 32; 70 L. T. 77; 58 J. P. 332; 6 R. 394, P. C.

Annotations:—**Refd.** Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; Holliday *v.* National Telephone Co., [1899] 2 Q. B. 392. **Mentd.** De Silva *v.* Korossa (Ceylon) Rubber Co. (1919), 88 L. J. P. C. 54; Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341.

1267. Removal of wreck sunk in navigable river.]—The owner of a vessel sunk in the fairway of a navigable river so as to be a danger to other vessels, who retains the possession, management & control of the wreck, is under an obligation to take reasonable care to warn other vessels of its position, & is liable for damage to another vessel, occasioned by the neglect to give proper warning, though such neglect was that of an independent contractor employed by him.—THE SNARK, [1900] P. 105; 69 L. J. P. 41; 82 L. T. 42; 48 W. R. 279; 16 T. L. R. 160; 44 Sol. Jo. 209; 9 Asp. M. L. C. 50.

Annotations:—**Mentd.** The Wallsend (1907), 76 L. J. P. 131; The Manorbier Castle (1923), 129 L. T. 31.

1268. Driving cow & calf on highway.]—Deft. through an agent bought a cow & calf, & by deft.'s instructions the agent employed a drover to drive them to deft.'s farm. The drover got another man, who was about to drive bullocks in same direction, to drive the cow & calf along with them. On the way the cow tossed a dog & afterwards tossed pltf., who suffered injury thereby. In an action for negligence there was evidence that a cow with a calf might become dangerous if it met a dog, & the judge found that the drover was negligent as it was his duty to see that the cow was under control, that deft. was negligent in employing one man to perform a dangerous operation for which his powers were inadequate, that even if the drover was an independent contractor this was no defence, & awarded pltf. damages:—*Held:* there was evidence to support the findings of negligence & the judge was entitled to hold that the drover was employed to do a dangerous thing on a highway, & therefore, even if the drover was an independent contractor, deft. was liable.—PINN *v.* REW (1916), 32 T. L. R. 451.

Annotation:—**Mentd.** Turner *v.* Coates, [1917] 1 K. B. 670.

ii. *Works on Public Highway.*

1269. Deposit of materials on highway.]—B., the owner & occupier of premises adjoining the highway, employed C. to make a drain therefrom to communicate with the common sewer. In the performance of this work, the workmen employed by C. placed gravel on the highway; in consequence of which A., in driving along the road, sustained personal injury. Before the accident the dangerous position of the heap was pointed out to B., who promised to remove it. C. had the sole management of the work, & employed & paid D. to cart away part of the rubbish, at a certain price per load, & had charged A. in his bill with the sum so paid:—*Held:* B. was liable to A., in case.—BURGESS *v.* GRAY (1845), 1 C. B. 578; 14 L. J. C. P. 184; 4 L. T. O. S. 292; 135 E. R. 667.

Annotations:—**Distd.** Knight *v.* Fox (1850), 5 Exch. 721; Butler *v.* Hunter (1861), 31 L. J. Ex. 214. **Refd.** Peachey *v.* Rowland (1853), 13 C. B. 182. **Mentd.** Rich *v.* Basterfield (1847), 4 C. B. 783; Hardwick *v.* Moss (1861), 31 L. J. Ex. 205; Barker *v.* Herbert, [1911] 2 K. B. 633; Robinson *v.* Beaconsfield U. D. C. (1911), 105 L. T. 121.

1270. ——.]—BLAKE *v.* THIRST, No. 1253, *ante*.

1271. ——.]—Defts., a telephone co., were lawfully engaged in laying telephone wires along a street. They passed the wires through tubes which they laid in a trench under the level of the pavement. Defts. contracted with a plumber to connect these tubes at the joints with lead & solder to the satisfaction of defts.' foreman at the sum of 12*s.* per joint. There was evidence that the work was done by the plumber under the supervision of defts.' foreman, & that one of their men was assisting him in it. Pltf. who was passing on the highway was splashed by molten solder & thereby injured:—*Held:* there was evidence that defts. & the plumber were jointly engaged in the performance of the work under such circumstances as to render defts. liable for the negligence of which the plumber had been guilty; & even if the plumber were an independent contractor, defts., having authorised the performance upon a highway of work, which from its nature was likely to involve danger to persons using the highway, were bound to take care that those who executed the work for them did not negligently cause injury to such persons.—HOLLIDAY *v.* NATIONAL TELEPHONE CO., [1899] 2 Q. B. 392; 68 L. J. Q. B. 1016; 81 L. T. 252; 47 W. R. 658; 15 T. L. R. 483, C. A.

Annotations:—**Distd.** Wilson *v.* Hodgson's Kingston Brewery Co. (1915), 85 L. J. K. B. 270. **Apld.** Pinn *v.* Rew (1916), 32 T. L. R. 451. **Refd.** Padbury *v.* Holliday & Greenwood (1912), 28 T. L. R. 494; Hurlstone *v.* L. Elec. Ry. (1913), 29 T. L. R. 514; Turnbull *v.* Wieland (1916), 33 T. L. R. 143.

1272. Erection of standards for tramways.]—A town council, owners of tramways, entered into a contract with a contractor whereby the latter undertook to do the whole of the work of equipping the tramways for electric traction. The contractor entered into a sub-contract whereby the sub-contractor agreed to do part of the work, namely, the erection of the iron standards along the streets & the fixing of the wires thereto. For this purpose the sub-contractor used a tall derrick, which was a usual structure to employ in executing work of this kind, & his workmen, on leaving off work, negligently left the derrick too close to the tramlines, whereby pltf., who was riding on a tramcar, was injured. In an action against the contractor to recover damages:—*Held:* as the work was being done on a highway, it was the contractor's duty to take reasonable precautions to protect the public, & he could not escape from that duty by delegating the work to a sub-contractor; the act of negligence was not merely casual or collateral; & defts. were liable.—MAXWELL *v.* BRITISH THOMSON-HOUSTON CO., LTD., BLACKWELL & CO., THIRD PARTIES (1902), 18 T. L. R. 278, C. A.

Liability of highway authority.]—*See* HIGHWAYS, Vol. XXVI., pp. 409, 410, 418, 420, Nos. 1300–1309, 1308, 1393.

As to interference with highways under statutory powers, *see* Nos. 1281–1285, *post*.

iii. *Repairs to Buildings.*

1273. Deposit of materials on highway.]—A. having a house by the road side, contracted with B. to repair it for a stipulated sum; B. contracted with C. to do the work; & C. with D. to furnish the materials. The servant of D. brought a quantity of lime to the house & placed it in the road, by which pltf.'s carriage was overturned:—*Held:* A. was answerable for the damage sustained.—BUSH *v.* STEINMAN (1799), 1 Bos. & P. 404; 126 E. R. 978.

Annotations:—**Consd.** Laugher *v.* Pointer (1826), 5 B. & C. 547. **Distd.** Burgess *v.* Gray (1845), 1 C. B. 578. **Consd.** Roedie *v.* L. & N. W. Ry., Hobbit *v.* Same (1849), 4 Exch. 244. **N.F.** Gayford *v.* Nicholls (1854), 9 Exch. 702 **Refd.** Duncan *v.* Findlater (1839), 6 Cl. & Fin. 894; Quarman *v.* Burnett (1840), 6 M. & W. 499; Rapson *v.* Cubitt (1842), 9 M. & W. 710; Overton *v.* Freeman (1852), 11 C. B. 867. **Mentd.** Nicholson *v.* Mouncey (1812), 15 East, 384; Harris *v.* Baker (1815), 4 M. & S. 27; Rich *v.* Basterfield (1847), 4 C. B. 783; MacCarthy *v.* Young (1861), 6 H. & N. 329; Gandy *v.* Jubber (1864), 3 New Rep. 569; R. *v.* Stephens (1866), 7 B. & S. 710; Barker *v.* Herbert, [1911] 2 K. B. 633.

1274. Lamp overhanging street.]—Deft. became the lessee & occupier of a house, from the front of which a heavy lamp projected several feet over the public foot-pavement. As pltf. was walking along, in Nov., the lamp fell on her & injured her. It appeared in evidence that in the previous Aug. deft. employed an experienced gasfitter, C., to put this lamp, etc., in repair. At the time of the accident a person employed by deft. was blowing the water out of the gas-pipes of the lamp, & in doing this a ladder was raised against the lamp-iron or bracket from which the lamp hung, & on the man mounting the ladder, owing to the wind & wet, the ladder slipped, & he, to save himself, clung to the lamp-iron, & the shaking caused the lamp to fall. On examination it turned out that the fastening by which the lamp was attached to the lamp-iron was in a decayed state. The jury found that there had been negligence on the part of C., but no negligence on the part of deft. personally; that the lamp was out of repair, through general decay; but not to the knowledge of deft.; that the immediate cause of the fall of the lamp was the slipping of the ladder; but that, if the lamp had been in good repair, the slipping of the ladder would not have caused it to fall:—*Held:* pltf. was entitled to the verdict. If a person maintains a lamp projecting over the highway for his own purposes it is his duty to maintain it so as not to be dangerous to the passengers; & if it causes injury owing to want of repair, it is no answer on his part that he had employed a competent person to repair it. Under the circumstances of the case, it was shown that deft. knew

PART IX. SECT. 6, SUB-SECT. 2.—B. (c) ii.

l. *Construction of drain.*]—MURPHY *v.* CITY OF OTTAWA (1887), 13 O. R. 334.—CAN.

m. *Construction of house — Injury to house adjoining.*]—WHEELHOUSE *v.* DARCH (1877), 28 C. P. 269.—CAN.

n. *Sawing wood — Injury to child caused by flying splinters.*]—SEROTA *v.* BELWAY (Sask.), [1919] 2 W. W. R. 267.—CAN.

Sect. 6.—Acts of contractors and their servants: Sub-sect. 2, B. (c) iii., & (d).]

that the lamp wanted repair in Aug., & it was his duty, therefore, to put it in reasonable repair, & the person he employed having failed to do so, deft. was liable for the consequences of the breach of duty.—TARRY *v.* ASHTON (1876), 1 Q. B. D. 314; 45 L. J. Q. B. 260; 34 L. T. 97; 40 J. P. 439; *sub nom.* TERRY *v.* ASHTON, 24 W. R. 581.

Annotations:—**Consd.** Bower *v.* Peate (1876), 1 Q. B. D. 321. **Refd.** Dalton *v.* Angus (1881), 6 App. Cas. 740; Hughes *v.* Percival (1883), 8 App. Cas. 443; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; Cole *v.* De Trafford, [1918] 2 K. B. 523; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539. **Mentd.** Nichols *v.* Marsland (1876), 46 L. J. Q. B. 174; Ivay *v.* Hedges (1882), 9 Q. B. D. 80; The European (1885), 10 P. D. 99; Kiddle *v.* Lovett (1885), 16 Q. B. D. 605; Silverton *v.* Marriott (1888), 59 L. T. 61; Blake *v.* Woolf (1898), 47 W. R. 8; Barker *v.* Herbert, [1911] 2 K. B. 633; A.-G. *v.* Roe, [1915] 1 Ch. 235; Cox *v.* Coulson, [1916] 2 K. B. 177; Pritchard *v.* Peto, [1917] 2 K. B. 173; Ilford U. C. *v.* Beal, [1925] 1 K. B. 671; Noble *v.* Harrison, [1926] 2 K. B. 332.

1275. Adjoining buildings—Interference with right to support.]—A man, who orders a work to be executed on his own premises, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented is bound to see to the doing of that which is necessary to prevent the mischief; & cannot relieve himself of his responsibility by employing some one else to do what is necessary to prevent the act he had ordered to be done from becoming wrongful.

Pltf. & deft. were respective owners of two adjoining houses, pltf. being entitled to the support, for his house, of deft.'s soil. Deft. employed a contractor to pull down his house, excavate the foundations & rebuild the house; the contractor undertook the risk of supporting pltf.'s house, as far as might be necessary, during the work, & to make good any damage & satisfy any claims arising therefrom. Pltf.'s house was injured in the progress of the work owing to the means taken by the contractor to support it being insufficient:—*Held:* on the above principle, deft. was liable even if the undertaking as to risk, etc., had amounted, which it did not, to an express stipulation that the contractor should do as part of the works contracted for, all that was necessary to support pltf.'s house.—BOWER *v.* PEATE (1876), 1 Q. B. D. 321; 45 L. J. Q. B. 446; 35 L. T. 321; 40 J. P. 789.

Annotations:—**Consd.** Dalton *v.* Angus (1881), 6 App. Cas. 740. **Apld.** Lemaitre *v.* Davis (1881), 51 L. J. Ch. 173. **Consd.** Hughes *v.* Percival (1883), 8 App. Cas. 443. **Apld.** Odell *v.* Cleveland House (1910), 102 L. T. 602. **Refd.** Whiteley *v.* Pepper (1877), 46 L. J. Q. B. 436; Burt *v.* Victoria Graving Dock Co. & London & St. Katherine's Dock Co. (1882), 47 L. T. 378; Barham *v.* Ipswich Dock Comrs. (1885), 54 L. T. 23; Jolliffe *v.* Woodhouse (1894), 10 T. L. R. 553; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; Penny *v.* Wimbledon U. C. (1899), 68 L. J. Q. B. 704; Cribb *v.* Kynoch, [1907] 2 K. B. 548. **Mentd.** Birmingham Corpn. *v.* Allen (1877), 6 Ch. D. 284; Cox *v.* Coulson, [1916] 2 K. B. 177; Selby *v.* Whitbread, [1917] 1 K. B. 736.

1276. —— ——.]—One of the two adjoining houses having been, twenty-seven years before the accident, altered internally by pltfs., the owners, so as to rest chiefly on a pillar built on the edge of their land, & contiguous to the land on which the adjoining house of defts. stood, fell down in consequence of excavations made by defts. on the site of their house which they had pulled down, & by reason of the pillar being deprived of the lateral support previously afforded by the soil under the surface of the adjoining land of defts. In an action by pltfs. to recover damages for the loss caused by the fall of their house, the judge at the trial directed a verdict for pltfs.:—*Held:* where a principal has employed a contractor to do work which is in its nature dangerous to adjoining property, the employer is bound to see that proper means are adopted to prevent injurious consequences, & cannot discharge himself of his liability by employing a competent contractor & directing him to use proper precautions.—ANGUS *v.* DALTON (1878), 4 Q. B. D. 162; 48 L. J. Q. B. 225; 40 L. T. 605; 43 J. P. 412; 27 W. R. 623, C. A.; *affd. sub nom.* DALTON *v.* ANGUS (1881), 6 App. Cas. 740, H. L.

Annotations:—**Refd.** Lemaitre *v.* Davis (1881), 19 Ch. D. 281; Duke *v.* Courage (1882), 46 J. P. 453; Hughes *v.* Percival (1883), 8 App. Cas. 443; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; Penny *v.* Wimbledon U. C. (1899), 68 L. J. Q. B. 704; Cribb *v.* Kynoch, [1907] 2 K. B. 548; Robinson *v.* Beaconsfield R. C., [1911] 2 Ch. 188; Padbury *v.* Holliday & Greenwood (1912), 28 T. L. R. 494; Hurlstone *v.* L. Elec. Ry. (1913), 30 T. L. R. 398. **Mentd.** Rivers *v.* Adams (1878), 3 Ex. D. 361; Sturges *v.* Bridgman (1879), 11 Ch. D. 852; Norfolk *v.* Arbuthnot (1880), 5 C. P. D. 390; Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633; Bell *v.* Love (1883), 10 Q. B. D. 547; Tone *v.* Preston (1883), 24 Ch. D. 739; Esdaile *v.* Payne (No. 2) (1885), 53 L. T. 21; Russell *v.* Watts (1885), 55 L. J. Ch. 158; Harris *v.* De Pinna (1886), 33 Ch. D. 238; Bass *v.* Gregory (1890), 25 Q. B. D. 481; Dicker *v.* Popham, Radford (1890), 63 L. T. 379; Perry *v.* Eames, Salaman *v.* Eames, Mercer's Co. *v.* Eames; [1891] 1 Ch. 658; Corbett *v.* Jonas, [1892] 3 Ch. 137; Haigh *v.* West (1893), 62 L. J. Q. B. 532; Wheaton *v.* Maple, [1893] 3 Ch. 48; Chastey *v.* Ackland (1895), 72 L. T. 845; Greenwell *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165; Simpson *v.* Godmanchester Corpn., [1897] A. C. 696; Blake *v.* Woolf, [1898] 2 Q. B. 426; Southwark & Vauxhall Water Co. *v.* Wandsworth Board of Works, [1898] 2 Ch. 603; Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217; Gardner *v.* Hodgson's Kingston Breweries Co., [1900] 1 Ch. 592; Smith *v.* Baxter, [1900] 2 Ch. 138; G. N. Ry. *v.* I. R. Comrs., [1901] 1 K. B. 416; Edinburgh & District Water Trustees *v.* Clippens Oil Co. (1902), 87 L. T. 275; Union Lighterage Co. *v.* London Graving Dock Co., [1902] 2 Ch. 557; A.-G. *v.* Antrobus (1905), 74 L. J. Ch. 599; Kine *v.* Jolly, [1905] 1 Ch. 480; Cable *v.* Bryant, [1908] 1 Ch. 259; Hyman *v.* Van Den Bergh, [1908] 1 Ch. 167; A.-G. *v.* Horner (No. 2), [1913] 2 Ch. 140; Howley Park Coal & Cannel Co. *v.* L. & N. W. Ry., [1913] A. C. 11; Kirby *v.* Chessum (1913), 30 T. L. R. 15; Hall *v.* Manchester Corpn. (1914), 111 L. T. 182; Lyell *v.* Hothfield, [1914] 3 K. B. 911; Pwllbach Colliery Co. *v.* Woodman, [1915] A. C. 634; Cox *v.* Coulson, [1916] 2 K. B. 177; Schwann *v.* Cotton, [1916] 2 Ch. 120; Selby *v.* Whitbread, [1917] 1 K. B. 736; Cory *v.* Davies, [1923] 2 Ch. 95; Sack *v.* Jones, [1925] Ch. 235.

1277. —— ——.]—Damage having been done by the wrongful acts of a contractor or his workmen, employed under a contract & specification, to a neighbour's vault:—*Held:* under the circumstances, both the employer & contractor were liable for it.—LEMAITRE *v.* DAVIS (1881), 19 Ch. D. 281; 51 L. J. Ch. 173; 46 L. T. 407; 46 J. P. 324; 30 W. R. 360.

Annotations:—**Mentd.** Tone *v.* Preston (1883), 24 Ch. D. 739; Simpson *v.* Godmanchester Corpn. (1895), 64 L. J. Ch. 837; Selby *v.* Whitbread, [1917] 1 K. B. 736.

Right to support generally, *see* EASEMENTS, Vol. XIX., pp. 163 *et seq.*

1278. Demolition of upper part of building—Damage to ground floor tenant.]—Pltf. was the tenant of a shop on the ground floor of a large building belonging to defts. For their own purposes defts. demolished the premises above pltf.'s shop, employing an independent contractor to execute the work. In the course of the demolition of defts.' premises damage was done to pltf.'s premises & goods. In an action in the county ct. against defts. to recover damages for the nuisance, the judge found that defts. had not taken all the precautions they might have taken to prevent the mischief, & gave judgment for pltf.:—*Held:* although defts. had employed an independent contractor to do the work, yet, as the work was of a character from which in the natural course of things injurious consequences must be expected to arise unless preventive means were

adopted, there remained a duty upon defts. to see that such measures were adopted, &, the judge having found upon the evidence before him that defts. had not taken all the precautions possible, they were not exonerated from liability by employing an independent contractor.—ODELL *v.* CLEVELAND HOUSE, LTD. (1910), 102 L. T. 602; 26 T. L. R. 410, D. C.

(d) Statutory Obligation to do Work.

See, generally, CORPORATIONS, Vol. XIII., pp. 399 *et seq.*; PUBLIC AUTHORITIES.

1279. General rule.] — Where a statutory obligation is imposed on a person, he is liable for any injury that arises to others in consequence of its having been negligently performed, & this whether it were performed by himself or by a contractor employed by him.

A. was empowered under Metropolis Management Act, 1855 (c. 120), ss. 77, 110, 111, to make a drain from his premises to a sewer, by cutting a trench across a highway, & filling it up after the drain should be completed. For this purpose he employed a contractor, by whose negligence it was filled up improperly, in consequence of which damage ensued to B.:—*Held:* A. was responsible in an action by B.—GRAY *v.* PULLEN (1864), 5 B. & S. 970; 5 New Rep. 249; 34 L. J. Q. B. 265; 11 L. T. 569; 29 J. P. 69; 13 W. R. 257; 122 E. R. 1091, Ex. Ch.

Annotations:—**Dbtd.** Wilson *v.* Merry (1868), L. R. 1 Sc. & Div. 326. **Apld.** Bower *v.* Peate (1876), 1 Q. B. D. 321; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335. **Consd.** Groves *v.* Wimborne, [1898] 2 Q. B. 402. **Apld.** Penny *v.* Wimbledon U. C. (1899), 68 L. J. Q. B. 704. **Refd.** Hyams *v.* Webster (1867), L. R. 2 Q. B. 264; Smith *v.* West Derby L. B. (1878), 3 C. P. D. 423; Barham *v.* Ipswich Dock Comrs. (1885), 54 L. T. 23.

1280. Taking lands for public works.] — A corpn. having, under an Act of Parliament, right to take lands for the purpose of certain public works, gave notice to the owner of the inheritance of an intention to take it. They then entered regularly upon the land for the purpose of surveys, etc., & afterwards their contractors, without the knowledge of the corpn., but with the assent of the occupying tenants brought some waggons & rails & other implements on the land & there left them, but did not commence the works or do any damage. This was done without obtaining the assent of pltf., but it became known to his agent in the end of Dec. In the beginning of the following Feb. without any previous communication with defts. he filed his bill for an injunction to restrain them from allowing the waggons, etc., to remain on the land & from taking possession of the land until they had complied with the provisions of Lands Clauses Consolidation Act, 1845 (c. 18):—*Held:* though the corpn. were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the Act & the bill was improperly filed.—STANDISH *v.* LIVERPOOL CORPN. (1852), 1 Drew. 1; 61 E. R. 351.

1281. Works on highway.]—WYATT *v.* DETHICK (1858), 31 L. T. O. S. 104; 22 J. P. 387.

1282. ——.]—GRAY *v.* PULLEN, No. 1279, *ante.*

1283. ——.]—Deft., under a contract with the Metropolitan Board of Works, opened a public highway, not being a turnpike road, in a metropolitan parish, for the purpose of constructing a sewer; some months after the work was finished, damage ensued to pltf. from his horse stumbling in a hole in the road. The filling in of the road had been properly done by deft., & the hole was owing to the natural subsidence of the materials, which sometimes takes place, to a greater or less degree, six months or longer after such an excavation has been filled in:—*Held:* deft. was not liable to pltf. for the damage: for there was no obligation on the deft. by common law or statute to do more than properly reinstate the road.—HYAMS *v.* WEBSTER (1868), L. R. 4 Q. B. 138; 9 B. & S. 1016; 38 L. J. Q. B. 21; 17 W. R. 232, Ex. Ch.

Annotation:—**Consd.** Cox *v.* Paddington Vestry (1891), 64 L. T. 566.

1284. ——.]—Where a surveyor of highways has been ordered by a vestry to do certain works on a highway, & during the performance of those works an accident occurs in consequence of the road being left in a dangerous condition, the surveyor is guilty of neglect of a statutory duty under Highway Act, 1835 (c. 50), s. 56, & will be liable in an action for damage notwithstanding that he has contracted with a third party for supplying the necessary labour, & has not personally interfered with the work.—TAYLOR *v.* GREENHALGH (1876), 24 W. R. 311, C. A.; *revsg.* (1874), L. R. 9 Q. B. 487.

Annotation:—**Refd.** Pendlebury *v.* Greenhalgh (1875), 1 Q. B. D. 36.

1285. ——.]—HARDAKER *v.* IDLE DISTRICT COUNCIL, No. 1255, *ante.*

1286. Construction of railway bridge.]—HOLE *v.* SITTINGBOURNE & SHEERNESS RY. CO., No. 1263, *ante.*

1287. Erection of piles in navigable river.]—No power is conferred on the Metropolitan Board of Works of erecting any works in the soil or bed of the River Thames by Metropolis Management Act, 1855 (c. 120), s. 135. That power is conferred by Metropolis Management Amendment Act, 1858 (c. 104), s. 2, subject, by sect. 27, to the consent of the Admlty. being previously obtained in respect of all works below high water mark which may interfere with the navigation. Where, therefore, a contractor, by direction of the Metropolitan Board, had placed piles in the bed of the river to protect sewage works there, without having obtained the consent of the Admlty., the Metropolitan Board & the contractor were held liable to damages in an action brought by the owner of a vessel, which had been injured by grounding on the piles.—BROWNLOW *v.* METROPOLITAN BOARD OF WORKS & AIRD (1864), 16 C. B. N. S. 546; 4 New Rep. 173; 33 L. J. C. P. 233; 12 W. R. 871; 143 E. R. 1241, Ex. Ch.

Annotations:—**Consd.** Coe *v.* Wise (1864), 5 B. & S. 440; Mersey Docks Trustees *v.* Gibbs (1866), L. R. 1 H. L. 93. **Refd.** L. C. C. *v.* Port of London Authority, [1914] 2 Ch. 362.

1288. User of roadway.]—Railways Clauses Act, 1845 (c. 19), s. 58, provides that if the co. shall in the course of making the railway use or interfere with any road, they shall from time to time make good all damage done by them to such road. A railway co. used certain roads by the carriage of stone, bricks, timber & other materials over the same, to be used, & which were actually used, in the making of the railway & works. In the opinion of two justices, they had thereby done damage to such roads:—*Held:* under the above provision they were liable to make good the damage so done, although the materials were really conveyed in the carts of the contractors, or sub-contractors, or of other persons employed by them.—WEST RIDING & GRIMSBY RY. CO. *v.* WAKEFIELD LOCAL BOARD OF HEALTH (1864), 5 B. & S. 478; 33 L. J. M. C. 174; 10 Jur. N. S. 1046; 12 W. R. 1076; 122 E. R. 908.

Annotation:—**Refd.** Barnett *v.* Hoo Highway Board (1882), 46 J. P. 805.

1289. ——.]—A corpn. in carrying out a scheme for the widening of one of their roads, entered into a contract with a contractor for the hauling of

Sect. 6.—*Acts of contractors and their servants: Sub-sect.* 2, *B.* (*d*), (*e*) & (*f*). *Sects.* 7 & 8. *Part X. Sect.* 1: *Sub-sect.* 1, *A. & B.* (*a*) & (*b*) *i.*]

stone. The contractor used traction engines to haul the stone, & in so doing caused damage to some other roads, which were repairable by the county council as the highway authority. The contract was for a year, commencing on Apr. 1, 1902, & terminating on Mar. 31, 1903. The damage to the roads took place between Jan. 19 & Mar. 24, 1903. The work of widening the road was completed in Sept. 1903. On Feb. 11, 1904, the county council commenced an action against the corpn. to recover the additional expenses of repairing pltfs.' roads in consequence of the use of the traction engines:—*Held:* the action could be maintained against the corpn. as the persons in consequence of whose order the damage had been done.—KENT COUNTY COUNCIL *v.* FOLKESTONE CORPN., [1905] 1 K. B. 620; 74 L. J. K. B. 352; 92 L. T. 309; 69 J. P. 125; 53 W. R. 371; 21 T. L. R. 269; 49 Sol. Jo. 281; 3 L. G. R. 438, C. A.

Annotations:—**Consd.** Bromley R. C. *v.* Croydon Corpn., [1908] 1 K. B. 353. **Refd.** Tilling *v.* Dick Kerr, [1905] 1 K. B. 562; Reigate R. C. *v.* Sutton District Water Co. (1909), 73 L. J. K. B. 315.

1290. Non-repair of roadway.]—Defts. were the owners of a quay over which there was a public right of way to their docks. The Great Eastern Ry. co., by their private Act of Parliament, were empowered to & did enter into an arrangement with defts. to lay tramways connecting the docks with the railway system. The co. were to keep the tramways in good working order. Under Tramways Act, 1870 (c. 78), the co. as promoters gave notice to defts. of their intention to open & break up the road for the purpose of doubling the rails at a particular point. The co. did break up the highway for their tramway purposes. Pltf. was injured by being thrown from his cart through the defective condition of the roadway at the place where the works were being carried out, & brought his action for compensation against defts. as owners of the highway. The jury at the trial found that the accident to pltf. had been caused by the negligence of the railway co., who were in possession of the spot where the occurrence took place, & that the roadway was in a defective condition owing to a breach of duty on the part of the railway co., & gave pltf. substantial damages. It was contended, on argument on behalf of pltf., that on these findings he was entitled to have the verdict entered for him, & on the part of defts. that they amounted to a verdict for them:—*Held:* as the railway co. were carrying out their works not under the orders or as licensees of defts., but under their statutory powers, & were in the sole possession of the place where the accident happened, which was entirely under their control, & the negligence causing the accident was that of the railway co. & not of defts., the verdict ought to be entered for defts.—BARHAM *v.* IPSWICH DOCK COMRS. (1885), 54 L. T. 23.

1291. Disposal of sewage.]—The Beaconsfield Rural District Council had undertaken, under powers given to them by Public Health Act, 1875 (c. 55), the cleansing of cesspools in part of their district. They entered into a contract with H. that he should keep the cesspools clear. The contract did not contain any express provision as to disposal of the sewage matter emptied out of the cesspools. H.'s men had without leave deposited the sewage on the land of pltfs., who brought an action against the council & H. for damages:—*Held:* the council had a duty to dispose of the sewage, & on the construction of the special contract they had not contracted with H. for the discharge of this duty & were still liable for it not being discharged; (2) even if they had contracted for the discharge of this duty they would have remained liable to pltfs., for the contractor's failure to perform the duty.—ROBINSON *v.* BEACONSFIELD RURAL COUNCIL, [1911] 2 Ch. 188; 80 L. J. Ch. 647; 105 L. T. 121; 75 J. P. 353; 27 T. L. R. 478; 9 L. G. R. 789, C. A.

(*e*) *Unlawful Acts.*

1292. Employer liable.] — Though a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or his servants in executing that act, yet, if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, & is liable to third persons who sustain damage from the doing of that wrong.—ELLIS *v.* SHEFFIELD GAS CONSUMERS CO. (1853), 2 E. & B. 767; 2 C. L. R. 249; 23 L. J. Q. B. 42; 22 L. T. O. S. 84; 17 J. P. 823; 18 Jur. 146; 2 W. R. 19; 118 E. R. 955.

Annotations:—**Apld.** Hole *v.* Sittingbourne & Sheerness Ry. (1861), 6 H. & N. 488; Pickard *v.* Smith (1861), 10 C. B. N. S. 470. **Refd.** Sadler *v.* Henlock (1855), 4 E. & B. 570; R. *v.* Longton Gas Co. (1860), 6 Jur. N. S. 601; Butler *v.* Hunter (1862), 7 H. & N. 826; Blake *v.* Thirst (1863), 2 H. & C. 20; Gray *v.* Pullen (1864), 5 B. & S. 970; Sórandat *v.* Saisse (1866), L. R. 1 P. C. 152; Bower *v.* Peate (1876), 1 Q. B. D. 321; Belvedere Fish Guano Co. *v.* Rainham Chemical Works, Feldman & Partridge, Ind, Coope *v.* Same, [1920] 2 K. B. 487.

1293. ——.]—BUTLER *v.* HUNTER, No. 1226, *ante.*

1294. ——.]—HOBBS *v.* TUNBRIDGE WELLS LOCAL BOARD (1885), 49 J. P. 679.

Annotation:—**Refd.** Gerard *v.* Kent County Council, [1897] 1 Q. B. 351.

(*f*) *Other Cases.*

1295. Acts done on land of employer—Though done as contractor for another.]—Two cos. employed the same solr. & contractor:—*Held:* it is no defence to a suit against one of the cos. for acts done by the contractor upon the land purchased by that co., that the acts complained of were done by him in his capacity of contractor for the other co.—KENSINGTON (LORD) *v.* METROPOLITAN RY. CO., WILLIAMS *v.* METROPOLITAN RY. CO. (1866), 14 L. T. 580; 14 W. R. 754.

1296. Where contractual liability—Payment for admission to race-course stand—Negligent construction.]—Deft., acting on behalf of himself & other persons interested in the C. steeplechases, entered into a contract with E. & co., by which E. & co. engaged to erect & let to them a temporary stand for the accommodation of persons desiring to see the races. The stand having been erected, deft., on behalf of himself & his colleagues, received money from visitors for the use of places on the stand. E. & co. were competent & proper persons to be employed to erect the stand, but it was in fact negligently erected by them, & in consequence fell, & pltf., who had paid for admission & was upon the stand looking at the races, was injured by the fall. Neither pltf. nor deft. knew of the improper construction of the stand:—*Held:* the

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PART IX. SECT. 6, SUB-SECT. 2.—B. (f).

c. *Earth borrowed for embankment—Causing damage.*] — A co. building a railway is not liable for injury to property caused by the wrongful act of their contractor in borrowing earth for embankments from a place, & in a manner, not authorised by the contract.—KERR *v.* ATLANTIC & NORTH WESTERN RY. CO. (1895), 25 S. C. R. 197.—CAN.

contract by deft. to be implied from the relation which existed between him & pltf. was that due care had been used not only by deft. & his servants, but by the persons whom he employed to erect the stand, & therefore he was liable for the injury to pltf.—FRANCIS *v.* COCKRELL (1870), L. R. 5 Q. B. 501; 10 B. & S. 950; 39 L. J. Q. B. 291; 23 L. T. 466; 18 W. R. 1205, Ex. Ch.

Annotations:—**Apld.** John *v.* Bacon (1870), L. R. 5 C. P. 437. **Distd.** Searle *v.* Laverick (1874), L. R. 9 Q. B. 122. **Expld.** Randall *v.* Newson (1877), 2 Q. B. D. 102. **Apld.** Kiddle *v.* Lovett (1885), 16 Q. B. D. 605. **Consd.** Marney *v.* Scott, [1899] 1 Q. B. 986; Liebig's Extract of Meat Co. *v.* Mersey Docks & Harbour Board & Nelson (1917), 87 L. J. K. B. 47. **Apld.** Maclenan *v.* Segar, [1917] 2 K. B. 325. **Refd.** Carstairs *v.* Taylor (1871), L. R. 6 Exch. 217; Richardson *v.* G. E. Ry. (1875), L. R. 10 C. P. 486; Kopitoff *v.* Wilson (1876), 1 Q. B. D. 377; Tarry *v.* Ashton (1876), 1 Q. B. D. 314; Hyman *v.* Nye (1881), 6 Q. B. D. 685; Heaven *v.* Pender (1883), 11 Q. B. D. 503; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; Norman *v.* G. W. Ry., [1914] 2 K. B. 153; Cox *v.* Coulson, [1916] 2 K. B. 177; Brannigen *v.* Harrington (1921), 37 T. L. R. 349; British Petroleum Co. *v.* A.-G. for Ceylon, [1926] A. C. 147.

SECT. 7.—SERVANTS HIRED TO EMPLOYER.

See Part I., Sect. 2, sub-sect. 1, B., *ante*.

SECT. 8.—LIABILITY OF CONTRACTOR AS MASTER.

See, generally, Sect. 5, *ante*.

1297. General rule—Contractor liable—Acts done in course of employment.]—SLY *v.* EDGLEY, No. 1248, *ante*.

1298. —— —— ——.]—A., an engineer, being employed by B. to erect a steam boiler, & other apparatus, on premises adjoining to the manufactory of C., & in consequence of the explosion of the boiler from the insufficiency of the materials of which it was composed, the property of the latter was injured, & it being found as a fact by the jury, that A. was personally present, & that his servants had the management of the apparatus at the time of the accident:—*Held*: C. might maintain case against A. for the injury he had sustained. *Semble*: if the jury had negatived the fact of A.'s management of the apparatus, though the accident arose from an imperfection in the materials of which it was composed, he would not have been primarily liable.—WITTE *v.* HAGUE (1822), 2 Dow. & Ry. K. B. 33; 1 L. J. O. S. K. B. 9.

Annotations:—**Refd.** Rapson *v.* Cubitt (1842), 9 M. & W. 710; Reedie *v.* L. & N. W. Ry., Hobbit *v.* Same (1849), 4 Exch. 244.

Part X.—Rights of Master against Third Persons.

SECT. 1.—PROCURING OR ENCOURAGING BREACH OF CONTRACT BY SERVANT.

SUB-SECT. 1.—INDUCING SERVANT TO LEAVE SERVICE.

A. In General.

See, generally, TRADE & TRADE UNIONS.

1299. What is evidence of inducing.]—In an action against A. for seducing the servant of B. from his service, it is sufficient evidence that A. asked the servant to enlist in the army & afterwards gave him money. An infant slave in the West Indies executed an indenture, by which he covenanted to serve B. for a certain term of years as his servant, & B. covenanted to do certain things on his part: B. then came to England with the slave. In an action against A. who had seduced him from the service of B., A. was not permitted to allege that the contract was void, as being made by an infant & a slave, & therefore that the declaration, which stated him to have been retained as a servant for a term of years, was not proved; for the ct. held that the effect of such a contract might be the manumission of the slave, & consequently that it was for his own benefit, & being for his own benefit, that it was, at most, only voidable by the infant himself.—KEANE *v.* BOYCOTT (1795), 2 Hy. Bl. 511; 126 E. R. 676.

Annotations:—**Consd.** Evans *v.* Walton (1867), L. R. 2 C. P. 615. **Refd.** Forbes *v.* Cochrane (1823), 3 Dow. & Ry. K. B. 679; *Re* The Slave, Grace, R. *v.* Allan (1827), 2 Hag. Adm. 94; Sykes *v.* Dixon (1839), 9 Ad. & El. 693; Hartley *v.* Cummings (1847), 5 C. B. 247; Cox *v.* Muncey (1859), 6 C. B. N. S. 375. **Mentd.** Baylis *v.* Dineley (1815), 3 M. & S. 477; Cooper *v.* Simmons (1862), 7 H. & N. 707; Walter *v.* Everard, [1891] 2 Q. B. 369.

B. When Action lies.

(a) Injury to Master.

1300. Essential to action.]—HART *v.* ALDRIDGE (1774), 1 Cowp. 54; 98 E. R. 964; *sub nom.* ANON., Lofft, 493.

Annotations:—**Apld.** Lumley *v.* Gye (1853), 2 E. B. 216. **Refd.** Allen *v.* Flood, [1898] A. C. 1.

1301. ——.]—LUMLEY *v.* GYE, No. 1307, *post*.

1302. ——.]—BOWEN *v.* HALL, No. 1313, *post*.

1303. ——.]—TAYLOR *v.* CAMBRIDGE GAZETTE CO., LTD. & KILNER (1898), 42 Sol. Jo. 832.

1304. ——.]—QUINN *v.* LEATHEM, No. 1320, *post*.

1305. ——.]—JASPERSON *v.* DOMINION TOBACCO CO., No. 1336, *post*.

(b) Subsisting Contract of Service.

i. In General.

Seduction, *see* Sect. 2, *post*.

1306. Essential to action.]—A servant, while in his master's service, may solicit business from his customers for himself, when his service is at an end, & he sets up on his own account.

A servant, while engaged in the service of his master has no right to do any act which may injure his trade. . . . There is nothing morally bad or very improper in a servant, who has it in contemplation at a future period to set up for himself, to endeavour to conciliate the regard of his master's customers & to recommend himself to them.

Seducing a servant & enticing him to leave his master while the master by contract has a right to his services is certainly actionable, but to induce a

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PART IX. SECT. 8.

p. *General rule — Contractor liable.*]—GILLSON *v.* NORTH GREY RY. CO. (1872), 33 U. C. R. 128; *affd.* (1874), 35 U. C. R. 475.—**CAN.**

q. —— ——.]—CRAIG *v.* CHISHOLM, NEVIN *v.* CHISHOLM (1877), 1 P. & B. 218.—**CAN.**

PART X. SECT. 1, SUB-SECT. 1.—B. (a).

1300 i. *Essential to action.*]—An action will lie by a father for enticing away his daughter from living with him & so depriving him of such services as she renders him from her sense of duty & filial gratitude.—MOORE *v.* WALTERS (Sask.), [1919] 3 W. W. R. 806.—**CAN.**

PART X. SECT. 1, SUB-SECT. 1.—B. (b) i.

1306 i. *Essential to action.*]—Pltf. sued defts. for enticing & procuring certain of his servants to desert his service, & the trial established that the parties

Sect. 1.—Procuring or encouraging breach of contract by servant: Sub-sect. 1, B. (b) i. & ii., & (c), C. (a) & (b), & D.; sub-sect. 2, A.]

servant to leave his master's service at the expiration of the time for which the servant had hired himself . . . is not the subject of an action (LORD KENYON, C.J.).—NICHOL *v.* MARTYN (1799), 2 Esp. 732, N. P.

Annotation:—**Consd.** Robb *v.* Greene (1895), 64 L. J. Q. B. 593.

1307. ——.]—A declaration, by the lessee of a theatre, charged in the first & second counts that J. had contracted with pltf. to sing at his theatre, & not elsewhere, during a certain term, without pltf.'s consent, & that deft. had during the term maliciously enticed & procured J. to depart from her said contract against the will of pltf., whereby J. refused to sing for pltf. at his theatre during the whole of the term. The third count alleged that J. had been hired by pltf. as & was his dramatic artiste, for a certain term, & that deft. had maliciously enticed & procured her to depart from her said employment during the said term. All the counts alleged special damage. On a demurrer to the declaration:—*Held:* the action was maintainable at common law, as the maliciously procuring J. to break her contract was a wrongful act from which damage accrued to pltf.; the rule of law giving a remedy for enticing away servants, is not confined to menial servants, or to such as fall within the Statute of Labourers, but extends to all cases where there is an unlawful or malicious enticing away of a person employed to give his exclusive personal service for a given time under the direction of an employer who is injured by the wrongful act; & the action for maliciously persuading a servant to quit his service is maintainable wherever there is at the time of the persuading a binding contract of hiring & service existing between the parties, whether the service be then actually subsisting or not.

Semble: the contract need not be for exclusive service; & an action will lie for maliciously inducing another to break a contract of any description whereby damage accrues to the party with whom the contract has been made.—LUMLEY *v.* GYE (1853), 2 E. & B. 216; 22 L. J. Q. B. 463; 17 Jur. 827; 1 W. R. 432; 118 E. R. 749.

Annotations:—**Apld.** Bowen *v.* Hall (1881), 6 Q. B. D. 333; De Francesco *v.* Barnum (1890), 63 L. T. 514; Exchange Telegraph Co. *v.* Gregory (1895), 73 L. T. 120. **Consd.** Allen *v.* Flood, [1898] A. C. 1. **Apprvd.** Quinn *v.* Leathem, [1901] A. C. 495. **Consd.** Read *v.* Friendly Soc. of Operative Stonemasons of England, Ireland & Wales, [1902] 2 K. B. 732. **Apld.** South Wales Miners' Federation *v.* Glamorgan Coal Co., [1905] A. C. 239. **Consd.** Long *v.* Smithson (1918), 88 L. J. K. B. 223; Said *v.* Butt, [1920] 3 K. B. 497. **Apld.** Jasperson *v.* Dominion Tobacco Co., [1923] A. C. 709. **Consd.** Black *v.* Admiralty Comrs. (1924), 93 L. J. K. B. 341. **Reid.** Evans *v.* Walton (1867), 36 L. J. C. P. 307; Cattle *v.* Stockton Waterworks (1875), L. R. 10 Q. B. 453; Mogul S.S. Co. *v.* McGregor, Gow (1889), 23 Q. B. D. 598; Temperton *v.* Russell, [1893] 1 Q. B. 715; Charnock *v.* Court (1899), 68 L. J. Ch. 550; National Phonograph Co. *v.* Edison Bell Consolidated Phonograph Co., [1908] 1 Ch. 335; Conway *v.* Wade, [1909] A. C. 506; Larkin *v.* Long, [1915] A. C. 814; Stott *v.* Gamble, [1916] 2 K. B. 504; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244; Valentine *v.* Hyde, [1919] 2 Ch. 129; Davies *v.* Thomas, [1920] 2 Ch. 189; Wolstenholme *v.* Ariss, [1920] 2 Ch. 403; Ware & De Freville *v.* Motor Trade Assocn., [1921] 3 K. B. 40; White *v.* Riley, [1921] 1 Ch. 1; Sorrell *v.* Smith, [1925] A. C. 700; Rely-A-Bell Burglar & Fire Alarm Co. *v.* Eisler, [1926] Ch. 609. **Mentd.** Rogers *v.* Rajendro Dutt (1860), 13 Moo. P. C. C. 209; Lynch *v.* Knight (1861), 5 L. T. 291; Miller *v.* David (1874), 22 W. R. 332; Alderson *v.* Maddison (1881), 7 Q. B. D. 174; Lyons *v.* Wilkins, [1899] 1 Ch. 255; Weld-Blundell *v.* Stephens, [1920] A. C. 956; McColl *v.* Canadian Pacific Ry., [1923] A. C. 126; G. W. K. *v.* Dunlop Rubber Co. (1926), 42 T. L. R. 376.

1308. ——.]—A number of discharged sailors entered into a partnership according to the terms of which the sailors were to perform together at certain music halls & were not to appear during the term of the partnership in any other theatre or music hall. Pltfs., who were members of the co., complained that deft. had induced certain of the sailors to break the contract by promising to get them employment & by obtaining other engagements for them. By amendment it was further alleged that deft. had wrongfully continued persons in her employment with the knowledge that by being in her employment those persons were breaking a contract with pltfs.:—*Held:* assuming an action lies to recover damages on the latter ground, the foundation of this action is that there shall be notice to deft. of a subsisting contract which one party, at all events, is still willing & able to perform; & there being sufficient evidence before the county ct. judge that the partnership had for all practical purposes come to an end, no action lay.—LONG *v.* SMITHSON (1918), 88 L. J. K. B. 223; 118 L. T. 678; 62 Sol. Jo. 472, D. C.

Annotation:—**Reid.** Said *v.* Butt, [1920] 3 K. B. 497.

1309. Whether actual service necessary.]—LUMLEY *v.* GYE, No. 1307, *ante.*

1310. ——.]—LONG *v.* SMITHSON, No. 1308, *ante.*

ii. *Nature of Contract.*

1311. Contract for piece work.]—ANON. (1774), Lofft, 493; 98 E. R. 764; *sub nom.* HART *v.* ALDRIDGE, 1 Cowp. 54.

Annotations:—**Reid.** Lumley *v.* Gye (1853), 2 E. & B. 216; Allen *v.* Flood, [1898] A. C. 1.

1312. Whether contract must be for exclusive service.]—LUMLEY *v.* GYE, No. 1307, *ante.*

1313. ——.]—An action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer, which thereby would naturally cause, & did in fact cause, an injury to such employer, although the relation of master & servant may not strictly exist between the employer & employed.

Where in such an action the employed was also a defendant, but as against him pltf. claimed only an injunction & not damages:—*Held:* damages might, in the discretion of the ct. be given under Chancery Amendment Act, 1858 (c. 27), & the jury, therefore, should be directed by the judge, in the event of a verdict for pltf., to find such damages as should be awarded (*a*) if the ct. should think it a proper case both for injunction & damages, & (*b*) if the ct. should think it a proper case for damages only, & not also for an injunction.—BOWEN *v.* HALL (1881), 6 Q. B. D. 333; 50 L. J. Q. B. 305; 44 L. T. 75; 45 J. P. 373; 29 W. R. 367, C. A.

Annotations:—**Consd.** Temperton *v.* Russell, [1893] 1 Q. B. 715; Wright *v.* Hennessey (1894), 11 T. L. R. 14; Allen *v.* Flood, [1898] A. C. 1; Long *v.* Smithson (1918), 88 L. J. K. B. 223; Rely-A-Bell Burglar & Fire Alarm Co. *v.* Eisler, [1926] Ch. 609. **Reid.** Mineral Water Bottle Exchange & Trade Protection Soc. *v.* Booth (1887), 36 W. R. 274; Mogul S.S. Co. *v.* McGregor, Gow (1889), 23 Q. B. D. 598; De Francesco *v.* Barnum (1890), 63 L. T. 514; Exchange Telegraph Co. *v.* Gregory (1895), 73 L. T. 120; Lyons *v.* Wilkins (1896), 74 L. T. 358; Charnock *v.* Court (1899), 68 L. J. Ch. 550; Quinn *v.* Leathem, [1901] A. C. 495; South Wales Miners' Federation *v.* Glamorgan Coal Co., [1905] A. C. 239; National Phonograph Co. *v.* Edison Bell Consolidated Phonograph Co., [1908] 1 Ch. 335; Ware & De Freville *v.* Motor Trade Assocn., [1921] 3 K. B. 40; Sorrell *v.* Smith, [1925] A. C. 700. **Mentd.** Woolley *v.* Broad, [1892] 1 Q. B. 806; Weld-Blundell *v.* Stephens, [1920] A. C. 956.

were in pltf.'s services, & were, with the exception of one of them, induced by defts.' manager to leave:—*Held:* pltf. was entitled to recover.—HEWITT *v.* ONTARIO COPPER LIGHTNING ROD CO. (1879), 44 U. C. R. 287.—CAN.

1314. Not confined to menial servants.]—LUMLEY *v.* GYE, No. 1307, *ante.*

1315. May be inferred from relationship.]—An action will lie for enticing away pltf.'s daughter, though there be no allegation that deft. debauched her, or that there was any binding contract of service between her & pltf. Pltf.'s daughter, who was about nineteen years of age, resided with him as a member of his family, & assisted him in his business of a licensed victualler. By means of a fictitious letter of invitation dictated by deft., she procured her mother's consent to her quitting her home for a few days, when she left, & deft. took her to a lodging house, where he cohabited with her for nine days, & she then returned home:—*Held:* there was a sufficient continuing relation of master & servant *de facto*, & sufficient evidence of a wrongful enticing away of the daughter by deft. to entitle pltf. to maintain an action against him.—EVANS *v.* WALTON (1867), L. R. 2 C. P. 615; 36 L. J. C. P. 307; 17 L. T. 92; 15 W. R. 1062.

Annotation:—**Consd.** Allen *v.* Flood. [1898] A. C. 1.

1316. Strict relationship of master & servant need not exist.]—BOWEN *v.* HALL, No. 1313, *ante.*

(c) Where no Actual Breach of Contract.

1317. Employment of unlawful means.]—An action for misfeasance will lie for threatening the workmen or customers of another, so that he thereby loses profit.—GARRET *v.* TAYLOR (1620), Cro. Jac. 567; 2 Roll. Rep. 162; 79 E. R. 485.

Annotations:—**Consd.** Allen *v.* Flood, [1898] A. C. 1. **Refd.** Quinn *v.* Leathem (1901), 70 L. J. P. C. 76. **Mentd.** Rogers *v.* Rajendro Dutt (1860), 13 Moo. P. C. C. 209; Mogul S.S. Co. *v.* McGregor, Gow (1889), 23 Q. B. D. 598; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244; Sorrell *v.* Smith, [1925] A. C. 700.

1318. —— Where business managed by receiver.]—Where a partnership is dissolved by the ct., & a receiver & manager is appointed with a view to the sale of the business as a going concern, any deliberate act, whether by a partner, party to the action, or a stranger, calculated to destroy the value of the business, is an interference with the receiver & manager, & may be restrained as such, even though not otherwise illegal. *E.g.*, tampering with the employees of the business & inducing them to give notice to leave, & to join a rival business, is an act of interference, although no breach of contract is instigated.—DIXON *v.* DIXON, [1904] 1 Ch. 161; 73 L. J. Ch. 103; 89 L. T. 272.

1319. Inducing servant to leave—At expiration of term.]—NICHOL *v.* MARTYN, No. 1306, *ante.*

C. Justification.

(a) In General.

1320. Necessity for—As defence to action.]—It is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.

This principle cannot be confined to inducements to break contracts of service. If such wrongful interference with a man's liberty of action is intended to injure & in fact damages a third person, such third person has a remedy by an action.—QUINN *v.* LEATHEM, [1901] A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289; 65 J. P. 708; 50 W. R. 139; 17 T. L. R. 749, H. L.

Annotations:—**Distd.** Bulcock *v.* St. Anne's Master Builders' Federation (1902), 19 T. L. R. 27. **Consd.** Giblan *v.* National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600. **Apld.** National Phonograph Co. *v.* Edison-Bell Consolidated Phonograph Co., [1908] 1 Ch. 335. **Consd.** Long *v.* Smithson (1918), 88 L. J. K. B. 223; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244; Valentine *v.* Hyde, [1919] 2 Ch. 129. **Apld.** Davies *v.* Thomas, [1920] 2 Ch. 189. **Consd.** Hodges *v.* Webb, [1920] 2 Ch. 70; Ware & De Freville *v.* Motor Trade Assocn., [1921] 3 K. B. 40. **Apld.** Jasperson *v.* Dominion Tobacco Co., [1923] A. C. 709; Brimelow *v.* Casson, [1924] 1 Ch. 302. **Distd.** Reynolds *v.* Shipping Federation, [1924] 1 Ch. 28; Sorrell *v.* Smith, [1925] A. C. 700. **Apld.** G. W. K. *v.* Dunlop Rubber Co. (1926), 42 T. L. R. 376. **Refd.** Read *v.* Friendly Soc. of Operative Stonemasons of England, Ireland & Wales, [1902] 2. K. B. 732; South Wales Miners' Federation *v.* Glamorgan Coal Co., [1905] A. C. 239; Denaby & Cadeby Main Collieries *v.* Yorkshire Miners' Assocn., [1906] A. C. 384; Santen *v.* Busnach (1913), 29 T. L. R. 214; Said *v.* Butt, [1920] 3 K. B. 497; White *v.* Riley, [1921] 1 Ch. 1. **Mentd.** West Ham Union *v.* L. C. C. (1902), 71 L. J. K. B. 299; R. *v.* Brailsford, [1905] 2 K. B. 730; Conway *v.* Wade, [1908] 2 K. B. 844; Gaskell *v.* Lancashire & Cheshire Miners' Federation (1912), 56 Sol. Jo. 719; *In the Goods of* Hall, Hall *v.* Knight & Baxter (1913), 109 L. T. 587; Vacher *v.* London Soc. of Compositors, [1913] A. C. 107; *Re* Ainsworth, Finch *v.* Smith, [1915] 2 Ch. 96; Larkin *v.* Long, [1915] A. C. 814; Croft *v.* Blay, [1919] 1 Ch. 277; Welldon *v.* Butterley Co., [1920] 1 Ch. 130; Tinline *v.* White Cross Insce., [1921] 3 K. B. 327.

1321. —— ——.]—SOUTH WALES MINERS' FEDERATION *v.* GLAMORGAN COAL CO., No. 1322, *post.*

(b) What amounts to Justification.

Trade disputes.]—*See* TRADE & TRADE UNIONS.

1322. Interference limited to advice.]—Procuring a breach of contract is an actionable wrong unless there be justification for interfering with the legal right.

The infliction of an unlawful injury upon the persons entitled to have the services of their workmen . . . is an actionable wrong unless it can be justified (LORD HALSBURY, C.).

As regards advice . . . that there are cases in which it is not actionable to exhort a person to break a contract may be admitted; & it is very difficult to draw a sharp line separating all such cases from all others (LORD LINDLEY).—SOUTH WALES MINERS' FEDERATION *v.* GLAMORGAN COAL CO., [1905] A. C. 239; 74 L. J. K. B. 525; 92 L. T. 710; 53 W. R. 593; 21 T. L. R. 441, H. L.; *affg.* S. C. *sub nom.* GLAMORGAN COAL CO. *v.* SOUTH WALES MINERS' FEDERATION, [1903] 2 K. B. 545, C. A.

Annotations:—**Refd.** Giblan *v.* National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; Larkin *v.* Long (1915), 84 L. J. P. C. 201; Valentine *v.* Hyde, [1919] 2 Ch. 129; Davies *v.* Thomas, [1920] 1 Ch. 217; Brimelow *v.* Casson, [1924] 1 Ch. 302. **Mentd.** National Phonograph Co. *v.* Edison Bell Consolidated Phonograph Co., [1908] 1 Ch. 335; Stott *v.* Gamble, [1916] 2 K. B. 504; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244; Said *v.* Butt, [1920] 3 K. B. 497; Ware & De Freville *v.* Motor Trade Assocn., [1921] 3 K. B. 40; Sorrell *v.* Smith, [1925] A. C. 700.

D. In Connection with Trade Disputes.

See TRADE & TRADE UNIONS.

SUB-SECT. 2.—HARBOURING SERVANT.

A. In General.

1323. Action lies.]—ANON. (1430), Fitz. Nat. Brev. 167 B.

Annotation:—**Refd.** Lumley *v.* Gye (1853), 2 E. & B. 216.

1324. ——.]—Pltfs. agreed in writing with L., that he should serve them for seven years as a crown glass maker; that he should not during that term work for any other person without their

r. Contract not in writing—Whether a defence.]—In an action for enticing away a servant from his master's service, & harbouring him it is no defence that the agreement entered into between the servant & the master was signed only by the former, or that the servant had not actually entered into the service of the master & performed any work.—FITZGERALD *v.* STAPLETON (1857), 4 Nfld. L. R. 170.—**NFLD.**

Sect. 1.—Procuring or encouraging breach of contract by servant: Sub-sect. 2, A. & B.; sub-sects. 3 & 4. Sect. 2: Sub-sect. 1, A.]

licence; that they might deduct from his wages any fine he might incur for breach of their rules; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick or lame, pltfs. should be at liberty to employ any other person in his stead, without paying him any wages; that pltfs. should pay him, so long as he should be employed & work as a crown glass maker, certain wages by the piece, & £8 a year, in *lieu* of house rent & firing; & that pltfs. should have the option of dismissing him from their service on giving him a month's notice or a month's wages:—*Held:* this agreement bound pltfs. to employ L. during the seven years, subject to the above power of dismissal.

The contract is not void as being in restraint of trade, & being binding on the parties, may be made the foundation of an action against defts. for harbouring & employing pltfs.' servant (ALDERSON, B.).—PILKINGTON *v.* SCOTT (1846), 15 M. & W. 657; 15 L. J. Ex. 329; 7 L. T. O. S. 340; 153 E. R. 1014.

Annotations:—**Refd.** Hartley *v.* Cummings (1847), 5 C. B. 247; Lumley *v.* Gye (1853), 2 E. & B. 216. **Mentd.** G. N. Ry. *v.* Harrison (1852), 12 C. B. 576; Emmens *v.* Elderton (1853), 4 H. L. Cas. 624; R. *v.* Welch (1853), 2 E. & B. 357; *Re* Bailey, *Re* Collier (1854), 3 E. & B. 607; Whittle *v.* Frankland (1862), 2 B. & S. 49; Worthington *v.* Sudlow (1862), 31 L. J. Q. B. 131; Eyre & Spottiswoode *v.* It. (1886), 3 T. L. R. 5; Easton Deep Sea Fishing & Ice Co. *v.* Ansell (1888), 59 L. T. 345; Maxim Nordenfelt Guns & Ammunition Co. *v.* Nordenfelt, [1893] 1 Ch. 630; Robinson *v.* Hever, [1898] 2 Ch. 451; Devonald *v.* Rosser, [1906] 2 K. B. 728.

1325. Defence to action—Contract avoided by servants leaving service—Escape of slave to British ship.]—Where certain persons who had been slaves in a foreign country where slavery was tolerated by law, escaped thence & got on board a British ship of war on the high seas:—*Held:* a British subject resident in that country, who claimed the slaves as his property, could not maintain an action against the commander of the ship for harbouring the slaves after notice.—FORBES *v.* COCHRANE (1824), 2 B. & C. 448; 2 State Tr. N. S. 147; 3 Dow. & Ry. K. B. 679; 2 L. J. O. S. K. B. 67; 107 E. R. 450.

Annotations:—**Consd.** The Slave, Grace, R. *v.* Allan (1827), 2 Hag. Adm. 94. **Mentd.** It. *v.* Lopez, It. *v.* Sattler (1858), Dears. & B. 525.

1326. —— Invalidity of contract.]—An agreement by B. to serve pltf. & him only, for a twelvemonth, & so on, from twelvemonth's end to twelvemonth's end, & to give twelve months' notice to quit in writing is bad, under Stat. Frauds, s. 4, as showing no consideration moving from the master; & no consideration can be inferred from the implied promise of the master to pay sufficient wages. B. left pltf.'s service, & afterwards entered into that of deft.:—*Held:* in an action for harbouring B. it was open to deft. to object to the validity of the contract.

Qu.: whether it would have been so had B. been *de facto*, continuing in pltf.'s service.—SYKES *v.* DIXON (1839), 9 Ad. & El. 693; 1 Per. & Dav. 463; 2 Will. Woll. & H. 120; 8 L. J. Q. B. 102; 112 E. R. 1374.

Annotations:—**Consd.** Hartley *v.* Cummings (1847), 5 C. B. 247; Lumley *v.* Gye (1853), 2 E. & B. 216; Evans *v.* Walton (1867), L. R. 2 C. P. 615. **Refd.** Cox *v.* Muncey (1859), 6 C. B. N. S. 375. **Mentd.** Emmens *v.* Elderton (1853), 4 H. L. Cas. 624; Payne *v.* New South Wales Coal & Intercolonial Steam Navigation Co. (1854), 10 Exch. 283; Bealey *v.* Stuart (1862), 7 H. & N. 753; Whittle *v.* Frankland (1862), 2 B. & S. 49; Firth *v.* Ridley (1864), 33 Beav. 516.

Harbouring apprentice.]—*See* Part XV., Sect. 2, sub-sect. 4, *post.*

B. With Knowledge of Contract.

1327. Knowledge at time of breach.]—ADAMS & BAFEALDS CASE (1591), 1 Leon. 240; 74 E. R. 219.

Annotation:—**Consd.** Lumley *v.* Gye (1853), 2 E. & B. 216.

1328. ——.]—FOSSET *v.* BREER (1672), 3 Keb. 59; 84 E. R. 593.

1329. ——.]—Where a person employed under a contract of service for a term leaves his employment, & before the expiration of the term is taken into the service of another & in breach of that contract employed by him with knowledge thereof, the new employer is liable to an action at the suit of the former.—WILKINS (FRED) & BROTHERS, LTD. *v.* WEAVER, [1915] 2 Ch. 322; 84 L. J. Ch. 929.

1330. Presumption as to knowledge.]—ANON. (1622), Win. 51; 124 E. R. 43.

1331. Notice of contract after breach.]—An action will lie for continuing to employ the servant of another after notice, though the person so continuing to employ the servant did not procure him to leave his master, or know when he employed him that he was the servant of another.—BLAKE *v.* LANYON (1795), 6 Term Rep. 221; 101 E. R. 521.

Annotations:—**Folld.** De Francesco *v.* Barnum (1890), 63 L. T. 514. **Refd.** Forbes *v.* Cochrane (1824), 2 B. & C. 448; Lumley *v.* Gye (1853), 2 E. & B. 216; Allen *v.* Flood, [1898] A. C. 1; Long *v.* Smithson (1918), 88 L. J. K. B. 223.

1332. ——.]—Pltf. in May, 1889, entered into agreements with five girls whereby they agreed to perform in the ballet for pltf. during the following pantomime season at certain salaries. In Oct. 1889, B., who had at that time no notice of these agreements, engaged the same girls to perform under his directions. Pltf., on discovering this engagement, gave notice to B. of the agreements of May 1889, but notwithstanding this the girls continued to be employed by B. Pltf. sued B. for damages for continuing to employ the girls after notice of the agreements of May, 1889, & the girls for breach of these agreements:—*Held:* an action will be against one who continues to employ the servant of another after notice of the prior contract of service & in order to maintain such an action it is not necessary that the employer & employed should stand in the strict relation of master & servant.—DE FRANCESCO *v.* BARNUM (1890), 63 L. T. 514; 6 T. L. R. 486.

Annotations:—**Folld.** Wilkins *v.* Weaver, [1915] 2 Ch. 322. **Consd.** Long *v.* Smithson (1918), 88 L. J. K. B. 223.

—— **Where contract avoided.**]—*See* No. 1325, *ante.*

PART X. SECT. 1, SUB-SECT. 2.—B.

1327 i. *Knowledge at time of breach.*]—As long as an obligation exists on the part of a servant to a first master, other persons are bound not to aid or abet such servant in a breach of such obligation if they have notice of its existence; & if a person takes into his service one who is in fact the servant of another, & after knowledge of the previous contract of service continues to employ him, such person is liable in an action by the first employer.—PERCY *v.* CROSS (1918), 20 W. A. L. R. 25.—**AUS.**

1327 ii. ——.]—An action will not lie for the mere harbouring or sheltering a person who is under a contract of service to another, even with notice of such contract of service.—BRUKOWSKY *v.* THACKER, SPINK, ETC. (1870), 6 B. L. R. 107.—**IND.**

1327 iii. ——.]—A master who takes a servant into, or retains him in, his employment, after learning that the servant is at the time under contract to serve another employer, & has wrongfully quitted that service, may be found liable in damages in an action at the instance of that other employer.—ROSE STREET FOUNDRY & ENGINEERING CO., LTD. *v.* LEWIS (J.) & SONS, LTD., [1917] S. C. 341.—**SCOT.**

SUB-SECT. 3.—OTHER CASES.

1333. Forcibly removing from service.]—HUNGERFORD *v.* ROBERT (1443), Y. B. 22, Hen. 6, p. 30, pl. 49.

Annotation :—**Mentd.** Darcy *v.* Jackson (1621), Palm. 224.

1334. ——.]—Where two persons are appointed joint testamentary guardians of an infant, under Tenures Act, 1660 (c. 24), s. 8, trespass lies by one of them against the other, for forcibly removing the infant from the lawful service of the former, against his consent.—GILBERT *v.* SCHWENCK (1845), 14 M. & W. 488 ; 14 L. J. Ex. 317 ; 9 Jur. 693 ; 153 E. R. 567.

Annotation :—**Distd.** Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213.

1335. Bribing servant to disclose master's business secrets.]—Where it was in the course of the business of defts., a firm of grain merchants, which consisted of two partners, to obtain by legitimate means information in regard to contracts made or tendered for with brewers or with buyers of grain by competing firms, & one of the partners obtained such information by bribing a clerk of pltf. a competitor in business, to break his contract of service by dishonestly & improperly communicating to him knowledge obtained in the course of the clerk's employment :—*Held :* both the partners were responsible in damages to pltf. for the action of one of them as aforesaid, on the ground that it was within the general scope of the authority given to him as a partner to conduct the business of the firm.—HAMLYN *v.* HOUSTON & Co., [1903] 1 K. B. 81 ; 72 L. J. K. B. 72 ; 87 L. T. 500 ; 51 W. R. 99 ; 19 T. L. R. 66 ; 47 Sol. Jo. 90, C. A.

1336. Inducing servant to execute commissions—Where contract for exclusive service.]—Resps. employed D. as their agent to buy tobacco from growers, the total bought not to exceed 300,000 lbs., & supplied him with forms of contract bearing their firm name as buyers. D. agreed not to act as buying agent for anybody except resps. & another firm. Applt., who knew the position as between D. & resps., induced him to buy in the names of the two firms a total of 1,100,000 lbs., arranging with him to take over the surplus not required for them. Out of that total weight D. handed 300,000 lbs. to resps., & tendered the balance to applt. ; but he repudiated the arrangement, the market having fallen heavily. Resps. having also repudiated liability, one of the vendors, with whom D. had contracted upon resp.'s form, was held to be entitled to damages from resps. as having held out D. as their agent ; resps. claimed to recover over from applt. :—*Held :* resps. were so entitled, applt. having knowingly induced D. to commit a breach of his duty to them, whereby they had suffered the damage.—JASPERSON *v.* DOMINION TOBACCO Co., [1923] A. C. 709 ; 92 L. J. P. C. 190 ; 129 L. T. 771, P. C.

SUB-SECT. 4.—REMEDIES OF MASTER.

1337. Right to damages—Where master indemnified.]—No action lies for seducing a servant from his master, who has been paid the stipulated penalties for leaving him.—BIRD *v.* RANDALL (1762), 3 Burr. 1345 ; 1 Wm. Bl. 387 ; 97 E. R. 866.

Annotations :—**Reld.** Godsall *v.* Boldero (1807), 9 East, 72 ; Lumley *v.* Gye (1853), 2 E. & B. 216 ; Allen *v.* Flood (1897), 67 L. J. Q. B. 122. **Mentd.** Winter *v.* Trimmer (1762), 1 Wm. Bl. 395 ; Martin *v.* Kennedy (1800), 2 Bos. & P. 69 ; Richardson *v.* Smith (1808), 1 Camp. 277 ; Harrison *v.* Wright (1811), 13 East, 343 ; Vooght *v.* Winch (1819), 2 B. & Ald. 662 ; Davis *v.* Bank of England (1824), 2 Bing. 393 ; Stafford *v.* Clark (1824), 2 Bing. 377 ; Doe *v.* Huddart (1835), 2 Cr. M. & R. 316 ; Cooper *v.* Shepherd (1846), 3 C. B. 266 ; Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141.

1338. —— Measure of damages—How ascertained.]—GUNTER *v.* ASTOR (1819), 4 Moore, C. P. 12.

Annotation :—**Reld.** Allen *v.* Flood, [1898] A. C. 1.

1339. —— —— Question for jury.]—BOWEN *v.* HALL, No. 1313, *ante*.

1340. Right to injunction—Where damages not sufficient remedy.]—BOWEN *v.* HALL, No. 1313, *ante*.

1341. —— Where defendant gives undertaking.]—On deft. undertaking not to attempt to induce certain persons to break their contracts, the ct. refused an injunction to restrain him either from persuading persons not to enter into contracts or from inducing persons to go out on strike.—WRIGHT *v.* HENNESSEY (1891), 11 T. L. R. 14, D. C.

SECT. 2.—SEDUCTION.

SUB-SECT. 1.—RIGHT OF ACTION.

A. In General.

1342. When arising—Whether before confinement.]—JOSEPH *v.* CORVANDER (1834), unreported, cited in 1 Roscoe's Evidence in Civil Actions, 19th ed. at p. 788.

1343. Failure in affiliation proceedings against alleged father—As estoppel in action for seduction.]—In affiliation proceedings against deft. he appealed to quarter sessions against an order of justices adjudging him to be the father of A.'s illegitimate child, & the ct. of quarter sessions quashed the order on the ground that he was not the father. Subsequently an action for damages

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PART X. SECT. 1, SUB-SECT. 4.

t. *Right to damages.*]—EMBERLEY *v.* BENNETT (1861), 4 Nfld. L. R. 562.—**NFLD.**

PART X. SECT. 2, SUB-SECT. 1.—A.

1342 i. *When arising—Whether before confinement.*]—7 Will. 4, c. 8, restrains the master of an unmarried female from suing for her seduction until six months have elapsed from the birth of the child, & it be first seen whether her father or mother within that time (not having abandoned her before her seduction) intend bringing the action.—WHITFIELD *v.* TODD (1844), 1 U. C. R. 223.—**CAN.**

1342 ii. —— ——.]—Seduction followed by pregnancy entitles the parent, even before the birth of the child, & to the exclusion of any other person, to maintain an action, although the daughter had from tender years been living in the family of a stranger, & continued to reside there up to the time of bringing the action.—L'ESPERANCE *v.* DUCHENE (1849), 7 U. C. R. 146.—**CAN.**

1342 iii. —— ——.]—An action for the seduction of pltf.'s daughter, may be maintained before the birth of the child.—WESTACOTT *v.* POWELL (1864), 2 E. & A. 525.—**CAN.**

a. —— *Evidence amounting to rape.*]—Case for seduction will lie to recover damages arising from subsequent connection, though the evidence strongly tend to show that deft. had in the first instance committed a rape on the girl.—HAYLE *v.* HAYLE (1833), 3 O. S. 295.—**CAN.**

b. —— ——.]—An action for seduction will not lie, where deft. has had connection with the seduced against her will.—VINCENT *v.* SPRAGUE (1846), 3 U. C. R. 283.—**CAN.**

c. *Form of action.*]—Action on the case lies as well as trespass for seduction.—CAVAN *v.* WELSH (1830), Dra. 257.—**CAN.**

d. *Application of statute—Necessity for parent, guardian or master.*]—15 Vict. c. 23 (P. E. I.) only applies to women who have a parent, guardian or master, who might maintain an action at common law.—MCINNIS *v.* MCCALLUM (1854), Peters Prince Edward Island Reports, 72.—**CAN.**

e. ——.]—55 Vict. c. 43, s. 1, does not apply to the case of the seduction of an illegitimate female.—ST. GERMAIN *v.* CHARETTE (1900), 13 Man. L. R. 63.—**CAN.**

f. *Survival of right of action.*]—HEALEY *v.* CRUMMER (1862), 11 C. P. 527.—**CAN.**

g. ——.]—In an action for seduction the right of action does not survive to the administrator of original

Sect. 2.—Seduction: Sub-sect. 1, A., B. & C.; sub-sect. 2.]

for the seduction of A. was brought by her mother against deft. :—*Held:* pltf. in the action was not estopped by the decision of the ct. of quarter sessions from alleging that deft. was the father of the child.—ANDERSON *v.* COLLINSON, [1901] 2 K. B. 107; 70 L. J. K. B. 620; 84 L. T. 405; 49 W. R. 623; 17 T. L. R. 425; 45 Sol. Jo. 447, D. C.

B. Deprivation of Service.

1344. Basis of action.]—No action will lie for debauching a daughter, though the mother maintain her & her child during her lying in, unless on the ground of the loss of service.—SATTERTHWAITE *v.* DEWHURST (1785), 4 Doug. K. B. 315; 99 E. R. 899; *sub nom.* SATERTHWAITE *v.* DUEST, 5 East, 47, n.

Annotations:—**Refd.** Carr *v.* Clarke (1818), 2 Chit. 260; Hall *v.* Hollander (1825), 4 B. & C. 660; Barrett *v.* Oliver (1846), 7 L. T. O. S. 469.

1345. ——.]—Declaration in case for the seduction of pltf.'s daughter, not founded on the loss of service, nor distinctly showing that the injury complained of was in breach of a contract by deft., express or implied, is bad on demurrer.—HARRIS *v.* BUTLER (1837), 2 M. & W. 539; Murp. & H. 117; 6 L. J. Ex. 133; 1 Jur. 608; 150 E. R. 871.

Annotation:—**Refd.** Grinnell *v.* Wells (1844), 2 Do. & L. 610.

1346. ——.]—GRINNELL *v.* WELLS, No. 1439, *post.*

1347. ——.]—EAGER *v.* GRIMWOOD, No. 1395, *post.*

1348. ——.]—HEDGES *v.* TAGG, No. 1399, *post.*

1349. ——.]—BILLINGTON *v.* OSBORNE (1895), 11 T. L. R. 569.

1350. ——.]—MANVELL *v.* THOMSON, No. 1372, *post.*

What amounts to.]—*See* Sub-sect. 3, B., *post.*

Dates at which service must exist.]—*See* Sub-sect. 4, *post.*

C. Effect of Concurrent Contract of Service.

1351. General rule.]—Action for seducing a daughter *per quod servitium amisit*, does not lie, if she be in the service of another.—POSTLETHWAITE *v.* PARKES (1766), 3 Burr. 1878; 97 E. R. 1147.

Annotations:—**Distd.** Bennett *v.* Allcott (1787), 2 Term Rep. 166. **Refd.** Woodward *v.* Walton (1807), 2 Bos. & P. N. R. 476.

1352. No intention to return.]—An action on the case for debauching & getting with child pltf.'s daughter & servant, *per quod servitium amisit*, is not maintained by evidence that the daughter, though under age, was living in another person's family in the capacity of a housekeeper, & had no intention at the time of the seduction to return to her father's house, though she afterwards did return there while within age in consequence of the seduction, & was maintained by her father.—DEAN *v.* PEEL (1804), 5 East, 45; 102 E. R. 986; *sub nom.* ANON., 1 Smith, K. B. 333.

Annotations:—**Consd.** Harris *v.* Butler (1837), 2 M. & W. 539; Blaymire *v.* Haley (1840), 6 M. & W. 55; Grinnell *v.* Wells (1844), 7 Man. & G. 1033. **Refd.** Terry *v.* Hutchinson (1868), L. R. 3 Q. B. 599.

1353. —— **Until termination of service.**]—An action cannot be maintained by a father for the seduction of his daughter while she was in the domestic service of another person; although it be alleged in the declaration that she was there with the intention on the part of her father & herself that she should return to her father's when she quitted her service, unless she should go into another service.—BLAYMIRE *v.* HALEY (1840), 6 M. & W. 55; 9 L. J. Ex. 147; 151 E. R. 319; *sub nom.* BLAMIRE *v.* HALEY, 4 Jur. 107.

Annotations:—**Refd.** Grinnell *v.* Wells (1844), 2 Dow. & L. 610; Whitbourne *v.* Williams (1901), 70 L. J. K. B. 933.

1354. Father receiving part of daughter's wages —Daughter under age.]—CARR *v.* CLARKE, No. 1374, *post.*

1355. Contract with intent to seduce.]—A., with intent to seduce the servant & daughter of B. hires her as his servant, & by this means obtains possession of her person. B. may maintain an action against A. for such seduction.—SPEIGHT *v.* OLIVIERA (1819), 2 Stark. 493, N. P.

Annotations:—**Consd.** Harris *v.* Butler (1837), 2 M. & W. 539; Griffiths *v.* Teetgen (1854), 15 C. B. 344. **Apld.** Evans *v.* Walton (1867), L. R. 2 C. P. 615.

1356. Temporary service.]—A. agreed with B. to permit his (B.'s) daughter, who was then residing with him as part of his family, to enter his (A.'s) service, to assist in his business during a temporary absence of his wife:—*Held:* B. might maintain an action for her seduction by A. during that period.—GRIFFITHS *v.* TEETGEN (1854), 15 C. B. 344; 24 L. J. C. P. 35; 24 L. T. O. S. 76; 1 Jur. N. S. 426; 3 W. R. 11; 139 E. R. 456.

1357. Occasional service at home.]—The fact of a daughter, while out at service, occasionally, with her mistress's consent, helping her mother in needlework, does not constitute the relationship of master & servant between the mother & daughter, so as to enable the former to maintain an action for the seduction of her daughter.—THOMPSON *v.* ROSS (1859), 5 H. & N. 16; 29 L. J. Ex. 1; 1 L. T. 43; 5 Jur. N. S. 1133; 8 W. R. 44; 157 E. R. 1082.

Annotations:—**Consd.** Evans *v.* Walton (1867), L. R. 2 C. P. 615. **Foll.** Whitbourne *v.* Williams, [1901] 2 K. B. 722. **Refd.** Allen *v.* Flood, [1898] A. C. 1.

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pltf., the mother of deceased.—BALL *v.* GOODMAN (1860), 10 C. P. 174.—**CAN.**

h. *At common law.*]—The common law governs in Manitoba in respect of seduction actions, if the relation of master & servant exists.—BOLTON *v.* HODGINS (1910), 14 W. L. R. 210; 3 Sask. L. R. 149.—**CAN.**

PART X. SECT. 2, SUB-SECT. 1.—B.

1344 i. *Basis of action.*]—POTTER *v.* LINDEN (1867), 6 N. S. W. S. C. R. (L.) 351.—**AUS.**

1344 ii. ——.]—Pltf., a widow, sued deft. for the seduction of A., her daughter. The seduction took place in Oct. 1861, during the lifetime of pltf.'s husband, father of A., the daughter. On June 15, 1862, the father died, & on July 16, 1862, a child was borne by the daughter:—*Held:* the action was not maintainable without proof of actual service.—SMART *v.* HAY (1862), 12 C. P. 528.—**CAN.**

1344 iii. ——.]—SMITH *v.* CROOKER (1863), 23 U. C. R. 84.—**CAN.**

1344 iv. ——.]—HOGAN *v.* AIKMAN (1870), 30 U. C. R. 14.—**CAN.**

1344 v. ——.]—STRAUGHAN *v.* SMITH (1890), 19 O. R. 558.—**CAN.**

1344 vi. ——.]—Where a girl under age was seduced by her master whilst his hired servant & rendering no service to her parents, & afterwards having quitted his service gave birth to a child in her parents' home:—*Held:* her father could not maintain an action for seduction although the girl intended to return home at the end of her service.—GLADNEY *v.* MURPHY (1890), 26 L. R. Ir. 651.—**IR.**

1344 vii. ——.]—To sustain a seduction action the services must be rendered to some one entitled to them as master.—MURRAY *v.* FITZGERALD, [1906] 2 I. R. 254.—**IR.**

PART X. SECT. 2, SUB-SECT. 1.—C.

1355 i. *Contract with intent to seduce.*]—FLYNN *v.* CONNELL, [1919] 2 I. R. 427.—**IR.**

1357 i. *Occasional service at home.*]—O'REILLY *v.* GLAVEY (1892), 32 L. R. Ir. 316.—**IR.**

1358. —— During temporary visit.]—HEDGES *v.* TAGG, No. 1399, *post.*

1359. —— —— Weekly leave of absence.]—Pltf.'s daughter, who was in the service of deft., was permitted to go out once a week for an afternoon & evening. On such occasions she went to her father's house & assisted in household duties. In an action by pltf. for the seduction of his daughter by deft. while she was in the latter's service:—*Held:* there was no evidence of the relation of master & servant between pltf. & his daughter to support the action.—WHITBOURNE *v.* WILLIAMS, [1901] 2 K. B. 722; 70 L. J. K. B. 933; 85 L. T. 271; 17 T. L. R. 707, C. A.

1360. Part service at home—Employment during the day.]—In an action for debauching & carnally knowing the daughter & servant of pltf., whereby he was deprived of her services, pltf. gave in evidence that the daughter lived with him as a member of his family, & was always at home at his house doing the work of the house, assisting in his domestic affairs, & attending on his wife who was in ill health, from shortly after six o'clock in the evening of one day until seven o'clock in the morning of the next day, & that she slept in his house; that during the same time she in the service of deft., hired as a labourer in husbandry to do outdoor work on his farm, at the wages of 5*s.* per week, during the usual hours of labour for such persons, that is to say, from seven in the morning until six o'clock in the evening during the months of Apr., May, June, July, Aug. & Sept. & from eight o'clock in the morning to dusk during the other months of the year:—*Held:* there was, in point of law, sufficient evidence to warrant the jury in finding that the daughter was the servant of pltf.—RIST *v.* FAUX (1863), 4 B. & S. 409; 2 New Rep. 373; 32 L. J. Q. B. 386; 8 L. T. 737; 10 Jur. N. S. 202; 11 W. R. 918; 122 E. R. 513, Ex. Ch.

Annotation:—**Consd.** Whitbourne *v.* Williams (1901), 70 L. J. K. B. 933.

1361. —— ——.]—Pltf.'s daughter lived in her father's house, but worked during the day at deft.'s mill, receiving wages. She did washing & other domestic duties for her father:—*Held:* sufficient evidence of service to entitle the father to maintain an action for the seduction of his daughter.—OGDEN *v.* LANCASHIRE (1866), 15 W. R. 158.

SUB-SECT. 2.—WHO MAY SUE.

1362. Not person seduced.]—NORTON *v.* JASON (1653), Sty. 398; 82 E. R. 809.

Annotations:—**Mentd.** Hunt *v.* Wotton (1679), T. Raym. 259; Eager *v.* Grimwood (1847), 1 Exch. 61.

1363. ——.]—WELLOCK *v.* CONSTANTINE (1863), 2 H. & C. 146; 32 L. J. Ex. 285; 7 L. T. 751; 9 Jur. N. S. 232; 159 E. R. 61.

Annotations:—**Mentd.** Wells *v.* Abraham (1872), L. R. 7 Q. B. 554; Osborn *v.* Gillett (1873), 42 L. J. Ex. 53; *Re* Shepherd, *Ex p.* Ball (1879), 10 Ch. D. 667; Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561; *Re* Guerrier, *Ex p.* Leslie (1882), 30 W. R. 344; Appleby *v.* Franklin (1885), 55 L. J. Q. B. 129; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38.

1364. Not person conniving at seduction.]—A father who has permitted a married man to visit his daughter as a suitor, cannot maintain an action against him for seducing her.—REDDIE *v.* SCOOLT (1794), Peake, 316, N. P.

1365. Parent.]—NORTON *v.* JASON (1653), Sty. 398; 82 E. R. 809.

Annotations:—**Refd.** Eager *v.* Grimwood (1847), 1 Exch. 61. **Mentd.** Hunt *v.* Wotton (1679), T. Raym. 259.

1366. —— Seduction of married woman.]—A father may maintain an action of trespass for the seduction of his daughter & servant, whom he maintains in consideration of her services, though she be a married woman; for though the relation of master & servant subsisting between them, may not be binding as against her husband, it is binding as against a stranger & a wrongdoer.

Where a married woman enters into a contract of hiring & service apart from her husband, she nevertheless continues subject to his control, & the contract may be defeasible by him, by his, at any moment, choosing to renew the exercise of his marital rights. That may be the case *quoad* the husband; but it by no means follows that the rule would extend to third persons, especially wrongdoers, & that they should be allowed to say that such a contract is void. Wages do not necessarily consist in money payments; & as she and her children were maintained by her father, she did receive such a compensation for her services as may be fairly considered as wages (LORD TENTERDEN, C.J.).—HARPER *v.* LUFFKIN (1827), 7 B. & C. 387; 1 Man. & Ry. K. B. 166; 6 L. J. O. S. K. B. 23; 108 E. R. 767.

1367. —— By adoption.]—Damages *ultrà* the mere loss of service having been given against

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PART X. SECT. 2, SUB-SECT. 2.

1365 i. *Parent.*]—The father of an illegitimate daughter can not bring an action for her seduction, merely on the footing of being her father.—BIGGS *v.* BURNHAM (1844), 1 U. C. R. 106.—**CAN.**

1365 ii. ——.]—The mother of an illegitimate daughter can maintain an action for her seduction only on the principles of the common law.—MUCKLEROY *v.* BURNHAM (1845), 1 U. C. R. 351.—**CAN.**

1365 iii. ——.]—A "widow" is not an "unmarried female," within 7 Will. 4, c. 8, & her father cannot sue for her seduction when she was not living in his service, but in that of her seducer.—KIRK *v.* LONG (1858), 7 C. P. 363.—**CAN.**

1365 iv. ——.]—Action by pltf., the father, against deft. for the seduction of his daughter, a widow, living with deft. & in his service:—*Held:* as the daughter was not an unmarried woman the action was not maintainable under 7 Will. 4, c. 8.—ANDERSON *v.* RANNIE (1862), 12 C. P. 536.—**CAN.**

1365 v. ——.]—A widow having an unmarried daughter married pltf., & took the daughter to her new home. While living there & performing acts of service the daughter was seduced:—*Held:* the step-father might maintain an action as at common law.—MCINTOSH *v.* TYHURST (1865), 24 U. C. R. 443.—**CAN.**

1365 vi. ——.]—The mother of an illegitimate daughter cannot, under the Seduction Act, maintain an action for the seduction of such daughter while she was living with deft.—HICKS *v.* ROSS (1865), 25 U. C. R. 50.—**CAN.**

1365 vii. ——.]—The parent may sue for the seduction of his daughter, though he was resident abroad at the birth of the child, & a cause of action at common law has vested in a master, whom she served.—CROMIE *v.* SKENE (1869), 19 C. P. 328.—**CAN.**

1365 viii. ——.]—WATERS *v.* POWERS (1869), 29 U. C. R. 336.—**CAN.**

1365 ix. ——.]—JAMES *v.* HAWKINS (1875), 25 C. P. 346.—**CAN.**

1365 x. ——.]—TWEEDLIE *v.* BOGIE (1877), 27 C. P. 561.—**CAN.**

1365 xi. ——.]—Where an unmarried woman is seduced & pregnancy follows, or sickness which weakens or renders her less able to work or serve, the father's cause of action is complete, & cannot be divested by the subsequent marriage of his daughter before the birth of a child.—EVANS *v.* WATT (1883), 2 O. R. 166.—**CAN.**

1365 xii. ——.]—In an action for seduction brought by the mother & stepfather of the daughter, it appeared that at the time of the seduction the daughter was not living at home with pltfs., but was out at service:—*Held:* pltfs. had the right to maintain the action.—MEYER *v.* BELL (1887), 13 O. R. 35.—**CAN.**

1365 xiii. ——.]—On demurrer to a statement of claim in an action of seduction:—*Held:* the mother of the girl seduced, suing as her mistress, had a sufficient common law right to bring the action.—GOULD *v.* ERSKINE (1890), 20 O. R. 347.—**CAN.**

1365 xiv. ——.]—STONER *v.* SKENE (1919), 44 O. L. R. 609; 15 O. W. N. 312.—**CAN.**

1365 xv. ——.]—HAMILTON *v.* LONG, [1905] 2 I. R. 552; *affy.*, [1903] 2 I. R. 407.—**IR.**

1365 xvi. ——.]—A mother cannot sue for seduction where the father is living with her, even though he be "bedridden & doting," & though the mother does all the father's business, as well as her household duties.—THOMPSON *v.* FITZPATRICK (1920), 54 I. L. T. 184.—**IR.**

Sect. 2.—*Seduction: Sub-sects.* 2 & 3, *A.* (*a*) & (*b*), & *B.*]

deft. for debauching & getting with child the adopted daughter & servant of pltf., by which he lost her service, the ct. refused to set aside the inquisition.—IRWIN *v.* DEARMAN (1809), 11 East, 23; 103 E. R. 912.

Annotations:—**Refd.** Thompson *v.* Ross (1859), 29 L. J. Ex. 1; Terry *v.* Hutchinson (1868), L. R. 3 Q. B. 599.

1368. —— —— Wife of master.]—PETERS *v.* JONES, No. 1377, *post.*

1369. Master—Not related.]—(1) A master may maintain an action for debauching his servant, though he is no ways related to her in blood.

(2) In an action for debauching a servant *per quod*, etc., it is not necessary to prove that she was employed as a menial servant.—FORES *v.* WILSON (1791), Peake, 77, N. P.

Annotations:—*As to* (2) **Refd.** Carr *v.* Clarke (1818), 2 Chit. 260; Hall *v.* Hollander (1825), 7 Dow. & Ry. K. B. 133. *Generally*, **Mentd.** Lumley *v.* Gye (1853), 2 E. & B. 216.

1370. —— —— Or in loco parentis.]—MCKENZIE *v.* HARDINGE, No. 1417, *post.*

1371. —— Right of assignees in bankruptcy.]—The right of action for the seduction of a servant does not pass to the master's assignees on his bkpcy.—HOWARD *v.* CROWTHER (1841), 8 M. & W. 601; 10 L. J. Ex. 355; 5 Jur. 914; 151 E. R. 1179.

Annotation:—**Mentd.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579.

1372. Uncle.]—(1) In trespass for seducing pltf.'s niece & servant, *per quod servitium amisit* evidence that the party seduced, being about sixteen years of age, occasionally assisted in the household work, no servant being kept in the family, is sufficient to constitute the relation of master & servant between the uncle & niece; & such relation is not destroyed by the circumstance of the niece's being entitled, on her coming of age, to a sum of nearly £500, of which the interest is applied in the mean time for her benefit.

(2) Proof in such case, that the niece, after her seduction & abandonment by deft., returned to her uncle's house, where she continued some time in a state of great agitation, & received medical attendance, & was obliged to be watched, lest she should do herself some injury, is sufficient to raise the presumption of that loss of service by the uncle, which is necessary to maintain the action.—MANVELL *v.* THOMSON (1826), 2 C. & P. 303, N. P.

SUB-SECT. 3.—WHAT MUST BE PROVED.

A. Service.

(*a*) *In General.*

1373. Relation of master & servant must exist.]—DEAN *v.* PEEL, No. 1352, *ante.*

1374. ——.]—In order to maintain an action for seduction, the daughter must be the father's servant; & though he receives part of her wages, & she is under age, yet, if she is not his servant, he cannot maintain the action.—CARR *v.* CLARKE (1818), 2 Chit. 260.

Annotation:—**Refd.** Harris *v.* Butler (1837), Murp. & H. 117.

1375. ——.]—To a declaration complaining that deft. debauched J., being daughter & servant of pltf. & alleging damage by loss of service, deft. pleaded that J. was not the servant of pltf.:—*Held*: a good plea.—TORRENCE *v.* GIBBINS (1843), 5 Q. B. 297; Dav. & Mer. 226; 13 L. J. Q. B. 36; 2 L. T. O. S. 147; 7 Jur. 1153; 114 E. R. 1261.

Annotation:—**Refd.** Salter *v.* Walker (1869), 21 L. T. 360.

1376. ——.]—MANLEY *v.* FIELD, No. 1389, *post.*

1377. ——.]—The principle on which an action for seduction is maintainable is not that there must be the relationship, or any quasi-relationship, of parent & child. The necessary & sufficient relation is that of master & servant.

An action was brought to recover damages for the seduction of a girl aged twenty-two, the adopted daughter of pltf., a married woman. Pltf. lived with her husband. The girl lived in the house with pltf. & her husband, & without any specific contract of service either with pltf. or her husband performed there the ordinary domestic services of the household. She was given by pltf. about 5*s.* a week for pocket money. Her clothes also were provided for her. The clothes & pocket money were provided out of the husband's money. At the trial evidence of the facts stated above was given, & that deft. had seduced the girl. Pltf. had no separate estate:—*Held*: the action would not lie at the suit of pltf. The legal relationship of father & child did not by itself justify the maintenance of the action, which could be justified only by the legal fiction to which that relationship gave rise, namely, that a child living with the parent was a servant; & while the wife was living with her husband any ordinary domestic servant employed in the house was the servant of the husband & not of his wife.—PETERS *v.* JONES, [1914] 2 K. B. 781; 83 L. J. K. B. 1115; 110 L. T. 937; 30 T. L. R. 421.

1378. —— Need not be menial servant.]—FORES *v.* WILSON, No. 1369, *ante.*

(*b*) *Presumption of Service.*

1379. Daughter—Under twenty-one years of age—Not living at home.]—JOHNSON *v.* MCADAM (1789), cited 5 East, 47; 1 Smith, K. B. 333; 102 E. R. 987, N. P.

Annotation:—**Distd.** Dean *v.* Peel (1804), 5 East, 45.

1380. —— —— ——.]—BOOTH *v.* CHARLTON (1789), cited 5 East, 47; 102 E. R. 987, N. P.

Annotation:—**Distd.** Dean *v.* Peel (1804), 5 East, 45.

1381. —— Over twenty-one years of age—Acts of service proved.]—A father may bring an action of trespass for breaking, etc., his house, & debauching his daughter, *per quod servitium amisit*, though

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1372 i. *Uncle.*]—ABERNETHY *v.* MCPHERSON (1876), 26 C. P. 516.—**CAN.**

1372 ii. ——.]—MCKERSIE *v.* MCLEAN (1884), 6 O. R. 428.—**CAN.**

PART X. SECT. 2, SUB-SECT. 3.—A. (a).

1373 i. *Relation of master & servant must exist.*]—An action cannot be maintained by a father for the seduction of his daughter while she is hired by the month in the service of another person, though the father received her wages & was obliged to maintain her in consequence of her pregnancy.—SIMPSON *v.* READ (1858), 4 All. 52.—**CAN.**

1373 ii. ——.]—Where an action for seduction is brought by the brother of the girl, not by the parents, 7 Will. 4, c. 8, does not apply, & proof of service must be given.—MCKAY *v.* BURLEY (1859), 18 U. C. R. 251.—**CAN.**

1373 iii. ——.]—In an action, after the death of the father, by the mother for the seduction of her daughter in the lifetime of the father, who was an invalid supported by the mother & daughter, no evidence of the actual relationship of mistress & servant was given:—*Held*: the action was not maintainable.—ENTNER *v.* BENNEWEIS (1894), 24 O. R. 407.—**CAN.**

1373 iv. ——.]—DENT *v.* MAGUIRE, [1917] 2 I. R. 59.—**IR.**

PART X. SECT. 2, SUB-SECT. 3.—A. (b).

1379 i. *Daughter—Under twenty-one years of age—Not living at home.*]—BARNES *v.* FOX, [1914] 2 I. R. 276.—**IR.**

k. —— *Over twenty-one years of age—Evidence of animus revertendi.*]—Where pltf.'s daughter was residing

the daughter be above twenty-one years of age, where acts of service are proved, though there be no contract for service.—BENNETT *v.* ALLCOTT (1787), 2 Term Rep. 166; 100 E. R. 90.

Annotations :—**Distd.** Thompson *v.* Ross (1859), 29 L. J. Ex. 1. **Refd.** Dean *v.* Peel (1804), 5 East, 45; Woodward *v.* Walton (1807), 2 Bos. & P. N. R. 476; Ditcham *v.* Bond (1814), 2 M. & S. 436; Parker *v.* Bailey (1824), 4 Dow. & Ry. K. B. 215; Stammers *v.* Yearsley (1833), 10 Bing. 35; Grinnell *v.* Wells (1844), 2 Dow. & L. 610; Newton *v.* Holford (1845), 4 L. T. O. S. 358; Allen *v.* Flood, [1898] A. C. 1.

1382. —— —— Living at home.]—BOOTH *v.* CHARLTON (1789), cited 5 East, 47; 102 E. R. 987.

Annotation :—**Refd.** Dean *v.* Peel (1804), 5 East, 45.

1383. —— Not sleeping at father's house—Acts of service performed.]—If the daughter of a person performs all the duties of a servant, & all domestic office in her father's house, though she does not actually sleep in the house, is seduced, the father may support an action *per quod servitium amisit.* —MANN *v.* BARRETT (1806), 6 Esp. 32, N. P.

1384. —— —— ——.]—(1) It is not absolutely essential to prove actual service by the daughter; it is sufficient if she was under the control of her father.

A. occupied two farms seven miles distant from each other. A. resided at one, & his son & daughter at the other. The daughter acted as mistress of the house at the latter, & had the poultry for her own benefit :—*Held :* she was sufficiently the servant of A. for him to maintain an action for her seduction.

(2) If a young girl goes to live with a family, they maintaining her, & she being neither a servant nor a temporary visitor, no action for seducing her would lie.

(3) In a case of seduction, deft. may show that the daughter is not servant of the father under the general issue, without pleading specially.—HOLLOWAY *v.* ABELL (1836), 7 C. & P. 528.

1385. —— Married woman.] — HARPER *v.* LUFFKIN, No. 1366, *ante*.

1386. —— Right of father to services—Necessity for actual service.]—In an action by a father for seduction, it is not necessary to show any acts of service done by the daughter: it is enough that she lived in the father's family under such circumstances that he had a right to her services. —MAUNDER *v.* VENN (1829), Mood. & M. 323, N. P.

Annotations :—**Consd.** Barrett *v.* Oliver (1846), 7 L. T. O. S. 469; Terry *v.* Hutchinson (1868), L. R. 3 Q. B. 599. **Refd.** Harris *v.* Butler (1837), Murph. & H. 117; Blaymire *v.* Haley (1840), 6 M. & W. 55; Torrence *v.* Gibbins (1843), 5 Q. B. 297.

1387. —— —— ——.]—HOLLOWAY *v.* ABELL, No. 1384, *ante*.

1388. —— What service sufficient—Slight services.]—Where the relation of parent & child subsists, very little [service] will suffice (LORD DENMAN, C.J.).—BARRETT *v.* OLIVER (1846), 7 L. T. O. S. 469.

1389. —— Supporting mother & family—Father living elsewhere.]—In order to support an action by a father for the seduction of his daughter, it is necessary that the relationship of master & servant should subsist between them at the time of the seduction; & the fact that the daughter renders services, in the sense of conferring benefits upon the father, is not, of itself, sufficient to constitute such relationship.

Where the daughter rented a house, & carried on the business of a milliner at the time of her seduction :—*Held :* the circumstance of her mother & the younger branches of her family residing with her, & receiving part of their support from the proceeds of her business, the father lodging elsewhere, did not constitute such " services " as to entitle the father to maintain the action.—MANLEY *v.* FIELD (1859), 7 C. B. N. S. 96; 29 L. J. C. P. 79; 141 E. R. 751; *sub nom.* MANLEY *v.* HEELD, 6 Jur. N. S. 300.

1390. —— Revival of service—On dismissal from other employment—Where intention to return.]—(1) Pltf.'s daughter, being under age, left his house & went into service. After nearly a month the master dismissed her at a day's notice, & the next day, on her way home to her father's house, deft. seduced her :—*Held :* as soon as the real service was put an end to by the master, whether rightfully or wrongfully, the girl intending to return home, the right of the father to her services revived, & there was therefore sufficient evidence of service to maintain an action for the seduction.

(2) In estimating the damages the jury may take into account the expense of maintaining a bastard child & the dishonour done to pltf. & his daughter.—TERRY *v.* HUTCHINSON (1868), L. R. 3 Q. B. 599; 9 B. & S. 487; 37 L. J. Q. B. 257; 18 L. T. 521; 32 J. P. 712; 16 W. R. 932.

Annotation :—**Distd.** Hedges *v.* Tagg (1872), L. R. 7 Exch. 283.

1391. Niece—Under twenty-one years of age—Where acts of service performed—Niece having private means.]—MANVELL *v.* THOMSON, No. 1372, *ante*.

1392. Young girl living with family—Not as servant or temporary visitor.]—HOLLOWAY *v.* ABELL, No. 1384, *ante*.

Compare Part X., Sect. 3, sub-sect. 2, B. (*b*), *post*.

B. Loss of Service.

Loss of service as basis of action.]—*See* Sect. 2, sub-sect. 1, B., *ante*.

1393. What amounts to loss of service—Servant in state of great agitation—Prevention of self-inflicted injury.]—MANVELL *v.* THOMSON, No. 1372, *ante*.

1394. —— Illness following abandonment by seducer.]—*Qu. :* where a woman is seduced, & abandoned by the seducer, & in consequence of being abandoned becomes ill, whereby her services are lost to her parents, whether such loss of service will sustain an action by the parent for the seduction.—BOYLE *v.* BRANDON (1845), 13 M. & W. 738; 14 L. J. Ex. 344; 4 L. T. O. S. 375; 155 E. R. 310; *subsequent proceedings* (1846), 7 L. T. O. S. 116.

Annotation :—**Mentd.** Victorian Railways Comrs. *v.* Coultas (1888), 13 App. Cas. 222.

1395. —— Child not child of seducer.]—An action for seduction cannot be maintained without some proof of loss of service thereby; therefore, where it appeared that deft. had debauched pltf.'s daughter & that she was delivered of a child, but the jury found that the child was not

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with deft., & performing services for him, but not under any contract of service, at the time of his seduction, but there was evidence of an *animus revertendi* to her father's house at the time & she afterwards delivered there: —*Held :* a verdict for pltf. should be upheld.—CUMBER *v.* MORLEY (1878), 4 V. L. R. (L.) 3.—**AUS.**

PART X. SECT. 2, SUB-SECT 3.—B.

l. *What amounts to loss of service—Illness or physical disturbance.*]—While mere illicit intercourse affords no ground of action, proof of illness or physical disturbance sufficient to have caused loss of service to the parent, if the girl had been living with the parent, is all that is necessary.—HARRISON *v.* PRENTICE (1897), 24 A. R. 677.—**CAN.**

m. ——.] — Pltf.'s daughter, aged 24, was seduced in the house & service of pltf., & the day after left this country pursuant to prior arrangements, for America, but, while in service there,

Sect. 2.—Seduction: Sub-sect. 6, B.; sub-sect. 7.]

B. For Defendant.

1428. What evidence is admissible—Other acts of misconduct.]—In an action for seduction of pltf.'s daughter, deft. may examine witnesses to prove particular acts of sexual intercourse between pltf.'s daughter & those witnesses, who may each be asked as to the fact, & the time & place of its occurrence; but if the jury are of opinion that deft. had such intercourse with pltf.'s daughter as caused him to be the father of the child, pltf. is entitled to the verdict; & the evidence of her unchastity with others is only to be considered in mitigation of damages.—VERRY *v.* WATKINS (1836), 7 C. & P. 308.

1429. —— —— Right to cross-examine daughter as to.]—DODD *v.* NORRIS, No. 1422, *ante*.

1430. —— —— ——.]—ANDREWS *v.* ASKEY, No. 1402, *ante*.

1431. —— —— Where daughter not cross-examined as to.]—ANDREWS *v.* ASKEY, No. 1402, *ante*.

1432. —— —— ——.]—In an action for the seduction of pltf.'s daughter, the daughter was called, & asked on cross-examination if she knew B., which she denied. In defence it was sought to contradict her, by proving that she had stated that B. was the father of her illegitimate child, & that he had deserted her:—*Held:* the evidence was inadmissible as a contradiction, the witness not having been cross-examined as to these statements; *semble:* the evidence might have been given to prove her loose character.—CARPENTER *v.* WALL (1840), 11 Ad. & El. 803; 3 Per. & Dav. 457; 9 L. J. Q. B. 217; 4 Jur. 961; 113 E. R. 619.

Annotation:—**Refd.** A.-G. *v.* Hitchcock (1847), 1 Exch. 91.

1433. —— —— **To prove loose character of daughter.**]—CARPENTER *v.* WALL, No. 1432, *ante*.

1434. —— **Evidence as to paternity—Negative or positive.**]—Where, in an action for seduction, deft. in his defence admitted that he had had carnal knowledge of pltf.'s daughter at certain dates, but he denied that he was the father of a child born on Dec. 6, 1906, pltf. was not allowed to interrogate deft. that, if he alleged that carnal knowledge had been had of pltf.'s daughter by any male person or persons other than himself, he was to give the name & address of each of such persons respectively.

The evidence which deft. will adduce at the trial may be either (*a*) evidence to show negatively that he is not the father, or (*b*) evidence to show affirmatively that some one else is. It may be either (*a*) evidence to show that pltf.'s facts are not right, or (*b*) evidence of independent facts which, if true, render pltf.'s facts impossible. Each of these is simply deft.'s evidence, & pltf. is not entitled to interrogate him about them (BUCKLEY, L. J.).—HOOTON *v.* DALBY, [1907] 2 K. B. 18; 76 L. J. K. B. 652; 96 L. T. 537, C. A.

Annotation:—**Refd.** The Shropshire (1922), 127 L. T. 487.

SUB-SECT. 7.—PRACTICE.

1435. Grant of new trial—Evidence of bad character contradicted by affidavit.]—In an action for seducing pltf.'s daughter, three persons swore that they had had criminal connection with her, & the jury found a verdict for pltf. for 1*s.* only, the ct. refused to grant a new trial, although the testimony of those persons was contradicted by affidavit.—SIMPSON *v.* DICKENS (1827), 5 L. J. O. S. C. P. 109.

1436. —— **Only in interests of justice.**]—The ct. will be especially careful not to grant new trials in actions of seduction & cases of that description, unless almost compelled & the interests of justice require it.—WALKER *v.* ENTWISLE (1860), 1 L. T. 553.

1437. —— **Verdict against evidence.**]—WOOTTEN *v.* SNAPE (1860), 2 L. T. 468.

—— **On ground of excessive damage.**]—*See* Nos. 1419-1424, *ante*.

1438. Form of action—Trespass or action on case.]—An action for seducing the daughter & servant of pltf. may be brought either in trespass for the direct injury *per quod servitium amisit* or in case for the consequential damage.—CHAMBERLAIN *v.* HAZLEWOOD (1839), 5 M. & W. 515; 7 Dowl. 816; 9 L. J. Ex. 87; 3 Jur. 1079; 151 E. R. 218.

Annotation:—**Refd.** Eager *v.* Grimwood (1847), 1 Exch. 61.

1439. What must be pleaded—Loss of service.]—In an action for seducing pltf.'s daughter, the omission of the allegation *per quod servitium amisit* is not cured by stating that pltf.'s daughter is a poor person maintaining herself by her own labour, & not sufficient to maintain herself otherwise; & that deft. debauched her, & that she was delivered of a child, stating further, as the grievance of the charge, that pltf., being her father, was forced & obliged to expend certain sums of money in the maintenance of his daughter.

The foundation of an action by a father to recover damages against the wrong doer for the seduction of his daughter has been uniformly

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PART X. SECT 2, SUB-SECT. 6.—B.

1428 i. *What evidence is admissible—Other acts of misconduct.*]—Where the female seduced has denied on her examination that she had intercourse with others besides deft., deft. can only show in answer that to the knowledge of his witnesses that statement was not true; he cannot be permitted to ask them whether they themselves had connection with her.—MCMAHON *v.* SKINNER (1845), 2 U. C. R. 272.—**CAN.**

1428 ii. —— ——.]—HOPE *v.* DAVIDSON (1873), 33 U. C. R. 550.—**CAN.**

1428 iii. —— ——.]—In an action for seduction witnesses called for the defence testified to having had connection with the girl. The jury were told that these witnesses had a right to refuse to answer such questions:—*Held:* a misdirection.—MCCREARY *v.* GRUNDY (1876), 39 U. C. R. 316.—**CAN.**

PART X. SECT. 2, SUB-SECT. 7.

b. *Grant of new trial—Connivance & negligence of parent.*]—Where in an action for seduction of pltfs.' daughter evidence had been given of connivance on the mother's part, & great negligence on the father's part, & the jury found a verdict for pltf. with £200 damages, the ct. granted a new trial.—BEADSTEAD *v.* WYLLIE (1823), Tay. 60.—**CAN.**

c. —— ——.]—Gross neglect on the part of the parents is held to be a good ground for a new trial for seduction.—HOGLE *v.* HAM (1825), Tay. 248.—**CAN.**

d. —— *Other acts of misconduct.*]—The ct. refused a new trial where the jury had found for deft. on evidence clearly impeaching the character of the seduced, although affidavits were produced that pltf. could rebut such evidence, & would have been prepared to do so at the former trial had he had notice.—MONK *v.* CASSELMAN (1835), 4 O. S. 336.—**CAN.**

e. —— *On payment of costs.*]—CANE *v.* REID (1853), 2 C. P. 342.—**CAN.**

f. ——.]—SNURE *v.* GILCHRIST (1863), 23 U. C. R. 81.—**CAN.**

g. ——.]—UDY *v.* STEWART (1885), 10 O. R. 591.—**CAN.**

1439 i. *What must be pleaded—Loss of service.*]—A declaration for seduction not containing an averment of loss by pltfs. of the services of the seduced, nor that the seduced was the servant of pltfs., is bad.—LAKE *v.* BEMISS (1855), 4 C. P. 430.—**CAN.**

1439 ii. —— ——.]—A declaration by a woman that deft. seduced her daughter & servant, whereby she lost her services:—*Held:* good, either at common law or under the statute, without alleging the father's death.—

based, from the earliest times hitherto, not upon the seduction itself, nor upon the wrongful act of deft., but on the loss of service of the daughter, in which service he is supposed to have a legal right & interest. It has always been held that the loss of service must be alleged in the declaration & loss of service must be proved at the trial, or pltf. must fail. It is the invasion of the legal right of the master to the services of the servant that gives him a right of action for the beating of the servant, & it is the invasion of the same legal right, & no other, that gives the father a right of action against the seducer of his daughter; so that the original act is not the cause of the action; but the consequence upon it, namely, the loss of the service, is the cause of the action (TINDAL, C.J.). —GRINNELL *v.* WELLS (1844), 7 Man. & G. 1033; 2 Dow. & L. 610; 8 Scott, N. R. 741; 14 L. J. C. P. 19; 4 L. T. O. S. 173; 8 Jur. 1101; 135 E. R. 419.

Annotations :—**Folld.** Eager *v.* Grimwood (1847), 1 Exch. 61. **Consd.** Whitbourne *v.* Williams, [1901] 2 K. B. 722. **Refd.** Barrett *v.* Oliver (1846), 7 L. T. O. S. 469; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38.

1440. —— Denial of relationship of master & servant.]—SALTER *v.* WALKER, No. 1426, *ante*.

1441. Interrogatories — Pecuniary means of defendant.]—In an action for the seduction of pltf.'s daughter, interrogatories as to deft.'s pecuniary means cannot be administered to deft.; but interrogatories as to whether deft. had had sexual intercourse with the daughter, & had stated that he believed that she had not had such intercourse with any other man, are allowable.—HODSOLL *v.* TAYLOR (1873), L. R. 9 Q. B. 70; 43 L. J. Q. B. 14; 29 L. T. 534; 22 W. R. 89.

1442. —— Paternity denied—Name of alleged father.]—HOOTON *v.* DALBY, No. 1434, *ante*.

1443. —— As to admissions of defendants.]—HODSOLL *v.* TAYLOR, No. 1441, *ante*.

Right of plaintiff to administer interrogatories.]—*See* DISCOVERY, Vol. XVIII., p. 220, Nos. 1685–1687.

1444. Right of defendant to particulars—As to times & places of intercourse—Denial of seduction on oath.]—Pltf., in an action for the seduction of his daughter by deft. & consequent loss of her services, alleged that deft., when engaging his daughter as servant, had entered into a contract to treat his daughter in a proper & becoming manner; but that deft. had committed a breach of that contract by behaving to his daughter in an improper manner, namely, by seducing her whilst in his service, whereby she had become pregnant, & that in consequence of her pregnancy pltf. had lost her services. Deft. did not deny the seduction on oath, but sought to obtain particulars of the times & places at which the alleged connection between himself & pltf.'s daughter had taken place :—*Held :* under the circumstances deft., without denying the seduction on oath, was not entitled to an order for such particulars.—THOMSON *v.* BIRKLEY (1882), 47 L. T. 700; 31 W. R. 230, D. C.

Annotations :—**Consd.** Sachs *v.* Speilman (1887), 37 Ch. D. 295. **N.F.** Kelly *v.* Briggs (1888), 4 T. L. R. 556. **Folld.** Knight *v.* Engle (1889), 61 L. T. 780. **Refd.** Briton Medical & General Life Assocn., Ltd. *v.* Britannia Fire Assocn. & Whinney (1888), 59 L. T. 888.

1445. —— —— ——.]—KELLY *v.* BRIGGS (1888), 4 T. L. R. 556, D. C.

Annotation :—**N.F.** Knight *v.* Engle (1889), 61 L. T. 780.

1446. —— —— ——.]—In an action for seduction particulars of the time & place of the alleged seduction will not be ordered on the application of deft. before delivering his defence, unless the application is accompanied by an affidavit stating his intention to deny the seduction.—KNIGHT *v.* ENGLE (1889), 61 L. T. 780, D. C.

1447. —— —— Before delivery of defence.]—KNIGHT *v.* ENGLE, No. 1446, *ante*.

1448. Right to have claim struck out—On ground of failure to prosecute felony—Administering drugs to procure abortion.]—In an action for the seduction of pltf.'s daughter a paragraph of the statement of claim alleged that deft. administered noxious drugs to the daughter for the purpose of procuring abortion :—*Held :* the paragraph could not be struck out as disclosing a felony for which deft. ought to have been prosecuted, inasmuch as pltf. was not the person upon whom the felonious act was committed, & had no duty

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KELLY *v.* BULL (1864), 23 U. C. R. 278.—**CAN.**

1439 iii. —— ——.]—Declaration by husband & wife, for seducing the daughter of the wife, by a former marriage, alleging her to be the servant of pltfs., whereby pltfs. lost her services :—*Held :* bad, for if the cause of action accrued before the intermarriage of pltfs. the girl was not then the servant of the husband, & if after she was his servant alone, so that in either case she could not be pltfs.' servant, as alleged.—GREEN *v.* WRIGHT (1865), 24 U. C. R. 245.—**CAN.**

1439 iv. —— ——.]—HOGAN *v.* AIKMAN (1870), 30 U. C. R. 14.—**CAN.**

1439 v. —— ——.]—FORD *v.* GOURLAY (1878), 42 U. C. R. 552.—**CAN.**

h. —— *Statute.*]—In an action by a father for the seduction of his daughter, who was not living with him at the time of the seduction, it is not necessary to aver in the declaration that the action is brought under the statute.—MCLEAN *v.* AINSLIE (1843), 6 O. S. 456.—**CAN.**

k. —— *Whether residence of father & mother.*]—NICKELLS *v.* GOULDING (1862), 21 U. C. R. 366.—**CAN.**

l. —— *Accord & satisfaction.*]—MCHUGH *v.* GREAR (1868), 18 C. P. 488.—**CAN.**

m. ——.]—DALEY *v.* BYRNE (1892), 15 P. R. 4.—**CAN.**

n. ——.]—BALDWIN *v.* HESLER (1917), 38 O. L. R. 172.—**CAN.**

1444 i. *Right of defendant to particulars —As to time & places of intercourse— Denial of seduction on oath.*]—Deft. having made an affidavit denying the seduction & all knowledge of it, an order was made for particulars of specific acts, with regard to which pltf. proposed to give evidence.—HOLLISTER *v.* ANNABLE (1890), 14 P. R. 11.—**CAN.**

1444 ii. —— —— ——.]—Where deft. in an action of seduction denies the seduction on oath, pltf. will be required to furnish particulars of the times & places at which it is charged that the alleged seduction took place.—MASON *v.* VANCAMP (1891), 14 P. R. 296.—**CAN.**

1444 iii. —— —— ——.]—In an action for seduction, where deft. denied upon affidavit pltf.'s allegations, an order for particulars to be given by pltf. was made before the defence was filed. —A. *v.* B. (1903), 7 O. L. R. 73.—**CAN.**

1444 iv. —— —— ——.]—In an action for seduction, where deft. denied upon affidavit pltf.'s allegations, an order for particulars to be given by pltf. was made before the defence was filed. —GAMBELL *v.* HEGGIE (1903), 24 C. L. T. 91; 2 O. W. R. 1174; 3 O. W. R. 49, 412.—**CAN.**

1444 v. ——.]—Deft. in an action for seduction is not entitled to call for particulars without making an affidavit of merits.—HANNA *v.* KEERS (1), [1896] 2 I. R. 226.—**IR.**

1444 vi. —— —— ——.]—In an action for seduction of pltf.'s daughter particulars were ordered of the name of the daughter, the dates of the alleged seduction, & the date of an alleged administration of noxious drugs, without requiring deft. to first deny the seduction on oath.—WILKINS *v.* CONNELL (1903), 22 N. Z. L. R. 961.—**N.Z.**

o. *Right to have claim struck out —On ground of failure to prosecute felony.*]—BROWN *v.* DALBY (1849), 7 U. C. R. 160.—**CAN.**

p. —— ——.]—WILLIAMS *v.* ROBINSON (1869), 20 C. P. 255.—**CAN.**

q. —— ——.]—Deft. in an action of seduction cannot move against a verdict for pltf. as contrary to law & evidence, on the ground that the evidence showed a rape. In such case, if pltf. refused to be nonsuited, the judge should discharge the jury until the criminal defence has been disposed of.—WALSH *v.* NATTRASS (1869), 19 C. P. 453.—**CAN.**

r. *Necessity for affidavit of seduction.*]—In an action by a father for the seduction of his daughter while she was living with a third person, it is not necessary to prove that an affidavit of the seduction was made & filed.—GILL *v.* BROWN (1841), 6 O. S. 142.—**CAN.**

t. *Inference of law traversed — Whether allowable.*] — MCLEOD *v.* MCLEOD (1851), 9 U. C. R. 331.—**CAN.**

u. *Plea of "not guilty" — Whether allegation of service denied.*]—

Sect. 2.—*Seduction: Sub-sect.* 7. *Sect.* 3: *Sub-sects.* 1 & 2, *A., B. (a) & (b), & C.*]

to prosecute.—APPLEBY *v.* FRANKLIN (1885), 17 Q. B. D. 93; 55 L. J. Q. B. 129; 54 L. T. 135; 50 J. P. 359; 34 W. R. 231; 2 T. L. R. 170, D. C.

Annotation:—**Distd.** Smith *v.* Selwyn, [1914] 3 K. B. 98.

Cross-examination of daughter.]—*See* Nos. 1402, 1422, *ante*.

SECT. 3.—PERSONAL INJURY TO SERVANT.

SUB-SECT. 1.—RIGHT TO PROTECT SERVANT.

1449. Assault in defence of servant—Whether defence to action.]—SEAMAN *v.* CUPPLEDICK, No. 1451, *post*.

1450. —— ——.]—A master may justify the assault, that pltf. was beating his servant, & that he prevented him, which was the assault, etc. of which pltf. complains.—TICKELL *v.* READ (1773), Lofft, 215; 98 E. R. 617.

SUB-SECT. 2.—RIGHT OF ACTION.

A. In General.

1451. For battery of servant.]—In an action of assault & battery, deft. justified in defence of his servant, that pltf. had assaulted his servant, & would have beaten him:—*Held:* master may defend his servant, & shall have action for beating him.—SEAMAN *v.* CUPPLEDICK (1615), Owen, 150; 74 E. R. 966.

1452. —— **Assault not whilst on master's business.**]—ANON. (1516), No. 1462, *post*.

1453. —— **Assault on public performer.**]—An action with a *per quod servitium amisit* will not lie for the manager of a place of public entertainment against a person for beating one of the performers, who is thereby prevented from performing.—TAYLOR *v.* NERI (1795), 1 Esp. 385, N. P.

Annotations:—**Consd.** Lumley *v.* Gye (1853), 2 E. & B 216. **Refd.** Rogers *v.* Rajendro Dutt (1860), 13 Moo. P. C. C. 209; Higgins *v.* O'Donnell (1870), 18 W. R. 378.

1454. —— **Joinder with action in trespass.**]—A count for beating pltf.'s servant *per quod servitium amisit* may be joined with counts in trespass.—DITCHAM *v.* BOND (1814), 2 M. & S. 436; 3 Camp. 526, n.; 105 E. R. 443.

Annotations:—**Consd.** Chamberlain *v.* Hazlewood (1838), 5 M. & W. 515. **Refd.** Eager *v.* Grimwood (1847), 1 Exch. 61.

1455. For injury by negligence—Excavation in highway.]—(1) If a man sends his servant upon a message of some importance, another having digged a hole in the highway, into which the servant falls, & hurts himself, so that he cannot go any farther upon his master's message, here the servant shall have an action upon the case for this, & the master also shall have his action (CROKE, J.).

(2) If a man slanders a servant at which the servant is so grieved that he cannot perform his duties, the master has no action (COKE, C.J.).

(3) Where a surgeon is employed by a master to cure his servant, the master may sue for breach of contract in not supplying wholesome medicine, but the servant cannot sue on his contract.—EVERARD *v.* HOPKINS (1615), 2 Bulst. 332; 1 Roll. Rep. 124; 80 E. R. 1164.

Annotations:—*As to* (1) **Refd.** Longmeid *v.* Holliday (1881), 6 Exch. 761. *As to* (3) **Consd.** Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213. *Generally*, **Mentd.** Hadley *v.* Baxendale (1854), 9 Exch. 341; Horne *v.* Mid. Ry. (1872), L. R. 7 C. P. 583.

1456. —— **Negligent driving.**]—A master may sue in case, for the consequential damage arising to him from an injury to his servant, though the only remedy of the servant for the injury be by action on the case also.

Where the declaration alleged that G. was & is the servant of pltfs.; that he had been injured by the negligent driving of deft., whereby pltfs. were deprived of his services, & forced to pay another person wages during his illness; on motion in arrest of judgment:—*Held:* (1) the action was maintainable; (2) it sufficiently appeared from the declaration, that G. was entitled to receive his wages from pltfs. during his illness.

(3) A general allegation of service is sufficient without stating that the servant was hired or that he was to receive a salary.—MARTINEZ *v.* GERBER (1841), 3 Man. & G. 88; Drinkwater, 231; 3 Scott, N. R. 386; 10 L. J. C. P. 314; 5 Jur. 463; 133 E. R. 1069.

Annotation:—*As to* (1) **Refd.** Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213.

1457. —— **Breach of duty arising out of contract—With servant injured.**]—One who is no party to a contract cannot sue in respect of the breach of a duty arising out of the contract.

An action will not lie against a railway co., as carriers of passengers for hire, at the suit of a master, for a personal injury sustained through their negligence by his servant, whereby the master lost the benefit of the services of the servant, the contract out of which arose the duty to carry safely being a contract between the co. & the servant.—ALTON *v.* MIDLAND RY. CO. (1865), 19 C. B. N. S. 213; 34 L. J. C. P. 292; 12 L. T. 703; 11 Jur. N. S. 672; 13 W. R. 918; 144 E. R. 768.

Annotations:—**Distd.** Meux *v.* G. E. Ry., [1895] 2 Q. B. 387. **Consd.** Taylor *v.* M. S. & L. Ry., [1895] 1 Q. B. 134. **Refd.** Dickson *v.* Reuter's Telegraph Co. (1877), 2 C. P. D. 62; Berringer *v.* G. E. Ry. (1879), 48 L. J. Q. B. 400. **Mentd.** Potter *v.* Met. Dist. Ry. (1874), 32 L. T. 36; Bradshaw *v.* L. & Y. Ry. (1875), L. R. 10 C. P. 189; Leslie *v.* Sheill, [1914] 3 K. B. 607.

1458. —— —— ——.]—Claim alleged that the servant of pltf. took a ticket & travelled by the L. T. & S. railway; that defts., the Great Eastern Ry. Co., supplied the engines, drivers, & firemen for working the traffic of the L. T. & S. railway, & also the signalmen for working the traffic at the S. Junction; that the L. T. & S. train in which the servant travelled came into collision with a train of the deft. co. at the junction through the negligence of defts.' signalmen there, that the servant was hurt, whereby pltf. lost his services & was damnified. On demurrer:—*Held:* the action was against independent wrongdoer; not parties to the contract of carriage, for a pure tort, & could therefore be maintained.—BERRINGER *v.* GREAT EASTERN RY. CO. (1879), 4 C. P. D. 163; 48 L. J. Q. B. 400; 43 J. P. 511; 27 W. R. 681.

1459. —— —— **Negligence of independent wrongdoers.**]—BERRINGER *v.* GREAT EASTERN RY. CO., No. 1458, *ante*.

1460. Slander of servant—Grief causing inability to perform duties.]—EVERARD *v.* HOPKINS, No. 1455, *ante*.

The plea of not guilty does not deny the allegation that the seduced was the servant of pltf.—ALTEMAN *v.* SMITH (1855), 4 C. P. 500.—**CAN.**

b. *Right to costs.*]—TOWNSEND *v.* STERLING (1867), 4 P. R. 125.—**CAN.**

c. ——.]—WALMSLEY *v.* MITCHELL (1884), 5 O. R. 427.—**CAN.**

d. *When amendment of pleading allowed.*]—COLE *v.* HUBBLE (1894), 26 O. R. 279.—**CAN.**

e. *Motion for dismissal of action—Three disagreements.*]—E. *v.* F. (1905), 10 O. L. R. 489.—**CAN.**

1461. Felonious injury—Necessity for previous prosecution.]—APPLEBY *v.* FRANKLIN, No. 1448, *ante*.

B. Deprivation of Service.

(*a*) *In General.*

1462. Basis of action.]—If A. beats, wounds or imprisons the servant of B., by which B. loses the servant's services, B. can bring an action of trespass against A.: not so if the servant goes to A. of his free will, although B. loses his services (FINEUX, C.J.).—ANON. (1516), Keil. 180; 72 E. R. 357.

1463. ——.]—When a master sues for assault & battery of his servant, it is necessary to allege *per quod servilium amisit*, for his master cannot recover any damages if his servant was not wounded so that by reason of this he has lost his service.—ANON. (1611), 1 Bulst. 173; 80 E. R. 863.

1464. ——.]—NORRIS *v.* BAKER (1616), J. Bridg. 47; 1 Roll. Rep. 393; 123 E. R. 1190; *sub nom.* MORRICE *v.* BAKER, 3 Bulst. 196.

Annotation:—**Refd.** Lemmon *v.* Webb, [1895] A. C. 1.

1465. ——.]—HANBURY *v.* IRELAND (1621), Cro. Jac. 618; 79 E. R. 532.

Annotation:—**Mentd.** Reynoldson *v.* Blake (1697), 1 Ld Raym. 192.

1466. ——.]—ROSIERE *v.* SAWKINS (1700), Holt, K. B. 460; 12 Mod. Rep. 399, 434; 90 E. R. 1154.

Annotations:—**Mentd.** Medina *v.* Staughton (1700), 1 Ld. Raym. 593; Card *v.* Hope (1824), 4 Dow. & Ry. K. B. 164.

1467. ——.]—A master cannot bring an action for the assault & battery of his servant unless he has thereby lost the services of the servant.—RANDLE *v.* DEAN & POPE (1700), 2 Lut. 1496; 125 E. R. 824.

Annotations:—**Refd.** Grinnell *v.* Wells (1844), 7 Man. & G. 1033. **Mentd.** East London Water Works Co. *v.* Bailey (1827), 4 Bing. 283.

1468. ——.]—If a servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself for every small battery shall have an action; & the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a *per quod*, viz. *per quod servitium*, etc. *amisit*; so that the original act is not the cause of his action, but the consequent upon it, viz. the loss of his service is the cause of his action; for be the battery greater or less, if the master does not lose the service of his servant, he shall not have an action (COKE, C.J.).—MARYS'S CASE (1612), 9 Co. Rep. 111 b; 77 E. R. 895.

Annotations:—**Expld.** Grinnell *v.* Wells (1844), 2 Dow. & L. 610. **Consd.** Pryce *v.* Belcher (1847), 11 Jur. 675. **Refd.** Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38. **Mentd.** Jeveson *v.* Moor (1699), 12 Mod. Rep. 262; Crouther *v.* Oldfield (1706), 1 Salk. 364; Hall *v.* Harding (1769), 4 Burr. 2426; Atkinson *v.* Teasdale (1772), 3 Wils. 278; Wells *v.* Watling (1778), 2 Wm. Bl. 1233; Pindar *v.* Wadsworth (1802), 2 East, 154; Robertson *v.* Hartopp (1889), 43 Ch. D. 484; King *v.* Brown, Durant, [1913] 2 Ch. 416.

1469. ——.]—No action lies for the master for battery of his servant without *per quod*, etc. (HOLT, C.J.).—RUSSEL *v.* CORN (1704), Holt, K. B. 699; 2 Ld. Raym. 1031; 6 Mod. Rep. 127; 1 Salk. 119; 87 E. R. 884.

Annotations:—**Consd.** Smalley *v.* Kerfoot (1738), Andr. 242; Grinnell *v.* Wells (1844), 2 Dow. & L. 610. **Refd.** Satterthwaite *v.* Dowhurst (1785), 4 Doug. K. B. 315; Woodward *v.* Walton (1807), 2 Bos. & P. N. R. 476; Saville *v.* Sweeny (1833), 4 B. & Ad. 514.

1470. ——.]—Trespass for driving a carriage against pltf.'s son & servant, whereby pltf. was deprived of his services & was put to expense in obtaining his cure. The child was two years & a half old, & pltf. might have placed him in an hospital which would not have occasioned any expense, but preferred having him at home:—*Held:* the loss of service was the gist of the action, & the child being incapable of performing any service by reason of his tender age, the action was not maintainable, particularly as no expense had been necessarily incurred. *Qu.:* whether the father might have maintained a special action for the expenses, if they had been necessarily incurred.—HALL *v.* HOLLANDER (1825), 4 B. & C. 660; 7 Dow. & Ry. K. B. 133; 4 L. J. O. S. K. B. 39; 107 E. R. 1206.

Annotations:—**Refd.** Harris *v.* Butler (1837), Murp. & H. 117; Grinnell *v.* Wells (1844), 7 Man. & G. 1033; Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213; Evans *v.* Walton (1867), L. R. 2 C. P. 615; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38.

(*b*) *What Constitutes Service.*

1471. Service at will.]—ANON. (1409), Y. B. 11 Hen. 4, fo. 1, pl. 2.

Annotations:—**Consd.** Evans *v.* Walton (1867), L. R. 2 C. P. 615. **Mentd.** Willowes' Case (1605), 13 Co. Rep. 1; Starkey *v.* Berton (1609), Cro. Jac. 234; Bowles *v.* Poore (1611), Cro. Jac. 282; Godfrey's Case (1613), 11 Co. Rep. 42 a.

1472. Actual service—Though servant retained by defendant.]—C. *v.* HODERNES (1442), Y. B. 21 Hen. 6, fo. 8, pl. 19.

Annotation:—**Consd.** Evans *v.* Walton (1867), L. R. 2 C. P. 615.

1473. General service—Temporary absence at time of assault.]—EDMONDSON *v.* MACHELL (1787), 2 Term Rep. 4; 100 E. R. 2.

Annotations:—**Refd.** Irwin *v.* Dearman (1809), 11 East 23. **Mentd.** Moore *v.* Tuckwell (1845), 1 C. B. 607.

1474. —— **Whether wages paid or not.**]—MARTINEZ *v.* GERBER, No. 1456, *ante*.

1475. Presumption as to service—Residence with parents.]—In an action for beating the son of pltf. stating him as the servant of the father *per quod servitium amisit*, it is not necessary to show that the son did any material business for the father; it is sufficient that he lives in his house, & is part of his family.—JONES *v.* BROWN (1794), 1 Esp. 216; Peake, 306, N. P.

Annotations: **Consd.** Hall *v.* Hollander (1825), 7 Dow. & Ry. K. B. 133. **Refd.** Evans *v.* Walton (1867), L. R. 2 C. P. 615.

1476. —— —— **Young child—When incapable of performing service.**]—HALL *v.* HOLLANDER, No. 1470, *ante*.

1477. —— —— **Occasional service by daughter—Though in service of third party.**]—A daughter who, although in the service of a third party, occasionally performs domestic duties in her father's house, is his servant so as to entitle him to recover damages for personal injuries sustained by her.—RANDALL *v.* STEVENS (1853), 23 L. T. O. S. 211.

Compare Sect. 2, sub-sect. 3, A. (*b*), *ante*.

C. When Injury results in Death.

1478. General rule.]—In a civil court the death of a human being cannot be complained of as an

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PART X. SECT. 3, SUB-SECT. 2.—C.

1. *When action lies.*]—By the law of Scotland, no action lies at the instance of a master for the loss caused to him by the death or injury of his servant through the fault of a third party.—REAVIS *v.* CLAN LINE STEAMERS, LTD. & LAIRD LINE, LTD., [1925] S. C. 725.—**SCOT.**

Sect. 3.—Personal injury to servant: Sub-sect. 2, C., D. & E. Sects. 4 & 5.]

injury (LORD ELLENBOROUGH).—BAKER *v.* BOLTON (1808), 1 Camp. 493, N. P.

Annotations:—**Apld.** Osborn *v.* Gillett (1873), L. R. 8 Exch. 88. **Consd.** Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648; Jackson *v.* Watson, [1909] 2 K. B. 193; Berry *v.* Humm, [1915] 1 K. B. 627; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38. **Apld.** The Molière, [1925] P. 27. **Refd.** Ward *v.* London & Blackwall Ry. (1845), 6 L. T. O. S. 125; Kent *v.* Atkinson, [1923] P. 142.

1479. Whether action lies—Merger of right of action in felony.]—If a man beats the servant of S. so that he dies of that battery, the master shall not have an action against the other for the battery & loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, & that drowns the particular offence, & private wrong offered to the master before, & his action is thereby lost (TANFIELD, J.).—HIGGINS *v.* BUTCHER (1606), Yelv. 89; 80 E. R. 61; *sub nom.* HUGGINS *v.* BUTCHER, 1 Brownl. 205; *sub nom.* HIGGINS' CASE, Noy, 18.

Annotations:—**Consd.** Cooper *v.* Witham (1668), 1 Sid. 375; Osborn *v.* Gillett (1873), L. R. 8 Exch. 88; Jackson *v.* Watson, [1909] 2 K. B. 193; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38. **Refd.** Wells *v.* Abrahams (1872), L. R. 7 Q. B. 554; Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561.

1480. —— When death instantaneous.]—(1) The death of a person cannot at common law be made the subject of an action for damages; & this rule extends to the action for loss of service, where the servant is killed on the spot.

(2) The defence that the act complained of amounted to a felony does not apply to an action brought against a master for damages sustained through the wrongful act of a servant.—OSBORN *v.* GILLETT (1873), L. R. 8 Exch. 88; 42 L. J. Ex. 53; 28 L. T. 197; 21 W. R. 409.

Annotations:—*As to* (1) **Apprvd.** Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648. **Consd.** Jackson *v.* Watson, [1909] 2 K. B. 193. Berry *v.* Humm, [1915] 1 K. B. 627; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38. **Refd.** Kent *v.* Atkinson, [1923] P. 142. *As to* (2) **Apld.** Appleby *v.* Franklin (1886), 17 Q. B. D. 93. **Refd.** Smith *v.* Selwyn, [1914] 3 K. B. 98.

1481. —— ——.]—A master cannot maintain an action for injuries which cause the immediate death of his servant.—CLARK *v.* LONDON GENERAL OMNIBUS CO., LTD., [1906] 2 K. B. 648; 75 L. J. K. B. 907; 95 L. T. 435; 22 T. L. R. 691; 50 Sol. Jo. 631, C. A.

Annotations:—**Consd.** Jackson *v.* Watson, [1909] 2 K. B. 193; Berry *v.* Humm, [1915] 1 K. B. 627; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38. **Refd.** Barnett *v.* Cohen, [1921] 2 K. B. 461; Kent *v.* Atkinson, [1923] P. 142.

1482. —— ——.]—ADMIRALTY COMRS. *v.* S.S. AMERIKA, No. 1489, *post*.

Measure of damages.]—*See* No. 1489, *post*.

D. Defences to Action.

1483. Interference with defendant's easement by plaintiff's servant—Forcibly prevented by defendant.]—NORRIS *v.* BAKER (1616), J. Bridg. 47; 1 Roll. Rep. 393; 123 E. R. 1190; *sub nom.* MORRICE *v.* BAKER, 3 Bulst. 196.

Annotation:—**Mentd.** Lemmon *v.* Webb, [1895] A. C. 1.

1484. Felonious act by servant of defendant—Failure to prosecute.]—OSBORN *v.* GILLETT, No. 1480, *ante*.

Immediate death of servant.]—*See* Nos. 1478–1482, *ante*.

E. Measure of Damages.

1485. Compensation for injury to feelings—Action by father.]—If pltf.'s son, who was in fact his servant, in delivering parcels from a stage coach, receive an injury, by which the father is deprived of his services, the father is not entitled, as part of the damages in an action for loss of his son's services, to have a compensation for the injury done to his parental feelings.—FLEMINGTON *v.* SMITHERS (1826), 2 C. & P. 292.

1486. Prospective damages—Permanent injury of servant.]—In an action for permanently injuring the hand of an apprentice, whereby loss of service accrued, the master may recover for prospective damage, for the damage alone is not the cause of action, but the illegal act & the damage together, & the master could not bring a fresh action as often as fresh damage resulted.—HODSOLL *v.* STALLEBRASS (1840), 11 Ad. & El. 301; 8 Dowl. 482; 3 Per. & Dav. 200; 9 L. J. Q. B. 132; 113 E. R. 429.

Annotations:—**Refd.** Russell *v.* Shinn (1861), 2 F. & F. 395; Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213; Osborn *v.* Gillett (1873), L. R. 8 Exch. 88; Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141. **Mentd.** Darley Main Colliery Co. *v.* Mitchell (1886), 11 App. Cas. 127.

1487. Wages paid during illness of servant.]—MARTINEZ *v.* GERBER, No. 1456, *ante*.

1488. Compensation paid to servant by master.]—Pltfs., a firm of stevedores, contracted to discharge a cargo from deft.'s ship, deft. agreeing to supply all necessary cranes, chains, & other gearing reasonably fit for that purpose. Deft. in breach of his agreement supplied a defective chain, which broke while being used, & in consequence one of pltfs.' workmen was injured. Pltfs. might have discovered the defect in the chain by the exercise of reasonable care. The workman brought an action for compensation under Employers' Liability Act, 1880 (c. 42), ss. 1, 2, against pltfs., who settled the action by paying the workman £125, which sum they sought to recover from deft. as damages for breach of his contract. It was not disputed that the settlement of the action brought by the workman was a proper one:—*Held:* pltfs.' liability to pay compensation to their workman was the natural consequence of deft.'s breach of contract, & such as might reasonably be supposed to have been within the contemplation of the parties when the contract was entered into, & therefore the damages claimed were not too remote.—MOWBRAY *v.* MERRYWEATHER, [1895] 2 Q. B. 640; 65 L. J. Q. B. 50; 73 L. T. 459; 59 J. P. 804; 41 W. R. 49; 12 T. L. R. 14; 40 Sol. Jo. 9; 14 R. 767, C. A.

Annotations:—**Refd.** Hawkins *v.* Smith (1896), 12 T. L. R. 532. **Mentd.** Scott *v.* Foley, Aikman (1899), 5 Com. Cas. 53; Vogan *v.* Oulton (1899), 81 L. T. 435; Bentley *v.* Metcalfe (1906), 75 L. J. K. B. 891.

1489. Amount of pensions payable to relatives of deceased servant—Voluntary payments in nature of compassionate allowances—Remoteness.]—One of His Majesty's submarines was run into & sunk by a steamship & the crew were drowned. In an action of damage by collision brought by the Comrs. for executing the Office of Lord High Admiral of the United Kingdom against the owners of the steamship, defts. submitted to judgment on the basis of paying to pltfs. 95 per cent. of their damage to be assessed by the Admlty. Registrar. Pltfs. claimed as an item of damage the capitalised amount of the pensions payable by them to the relatives of deceased men:—

PART X. SECT. 3, SUB-SECT. 2.—E. g. *Medical expenses.*]—In an action by a master against a person who has injured his servant the expenses of medical attendance on the servant may be recovered as part of the damages for loss of service.—SMAILL *v.* ALEXANDER (1904), 23 N. Z. L. R. 745.—N.Z.

Held: the claim failed; on the principle of *Baker* v. *Bolton*, No. 1478, *ante*, that in a civil ct. the death of a human being could not be complained of as an injury &, on the ground of remoteness, the pensions being voluntary payments in the nature of compassionate allowances.—ADMIRALTY COMRS. *v.* SS. AMERIKA, [1917] A. C. 38; *sub nom.* ADMIRALTY COMRS. *v.* THE AMERIKA (OWNERS), THE AMERIKA, 86 L. J. P. 58; 116 L. T. 34; 33 T. L. R. 135; 61 Sol. Jo. 158; 13 Asp. M. L. C. 558, H. L.; *affg.* S. C. *sub nom.* THE AMERIKA, [1914] P. 167, C. A.

Annotations:—**Refd.** Berry *v.* Humm, [1915] 1 K. B. 627; Bradford Corpn. *v.* Webster, [1920] 2 K. B. 135; Baker *v.* Dalgleish Steam Shipping Co., [1922] 1 K. B. 361. **Mentd.** The Molière, [1925] P. 27.

1490. Special pension payable on disablement.]—By the contract entered into in 1901 between a municipal corpn. & a constable in their service, the constable, if injured in the execution of his duty, was entitled to full pay during his incapacity. By the Police Act, 1890 (c. 45), & Regs. thereunder, the constable, if he had been able to serve until 1926, would have been entitled to retire on an annual pension of about £67, but, if at any time he was permanently incapacitated by injury in the execution of his duty, he was to be entitled to a special pension at a higher rate. Pensions were paid out of a police pension fund to which the corpn. contributed only 31¾ per cent., the rest of the fund being derived from other sources. In Sept. 1917, the constable, then aged thirty-nine, was injured in the execution of his duty by a steam wagon belonging to deft. in charge of his employee. From the date of the constable's injury to Oct. 1918, when it was first known that he was permanently incapacitated, the corpn. paid him his full wages, amounting to £185 0*s.* 10*d.*, & as from the latter date they awarded him a special pension for life of about £99 *per annum*. In June, 1919, the corpn. brought an action against deft. for damages for loss of service of the constable by the alleged negligence of deft.'s employee which deft. admitted:—*Held:* pltf. corpn. was entitled to recover, as damages in respect of the wages paid to the constable, the amount thereof, namely, £185 0*s.* 10*d.*,; in view more particularly of the facts that in consequence of the injury to the constable the corpn. had to pay him a pension sooner & at a higher rate than would otherwise have been the case, the corpn. was entitled to recover as damages in respect of the pension, a sum which in all the circumstances would be fairly assessed at £150; & there should therefore be judgment for the Corporation for £335 0*s.* 10*d.*—BRADFORD CORPN. *v.* WEBSTER, [1920] 2 K. B. 135; 89 L. J. K. B. 455; 123 L. T. 62; 84 J. P. 137; 36 T. L. R. 286; 64 Sol. Jo. 324; 18 L. G. R. 199.

See, also, Nos. 1462–1477, *ante*.

SECT. 4.—LOSS OF AND INJURY TO PROPERTY.

1491. Robbery of servant—Who may sue.]—Master brings action where the servant is robbed in an inn.—BEDLE *v.* MORRIS (1609), Yelv. 162; 80 E. R. 108; *sub nom.* BEEDLE *v.* MORRIS, Cro. Jac. 224.

1492. ——— ———.]—A master may maintain an action in his own name on the Statute of Hue & Cry for a robbery committed on his servant & the servant shall be sworn.——— *v.* ——— HUNDRED (INHABITANTS) (1633), Cro. Car. 336; 79 E. R. 894; *affg.* S. C. *sub nom.* REYMUND *v.* OKING HUNDRED (1626), Cro. Car. 37.

Annotation:—**Mentd.** Culliford *v.* Blandford (1691), Comb. 194.

1493. ——— ——— **Loss whilst servant at inn.**]—If a man's servant carries his master's horse to an inn, & there leaves him, & is stolen away; an action lies here for the master, as well as for the servant against the innkeeper (MONTAGUE, C.J.).—ROBINSON *v.* WALTER (1617), 3 Bulst. 269; Poph. 127; 1 Roll. Rep. 449; 81 E. R. 227.

Annotations:—**Refd.** Threlfall *v.* Borwick (1872), 26 L. T. 794; Robins *v.* Gray, [1895] 2 Q. B. 501. **Mentd.** Yorke *v.* Grenaugh (1703), 2 Ld. Raym. 866; Turrill *v.* Crawley (1849), 13 Q. B. 197.

1494. ——— ——— ———.]—DROPE *v.* THEYAR (1626), Poph. 178; Benl. 173; Lat. 126; Noy, 79; 79 E. R. 1274; *sub nom.* DROPE & THAYRE'S CASE, 2 Dyer, 158 b, n.

Annotations:—**Mentd.** York *v.* Grindstone (1704), 1 Salk. 388; Strauss *v.* County Hotel Co. (1883), 32 W. R. 170.

1495. ——— ——— **Robbery in presence of master.**]—Where a servant is robbed, & not in the presence of his master, the servant may bring the action upon the statute; but if in the presence of his master, then the master may bring the action.—ASHCOMB *v.* ELTHORN HUNDRED (1690), Carth. 145; 3 Mod. Rep. 287; Holt, K. B. 637; 90 E. R. 689; *sub nom.* ASCOMB *v.* SPELHOLM HUNDRED, 2 Salk. 613; *sub nom.* ASHCOMBE *v.* SPELHOLME HUNDRED, 1 Show. 241.

Annotation:—**Mentd.** Nesham *v.* Armstrong (1817), 1 B. & Ald. 146.

1496. ——— ——— ———.]—In an action by the master on the Statute of Hue & Cry for the robbery of his servant, the declaration may allege that the thieves robbed the servant, though it states that the master was in company.—WILLAN *v.* STANCLIFFE HUNDRED (1703), 2 Ld. Raym. 904; 92 E. R. 103.

Liability of railway company—Luggage sent with passenger's servant.]—*See* CARRIERS, Vol. VIII., p. 121, Nos. 811–813.

SECT. 5.—MAINTENANCE OF ACTION ON BEHALF OF SERVANT.

As to maintenance generally, *see* ACTION, Vol. I., pp. 66 *et seq.*

1497. Right to maintain servant.]—ROTHEWEL *v.* PEWER (1431), Y. B. 9 Hen. 6, fo. 64, pl. 17.

Annotations:—**Mentd.** Philipps *v.* Robinson (1827), 5 L. J. O. S. C. P. 111; Harris *v.* Brisco (1886), 55 L. T. 14.

1498. ———.]—Maintenance justifiable from the privity of the parties in estate or their connection as master & servant.—WALLIS *v.* PORTLAND (DUKE) (1797), 3 Ves. 494; 30 E. R. 1123; *on appeal* (1798), 8 Bro. Parl. Cas. 161.

Annotations:—**Mentd.** Stevens *v.* Bagwell (1808), 15 Ves. 139; Findon *v.* Parker (1843), 12 L. J. Ex. 444; Reynell *v.* Spryc (1852), 1 De G. M. & G. 660; *Re* Cambrian Mining Co. (1882), 48 L. T. 114; Bradlaugh *v.* Newdigate (1883), 11 Q. B. D. 1; Harris *v.* Brisco (1886), 17 Q. B. D. 504; Alabaster *v.* Harness, [1895] 1 Q. B. 339; Neville *v.* London Express Newspaper, [1919] A. C. 368.

1499. ——— **Action against servant—Libel.**]—A nursing assocn. incorporated by Royal charter were the proprietors & publishers of a newspaper on nursing, & employed one of the members of the assocn. as honorary editor. An action for libel having been brought against the editor alone in respect of an article inserted in the newspaper under the express instructions of the assocn.:

Sect. 5.—Maintenance of action on behalf of servant. Part XI. Sects. 1 & 2: Sub-sects. 1, 2 & 3.]

—*Held:* as a matter of ordinary business, & apart from any question as to the legal right of the editor to be indemnified, the funds of the assocn. could be lawfully applied in undertaking the defence of the action.—BREAY *v.* ROYAL BRITISH NURSES' ASSOCN., [1897] 2 Ch. 272; 66 L. J. Ch. 587; 76 L. T. 735; 46 W. R. 86; 13 T. L. R. 467, C. A.

Annotation:—**Mentd.** Jenkin *v.* Pharmaceutical Soc. of Great Britain, [1921] 1 Ch. 392.

1500. ——— ——— ———.]—HICKMAN *v.* KENT OR ROMNEY MARSH SHEEPBREEDERS' ASSOCN. (1920), 37 T. L. R. 163, C. A.

See, also, ACTION, Vol. I., p. 83, Nos. 674–679.

Part XI.—Liabilities of the Servant to Third Persons.

SECT. 1.—IN CONTRACT.

1501. Goods purchased for master's use.]—If a servant make a bill acknowledging the purchase of goods for his master's use, & bind himself to pay, but do not seal the bill, debt will not lie against him, but case on the *assumpsit*.—ALFORD *v.* EGLISFIELD (1564), 2 Dyer, 230 b; 73 E. R. 509.

Annotations:—**Distd.** Spearman *v.* Moreland (1706), Holt, K. B. 20. **Reld.** Manby *v.* Scott (1663), 1 Sid. 109.

1502. Solicitor's costs—Retained by servant for master.]—An attorney or solr. may have either debt or *assumpsit* for his fees against the agent by whom he was retained.—BRADFORD *v.* WOODHOUSE (1619), Cro. Jac. 520; Jenk. 332; 79 E. R. 445.

Bottomry bonds.]—*See* SHIPPING.

Rates.]—*See* RATES & RATING.

See, further, AGENCY, Vol. I., pp. 620 *et seq.*

SECT. 2.—IN TORT.

SUB-SECT. 1.—IN GENERAL.

As to liability of master for torts of servant, *see* Part IX., Sect. 3, *ante*.

1503. Servant acting without authority.]—BROWN *v.* NEWPORT DOCK CO. (1857), 28 L. T. O. S. 252.

1504. Servant acting for own advantage.]—If a parcel be given to a wagoner for him to carry for his own gain, & not for the profit of his master, the master is not liable in case the parcel be lost.—BUTLER *v.* BASING (1827), 2 C. & P. 613.

1505. ——.]—Pltf., who was a child of fourteen years of age, was being educated at a provided school. One of the teachers of the school directed her to go to a room used in common by the teachers, & to attend to the fire in that room. The fire was used for cooking this particular teacher's food. While she was attending to the fire pltf.'s clothes became alight & she was injured. In an action for damages for negligence, brought by her against the teacher & deft. corpn., who were the local education authority, a jury awarded pltf. £300 damages:—*Held:* the teacher was liable, & the education authority were also liable on the ground that the teacher was put by them in a position in which it was intended that her orders should be obeyed by the children, & the order given by her in the present case was, therefore, one for which the education authority were liable.—SMITH *v.* MARTIN & KINGSTON-UPON-HULL CORPN., [1911] 2 K. B. 775; 80 L. J. K. B. 1256; 105 L. T. 281; 27 T. L. R. 468; 55 Sol. Jo. 535; *sub nom.* SMITH *v.* HULL CORPN. & MARTIN, 75 J. P. 433; *sub nom.* MARTIN *v.* SMITH, SMITH *v.* MARTIN & HULL CORPN., 9 L. G. R. 780, C. A.

Annotations:—**Mentd.** Gillow *v.* Durham County Council, [1911] 2. K. B. 1074; Smith *v.* Macnally, [1912] 1 Ch. 816.

1506. Servant promising on behalf of master—Refusal of master to perform.]—Where a servant received a bill of exchange from A. making a promise that his master should discount it, which he then delivered to his master, who kept the bill as a security for money due from A. & refused to discount it:—*Held:* the servant was liable to an action of trover for the recovery of the bill.—CRANCH *v.* WHITE (1835), 1 Bing. N. C. 414; 1 Hodg. 61; 1 Scott, 314; 4 L. J. C. P. 113; 131 E. R. 1176.

Annotation:—**Reld.** Davies *v.* Vernon (1844), 6 Q. B. 443.

1507. Servant acting within scope of employment.]—JANVIER *v.* SWEENEY, No. 1171, *ante*.

Acts of underservants.]—*See* AGENCY, Vol. I., p. 683, Nos. 2924–2925.

Liability of Crown servants.]—*See* AGENCY, Vol. I., p. 655, No. 2727.

See, also, AGENCY, Vol. I., pp. 682 *et seq.*

SUB-SECT. 2.—ACT DONE IN CAPACITY OF SERVANT.

1508. Whether servant liable.]—A parcel delivered to the guard of a mail coach & by him to the porter of the inn where the mail stops, whose business it is to carry out the parcels brought by the coach, receiving for such duty a portion of the sum demanded for carriage, does not make such porter personally responsible for its loss.

It is impossible not to say that the porter is merely a servant in this case & therefore not responsible (RICHARDS, B.).—CAVENAGH *v.* SUCH (1815), 1 Price, 328; 145 E. R. 1419.

1509. ——.]—A porter, who in the course of his business, delivers parcels containing libellous handbills, is not liable in an action for libel, if he be shown to be ignorant of the contents of the parcel.—DAY *v.* BREAM (1837), 2 Mood. & R. 54, N. P.

Annotation:—**Mentd.** Martin *v.* British Museum Trustees & Thompson (1894), 10 T. L. R. 338.

1510. ——.]—Where a fraud is committed, all the parties are principals, & if two parties, one of whom is servant of the other, concur in committing the fraud, & injury accrues, the servant as well as the master is liable to the third party injured.—CULLEN *v.* THOMSON'S TRUSTEES &

PART XI. SECT. 2, SUB-SECT. 1.

h. *Servant acting within scope of employment—Not liable for inevitable accident.*]—MURPHY *v.* DULHANTY (1871), 8 N. S. R. 294.—**CAN.**

PART XI. SECT. 2, SUB-SECT. 2.

1508 i. *Whether servant liable.*]—MCDONALD *v.* DICKENSON (1897), 24 A. R. 31.—**CAN.**

KERR (1862), 4 Macq. 424; 6 L. T. 870; 26 J. P. 611; 9 Jur. N. S. 85, H. L.

Annotations:—**Refd.** Swift *v.* Winterbotham & Goddard (1873), L. R. 8 Q. B. 244; Weir *v.* Bell (1878), 3 Ex. D. 238; Burdett *v.* Horne (1911), 27 T. L. R. 402. **Mentd.** Peek *v.* Gurney (1873), L. R. 6 H. L. 377.

1511. ——.]—W. was surveyor to the owner of an estate, to which estate he, W., also acted as steward. The owner directed W. to make inquiries as to the existence on the estate of a house of bad character. W. in the course of his inquiries was referred to the house of B., but doubting the accuracy of his information made further inquiries & in the course of doing so mentioned what he had heard of the character of B.'s house. He then ascertained that the address of B.'s house had been given him erroneously, & that, by a mistake in the number of the street, a reference had been made to B.'s house which was intended for another residence. In an action filed for libel by B. against W. for the statements made by W. while following up the inquiries directed by his employer, & the further pursuit of which inquiries had been suggested by the erroneous information he, W., had received as to B.'s house. The judge directed the jury to consider whether the statements made by W. had been made in the course of the inquiries he had been directed by his employer to make, & whether such inquiries were in excess of his duty, & beyond the directions he had received from his employer or not, but did not direct them, that if the statements relied upon as slanderous were only made in the necessary course of pursuing the inquiries he had been directed by his employer to make, he would have been within his duty, & they, the jury, should then consider whether there was any proof of express malice or not:—*Held:* this direction was wrong, & in the absence of evidence of actual malice, the judge ought to have pointed out to the jury all the evidence bearing upon the character of deft.'s employment & the course of duty in which the statements charged as slanderous were made in order that the jury might have expressly found whether such statements were or were not made in pursuance of his duties under his employment, & the ct. have been enabled to decide upon such finding whether there was or was not existing such malice as would be implied by law & which might be rebutted by the character of privileged communication attaching to such statements.—BRETT *v.* WATSON (1872), 20 W. R. 723.

1512. ——.]—P., as servant of a freeholder, who held a conveyance of the manor & the right of fishery, cut the nets of a copyholder while fishing. P., on being summoned for assault, produced the conveyance, but no evidence was given of the freeholder ever having exercised the right, while evidence was given that all copyholders had the right to fish, & had exercised it for fifty years:—*Held:* the justices were right in convicting P., & in overruling the claim of right set up by him in the name of his master.—PRIEST *v.* ARCHER (1887), 51 J. P. 725, D. C.

1513. ——.]—*Semble:* a servant who, acting *bonâ fide* within the scope of his authority, procures the breach of a contract between his employer & a third person, is not liable to an action of tort at the suit of that third person.—SAID *v.* BUTT, [1920] 3 K. B. 497; 90 L. J. K. B. 239; 124 L. T. 413; 36 T. L. R. 762.

Annotation:—**Mentd.** Dyster *v.* Randall, [1926] Ch. 932.

1514. Whether acting as servant question for jury.]—Where one of the trespassers is servant to the others, it is a question for the jury, whether he acted merely as servant, or whether he were so implicated in the matter as to make himself a principal trespasser.—PETRIE *v.* LAMONT (1841), Car. & M. 93.

Annotations:—**Refd.** Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244; Performing Right Soc. *v.* Mitchell & Booker (Palais de Danse), [1924] 1 K. B. 762; Falcon *v.* Famous Players Film Co., [1926] 1 K. B. 393. **Mentd.** The Koursk, [1924] P. 140.

SUB-SECT. 3.—ACT IN OBEDIENCE TO EXPRESS ORDERS.

1515. Whether servant liable—Trespass.]—A servant may justify the bringing of his fellow servant *vi et armis* from a conventicle, or an alehouse, by the command of his master.—ANON. (1677), 2 Mod. Rep. 107; 86 E. R. 1003.

Annotation:—**Mentd.** R. *v.* Elliams (1734), 7 Mod. Rep. 223.

1516. —— ——.]—Trover will not lie against a servant for an unlawful intermeddling with the goods of any person by the command of his master, unless such intermeddling amount to a trespass; & then an action of trespass will lie against the servant, though done by the command of the master.—MIRES *v.* SOLEBAY (1677), 2 Mod. Rep. 242; 86 E. R. 1050.

Annotations:—**Apld.** Alexander *v.* Southey (1821), 5 B. & Ald. 247. **Refd.** Davies *v.* Vernon (1844), 6 Q. B. 443.

1517. —— ——.]—A servant is answerable for a tortious act done for the benefit of his master, although it be done by the command of his master.—PERKINS *v.* SMITH (1752), Say. 40; 1 Wils. 328; 96 E. R. 796.

Annotations:—**Apld.** Cranch *v.* White (1835), 1 Bing. N. C. 414; Bennett *v.* Bayes (1860), 5 H. & N. 391. **Refd.** Alexander *v.* Southey (1821), 5 B. & Ald. 247; Davies *v.* Vernon (1844), 6 Q. B. 443. **Mentd.** Stephenson *v.* Hart (1828), 1 Moo. & P. 357; Garland *v.* Carlisle (1837), 11 Bli. 421.

1518. —— ——.]—In an action of assault & battery, *de injuria* is good replication to a plea, stating that E. & B. were possessed of a close, & pltf. was making noise, etc., & defts., as servants of E. & B. & by their command, requested him to depart & he refused, whereupon defts., as the servants of E. & B. gently laid hands, etc., & because pltf. resisted, defts., as servants, etc., & by command, etc., a little hurt, etc.—PIGGOTT *v.* KEMP (1832), 1 Cr. & M. 197; 149 E. R. 373; *sub nom.* PIGOTT *v.* KEMP, 3 Tyr. 128.

Annotations:—**Mentd.** Bowler *v.* Nicholson (1840), 12 Ad. & El. 341; Purchell *v.* Salter (1841), 10 L. J. Q. B. 81.

1519. —— ——.]—If a master, having a doubt, or no doubt of his own rights, sets his servants to build a wall in a mine, they would, if he proved to have no right, be all liable in an action of trespass, but it would not be felony in the servants. . . . What I feel is this, that if these men acted *bonâ fide* . . . conceiving that he had the right which he claimed, they are not within this Act [7 & 8 Geo. 4, c. 30]. But if . . . [they] knew that it was a malicious act on the part of the master, I think then they would be guilty of the offence charged (LORD ABINGER, C.B.).—R. *v.* JAMES (1837), 8 C. & P. 131.

Annotation:—**Mentd.** R. *v.* Day (1844), 8 J. P. 186.

1520. —— ——.]—To a declaration in trespass *quare clausum fregit*, deft. pleaded that the *locus in quo* was the soil & freehold of T.: & justified as servant, & by command, of T. Replication, traversing the command. T. was a minor & ward in Chancery, & deft. the receiver & general agent for the estate:—*Held:* from this the jury might infer a general authority to do the act, &, if they so inferred, ought to find for deft. & upon this issue, pltf. was not entitled to show that he held under a lease, & to insist that the act was therefore such as an infant could not authorise.—EWER *v.*

Sect. 2.—In tort: Sub-sects. 3, 4, 5, 6 & 7, A., B., C., D. & E. Sect. 3: Sub-sect. 1.]

JONES (1846), 9 Q. B. 623; 16 L. J. Q. B. 42; 10 Jur. 965; 115 E. R. 1412; *sub nom.* URE *v.* JONES, 8 L. T. O. S. 135.

1521. —— ——.]—BRETT *v.* WATSON, No. 1511, *ante.*

1522. —— ——.]—Plff., the occupier of land through which an alleged highway ran, locked a gate which closed the path. On this the highway board of the district held a meeting at which all defts. except the surveyor to the board, were present, & a resolution was passed to which all defts. except the clerk & surveyor were parties, declaring the path to be a public road. A formal order, signed by the clerk, was given to the surveyor directing him to remove the lock, & this he did. Plff. thereon joined as defts. in an action of trespass, the clerk, the surveyor, & the individual members of the board:—*Held:* the surveyor was liable as he removed the lock, for a servant who does an unlawful act cannot justify it as having been done by his master's order.—MILL *v.* HAWKER (1874), L. R. 9 Exch. 309; 43 L. T. Ex. 129; 30 L. T. 894; 23 W. R. 26; *affd. on appeal* (1875), L. R. 10 Exch. 92, Ex. Ch.

Annotation:—**Mentd.** Denny *v.* Thwaites (1876), 2 Ex. D. 21.

1523. —— **Infringement of trade mark.**]—DIXON *v.* FAWCUS, No. 1544, *post.*

SUB-SECT. 4.—RATIFICATION BY MASTER.

See, generally, AGENCY, Vol. I., pp. 418 *et seq.*

Levying of distress.]—*See* DISTRESS, Vol. XVIII., p. 331, Nos. 643–647.

SUB-SECT. 5.—ACT IN MASTER'S INTEREST AND FOR HIS BENEFIT.

1524. Whether servant liable.]—PERKINS *v.* SMITH, No. 1517, *ante.*

1525. ——.]—A servant may be charged in trover, although the act of conversion be done by him for the benefit of his master.—STEPHENS *v.* ELWALL (1815), 4 M. & S. 259; 105 E. R. 830.

Annotations:—**Consd.** Cranch *v.* White (1835), 1 Bing. N. C. 414. **Apprvd.** Hollins *v.* Fowler (1875), L. R. 7 H. L. 757. **Apld.** Winter *v.* Bancks (1901), 84 L. T. 504. **Refd.** Alexander *v.* Southey (1821), 5 B. & Ald. 247; Stephenson *v.* Hart (1828), 1 Moo. & P. 357; Garland *v.* Carlisle (1837), 4 Scott, 587; Kynaston *v.* Crouch (1845), 14 M. & W. 266; Symonds *v.* Atkinson (1856), 1 H. & N. 146; McEntire *v.* Potter (1889), 22 Q. B. D. 438; Gordon *v.* London, City & Midland Bank, Gordon *v.* Capital & Counties Bank (1900), 83 L. T. 762. **Mentd.** Price *v.* Helyar (1828), 1 Moo. & P. 541; Balme *v.* Hutton (1833), 9 Bing. 471; Sharland *v.* Mildon, Sharland *v.* Loosemore (1846), 5 Hare, 469; Barker *v.* Furlong, [1891] 2 Ch. 172.

Assaults in defence of master's person or property.]—*See* Sub-sect. 7, D., *post.*

See, also, AGENCY, Vol. I., pp. 682, 683, Nos. 2919–2923.

SUB-SECT. 6.—EFFECT OF NON-FEASANCE.

1526. Whether servant liable.]—A servant not chargeable for neglect only for misfeasance.—LANE *v.* COTTON (1701), as reported in 12 Mod. Rep. 472, 488; 1 Ld. Raym. 646; 1 Salk. 17; 88 E. R. 1458.

Annotations:—**Refd.** Jones *v.* Hart (1697), 2 Salk. 441; Perkins *v.* Smith (1752), Say. 40; Woods *v.* Finnis (1852), 16 Jur. 936; Bennett *v.* Bayes (1860), 5 H. & N. 391. **Mentd.** R. *v.* Cotton (1751), Park. 112; Whitfield *v.* Le Despencer (1778), 2 Cowp. 754; Nicholson *v.* Mouncey (1812), 15 East, 384; Laugher *v.* Pointer (1826), 5 B. & C. 547; Muspratt *v.* Gregory (1836), 1 M. & W. 633; Duncan *v.* Findlater (1839), 6 Cl. & Fin. 894; Johnson *v.* Mid. Ry. (1849), 4 Exch. 367; Hearn *v.* L. & S. W. Ry. (1855), 24 L. J. Ex. 180; R. *v.* Gibbs (1855), Dears. C. C. 445; R. *v.* Kay (1857), 26 L. J. M. C. 119; Mersey Dock Trustees *v.* Gibbs (1866), L. R. 1 H. L. 93; R. *v.* Treasury Lords Comrs. (1872), 41 L. J. Q. B. 178; Bainbridge *v.* Postmaster General, [1906] 1 K. B. 178; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858; Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94; G. N. Ry. *v.* L. E. P. Transport & Depository, [1922] 2 K. B. 742.

1527. —— **Non-repair of highway.**]—A surveyor of highways is not personally responsible for injury arising from non-repair of the highways.

Although the servant of the parish for the performance of these duties, there is nothing to show an intention to make him liable for the non-performance of the duties of his master (WILLES, J.) —YOUNG *v.* DAVIS (1863), 2 H. & C. 197; 2 New Rep. 205; 9 L. T. 145; 10 Jur. N. S. 79; 11 W. R. 735; 159 E. R. 82, Ex. Ch.

Annotations:—**Refd.** Mill *v.* Hawker & Wickett (1874), 30 L. T. 894; Taylor *v.* Greenhalgh (1874), L. R. 9 Q. B. 487. **Mentd.** Hartnall *v.* Ryde Comrs. (1863), 4 B. & S. 361; Parsons *v.* St. Mathew, Bethnal Green (1867), L. R. 3 C. P. 56; Wilson *v.* Halifax Corpn. (1868), L. R. 3 Exch. 114; Gibson *v.* Preston Corpn. (1870), L. R. 5 Q. B. 218; Holborn Grdns. *v.* St. Leonard's Shoreditch Vestry (1876), 41 J. P. 38; Loughborough Highway Board *v.* Curzon (1886), 16 Q. B. D. 565; R. *v.* Poole Corpn. (1887), 19 Q. B. D. 602; Cowley *v.* Newmarket L. B., [1892] A. C. 345; Saunders *v.* Holborn Board of Works (1894), 71 L. T. 519; Rundle *v.* Hearle, [1898] 2 Q. B. 83; Maguire *v.* Liverpool Corpn., [1905] 1 K. B. 767.

SUB-SECT. 7.—LIABILITY FOR PARTICULAR TORTS.

A. Negligence.

See, generally, NEGLIGENCE.

1528. Whether servant liable—Negligent driving.]—MORETON *v.* HARDERN, No. 1121, *ante.*

1529. —— —— **Joint liability with master.**]—WHITAMORE *v.* WATERHOUSE, No. 1037, *ante.*

——.]—*See, also,* Nos. 1505–1508, *ante.*

B. Trespass.

See, generally, AGENCY, Vol. I., pp. 686, 687, Nos. 2956–2959.

1530. Whether servant liable—Trespass to land.]—WILSON *v.* WEDDELL (1608), Yelv. 144; 1 Brownl. 143; 80 E. R. 97.

Annotations:—**Mentd.** Doe d. Tofield *v.* Tofield (1809), 11 East, 246; Wainewright *v.* Elwell (1816), 1 Madd. 627; Right d. Taylor *v.* Banks (1832), 3 B. & Ad. 664; King *v.* Turner (1833), 1 My. & K. 456.

1531. Wrongful detention of railway passenger—Non-payment of fare.]—WHELDALE *v.* NORTHERN & EASTERN RY. CO. (1844), 3 L. T. O. S. 59.

See, also, Nos. 1514, 1516, 1519, 1520, *ante.*

C. Trover and Conversion.

See, generally, AGENCY, Vol. I., pp. 683–685, Nos. 2929–2945.

1532. Whether servant liable—Money received as servant—Misapplied by servant.]—CADY *v.* WEBSTER, No. 1035, *ante.*

1533. —— **Goods received as servant—Servant of carrier.**]—HARVEY *v.* SYLIARD, No. 1034, *ante.*

1534. —— —— **Proof of delivery to master.**]—The servant of a party who had been bargaining for the purchase of a chattel, came to the owner & said that his master desired to look at it, &

would keep it if approved of. The chattel was in consequence delivered to the servant, but was neither purchased nor returned. Trover was brought against the servant:—*Held:* the master was a competent witness to prove in defence, that the message had been delivered by his authority, & the chattel received & kept by him.—GRYLLS *v.* DAVIES (1831), 2 B. & Ad. 514; 109 E. R. 1234.

Annotation:—**Mentd.** Hearn *v.* Turner (1846), 2 C. B. 535.

1535. —— —— **Right of refusal to deliver up.**]—Where goods, the property of pltf., had been, by the servants of an insurance co., carried to a warehouse, of which deft., a servant of the co., kept the key, & deft., on being applied to by pltf. to deliver them up refused to do so without an order from the co.:—*Held:* this was not such a refusal as amounted to a conversion of the goods by deft.—ALEXANDER *v.* SOUTHEY (1821), 5 B. & Ald. 247; 106 E. R. 1183.

Annotations:—**Refd.** Mollin *v.* Kelshaw (1830), 1 Tyr. 109; Cranch *v.* White (1835), 1 Bing. N. C. 414; Garland *v.* Carlisle (1837), 4 Scott, 587; Davies *v.* Vernon (1844), 6 Q. B. 443; Lee *v.* Bayes (1856), 18 C. B. 599; Barnett *v.* Crystal Palace Co. (1861), 4 L. T. 403; Hollins *v.* Fowler (1875), L. R. 7 H. L. 757. **Mentd.** Hawkes *v.* Dunn (1831), 1 Cr. & J. 519; Clark *v.* Chamberlain (1836), 2 M. & W. 78.

1536. —— —— ——.]—A servant or agent who has received goods from his master or principal, may, on a demand made by the true owner of the goods, give a qualified refusal to deliver them up, without being liable to an action of trover; but where a bailee sets up or relies upon the title of his bailor, in answer to such demand, his refusal is evidence of a conversion by him.

A. lost a horse & found it at R.'s stable & R. refused to deliver it up, & said it belonged to B., & then both B. & R. refused; afterwards B. said he bought it at X.'s, not being market overt, which turned out to be true. A. then offered R. & B. separately an indemnity, if they would deliver the horse up, but R. refused to let it go, & B. said he left the matter entirely to R. In an action of trover against B. & R.: *Held:* there was sufficient evidence of conversion by R.—LEE *v.* BAYES (1856), 18 C. B. 599; 27 L. T. O. S. 157; 20 J. P. 694; 139 E. R. 1504; *sub nom.* LEE *v.* ROBINSON & BAYES, 25 L. J. C. P. 219; 2 Jur. N. S. 1093.

Annotations:—**Mentd.** Hargreave *v.* Spink, [1892] 1 Q. B. 25; Clayton *v.* Le Roy, [1911] 2 K. B. 1031.

——.]—*See, also,* Nos. 1506, 1516, 1525, *ante.*

D. Assault.

1537. Whether servant liable—Assault in defence of master.]—Servant may justify an assault in defence of his master.—LEEWERD *v.* BASILEE (1695), 1 Salk. 407; 91 E. R. 353; *sub nom.* LEWARD *v.* BASELY, 1 Ld. Raym. 62.

1538. —— ——.]—SHINGLETON *v.* SMITH (1699), 2 Lut. 1481; 125 E. R. 816.

Annotation:—**Mentd.** Weaver *v.* Bush (1798), 8 Term Rep. 78.

1539. —— ——.]—BARKER *v.* REYNOLDS & WESTWOOD (1733), Kel. W. 134; 25 E. R. 531; *sub nom.* BARFOOT *v.* REYNOLDS, 2 Stra. 953.

1540. —— —— **Assault on master justifiable.**]—Where to an action for an assault deft. justifies in defence of his master, pltf. cannot show his assault on the master to have been justifiable on the general replication, *de injuria sua propria,* but must new assign.—WEBBER *v.* LIVERSUCH (1795), Peake, Add. Cas. 51, N. P.

1541. —— **Assault in defence of master's goods.**]—LEEWERD *v.* BASILEE (1695), 1 Salk. 407; 91 E. R. 353; *sub nom.* LEWARD *v.* BASELY, 1 Ld. Raym. 62.

Annotation:—**Refd.** Tickell *v.* Read (1773), Lofft, 215.

1542. —— ——.]—SHINGLETON *v.* SMITH (1699), 2 Lut. 1481; 125 E. R. 816.

Annotation:—**Mentd.** Weaver *v.* Bush (1798), 8 Term Rep. 78.

——.]—*See, also,* Nos. 1512, 1515, 1518, *ante.*

E. Other Cases.

See, generally, AGENCY, Vol. I., p. 687, Nos. 2960–2964.

1543. Interference with easement.]—In an action on the case for obstructing pltf.'s lights, a clerk who superintended the erection of the building by which they were darkened, & who alone directed the workmen may be joined as a co-deft. with the original contractor.—WILSON *v.* PETO (1821), 6 Moore, C. P. 47.

Annotation:—**Refd.** Thompson *v.* Gibson (1841), 7 M. & W. 456.

See, generally, EASEMENTS, Vol. XIX., pp. 1 *et seq.*

1544. Infringement of trade mark by direction of master—Right to indemnity from master.]—A declaration alleged that pltf. was employed by the deft. to make certain articles, & that deft. fraudulently directed pltf. to place on each of the articles a mark which was the trade mark of R. & that pltf. did so innocently, & was thereby subjected to a chancery suit at the suit of R., which he had to pay a large sum to compromise:—*Held:* as this suit could have been prosecuted by R., successfully for an injunction & an account, the declaration showed a good cause of action.—DIXON *v.* FAWCUS (1861), 3 E. & E. 537; 30 L. J. Q. B. 137; 3 L. T. 693; 7 Jur. N. S. 895; 9 W. R. 414; 121 E. R. 544.

Annotations:—**Mentd.** Burrows *v.* Rhodes, [1899] 1 Q. B. 816; Bow *v.* Hart (1905), 74 L. J. K. B. 341; Britannia Hygienic Laundry Co. *v.* Thornycroft (1926), 135 L. T. 83.

1545. Infringement of copyright.]—An author whose copyright is infringed in any manner mentioned in Fine Arts Copyright Act, 1862 (c. 68), s. 6, is entitled to recover separate penalties against every infringer, whether principal or agent, master or servant, the minimum penalty in every case being a farthing for each copy by him pirated.—BASCHET *v.* LONDON ILLUSTRATED STANDARD CO., [1900] 1 Ch. 73; 69 L. J. Ch. 35; 81 L. T. 509; 48 W. R. 56; 44 Sol. Jo. 42.

Annotation:—**Mentd.** Hildesheimer *v.* Faulkner, [1901] 2 Ch. 552.

See, generally, COPYRIGHT, Vol. XIII., pp. 217 *et seq.*

Libel.]—*See* Nos. 1509, 1511, *ante.*

Fraud.]—*See* No. 1510, *ante;* AGENCY, Vol. I., pp. 685, 686, Nos. 2946–2955.

Procuring breach of contract between employer & third person.]—*See* No. 1513, *ante.*

Threats & false statements—Causing personal injury.]—*See* No. 1171, *ante.*

Illegal distress.]—*See* DISTRESS, Vol. XVII., pp. 331, 386, Nos. 642–656, 1267–1270.

SECT. 3.—CRIMINAL LIABILITY.

SUB-SECT. 1.—IN GENERAL.

Liability when acting under superior orders.]—*See* CRIMINAL LAW, Vol. XIV., pp. 52, 53, 67, 68, Nos. 185–188, 328–330.

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or principal, where the refusal by such servant or agent to deliver it to pltf. is absolute.—ADVANCE RUMELY THRESHER CO., INCORPORATED *v.* SERVICE, [1919] 2 W. W. R. 647; 12 Sask. L. R. 294.—CAN.

1.—Procuring or encouraging breach of contract by master. Sect. 2.]

this threat the employers refused to continue to teach pltf. under the terms of the deed of apprenticeship. In an action by him against the society & certain of the offices :—*Held :* pltf. had a good cause of action to which the previous agreement between the society & the employers was no answer.—READ *v.* FRIENDLY SOCIETY OF OPERATIVE STONEMASONS OF ENGLAND, IRELAND & WALES, [1902] 2 K. B. 732 ; 71 L. J. K. B. 994 ; 87 L. T. 493 ; 66 J. P. 822 ; 51 W. R. 115 ; 19 T. L. R. 20 ; 47 Sol. Jo. 29, C. A.

Annotations :—**Consd.** South Wales Miners' Federation *v.* Glamorgan Coal Co., [1905] A. C. 239. **Distd.** Smithies *v.* National Assocn. of Operative Plasterers, [1909] 1. K. B. 310. **Refd.** Bulcock *v.* St. Anne's Master Builders' Federation (1902), 19 T. L. R. 27 ; Larkin *v.* Long, [1915] A. C. 814 ; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244.

1557. —— ——.]—The rules of an assocn. comprising substantially all the retail dealers of yeast in a large area stated the object of the Assocn. to be (*a*) to enable the members to meet from time to time for mutual counsel ; (*b*) to advise the meeting of all defaulting customers ; & (*c*) to improve the tone of the trade generally & create a more amicable feeling amongst the members ; & (rule 20) " on an employee leaving an employer, who is a member of the assocn., the employer shall, if so desirous report the same to the secretary who shall advise all the members, & no other member of the assocn. shall employ or supply him for twelve months." The officials of the assocn. were W., the secretary, & three other persons.

D., after serving two years with W. as his traveller to obtain orders for yeast from his customers in his district, which was within the area entered the service of H., also a member of the assocn. & carrying on business in the same district, subject to a month's notice on either side to be given at any time. W., finding that D. was obtaining from his customers orders for yeast for H., convened a meeting of the assocn. which H. attended. At this meeting the attention of H. was called to rule 20 & he was asked to dismiss D. which he refused to do. After the meeting discussion took place between some of the members, including W. & H., & eventually H. consented to give & did give D. notice determining his employment. In an action by D. against the officials of the assocn. claiming damages & an injunction to restrain them from interfering with him in his calling on the ground that they had used their position & influence as officials to bring undue pressure to bear on H. to procure his dismissal :—*Held :* D. had no cause of action, for on the evidence he had failed to prove his dismissal was obtained by illegal means, *i.e.*, coercion, intimidation, threats or undue influence.—DAVIES *v.* THOMAS, [1920] 2 Ch. 189 ; 89 L. J. Ch. 338 ; 123 L. T. 456 ; 84 J. P. 201 ; 36 T. L. R. 571 ; 64 Sol. Jo. 529, C. A.

Annotations :—**Refd.** Hodges *v.* Webb, [1920] 2 Ch. 70 ; Said *v.* Butt, [1920] 3 K. B. 497.

1558. —— ——.]—Inducement not to continue an employment is illegal only if it is exercised by illegal means.

A branch of a musicians' trade union having expelled pltf. from the union passed a resolution on Feb. 2, 1919, that as pltf. was now a non-member of the union the members of the branch would not, after Mar. 3, 1919, play with him, & any member so doing would be treated as a non-member. On Feb. 7, 1919, the passing of this resolution was notified by the secretary of the branch to the manager & also to the musical director of the cinema where pltf. was employed. The enforcement of this resolution was suspended during correspondence & further meetings, & ultimately, on Apr. 21, 1919, the secretary of the branch wrote to inform pltf.'s employer that the resolution of Feb. 2, would be acted upon, whereupon pltf., who had on Feb. 15, 1919, received from his employer a fortnight's notice of dismissal, was instantly dismissed. In an action by pltf. against the secretary & members of the branch committee alleging threats & coercion by them & asking for an injunction to restrain them from individually or collectively interfering with his right to dispose of his labour as he would :—*Held :* the simple notification to the employer of an intention to do a lawful act, or lawful acts, whether on behalf of an individual or of a number of persons, could not properly be described as the use of illegal means against the person employed.—WOLSTENHOLME *v.* ARISS, [1920] 2 Ch. 403 ; 89 L. J. Ch. 395 ; *sub nom.* WOLSTENHOLME *v.* AMALGAMATED MUSICIANS' UNION, WOLSTENHOLME *v.* ARISS, 123 L. T. 741 ; 64 Sol. Jo. 585 ; 84 J. P. Jo. 266.

1559. —— **Conspiracy—Only when acts themselves actionable.**]—A conspiracy to do certain acts, not being criminally punishable, gives a right of action only where the acts agreed to be done & in fact done would had they been without preconcert, have involved a civil injury to pltf. for which he would have had a right of action.—HUTTLEY *v.* SIMMONS, [1898] 1 Q. B. 181 ; 67 L. J, Q. B. 213 ; 14 T. L. R. 150.

Annotations :—**Consd.** Quinn *v.* Leathem, [1901] A. C. 495. **Refd.** Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244 ; Valentine *v.* Hyde, [1919] 2 Ch. 129 ; Sorrell *v.* Smith, [1925] A. C. 700.

1560. —— **Effect of previous agreement between employers & third party.**]—READ *v.* FRIENDLY SOCIETY OF OPERATIVE STONEMASONS OF ENGLAND, IRELAND & WALES, No. 1556, *ante*.

1561. —— **Breach procured to compel payment of lawful debt.**]—Two or more persons, who have special power by virtue of their position, for example, as officers of a trade union, to carry out their design, commit an actionable wrong, & will be liable in damages, if they combine to prevent & in fact prevent a workman from obtaining employment in his trade or calling because they wish to compel him to pay a debt lawfully due from him.

It is not essential to pltf. in order to succeed that he should establish that there was a combination of two or more persons to do the acts complained of. A single person wrongfully preventing a man from obtaining or holding employment will be liable for the damages suffered (ROMER, L.J.).—GIBLAN *v.* NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN & IRELAND, [1903] 2 K. B. 600 ; 72 L. J. K. B. 907 ; 89 L. T. 386 ; 19 T. L. R. 708, C. A.

Annotations :—**Consd.** Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244 ; Valentine *v.* Hyde, [1919] 2 Ch. 129 ; Davies *v.* Thomas, [1920] 1 Ch. 217 ; White *v.* Riley, [1921] 1 Ch. 1. **Refd.** Airey *v.* Weighill (1905), 49 Sol. Jo. 279 ; Conway *v.* Wade, [1908] 2 K. B. 844 ; Malcolm, Brunker & Co. *v.* Waterhouse (1908), 24 T. L. R. 854 ; Hodges *v.* Webb, [1920] 2 Ch. 70 ; Ware & De Freville *v.* Motor Trade Assocn., [1921] 3 K. B. 40 ; Sorrell *v.* Smith, [1925] A. C. 700.

—— **Dismissal in consequence of libel & slander.**] —*See* LIBEL & SLANDER, Vol. XXXII., pp. 121, 122, 160, 161, 174, Nos. 1527–1537, 1936–1940, 2128–2135.

—— **Dismissal in consequence of threat to strike.**] —*See* TRADE & TRADE UNIONS.

1562. Against whom action may be brought—Single individual.]—GIBLAN *v.* NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN & IRELAND, No. 1561, *ante*.

—— **Against trade unions.**]—*See* TRADE & TRADE UNIONS.

SECT. 2.—PERSONAL INJURY.

See, generally, NEGLIGENCE.

1563. Whether duty owed to servant—Negligent performance by third party of contract with master.]—EVERARD *v.* HOPKINS, No. 1455, *ante*.

1564. —— ——.]—A. contracted with the Postmaster-General to provide a mail coach to convey the mail bags along a certain line of road; & B. & others also contracted to horse the coach along the same line. B. & his co-contractors hired C. to drive the coach:—*Held:* C. could not maintain an action against A. for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction.—WINTERBOTTOM *v.* WRIGHT (1842), 10 M. & W. 109; 11 L. J. Ex. 415; 152 E. R. 402.

Annotations:—**Expld.** Gerhard *v.* Bates (1853), 2 E. & B. 476. **Consd.** Blakemore *v.* Bristol & Exeter Ry. (1858), 8 E. & B. 1035. **Distd.** Heaven *v.* Pender (1883), 11 Q. B. D. 503. **Folld.** Earl *v.* Lubbock, [1905] 1 K. B. 253. **Refd.** Burgess *v.* Gray (1845), 1 C. B. 578; Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213; Collis *v.* Selden (1868), L. R. 3 C. P. 495; Moule *v.* Garrett (1870), L. R. 5 Exch. 132; Hawkins *v.* Smith (1896), 12 T. L. R. 532; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533. **Mentd.** Howard *v.* Shepherd (1850), 9 C. B. 297; Lumley *v.* Gye (1853), 2 E. & B. 216; Thompson *v.* Lucas (1868), 17 W. R. 520; George *v.* Skivington (1869), 21 L. T. 495; Calc. Ry. *v.* Warwick (1897), 77 L. T. 570; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

1565. —— ——.]—Pltf.'s master had completed a contract on deft.'s premises. After its completion, pltf., by his master's orders, went on to deft.'s premises for a purpose incidental to the contract. Near pltf. was an unfenced shaft, down which he fell, & injured himself. The jury found that deft. had not used reasonable care with respect to the shaft, & that pltf. had not contributed to the accident by his own negligence:—*Held:* pltf., being on deft.'s premises for a purpose incidental to a contract which had just been completed, by his order, was not a mere volunteer, but was in the position of a purchaser invited by the shopkeeper into a shop with unconcealed danger in it, & it was, therefore, the duty of deft. to have put up some safeguard around the shaft, or to have given pltf. reasonable notice of the danger. It made no difference in the liability of a shopkeeper for injuries sustained in his shop through his negligence, that the purchaser sends his servant instead of going himself.—INDERMAUR *v.* DAMES (1867), L. R. 2 C. P. 311; 36 L. J. C. P. 181; 16 L. T. 293; 31 J. P. 390; 15 W. R. 434, Ex. Ch.

Annotations:—**Distd.** Brooks *v.* Courtney (1869), 20 L. T. 440. **Consd.** King *v.* G. W. Ry. (1871), 24 L. T. 583; Smith *v.* Steele (1875), L. R. 10 Q. B. 125; Watkins *v.* G. W. Ry. (1877), 46 L. J. Q. B. 817; Elliott *v.* Hall (1885), 15 Q. B. D. 315; O'Neil *v.* Everest (1892), 61 L. J. Q. B. 453; Cavalier *v.* Pope, [1906] A. C. 428; Lewis *v.* Ronald (1909), 101 L. T. 534; Elliott *v.* Roberts (1915), 32 T. L. R. 71; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523; Fairman *v.* Perpetual Investment Bldg. Soc., [1923] A. C. 74; Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253; Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746. **Refd.** White *v.* France (1877), 2 C. P. D. 308; Woodley *v.* Met. Dist. Ry. (1877), 2 Ex. D. 384; Heaven *v.* Pender (1883), 11 Q. B. D. 503; Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685; Calc. Ry. *v.* Mulholland, [1898] A. C. 216; Earl *v.* Lubbock (1904), 74 L. J. K. B. 121; Bates *v.* Batey, [1913] 3 K. B. 351; Latham *v.* Johnson, [1913] 1 K. B. 398; Lucy *v.* Bawden, [1914] 2 K. B. 318; Norman *v.* G. W. Ry., [1915] 1 K. B. 584; Brackley *v.* Mid. Ry. (1916), 85 L. J. K. B. 1596; Cox *v.* Coulson, [1916] 2 K. B. 177; Walker *v.* Crabb (1916), 33 T. L. R. 119; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899; Maclenan *v.* Segar, [1917] 2 K. B. 325; Dunster *v.* Hollis, [1918] 2 K. B. 795. **Mentd.** Gautret *v.* Egerton, Jones *v.* Egerton (1867), L. R. 2 C. P. 371; Paddock *v.* N. E. Ry. (1868), 18 L. T. 60; Smith *v.* London & St. Katherine Docks Co. (1868), L. R. 3 C. P. 326; John *v.* Bacon (1870), L. R. 5 C. P. 437; M. S. & L. Ry. *v.* Woodcock (1871), 25 L. T. 335; Swainson *v.* N. E. Ry. (1877), 37 L. T. 102; Sandys *v.* Florence (1878), 47 L. J. Q. B. 598; Burchell *v.* Hickisson (1880), 50 L. J. Q. B. 101; Batchelor *v.* Fortescue (1883), 11 Q. B. D. 474; Gridley *v.* Thames Conservators (1886), 2 T. L. R. 469; Marney *v.* Scott, [1899] 1 Q. B. 986; Wright *v.* Lefever (1902), 51 W. R. 149; Lowery *v.* Walker, [1910] 1 K. B. 173; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; Clinton *v.* Lyons, [1912] 3 K. B. 198; R. *v.* Broad, [1915] A. C. 1110; Hart *v.* Rogers, [1916] 1 K. B. 646; Wilson *v.* Barry Ry. (1916), 116 L. T. 71; Pritchard *v.* Peto, [1917] 2 K. B. 173; Scrutton *v.* A.-G. for Trinidad] (1920), 90 L. J. P. C. 30; Anchor Line (Henderson) *v.* Dundee Harbour Trustees, Ellerman Lines *v.* Dundee Harbour Trustees, Thomson, Shepherd *v.* Dundee Harbour Trustees (1922), 38 T. L. R. 299; Mercer *v.* S. E. & C. Ry's Managing Committee, [1922] 2 K. B. 549; Cockburn *v.* Smith (1923), 40 T. L. R. 113; Sheehan *v.* Dreamland, Margate (1923), 40 T. L. R. 155; Letang *v.* Ottawa Electric Ry., [1926] A. C. 725.

1566. —— ——.]—A ry. co. agreed with a contractor that he should shunt their trucks upon their line, & should supply horses & men for that purpose, the co. to provide boys to assist in the shunting when they had boys, & when they had not the shunting to be done without boys. For several years pltf. as the servant of the contractor shunted trucks on the co.'s line, sometimes with & sometimes without boys. The operation of shunting is dangerous to any man performing it without assistance. Pltf. on one occasion asked the co.'s foreman for a boy, but as the co. could not provide one proceeded to shunt trucks alone, & without any negligence on his part was injured by a truck running over him. In an action by him against the co.:—*Held:* there was no evidence for the jury of any negligence or breach of duty on the part of the ry. co. towards pltf., & he had therefore no cause of action.—MEMBERY *v.* GREAT WESTERN RY. CO. (1889), 14 App. Cas. 179; 58 L. J. Q. B. 563; 61 L. T. 566; 54 J. P. 244; 38 W. R. 145; 5 T. L. R. 468, H. L.; *affg.* (1888), 4 T. L. R. 504, C. A.

Annotation:—**Refd.** Thrussell *v.* Handyside (1888), 20 Q. B. D. 359.

1567. —— ——.]—Deft. contracted to keep in repair a number of vans owned by a firm. Pltf. was a driver in the employment of the firm, & while he was driving one of the vans a wheel came off & he sustained injuries by falling from the van. The van had been in the hands of deft.'s workmen shortly before & on the day of the accident, & pltf.'s cause of action was based upon the negligence of the workmen in failing properly to inspect & repair the defective state of the van, & the negligent manner in which the repairs were done:—*Held:* deft. was under no duty to pltf., & there was no cause of action.—EARL *v.* LUBBOCK, [1905] 1 K. B. 253; 74 L. J. K. B. 121; 91 L. T. 830; 53 W. R. 145; 21 T. L. R. 71; 49 Sol. Jo. 83, C. A.

Annotations:—**Distd.** White *v.* Steadman, [1913] 3 K. B. 340. **Refd.** Cavalier *v.* Pope, [1906] A. C. 428; Bates *v.* Batey, [1913] 3 K. B. 351; Brackley *v.* Mid. Ry. (1916), 85 L. J. K. B. 1596. **Mentd.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; Latham *v.* Johnson, [1913] 1 K. B. 398; Lucy *v.* Bawden, [1914] 2 K. B. 318; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

1568. —— ——.]—The landlords of certain flats provided for the convenience of their tenants

1563 i. *Whether duty owed to servant—Negligent performance by third party of contract with master.*]—WOOD & Co. *v.* MACKAY (1906), 8 F. (Ct. of Sess.) 625.—SCOT.

a lift for the purpose of raising articles supplied by tradesmen to the various flats. The lift was in the form of a box, with a weight on the top, & was pulled up & down from below. It ran outside the building in iron guides & communicated with the scullery windows of the flats, & it was the landlords' duty to keep it in repair. Pltf., a servant of one of the tenants of the flats, was on Dec. 1, 1909, signalled to go to the lift, & she accordingly went to the scullery window, & was in the act of taking out some articles from the lift when some one pulled it down, with the result that the top of it struck her on the head & injured her. In an action claiming damages from the landlords in respect of her injuries it was alleged that the landlords were negligent in having constructed & maintained the lift without the means of keeping it stationary at a window. Evidence was given that on the day in question the lift was not out of repair, & that it had been in use for eighteen years without any accident having occurred. The jury found that the landlords were guilty of a breach of duty in supplying & maintaining a lift which was a source of danger to those likely to use it, & judgment was entered for pltf. On appeal by the landlords:—*Held:* the landlords had not been guilty of any negligence, & pltf. was not entitled to recover.—POWELL *v.* THORNDIKE (1910), 102 L. T. 600; 26 T. L. R. 399, D. C.

1569. —— —— Defective gas pipe.]—Deft., a gasfitter, was employed by pltf.'s master to repair a gas-meter upon his premises, & for the purpose of doing so took away the meter & in lieu of it made a temporary connection by means of a flexible tube between the inlet pipe & the pipe communicating with the house. Pltf. having gone, in the ordinary performance of his duty, with a light into the cellar where the meter had been, gas, which had escaped by reason of the insufficiency of the connecting tube, exploded & injured him. The jury found that the work had been negligently done, & that the injury to pltf. proceeded entirely from such negligence:—*Held:* deft. was liable.—PARRY *v.* SMITH (1879), 4 C. P. D. 325; 48 L. J. Q. B. 731; 41 L. T. 93; 43 J. P. 801; 27 W. R. 801.

Annotations:—**Expld.** Blacker *v.* Lake & Elliot (1912), 106 L. T. 533. **Refd.** Clarke *v.* Army & Navy Co-op. Soc. (1902), 72 L. J. K. B. 153. **Mentd.** Daniels *v.* Jones (1880), De Colyar's County Court Cases, 146; Cunnington *v.* G. N. Ry. (1883), 49 L. T. 392; Jackson *v.* Carshalton Gas Co. (1888), 5 T. L. R. 69; Whitby *v.* Brock (1888), 4 T. L. R. 241; Dominion Natural Gas Co. *v.* Collins & Perkins, [1909] A. C. 640.

1570. —— —— Defective staging & ropes.]—Deft., a dockowner, supplied & erected a staging round a ship in his dock under a contract with the shipowner. Pltf. was a workman in the employ of a ship painter who had contracted with the shipowner to paint the outside of a ship, & in order to do the painting pltf. went on & used the staging, when one of the ropes by which it was slung, being unfit for use when supplied by deft., broke, & by reason thereof pltf. fell into the dock & was injured:—*Held:* pltf., being engaged on work on the vessel in the performance of which deft., as dock owner, was interested, deft. was under an obligation to him to take reasonable care that at the time he supplied the ropes & staging they were in a fit state to be used, & for the neglect of such duty was liable to pltf. for the injury he had sustained.—HEAVEN *v.* PENDER (1883), 11 Q. B. D. 503; 52 L. J. Q. B. 702; 49 L. T. 357; 47 J. P. 709, C. A.

——— Elliott *v.* Hall (1885), 15 Q. B. D. 315. **Apld.** Thrussell *v.* Handyside (1888), 20 Q. B. D. 359. **Expld.** Cann *v.* Willson (1888), 39 Ch. D. 39; Le Lievre & Dennes *v.* Gould, [1893] 1 Q. B. 491; Hopkins *v.* G. E. Ry. (1895), 60 J. P. 86. **Distd.** Cale. Ry. *v.* Warwick (1897), 77 L. T. 570; Earl *v.* Lubbock, [1905] 1 K. B. 253; Bates *v.* Batey, [1913] 3 K. B. 351. **Refd.** Tolhausen *v.* Davies (1888), 57 L. J. Q. B. 392; Scholfield *v.* Londesborough (1894), 10 T. L. R. 518; Hawkins *v.* Smith (1896), 12 T. L. R. 532; Lane *v.* Cox (1896), 66 L. J. Q. B. 193; Milburn *v.* Jamaica Fruit Importing & Trading Co. of London, [1900] 2 Q. B. 540; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533; Baker *v.* James, [1921] 2 K. B. 674. **Mentd.** O'Neil *v.* Everest (1892), 61 L. J. Q. B. 453; Witted *v.* Galbraith (1893), 9 T. L. R. 300; Mowbray *v.* Merryweather, [1895] 2 Q. B. 640; Marney *v.* Scott, [1899] 1 Q. B. 986; Cavalier *v.* Pope, [1905] 2 K. B. 757; Jackson *v.* Watson (1909), 78 L. J. K. B. 587; Latham *v.* Johnson, [1913] 1 K. B. 398; Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272.

1571. —— —— Defective trucks.]—Deft., a colliery owner, consigned coals sold by him to the buyers by rail in a truck rented by him from a waggon co. for purposes of the colliery. Through the negligence of deft.'s servants the truck was allowed to leave the colliery in a defective state. In consequence of the defect in the truck injury was occasioned to pltf., one of the buyers' servants, who was employed in unloading the coals, & had got into the truck for that purpose:—*Held:* there was a duty on the part of deft. towards pltf. to exercise reasonable care with regard to the condition of the truck, & deft. was therefore liable to pltf. in respect of the injuries sustained by him.—ELLIOTT *v.* HALL (1885), 15 Q. B. D. 315; 54 L. J. Q. B. 518; *sub nom.* ELLIOTT *v.* NAILSTONE COLLIERY CO., 34 W. R. 16; 1 T. L. R. 628, D. C.

Annotations:—**Expld. & Distd.** Earl *v.* Lubbock (1904), 74 L. J. K. B. 121; Blacker *v.* Lake & Elliot (1912), 106 L. T. 533. **Refd.** Hawkins *v.* Smith (1896), 12 T. L. R. 532; Lane *v.* Cox (1896), 45 W. R. 261; White *v.* Steadman, [1913] 3 K. B. 340.

1572. —— Apart from contract—Servant not acting in course of employment—Bare licencee.]—Deceased was employed by a builder to watch & protect certain unfinished buildings. Workmen were employed by deft., a contractor, on the land near to where the deceased was on duty, to excavate the earth for the foundations of other buildings. In the performance of this operation they employed a steam crane & winch to which were attached a chain & iron bucket by means of which the earth was raised from the excavation & thence to the carts which were to carry it away. The deceased had nothing to do with the excavations, but was standing where he need not have been, watching deft.'s men at work, & allowing the bucket to pass some three feet over his head, when the chain broke & the bucket & its contents falling upon him so injured him that he subsequently died:—*Held:* there was no evidence of negligence in deft.'s workmen: deceased was at the most a bare licensee; & he stood where he did subject to all the risks incident to the position in which he had placed himself.—BATCHELOR *v.* FORTESCUE (1883), 11 Q. B. D. 474; 49 L. T. 644, C. A.

Annotations:—**Expld.** Berg *v.* Rotterdamsche Lloyd (1918), 34 T. L. R. 272. **Refd.** Tolhausen *v.* Davies (1888), 58 L. J. Q. B. 98; Lathan *v.* Johnson, [1913] 1 K. B. 398.

1573. —— —— Servant compelled to encounter danger.]—Pltf. was a workman, who was directed by his employer to work in a particular place. Defts. were contractors engaged in work above the place where pltf. was working. Defts.' work was of such a nature as to be dangerous to persons working below, unless proper precautions were taken for their safety. Pltf. was aware of the danger. Pltf., while working where he was directed by his employer, was injured by a piece of iron dropped by defts.' workmen, & brought an action to recover damages for the injury. The jury

found that defts. had been guilty of negligence in not taking proper precautions for those below, that there was no contributory negligence on the part of pltf., & that pltf. did not voluntarily incur the risk :—*Held :* the case was rightly left to the jury, although pltf. was aware of the danger, yet, as he was compelled by the orders of his employer to work where he was working when the accident happened, the maxim *volenti non fit injuria* did not apply, & he was entitled to recover.—THRUSSELL *v.* HANDYSIDE (1888), 20 Q. B. D. 359 ; 57 L. J. Q. B. 347 ; 58 L. T. 344 ; 52 J. P. 279 ; 4 T. L. R. 266, D. C.

1574. —— Want of repair of machine hired by master.]—HOPKINS *v.* GREAT EASTERN RY. CO. (1895), 60 J. P. 86 ; 12 T. L. R. 25, C. A.

1575. Servant's position no better than that of master—No right of action by master—Gratuitous loan of defective chattel to master.]—Deft. had erected a scaffold for his own use, he afterwards contracted with P. to pull down a certain wall of deft.'s. There was no provision in the contract for the use of the scaffold, but deft. was aware of its being used, & allowed P. to use it gratuitously. One of the put-logs or cross-supports on which the planks of the scaffold rested turned out to be rotten, but there was no evidence that deft. knew of this defect. The put-log gave way, & caused an injury to pltf., who was a labourer employed by P. :—*Held :* a gratuitous lender is not responsible to the borrower for injuries caused otherwise than directly by defects in the chattel in reference to the use for which he knows the loan was accepted, & of which defects he was aware, & the servant of the borrower is in no better position than his master would have been.—MACCARTHY *v.* YOUNG (1861), 6 H. & N. 329 ; 30 L. J. Ex. 227 ; 3 L. T. 785 ; 9 W. R. 439 ; 158 E. R. 136.

Annotations :—**Refd.** Indermaur *v.* Dames (1866), L. R. 1 C. P. 274 ; Coughlin *v.* Gillison, [1899] 1 Q. B. 145.

1576. —— —— Defective fence owned by master.]—Deft. kept swine in a field which he occupied, & which adjoined the line of a railway co., who were bound, under Railways Clauses Act, 1845 (c. 33), s. 68, to maintain sufficient fences between their line & the field. The existing fence was sufficient to keep out oxen, sheep & horses, but not swine, & deft.'s swine crawled through the fence & upset a trolly of the co., which was travelling on the line. Pltf., a plate-layer in the co.'s service, who was travelling on the trolly in the course of his service, was injured by the accident, & now sued deft. for the damages caused thereby. Deft. knew that some of his swine had on a former occasion strayed on to the line & been killed by a train, & he had been warned that the fence was insufficient to keep in the pigs :—*Held :* the co. could not have sued deft. for trespass because they were bound under the statute to maintain a fence sufficient to keep out swine, & the present action would not lie, because pltf. could not be in a better position than the co., his employers.—CHILD *v.* HEARN (1874), L. R. 9 Exch. 176 ; 43 L. J. Ex. 100 ; 22 W. R. 864.

Annotations :—**Consd.** The Bernina (2) (1887), 12 P. D. 58. **Mentd.** Coaker *v.* Willcocks, [1911] 2 K. B. 124.

SECT. 3.—LOSS OF, OR DAMAGE TO PROPERTY.

1577. Loss of master's property.]—ROBINSON *v.* WALTER, No. 1493, *ante*.

1578. —— Whether action lies for trover—Military officer.]—Where a colonel had purchased horses for the govt. & they being approved of by the proper inspecting officer, were sent under the care of a serjeant to the receiving depot for His Majesty's use :—*Held :* the colonel had not such a special property as to maintain trover for one of them which was taken out of the possession of the serjeant, as a distress for a turnpike toll.

You cannot make my servant, whose possession is my possession, my bailee. He is not liable as a bailee. Where goods are delivered to another as a bailee, the special property passes to him ; but here it does not. He is merely the servant of the govt. (LORD ELLENBOROUGH, C.J.).—HOPKINSON *v.* GIBSON (1805), 2 Smith, K. B. 202.

1579. Loss of own property—Action against railway company—Though ticket taken by master.]—A servant travelling with his master on a railway may have an action in his own name against the railway co. for the loss of his luggage, although the master took & paid for his ticket. The liability of the railway co. in such a case is independent of the contract.

A declaration stated that deft. received pltf. & his luggage to be carried for reward to deft.'s in that behalf & it was proved that pltf.'s master paid his fare & took the ticket :—*Held :* it was immaterial by whom the reward was to be paid, & the allegation in the declaration was proved.—MARSHALL *v.* YORK, NEWCASTLE & BERWICK RY. CO. (1851), 11 C. B. 655 ; 21 L. J. C. P. 34 ; 18 L. T. O. S. 94 ; 16 Jur. 124 ; 138 E. R. 632.

Annotations :—**Expld.** Tattan *v.* G. W. Ry. (1860), 2 E. & E. 844. **Refd.** Dalyell *v.* Tyrer (1858), E. B. & E. 899 ; R. *v.* Robson (1861), 9 Cox, C. C. 29 ; Foulkes *v.* Met. Dist. Ry. (1880), 5 C. P. D. 157 ; Elder, Dempster *v.* Paterson, Zochonis, Griffiths Lewis Steam Navigation Co. *v.* Paterson, Zochonis, [1924] A. C. 522. **Mentd.** Austin *v.* G. W. Ry. (1867), L. R. 2 Q. B. 442 ; Hayn, Roman *v.* Culliford & Clark (1879), 40 L. T. 536 ; Meux *v.* G. E. Ry., [1895] 2 Q. B. 387 ; Taylor *v.* M. S. & L. Ry., [1895] 1 Q. B. 134 ; East Indian Ry. *v.* Kalidas Mukerjee (1901), 84 L. T. 210 ; Harris *v.* Perry, [1903] 2 K. B. 219 ; Lyles *v.* Southend-on-Sea Corpn., [1905] 2 K. B. 1 ; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305 ; Pratt *v.* Patrick, [1924] 1 K. B. 488.

Part XIII.—Liability of Master in Case of Accident or Death.

SECT. 1.—AT COMMON LAW.

SUB-SECT. 1.—DUTIES OF MASTER.

A. In General.

1580. Protection.]—LIMLAND *v.* STEPHENS, No. 899, *ante*.

1581. To ensure safety.]—PRIESTLEY *v.* FOWLER, No. 1647, *post*.

1582. Same care as of himself.]—SOUTHCOTE *v.* STANLEY, No. 1702, *post*.

1583. Reasonable care—To ensure safety.]—(1) A master is bound to take all reasonable precautions to secure the safety of his workmen. The master who lets the workman down his mine is bound to bring him up safely, even though he come up on his own business, & not for that of his master.

(2) It is no answer to the claim of damages by the surviving relatives of a workman accidentally killed in a mine, "which was not in a safe & sufficient state," to say that he was at that moment of time in the act of leaving the work for a purpose of his own.—BRYDON *v.* STEWART (1855), 2 Macq. 30. H. L.

Annotations:—As to (1) **Consd.** Bartonshill Coal Co. *v.* Reid (1858), 31 L. T. O. S. 255. **Reid.** Waller *v.* S. E. Ry. (1863), 32 L. J. Ex. 205; Brown *v.* Accrington Co-op. Cotton Spinning Manufacturing Co. (1865), 13 L. T. 94; Hall *v.* Johnson (1865), 34 L. J. Ex. 222; Groves *v.* Fuller (1888), 4 T. L. R. 474; Holness *v.* Mackay & Davis, [1899] 2 Q. B. 319; Colo *v.* De Trafford (No. 2), [1918] 2 K. B. 523. *As to* (2) **Reid.** Fowler *v.* Lock (1872), L. R. 7 C. P. 272; Douglas *v.* United Mineral Mining Co. (1900), 2 W. C. C. 15; Taylor *v.* Jones (1907), 1 B. W. C. C. 3; Riley *v.* Holland, [1911] 1 K. B. 1029.

1584. —— ——.]—DIGBY *v.* EAST HAM URBAN DISTRICT COUNCIL (1896), 13 T. L. R. 11.

1585. —— ——.]—The servant of defts., who were cab proprietors, went out one night in Dec. with his master's cab. Later at night the horse & cab came home without the driver. There was no indication of any accident having happened. The horse had on former occasions, when left unattended, returned home by itself. One of defts., who saw the horse & cab return, went to a public-house in the neighbourhood to look for the driver, but found it closed, & he accordingly returned home. Next morning the driver was found in an unconscious condition, suffering from injuries which indicated that he had fallen from his seat on the cab, & he died in a week, his death being accelerated by the exposure. In an action by his widow to recover damages for his death, the county court judge held that there was a duty upon deft., who was aware that the horse had returned without a driver, to institute a proper search or to make inquiries, & that he had neglected that duty. He accordingly awarded pltf. damages:—*Held:* in the circumstances, there was no duty on defts. to make a search for the driver, & they were entitled to judgment.

No doubt an employer has a duty to take reasonable precautions to ensure the safety of his servants. That means it is his duty to take precautions to prevent accidents happening (PHILLIMORE, J.).—BOND *v.* WILSON & SONS (1908), 24 T. L. R. 238, D. C.

1586. —— —— **Dangerous work.**]—(1) A master is bound to take all reasonable precautions to secure the safety of his workmen; more especially if the work be of a dangerous character & the persons engaged proverbially reckless.

(2) By the law of England, when the accidental death of a servant is occasioned by the negligence of a fellow servant, the master is not generally held responsible. This does not appear to be the law of Scotland.—PATERSON *v.* WALLACE & Co. (1854), 1 Macq. 748; 23 L. T. O. S. 249, H. L.

Annotations:—As to (1) **Reid.** Dynen *v.* Leach (1857), 26 L. J. Ex. 221; Griffiths *v.* Gidlow (1858), 3 H. & N. 648; Vose *v.* L. & Y. Ry. (1858), 2 H. & N. 728; Clarke *v.* Holmes (1862), 7 H. & N. 937; Holmes *v.* Clark (1862), 10 W. R. 405; Brown *v.* Accrington Co-op. Cotton Spinning Manufacturing Co. (1865), 13 L. T. 94; Hall *v.* Johnson (1865), 13 W. R. 411; Fowler *v.* Lock (1872), L. R. 7 C. P. 272; Colo *v.* De Trafford (No. 2), [1918] 2 K. B. 523; Baker *v.* James, [1921] 2 K. B. 674. *As to* (2) **Consd.** Bartonshill Coal Co. *v.* Reid (1858), 31 L. T. O. S. 255. *Generally*, **Reid.** Degg *v.* Mid. Ry. (1857), 26 L. J. Ex. 171.

1587. —— —— ——.]—WEEMS *v.* MATHIESON, No. 1604, *post*.

1588. —— —— ——.]—Pltf. was employed by deft. to oil dangerous machinery. At the time pltf. entered upon the service, the machinery was fenced, but the fencing became broken by accident. Pltf. complained of the dangerous state of the machinery, & deft. promised him that the fencing should be restored. Pltf., without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced:—*Held:* deft. was liable for the injury.

Where a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care, & to use all reasonable means, to guard against & prevent any defects from which increased & unnecessary danger may occur. No doubt, when a servant enters on an employment from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or, if he thinks proper to accept an employment on machinery defective from its construction, or from the want of proper repair, & with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment. The

PART XIII. SECT. 1, SUB-SECT. 1.—A.

1580 i. *Protection.*]—An employer is practically an insurer of his employees' safety.—ALLIS *v.* BOLDUC (1908), 6 E. L. R. 185.—**CAN.**

1580 ii. ——.] — BERGKLINT *v.* WESTERN CANADA POWER CO. (1915), 32 W. L. R. 884; 9 W. W. R. 456; 24 D. L. R. 575; 22 B. C. R. 241.—**CAN.**

n. —— *Duty to take special precautions for safety of inexperienced workmen.*]—STURGEON *v.* CANADA IRON CORPN., LTD. (1913), 24 O. W. R. 684; 4 O. W. N. 1386; 12 D. L. R. 500.—**CAN.**

1583 i. *Reasonable care—To ensure safety.*]—A master is bound to take proper & reasonable precautions for the safety of his workmen.—MCDONALD *v.* MCFEE (1875), 3 Pug. 159.—**CAN.**

1583 ii. —— ——.]—The master's duty is to take reasonable care & to make reasonable efforts to provide a safe place & safe machinery in which & with which the servant is to work, but not to guarantee that place & machinery shall be absolutely safe.—KOLARI *v.* MOND NICKEL CO. (1914), 32 O. L. R. 470; 20 D. L. R. 412.—**CAN.**

1583 iii. —— ——.]—To establish liability of an employer at common law there must be evidence to show, not that every precaution which can be conceived of after the accident had not been taken, but that some precaution, which a reasonably prudent man before the accident would take, has not been taken.—MCPHERSON *v.* EDMONTON, DUNVEGAN & BRITISH COLUMBIA RY. CO. (Alta.), [1919] 3 W. W. R. 471; 49 D. L. R. 254.—**CAN.**

o. —— —— *Dangerous work—Duty to instruct inexperienced workmen.*]—VICARY *v.* KEITH (1873), 34 U. C. R. 212.—**CAN.**

p. —— —— —— ——.] — A master is under obligation to see that

rule I am laying down goes only to this, that the danger contemplated on entering into the contract, shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept (COCKBURN, C.J.)—CLARKE *v.* HOLMES (1862), 7 H. & N. 937; 8 Jur. N. S. 992; 158 E. R. 751; *sub nom.* HOLMES *v.* CLARKE, 31 L. J. Ex. 356; 9 L. T. 178; 10 W. R. 405, Ex. Ch.

Annotations:—**Apld.** Hoey *v.* Dublin & Belfast Ry. (1870), 18 W. R. 930; Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685. **Distd.** Butler *v.* Birnbaum (1891), 7 T. L. R. 287. **Refd.** Waller *v.* S. E. Ry. (1863), 2 H. & C. 102; Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669; Murphy *v.* Smith (1865), 19 C. B. N. S. 361; Feltham *v.* England (1866), 7 B. & S. 676; Smith *v.* Howard (1870), 22 L. T. 130; Britton *v.* Great Western Cotton Co. (1872), L. R. 7 Exch. 130; Weblin *v.* Ballard (1886), 17 Q. B. D. 122; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523. **Mentd.** Indermaur *v.* Dames (1866), L. R. 1 C. P. 274.

1589. —— —— ——.]—GRIZZLE *v.* FROST, No. 1820, *post.*

1590. —— —— ——.]—While a workman was in the course of his employment descending from an elevated tramway belonging to his employers, his foot slipped, & he fell to the ground, receiving injuries which caused his death. The employers had provided no ladder or other safe means of ascending to & descending from the tramway. In an action brought by the widow of deceased against his employers under Fatal Accidents Act, 1846 (c. 93), to recover damages in respect of his death, the jury found (*a*) that defts had not exercised due care to have the tramway in a safe & proper condition so as to protect their servants working upon it against unnecessary risks; (*b*) that it was dangerous to descend from the tramway without a ladder; (*c*) that deceased had the same means of knowing that it was dangerous as defts. had; & (*d*) that deceased did know that it was dangerous:—*Held:* in the absence of any finding by the jury that deceased had agreed to undertake the risk of descending from the tramway without a ladder or other safe means of descent, pltf. was entitled to judgment upon the findings of the jury.

If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of breach of that duty a servant suffers injury, the employer is *primâ facie* liable. . . . In order to escape liability the employer must establish that the servant has taken upon himself the risk without the precautions. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case (ROMER, L.J.).—WILLIAMS *v.* BIRMINGHAM BATTERY & METAL CO., [1899] 2 Q. B. 338; 68 L. J. Q. B. 918; 81 L. T. 62; 47 W. R. 680; 15 T. L. R. 468, C. A.

Annotations:—**Consd.** Abbott *v.* Isham (1920), 90 L. J. K. B. 309. **Apld.** Monaghan *v.* Rhodes, [1920] 1 K. B. 487. **Refd.** Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523; Baker *v.* James, [1921] 2 K. B. 674.

1591. —— **Protection from unnecessary risk.**]—SMITH *v.* BAKER & SONS, No. 1657, *post.*

1592. —— —— **Limited liability company.**]—KAY *v.* BRITISH WESTINGHOUSE ELECTRIC & MANUFACTURING CO., LTD. (1905), 49 Sol. Jo. 296, C. A.

1593. Not protection from extraordinary danger.]—From the mere relation of master & servant no contract can be implied on the part of the master to take due & ordinary care not to expose the servant to extraordinary danger & risk in the course of his employment.

An administratrix suing under Fatal Accidents Act, 1846 (c. 93), alleging in her declaration that deceased entered the service of defts. as a porter, "on the terms that defts. would take due & ordinary care not to expose him to extraordinary danger & risk in the course of his employment," & that he was, from want of such care, exposed to extraordinary danger & risk & killed; but not proposing to give any evidence of an express contract on such terms, was held to have been rightly non-suited.

The decision in *Priestley* v. *Fowler*, No. 1647, *post*, limiting the responsibility of the master to the servant for injuries to the latter in the course of his employment, ought to be maintained.—RILEY *v.* BAXENDALE (1861), 6 H. & N. 445; 30 L. J. Ex. 87; 25 J. P. 407; 9 W. R. 347; 158 E. R. 183.

1594. Duty to warn of danger—Young person.]—GRIZZLE *v.* FROST, No. 1820, *post.*

1595. —— —— **Wearing of masks in soda-water factory.**]—CROCKER *v.* BANKS (1888), 4 T. L. R. 324, C. A.

Annotation:—**Refd.** Cribb *v.* Kynoch, [1907] 2 K. B. 548.

1596. —— —— **Crossing railway.**]—Pltf., a boy of 12 years of age, was employed by defts. to deliver newspapers from their bookstall at a railway station to customers in the town. The bookstall was on a platform surrounded by lines of railway, there being a footbridge across the lines. Pltf. was shown his duties by a boy of the same age as himself, but he was not warned not to cross by the metals. There was a notice warning the public not to cross the metals but to use the footbridge. There was evidence that the newspaper boys were in the habit of crossing by the metals, & that the man in charge of the bookstall knew that pltf. was in the habit of so crossing. Pltf., in crossing by the metals, was run over by a train. In an action against defts. for damages for negligence, the county ct. judge non-suited pltf.:—*Held:* there was evidence of negligence to go to the jury.—ROBINSON *v.* SMITH & SON (1901), 17 T. L. R. 423, C. A.

Annotation:—**Refd.** Cribb *v.* Kynoch, [1907] 2 K. B. 548.

1597. —— —— **Testing loaded cartridges.**]—CRIBB *v.* KYNOCH, LTD., No. 1742, *post.*

proper instructions are given to inexperienced servants employed on dangerous work, to enable them to appreciate the nature & extent of the dangers likely to arise, & the best means of guarding against injury from such dangers.—AIMER *v.* CUSHING

1591 i. —— *Protection from unnecessary risk.*]—An employer is not entitled to expose his servants unnecessarily to dangers which they can escape only by constant vigilance or unfailing alertness.—NELSON *v.* CANADIAN PACIFIC RY. CO. (SASK.), [1918] 2 W. W. R. 177; 55 S. C. R. 626; 39 D. L. R. 760.—CAN.

q. —— —— *Latest protective devices—Extent of obligation to provide.*]—A master is not bound to provide all the latest devices for the care or benefit of those he employs; he is bound to take reasonable means to protect them from injury in his service.—REED *v.* ELLIS (1916), 27 O. W. R. 490; 38 O. L. R. 123.—CAN.

r. —— —— *Not to warrant safety.*]—A master is not bound to warrant each servant his safety in the course of his common employment.—POTTS *v.* PLUNKETT (1859), 33 L. T. O. S. 111.—IR.

1593 i. *Not protection from extraordinary danger.*]—ROOT *v.* VANCOUVER POWER CO. (1912), 20 W. L. R. 847; 1 W. W. R. 111; 17 B. C. R. 203; 2 D. L. R. 303.—CAN.

t. —— *Malicious assault by fellow servant.*]—ROTH *v.* CANADIAN PACIFIC RY. CO. (1905), 4 Can. Ry. Cas. 238.—CAN.

a. —— *Assault by third party.*]—It is not a master's duty to protect his servant from the assault of one for whom he is not responsible.—HARRIS *v.* GUIGUE, [1924] 1 D. L. R. 497; (1923), 53 O. L. R. 363.—CAN.

1594 i. *Duty to warn of danger—Young person.*]—O'BYRNE *v.* BURN (1854), 16 Dunl. (Ct. of Sess.) 1025.—SCOT.

Sect. 1.—At common law: Sub-sect. 1, A. & B.]

1598. —— Work of dangerous character.]—M'MANUS *v.* GREENWOOD (1886), 2 T. L. R. 588, C. A.

1599. —— ——.]—SMITH *v.* BAKER & SONS, No. 1657, *post.*

1600. —— —— May be delegated.]—CRIBB *v.* KYNOCH, LTD., No. 1742, *post.*

1601. Duty to search for missing servant—Cab-driver.]—BOND *v.* WILSON & SONS, No. 1585, *ante.*

B. Provision and Maintenance of Proper Plant, etc.

1602. Duty to provide proper plant—Cannot be delegated.]—If the negligence of the manager & the knowledge of his negligence was brought home to the directors of a limited co. they could not rely on the fact that they had substituted him for themselves, because the antecedent underlying obligation to supply adequate materials & resources remains & that was an obligation on them to rectify the mistake (COLLINS, M.R.).—KAY *v.* BRITISH WESTINGHOUSE ELECTRIC & MANUFACTURING CO., LTD. (1905), 49 Sol. Jo. 296, C. A.

1603. —— ——.]—TORONTO POWER CO., LTD. *v.* PASKWAN, No. 1611, *post.*

1604. —— Properly superintended.]—(1) The master of dangerous works is bound to be careful to prevent accidents to those employed by him. If his machinery or apparatus be not staunch & appropriate, or if he permit it to be used without proper guards, & mischief consequently arises, he will be responsible.

(2) All that the master is bound to do is to provide machinery fit & proper for the work, & to have it superintended by himself or his workmen in a fit & proper manner.—WEEMS *v.* MATHIESON (1861), 4 Macq. 215, H. L.

Annotations:—*As to* (1) **Reld.** Smith *v.* Baker, [1891] A. C. 325; Nimmo *v.* Connell, [1924] A. C. 595.

1605. —— ——.]—SEARLE *v.* LINDSAY, No. 1761, *post.*

1606. —— ——.]—WILSON *v.* MERRY, No. 1747, *post.*

1607. —— ——.]—LLOYD *v.* WOOLLAND BROTHERS, No. 1667, *post.*

1608. —— Whether master bound to adopt improvements.]—Where an injury happens to a servant while in the actual use of an instrument, engine or machine, in the course of his employment, of the nature of which he is as much aware as his master, & the use of which is, therefore, the proximate cause of the injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause, nor in case of his dying from the injury can his representative, under Fatal Accidents Act, 1846 (c. 93), recover against his master, there being no evidence that the injury arose through the personal negligence of the master. Nor is it any evidence of such personal negligence of the master that he has in use in his works an engine or machine less safe than some other which is in general use.

Therefore, where a labourer was killed through the fall of a weight which he was raising by means of an engine to which he attached it by fastening on to it a clip, & the clip had slipped off it:—*Held:* there was no case to go to the jury in an action by his representative against the master, although it appeared that another & safer mode of raising the weights was usual, & had been discarded by the orders of deft.—DYNEN *v.* LEACH (1857), 26 L. J. EX. 221; *sub nom.* DYMAN *v.* LEECH, 5 W. R. 490.

Annotations:—**Distd.** Mellors *v.* Shaw (1861), 1 B. & S. 437. **Consd.** Fowler *v.* Lock (1872), L. R. 7 C. P. 272. **Mentd.** Watling *v.* Oastler (1871), 40 L. J. EX. 43.

1609. —— ——.]—GRIZZLE *v.* FROST (1863), 3 F. & F. 622, N. P.

Annotations:—**Consd.** Young *v.* Hoffman Manufacturing Co., [1907] 2 K. B. 646. **Reld.** Feltham *v.* England (1866), 7 B. & S. 676; Cribb *v.* Kynoch, [1907] 2 K. B. 548.

1610. —— ——.]—An employer who is guilty of no personal negligence, & who has not undertaken to alter his machinery, is not liable for injuries sustained by a workman in his employment whilst using a machine, merely because a machine safer than that actually in use has been invented.—BUTLER *v.* BIRNBAUM (1891), 7 T. L. R. 287.

1611. —— —— All latest improvements.]—At common law a master does not warrant the condition of his plant, & is not liable for an accident caused by a defect which could have been discovered by him by reasonable diligence, & he is not bound to adopt all the latest improvements & appliances; but where an accident had occurred, & the master had made inquiries as to safety appliances which might have prevented such an accident in the future, but had not adopted any of them, & afterwards a similar accident occurred:—*Held:* (1) there was evidence

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1600 i. —— *Work of dangerous character—May be delegated.*]—Where instructions & warning are necessary to enable employees, in circumstances involving danger, to appreciate & protect themselves against the perils incident to the work in which they are engaged, it is the duty of the employer to take reasonable care to see that such instructions & warnings are given. The employer may delegate that duty to competent persons.—CANADIAN NORTHERN RY. CO. *v.* ANDERSON (1911), 20 W. L. R. 416; 45 S. C. R. 355; 13 Can. Ry. Cas. 339; 1 W. W. R. 501.—**CAN.**

b. —— —— *Dangers not patent.*]—STOKES *v.* CURLED HAIR CO. (1912), 22 O. W. R. 474; 3 O. W. N. 1414; 4 D. L. R. 844.—**CAN.**

c. —— —— ——.]—It is the duty of the master in any employment involving risk of life or limb to point out such dangers as are not patent.—BROWN *v.* COXWORTH (1913), 24 W. L. R. 361; 4 W. W. R. 776; 11 D. L. R. 369; 6 Sask. L. R. 80.—**CAN.**

d. —— *Onus of proof of breach.*]—In an action against an employer to recover damages for injuries received while operating a mangle, it is incumbent on plff. to show an omission on the part of the employer to inform her of something which she needed to know in order to be safe.—MCPHERSON *v.* VAIL (1904), 40 N. S. R. 517.—**CAN.**

PART XIII. SECT. 1, SUB-SECT. 1.—B.

1602 i. *Duty to provide proper plant—Cannot be delegated.*]—WILSON *v.* BOULTER (1899), 26 A. R. 184.—**CAN.**

1602 ii. —— ——.]—BRAND *v.* ROSS BROTHERS (1912), 22 W. L. R. 781; 8 D. L. R. 256; 3 W. W. R. 561.—**CAN.**

1602 iii. —— ——.]—Employers owe a duty to those who come upon their property for the purpose of work in which they are interested, to see that the property & appliances are fit for the purpose to which they are to be put, & that duty is not discharged by merely contracting with a competent person. If the owner lets a contract to make the premises safe he must see that it is carried out.—VELASKY *v.* WESTERN CANADA POWER CO. (1913), 25 W. L. R. 59; 12 D. L. R. 774; 18 B. C. R. 407.—**CAN.**

1602 iv. —— ——.]—The owner of machinery which is dangerous, if unfenced, is liable for the consequences of insufficient fencing; & it is no defence that he appointed an overseer, who ought to have seen to the fencing of the machinery.—DARBY *v.* DUNCAN & CO. (1861), 23 Dunl. (Ct. of Sess.) 529; 33 Sc. Jur. 206.—**SCOT.**

1604 i. —— *Properly superintended.*]—LUCAS *v.* LATTIN (1914), 10 Tas. L. R. 7.—**AUS.**

1604 ii. —— ——.]—An employer is bound to take reasonable care that his works are properly & safely constructed & fitted with machinery such as to ensure a reasonable degree of security to a careful workman, & to provide reasonably skilful & careful supervision.—FOLEY *v.* WEBSTER (1892), 2 B. C. R. 137.—**CAN.**

1604 iii. ——.]—LISBET *v.* BRITISH COLUMBIA LUMBER CORPN., LTD. (1914), 27 W. L. R. 859; 6 W. W. R. 817; 17 D. L. R. 449; 19 B. C. R. 480.—**CAN.**

1608 i. —— *Whether master bound to adopt improvements.*]—M'GILL *v.* BOWMAN & CO. (1890), 18 R. (Ct. of Sess.) 206; 28 Sc. L. R. 144.—**SCOT.**

1611 i. —— —— *All latest improvements.*]—Where an injury has occurred by reason of an employer's neglect to provide the best known or conceivable

on which a jury might find in the second case that there was an absence of reasonable care on the part of the master; (2) as the duty towards an employee to provide proper safety appliances to plant used in workshops, distinguished from its subsequent care, rested upon the employer himself, & could not be delegated by him to competent persons, as the duty to keep the plant in proper repair could be, the accident was due to negligence, for which the master himself was answerable.—TORONTO POWER CO., LTD. *v.* PASKWAN, [1915] A. C. 734; 84 L. J. P. C. 148; 113 L. T. 353, P. C.

Annotation:—As to (2) **Distd.** Laubach *v.* Co-optimists' Entertainment Syndicate (1926), 43 T. L. R. 30.

1612. —— —— When shown to be necessary by previous accident.]—TORONTO POWER CO., LTD. *v.* PASKWAN, No. 1611, *ante*.

1613. —— Maintained in proper condition.]—CLARKE *v.* HOLMES, No. 1588, *ante*.

1614. —— ——.]—WEBB *v.* RENNIE, No. 1635, *post*.

1615. —— ——.]—SMITH *v.* BAKER & SONS, No. 1657, *post*.

1616. —— —— Duty to maintain may be delegated.]—TORONTO POWER CO., LTD. *v.* PASKWAN, No. 1611, *ante*.

1617. —— ——.]—Pltf., the headmaster of a non-provided school, while discharging his duties in the school, was injured through the bursting of a boiler connected with the heating apparatus. In 1905 the heating apparatus & boiler were inspected & pltf. was warned that owing to the obsolete character of the apparatus & boiler, there was a danger of the boiler bursting. Pltf. duly reported the matter to the managers & subsequently, on several occasions, he brought the dangerous condition of the boiler to the notice of the managers, but nothing was done to remedy the defect. In Feb. 1919, as the result of a severe frost, the pipe of the heating apparatus got blocked, causing pressure of steam in the boiler which resulted in its bursting. Defts. were the managers of the school at the time of the accident. Two of them were appointed in 1904, one in 1908, & the remainder since 1908:—*Held:* (1) defts. were under a liability to keep the school house in good repair & were under the duty of taking reasonable care to provide proper appliances & to maintain them in a proper condition so as not to subject those employed by them to unnecessary risk; (2) on the facts, each of the managers, on taking office, was negligent in not ascertaining & remedying the condition of the heating apparatus, & in the case of the three managers appointed before 1909, they were negligent after having had notice by pltf. of the condition of the boiler; (3) pltf., having reported the matter, was not negligent in opening the school & having the fire lighted after the severe frost of Feb. 1919; (4) pltf. did not voluntarily incur the risk; (5) pltf. was entitled to succeed.—ABBOTT *v.* ISHAM (1920), 90 L. J. K. B. 309; 124 L. T. 734; 85 J. P. 30; 37 T. L. R. 7; 18 L. G. R. 719.

Annotation:—As to (1) & (2) **Reld.** Baker *v.* James, [1921] 2 K. B. 674.

1618. Duty to examine—Scaffolding.]—WEBB *v.* RENNIE, No. 1635, *post*.

1619. —— Machinery.]—Pltf., a stevedore in deft.'s service, was engaged in loading deft.'s ship with iron girders, which were being lifted on board by a chain attached to a donkey engine, when the chain suddenly snapped & a girder fell upon pltf. & injured him. It appeared from the evidence that some of the links of the chain were worn, & some also were badly welded; & that a person accustomed to chains could, on looking at the chain in question have observed these defects; also that there were well known methods adopted by "chain testers" for examining & testing chains. The chain in question which had been employed for the purpose, had been in use on deft.'s premises for seven years, & had not been examined or tested in any way before the accident. The jury found in answer to questions put by the learned judge, that the breaking of the chain was caused partly by bad welding & partly by its worn condition; that it was not in a fit condition for the work it was put to or to sustain the weight lifted by it; that deft. did not know of its defective

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appliances to prevent accidents, the employer is subject to common law liability.—BALCH & PEPPARD *v.* ROMBURGH (1900), 1 Cout. Dig. 432.—**CAN.**

1613 i. —— *Maintained in proper condition.*]—An employer is bound not only to provide reasonably efficient machinery, but to take means to prevent such deterioration as would increase the danger to the servant.—PUDSEY *v.* DOMINION ATLANTIC RY. CO. (1895), 27 N. S. R. 498; 25 S. C. R. 691.—**CAN.**

1613 ii. —— ——.]—DIXON *v.* WINNIPEG ELECTRIC STREET RY. CO. (1897), 11 Man. L. R. 528.—**CAN.**

1613 iii. ——.]—It is the duty of the employer at common law to provide proper appliances for his workmen to work with & to maintain them in proper condition.—HOOPER *v.* BEAIRSTO PLUMBING CO. (1913), 24 W. L. R. 182; 4 W. W. R. 562; 11 D. L. R. 245; 23 Man. L. R. 712.—**CAN.**

1613 iv. —— ——.]—WYERS *v.* WINLOW & IRVING CO. (1913), 24 O. W. R. 401; 4 O. W. N. 1080; 10 D. L. R. 587.—**CAN.**

1613 v. —— ——.]—COLLIER *v.* HAMILTON (1914), 32 O. L. R. 214; 20 D. L. R. 629; 7 O. W. N. 277.—**CAN.**

1613 vi. —— ——.]—To render an employer liable for injury to an employee from a defect in machinery it must be proved that the employer has failed to maintain the machinery in a condition in which it can be used with safety if operated with ordinary care according to the usage of the works.—NICHOLSON *v.* EAST RAND PROPRIETARY MINES, LTD., [1910] T. L. 235.—**S. AF.**

1616 i. —— —— *Duty to maintain may be delegated.*]—A railroad co. is not liable for personal injuries sustained by an employee by reason of a defect in the track, provided the track was properly constructed & competent workmen were employed to keep it in order.—WOOD *v.* CANADIAN PACIFIC RY. CO. (1899), 6 B. C. R. 561.—**CAN.**

e. —— —— *According to nature of defect.*]—OGDEN *v.* MELBOURNE ELECTRIC SUPPLY CO., LTD., [1918] V. L. R. 77.—**AUS.**

f. —— —— *Effect of unsuccessful attempt to repair.*]—HENDERSON *v.* CARRON CO. (1889), 16 R. (Ct. of Sess.) 633; 26 Sc. L. R. 456.—**SCOT.**

g. ——.]—BRIDGES *v.* ONTARIO ROLLING MILLS CO. (1890), 19 O. R. 731.—**CAN.**

h. ——.]—SIM *v.* DOMINION FISH CO. (1901), 21 C. L. T. 371; 2 O. L. R. 69.—**CAN.**

k. ——.]—CANADA WOOLLEN MILLS, LTD. *v.* TRAPLIN (1904), 25 C. L. T. 26; 35 S. C. R. 424.—**CAN.**

l. ——.]—At common law, the duty is cast upon the master of seeing that the machinery & tackle supplied by him to his servants for the performance of their duties are suitable & proper.—PROCTOR *v.* PARSONS BUILDING CO. (1913), 25 W. L. R. 463; 14 D. L. R. 40; 6 Sask. L. R. 123.—**CAN.**

m. ——.]—MARSHALL *v.* GRAND TRUNK PACIFIC RY. CO. (Sask.), [1922] 2 W. W. R. 1; 65 D. L. R. 440.—**CAN.**

n. ——.]—At common law, a master does not warrant the sufficiency of his machinery to his workmen.—OVINGTON *v.* M'VICAR (1864), 2 Macph. (Ct. of Sess.) 1066.—**SCOT.**

o. ——.]—CALDER *v.* NINIMO & CO., LTD. (1906), 45 Sc. L. R. 212.—**SCOT.**

p. —— *Reasonable precautions sufficient.*]—CARNEY *v.* CARAQUET RY. CO. (1890), 29 N. B. R. 425.—**CAN.**

q. —— ——.]—TORONTO POWER CO. *v.* RAYNOR (1915), 51 S. C. R 490.—**CAN.**

r. —— —— *Directions to jury.*]—GOODWIN *v.* TAYLOR (1918), 43 O. L. R. 141; 43 D. L. R. 610.—**CAN.**

t. —— *Properly safeguarded.*]—PRICE *v.* TALON (1902), 22 C. L. T. 195; 32 S. C. R. 123.—**CAN.**

a. —— ——.]—BISNAW *v.* SHIELDS (1904), 24 C. L. T. 120; 7 O. L. R. 210; 3 O. W. R. 112.—**CAN.**

b. —— ——.]—ALLAN *v.* SAWYER-MASSEY CO. (1906), 12 O. L. R. 282; 8 O. W. R. 269.—**CAN.**

c. —— ——.]—FAIRWEATHER *v.* CANADIAN GENERAL ELECTRIC CO. (1913), 28 O. L. R 300; 24 O. W. R. 164; 4 O. W. N. 892.—**CAN.**

d. —— ——.]—EDWARDS *v.*

Sect. 1.—At common law: Sub-sect. 1, B., C. & D.; sub-sect. 2, A.]

state, but that he might have discovered it had he chosen to examine the chain himself or to have had it examined by a competent person:—*Held:* deft. having failed in his duty to ascertain the condition of the chain, was liable to pltf., his servant, in an action to recover damages for the injury sustained by the latter through the breaking of the chain.—MURPHY *v.* PHILLIPS (1876), 35 L. T. 477; 24 W. R. 647.

Annotations:—**Reid.** Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523; Baker *v.* James, [1921] 2 K. B. 674.

1620. —— Ship.]—Deft. chartered for a single voyage a vessel which was at the time at sea & in ballast. The charterparty declared that she was in every way fit for the service, & provided that she should be so maintained by the owners. On the afternoon of Apr. 5 the vessel was put at deft.'s disposal in dock, & two hours afterwards the loading began, deft. having contracted with a stevedore for the purpose who had engaged pltf. amongst others to carry out the work. Fifteen minutes later pltf., in the course of his work, had to descend a ladder leading into the hold. It came adrift, & pltf. fell, sustaining injuries for which he sued deft.:—*Held:* deft. was liable to pltf., since it was his duty under the circumstances to make some inspection of the vessel before allowing the stevedore & his men to go on board her, & since the slightest inspection would have revealed the defective state of the ladder.—MARNEY *v.* SCOTT, [1899] 1 Q. B. 986; 68 L. J. Q. B. 736; 47 W. R. 666; 15 T. L. R. 320; 43 Sol. Jo. 417; *subsequent proceedings, sub nom.* SCOTT *v.* AIKMAN & Co., 16 T. L. R. 55.

Annotations:—**Distd.** Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305. **Mentd.** Maclenan *v.* Segar, [1917] 2 K. B. 325.

1621. —— Domestic premises.]—(1) A master is not under any legal duty to his servant to have any periodical or other examination of ordinary domestic premises, which are apparently in good condition for the purpose of discovering whether any defects exist which may be a possible source of danger to the servants employed upon the premises.

(2) The duty of a master towards his servant, in regard to premises of the master where the servant works, is to take reasonable care to maintain the premises *in a condition free from* any concealed danger of which the master is aware or ought to be aware.

Pltf., a chauffeur, was employed by deft. to take charge of her motor car & of the garage where it was kept. In the top of the door of the garage there was a window for admitting light to the garage. Whilst pltf., who had been in deft.'s service for about a fortnight, was opening the garage door from the inside to admit the car, a heavy piece of glass fell from the window & injured him. The evidence showed that the glass was of unusual weight & thickness, that portions of the beading & putty which had originally held the glass in position had at some time come away, & that a nail had been driven into the door with a view to making the glass secure. There was no evidence that either pltf. or deft. knew of the defective condition of the window. There was some evidence that such premises should be periodically examined, but there was no evidence to show the usual or proper periods at which they should be examined, or that deft. had negligently failed to secure a proper examination:—*Held:* (3) it was the duty of deft. to take reasonable care to maintain the premises in a condition free from any concealed dangers of which deft. knew or ought to know; (4) there was no evidence from which a jury could infer negligence on the part of deft.—COLE *v.* DE TRAFFORD (No. 2), [1918] 2 K. B. 523; 87 L. J. K. B. 1254; 119 L. T. 476; 62 Sol. Jo. 635, C. A.

Annotation:—*As to* (1) **Reid.** Baker *v.* James, [1921] 2 K. B. 674.

1622. Duty to provide proper means of access.]—PYNER *v.* BULLARD, KING & Co. (1897), 14 T. L. R. 57, C. A.

1623. Duty to maintain premises—Free from concealed danger.]—COLE *v.* DE TRAFFORD (No. 2), No. 1621, *ante*.

Duty to fence machinery.]—*See* FACTORIES, Vol. XXIV., pp. 908–910, Nos. 65–76.

C. Selection of Competent Fellow Servants.

See Sub-sect. 5, C. (*c*) i., *post*.

HUTCHEON (1889), 16 R. (Ct. of Sess.) 694; 26 Sc. L. R. 550.—**SCOT.**

e. —— *Whether master bound to use safety device.*]—If there is a good cause of action for negligence, because a safety device was not used, that cause of action is not taken away because a statute provides that under certain other conditions, the safety device must be used.—MUIRHEAD *v.* INTERCOLONIAL COAL MINING CO. (1914), 14 E. L. R. 195; 16 D. L. R. 450.—**CAN.**

f. —— *Reasonably fit for the purpose.*]—WAMBOLT *v.* HALIFAX & SOUTH WESTERN RY. (1919), 52 N. S. R. 341.—**CAN.**

g. *Duty to examine—Machinery—System of chain testing.*]—MCLELLAN *v.* HALIFAX GRAVING DOCK CO. (1897), 40 N. S. R. 90.—**CAN.**

h. —— *Ship—Liability of stevedore.*]—SIMPSON *v.* PATON (1896), 23 R. (Ct. of Sess.) 590; 33 Sc. L. R. 413; 3 S. L. T. 309.—**SCOT.**

k. —— *Delegation to competent person.*]—CANADIAN COLOURED COTTON MILLS CO. *v.* TALBOT (1897), 27 S. C. R. 198.—**CAN.**

l. —— ——.]—Where an inspection of plant has been duly made by competent persons using their best judgment in the honest discharge of their duty, there can be no negligence imputed to the employer in that respect, although it afterwards appear that there has been error in judgment or in the manner in which the inspection was performed.—CANADIAN ASBESTOS CO. *v.* GIRARD (1905), 36 S. C. R. 13.—**CAN.**

m. —— *Inadequate system of inspection.*]—DIXON *v.* CANADIAN COLLIERIES (B. C.), [1917] 2 W. W. R. 763; 36 D. L. R. 388; 24 B. C. R. 34; *affd., sub nom.* CANADIAN COLLIERIES (DUNSMUIR), LTD. *v.* DIXON (1918), 55 S. C. R. 620; 39 D. L. R. 758.—**CAN.**

n. —— *Cable.*]—WRENK *v.* SMITH BROTHERS & WILSON, LTD. (Sask.), [1919] 3 W. W. R. 212.—**CAN.**

o. —— *Reasonable examination.*]—PHALEN *v.* GRAND TRUNK PACIFIC RY. CO. (1913), 24 W. L. R. 785; 4 W. W. R. 1039; 12 D. L. R. 347; 23 Man. L. R. 435.—**CAN.**

p. —— ——.]—It is not sufficient in an action of damages for bodily injuries by a workman against his employer to prove that the employer's machinery broke down while being put to an ordinary use. Pursuer must prove that the cause of the breakdown of the machinery could have been discovered & remedied if a reasonable inspection of the machinery had been made by the employer.—GAVIN *v.* ROGERS (1889), 17 R. (Ct. of Sess.) 206; 27 Sc. L. R. 123.—**SCOT.**

q. ——.]—BRASS *v.* CANADIAN PACIFIC RY. CO., [1925] 4 D. L. R. 1079; *affg.*, [1925] 1 D. L. R. 1045; [1925] 1 W. W. R. 619; 19 Sask. L. R. 303.—**CAN.**

r. —— *Ropes.*]—FRASER *v.* FRASER (1882), 9 R. (Ct. of Sess.) 896; 19 Sc. L. R. 646.—**SCOT.**

1623 i. *Duty to maintain premises—Free from concealed danger.*]—MAGNUSSEN *v.* L'ABBE & BENGSTEN (1912), 21 O. W. R. 376; 3 O. W. N. 864; 4 D. L. R. 857.—**CAN.**

1623 ii. —— ——.]—FARNHAM *v.* NEW BANK COAL CO. (1896), 23 R. (Ct. of Sess.) 722; 33 Sc. L. R. 555; 4 S. L. T. 2.—**SCOT.**

t. ——.]—TOBIN *v.* NEW GLASGOW IRON, COAL & RY. CO. (1897), 26 N. S. R. 268.—**CAN.**

a. ——.]—BARNES *v.* BRITISH COLUMBIA COPPER CO., LTD. (1909), 14 B. C. R. 397.—**CAN.**

b. ——.]—SMITH *v.* ALBERTA CLAY PRODUCTS, LTD. (1914), 28 W. L. R. 740; 7 Alta. L. R. 358; 6 W. W. R. 788; 17 D. L. R. 214.—**CAN.**

c. —— *Negligence of independent contractors.*]—BUCHANAN *v.* LASHBROOK (1923), 54 O. L. R. 662.—**CAN.**

D. Proper System of Work.

1624. Master responsible for system of work.]—GURLING *v.* HURST & Co. (1889), 6 T. L. R. 94, D. C.

1625. ——.]—SMITH *v.* BAKER & SONS, No. 1657, *post*.

1626. ——.]—LLOYD *v.* WOOLLAND BROTHERS, No. 1667, *post*.

SUB-SECT. 2.—RISKS UNDERTAKEN BY SERVANT.

A. In General.

1627. General rule—All risks incidental to employment.]—HUTCHINSON *v.* YORK, NEWCASTLE & BERWICK RY. CO., No. 1697, *post*.

1628. —— ——.]—A declaration in case stated that deft. was possessed of a theatre & a stage therein for dramatic performances, & of a dressing room there, & a floor underneath the stage, in which floor was a hole, & along which floor the performers were accustomed to pass to & from the dressing room; that deft. hired pltf. to act & sing on the said stage, & that pltf., on, etc., did act & sing in a certain opera performed for deft.'s profit; & that it then became the duty of deft. to cause the floor to be sufficiently lighted, & the hole to be sufficiently fenced, etc.; yet deft. well knowing the premises, suffered & permitted the floor to be insufficiently lighted, & the hole to be open without any sufficient fence, whereby pltf., who was, after the performance, passing from the back of the stage to the dressing room along the floor, fell into the hole, & was grievously injured, etc.:—*Held*: bad in arrest of judgment; because the facts stated disclosed no duty, of which any breach was alleged, & the express allegation of duty was wholly immaterial.

If pltf. complains of a breach of duty on the part of deft., it is necessary for him to show the circumstances out of which that duty arises. Here he shows that he was hired to do certain service upon premises, in which there was a hole insufficiently lighted & guarded; but that imports no duty on the part of the master to guard or light that hole. It is for the servant to choose whether he will be hired upon such premises. This is in no respect different from the case of service in a house, of which the staircase is steep & difficult; the servant need not engage to serve in that house; but if he does, there is no contract on the part of the master that the house shall be in a particular state (ERLE, J.).—SEYMOUR *v.* MADDOX (1851), 16 Q. B. 326; 20 L. J. Q. B. 327; 16 L. T. O. S. 387; 15 Jur. 723; 117 E. R. 904.

Annotations:—**Apld.** Gott *v.* Gandy (1853), 23 L. J. Q. B. 1. **Reld.** Couch *v.* Steel (1854), 3 E. & B. 402; Metcalfe *v.* Hetherington (1855), 11 Exch. 257; Roberts *v.* Smith (1857), 2 H. & N. 213; Bolch *v.* Smith (1862), 7 H. & N. 736; Clarke *v.* Holmes (1862), 7 H. & N. 937; Indermaur *v.* Dames (1866), L. R. 1 C. P. 274; Collis *v.* Selden (1868), L. R. 3 C. P. 495; Burr *v.* Theatre Royal, Drury Lane, [1907] 1 K. B. 544; Cole *v.* De Trafford (No. 2) (1918), 87 L. J. K. B. 1254. **Mentd.** Charles *v.* Altin (1854), 2 W. R. 595.

1629. —— ——.]—WIGGETT *v.* FOX, No. 1770, *post*.

1630. —— ——.]—SOUTHCOTE *v.* STANLEY, No. 1702, *post*.

1631. —— ——.]—BARTONSHILL COAL CO. *v.* MCGUIRE, No. 972, *ante*.

1632. —— ——.]—LOVELL *v.* HOWELL, No. 1751, *post*.

1633. —— ——.]—THOMAS *v.* QUARTERMAINE, No. 1976, *post*.

1634. —— —— **Dangerous employment.**]—CLARKE *v.* HOLMES, No. 1588, *ante*.

PART XIII. SECT. 1, SUB-SECT. 1.—D.

1624 i. *Master responsible for system of work.*]—A master is responsible to his workmen for personal injuries occasioned by a defective system of using machinery as well as for injuries caused by a defect in the machinery itself.—WEBSTER *v.* FOLEY (1892), 21 S. C. R. 580.—**CAN.**

1624 ii. ——.]—GRAND TRUNK RY. CO. *v.* WEEGAR (1894), 23 S. C. R. 422.—**CAN.**

1624 iii. ——.]—CARRIGAN *v.* GRANBY CONSOLIDATED MINES (1911), 17 W. L. R. 459; 16 B. C. R. 157.—**CAN.**

1624 iv. ——.]—It is the duty of the master to provide fit & proper places for the workmen to work in & a fit & proper system & suitable materials.—SCOTNEY *v.* SMITH BROTHERS & WILSON (1912), 21 W. L. R. 287; 4 D. L. R. 143.—**CAN.**

1624 v. ——.]—A master is liable at common law for maintaining a dangerous & defective system.—HICKS *v.* SMITH'S FALLS ELECTRIC POWER CO. (1913), 24 O. W. R. 556; 4 O. W. N. 1215; 10 D. L. R. 653.—**CAN.**

1624 vi. ——.]—FAIRBROTHER *v.* FEGLES-BELLOWS ENGINEERING CO., LTD. (N. B.) (1919), 48 D. L. R. 248.—**CAN.**

1624 vii. ——.]—SWORD *v.* CAMERON (1839), 1 Dunl. (Ct. of Sess.) 493.—**SCOT.**

d. —— *Evidence of defective system.*]—The fact that for many years an operation has been carried on in the same way & with the same appliances without an accident, while strong evidence in the master's favour, is not conclusive, & if there is evidence that the system is defective the case must be submitted to the jury.—COMMARFORD *v.* EMPIRE LIMESTONE CO. (1905), 11 O. L. R. 119; 6 O. W. R. 1018.—**CAN.**

e. —— *Illegal system.*]—FRALICK *v.* GRAND TRUNK RY. CO. (1910), 43 S. C. R. 494; 30 C. L. T. 690.—**CAN.**

f. —— *Cannot be delegated.*]—An employer carrying on dangerous operations is liable at common law for damages sustained by an employee in consequence of injuries occasioned by the use of a system which failed to provide a safe & proper place in which the employee could do his work: he is not relieved from this responsibility by the fact that the operations were superintended by a competent foreman.—BROOKS, SCANLON, O'BRIEN CO., LTD. *v.* FAKKEMA (1911), 44 S. C. R. 412.—**CAN.**

g. —— *Thawing explosives.*]—TORONTO CONSTRUCTION CO. *v.* STRATI (1911), 23 O. W. R. 317; 46 S. C. R. 631.—**CAN.**

h. —— ——.]—LILJA *v.* GRANBY CONSOLIDATED MINING, ETC. CO., [1917] 1 W. W. R. 243; 23 B. C. R. 147.—**CAN.**

k. —— *Defective organisation.*]—TORANGUE *v.* CANADIAN PACIFIC RY. CO. (1912), 22 W. L. R. 467.—**CAN.**

l. —— *Duty to conform to established rule of operation.*]—STAATS *v.* CANADIAN PACIFIC RY. CO. (1914), 27 W. L. R. 627; 6 W. W. R. 401; 17 D. L. R. 309; 7 Sask. L. R. 184.—**CAN.**

m. —— *System of warning—Sufficient if effective when properly carried out.*]—CREVELLING *v.* CANADIAN BRIDGE CO. (1914), 28 W. L. R. 906; 20 B. C. R. 137; 6 W. W. R. 1399; 20 D. L. R. 528; 8 W. W. R. 619.—**CAN.**

n. —— *Effect of negligence of third party.*]—An employer is liable at common law for damages for an injury to an employee, the result of failure to adopt a proper & safe system of carrying on the work, even though the accident would not have happened but for the negligence of a third party.—FULTON *v.* FEGLES-BELLOWS ENGINEERING CO., LTD. (1919), 46 N. B. R. 249.—**CAN.**

o. *What amounts to defective system.*]—MCDONALD *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (1911), 16 B. C. R. 386.—**CAN.**

p. ——.]—KOSTENKO *v.* O'BRIEN (1914), 26 O. W. R. 387; 6 O. W. N. 99; 16 D. L. R. 875.—**CAN.**

PART XIII. SECT. 1, SUB-SECT. 2—A.

1627 i. *General rule—All risks incidental to employment.*]—Where pltf. knows that a certain amount of danger is connected with emergency work, & enters defts.' service for that purpose, in so doing, he takes upon himself the risk of any dangers which defts. could not, by reasonable skill or knowledge, have been expected to guard against.—ROSTROM *v.* CANADIAN NORTHERN RY. CO. (1912), 21 W. L. R. 225; 2 W. W. R. 260; 22 Man. L. R. 250; 3 D. L. R. 302.—**CAN.**

1627 ii. —— ——.]—WILLIAMS *v.* KELLER (Man.) (1918), 41 D. L. R. 69.—**CAN.**

1627 iii. —— ——.]—BRUCE *v.* BARCLAY (1890), 17 R. (Ct. of Sess.) 811; 27 Sc. L. R. 670.—**SCOT.**

q. —— —— *Dangerous employment — Inexperienced workman.*]—WILLIAMS *v.* WESTERN PLANING MILLS CO. (1910), 16 W. L. R. 13; 3 Alta. L. R. 314.—**CAN.**

r. —— —— *Not in absence of care & skill.*]—CANADA ATLANTIC RY. CO. *v.* HURDMAN (1895), 25 S. C. R. 205.—**CAN.**

Sect. 1.—*At common law: Sub-sect.* 2, *A. & B.; sub-sect.* 3, *A.*]

1635. ——— ——— ———.]—(1) In an action by a labourer against his employers for an injury caused by the fall of a scaffold pole, proved to have fallen through the rottenness of the end put into the earth, it appearing that it had been in the earth 2 years, & that though some poles might last as long without being rotten, others would not; & that no one was employed from time to time to take up the poles to see if they were sound:—*Held:* if the jury thought the pole was left in the ground an unreasonable time without examination, there was evidence of negligence to sustain the action.

(2) Where a particular service necessarily involves a certain amount of danger, the servant who engages in the employment must submit to the risks attendant upon it in the course of its ordinary conduct & management; but on the other hand, the servant had a right to expect that he shall only be exposed to the ordinary risks of the employment, & that the machinery or apparatus about which he is to be employed, & out of which danger arises, shall be attended to with reasonable care, to insure its being in a fit state to be worked without undue or extraordinary danger to those employed in or about it (COCKBURN, C.J.).

(3) Although in general an employer was not liable unless he knew of the danger, yet it was his business to know if, by reasonable care & precaution, he could ascertain whether the apparatus or machinery were in a fit state or not. It was not enough, therefore, that the master did not know of the danger if, by reasonable care, he might have known, & if, reasonably, he ought to have known, & to have taken the proper means of knowing (COCKBURN, C.J.).

(4) Although he would not be liable merely on account of the negligence of his servants, yet it was his duty either himself to take the proper means of knowing of the danger, or to employ come competent person to do so. . . . The master must either ascertain the state of the machinery or apparatus himself, or employ some competent person to do so; & if he did employ such a person, & a workman was injured in consequence of that person's neglect of his duty in that respect, the master would not be liable to one of his servants for such negligence of a fellow servant in the particular matter (COCKBURN, C.J.).—WEBB *v.* RENNIE (1865), 4 F. & F. 608.

Annotations:—*As to* (1) **Refd.** Baker *v.* James, [1921] 2 K. B. 674. *As to* (4) **Refd.** Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523. *Generally*, **Refd.** Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523.

1636. ——— ——— ———.]—If a party, whether a servant or otherwise, undertakes an employment which involves danger of accident, & an accident occur, he cannot sue his employer for damages, although such accident might have been avoided by additional care on the part of the master. A., who contracted with deft. to do certain work upon deft.'s premises, engaged pltf. as his servant to assist in doing such work. Upon the premises there was a large hole in the ground floor, which led down by a ladder to a urinal & water-closet for the use of the men employed. This hole was unprotected, & in a somewhat dark place, but pltf. knew of its existence & had used it. Having fallen down this hole & broken his leg, he sued deft. for damages for negligence:—*Held:* there was no negligence on the part of deft., & pltf. was not entitled to recover.—BROOKS *v.* COURTNEY (1869), 20 L. T. 440; 33 J. P. 453.

Annotation:—**Refd.** Weblin *v.* Ballard (1886), 17 Q. B. D. 122.

1637. ——— ——— ———.]—Pltf. was a sheetroller in the service of defts. at their steel works, & had been so for three years. Five steam engines properly constructed were used in the factory. Some stood at a distance from the other, but two men only were employed to attend to them all, as pltf. well knew. During the necessary absence of both the engine tenters, without negligence on their part, an engine ran away, or revolved too fast, & caused a drum connected with it to fly to pieces, one of which, passing through a yard, entered the mill where pltf. worked, & hurt him. The runaway engine might have been stopped in time to prevent mischief if an attendant had been near it. Pltf. having brought an action against deft., was nonsuited on the above facts, & the nonsuit was upheld by the Ct. of Exch.:—*Held:* pltf., being aware of the dangers incidental to his employment, contracted to take the risks, & therefore could not recover.—SAXTON *v.* HAWKSWORTH (1872), 26 L. T. 851, Exch.

1638. ——— ——— ———.]—Pltf., a workman in the employ of a contractor engaged by defts., had to work in a dark tunnel rendered dangerous by the passing of trains. After he had been working a fortnight he was injured by a passing train. The jury found that defts. in not adopting any precautions for the protection of pltf. had been guilty of negligence:—*Held:* pltf. having continued in his employment with full knowledge, could not make defts. liable for an injury arising from danger to which he voluntarily exposed himself.

If pltf., in doing the work on the railway, is to be looked upon as the servant of the co., the decision of the Ct. of Exch. in his favour cannot, as it seems to me, be upheld. It could not be said that any deception was practised on pltf. as to the degree of danger to which he would be exposed. He must be taken to have been aware of the nature & character of the work & its attendant risks when he entered into the employ of the contractor for the job in question, or at all events he must have become fully aware of it as soon as he began to work. If he had been misled in supposing that precautionary measures such as the dangerous nature of the service rendered reasonably necessary would be taken, he had a right to throw up his engagement & to decline to go on with the work; & such would have been his proper course. But with a full knowledge of the danger, he continued in the employment, & had been working in the tunnel for a fortnight when the accident happened. A man who enters on a necessarily dangerous employment with his eyes open takes it with its accompanying risks. On the other hand, if the danger is concealed from him & an accident happens before he becomes aware of it, or if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, & from the want of such precautions an accident happens to him before he has become aware of their absence, he may hold the employer liable. If he becomes aware of the danger which has been concealed from him, & which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as

though he had accepted it with a full knowledge of its danger in the first instance, & must be taken to waive his right to call upon the employer to do what is necessary for his protection, or in the alternative to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages. He cannot put on the employer terms to which he has now full notice that the employer never intended to bind himself. It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible, as I certainly think the co. were in the present instance. The workman who depends on his employment for the bread of himself & his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But looking at the matter in a legal point of view, if a man for the sake of the employment, takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury (COCKBURN, C.J.).—WOODLEY *v.* METROPOLITAN DISTRICT RY. CO. (1877), 2 Ex. D. 384; 46 L. J. Q. B. 521; 36 L. T. 419; 42 J. P. 181, C. A.

Annotations:—**Consd.** Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685. **Apld.** Yarmouth *v.* France (1887), 19 Q. B. D. 647. **Distd.** Thrussell *v.* Handyside (1888), 20 Q. B. D. 359. **Consd.** Membery *v.* G. W. Ry. (1889), 14 App. Cas. 179. **Refd.** Charles *v.* Taylor, Walker (1878), 38 L. T. 773.

1639. —— —— ——.]—SMITH *v.* BAKER & SONS, No. 1657, *post.*

1640. Application of rule to domestic establishments.]—SOUTHCOTE *v.* STANLEY, No. 1702, *post.*

1641. Not risks foreign to employment.]—BARTONSHILL COAL CO. *v.* MCGUIRE, No. 972, *ante.*

1642. —— Risk of bite from dog.]—Pltf. was employed by deft. as a dressmaker. It was no part of her duty to go down into the kitchen, but on one occasion she went there, at the request of deft. to fetch something up. As she was leaving the kitchen a savage dog, which was generally tied up, rushed from under the table and bit her leg. Pltf. was aware that a dog of this kind was kept on the premises. The county ct. judge at the trial nonsuited pltf., on the ground that as pltf. was a servant, & knew the disposition of the dog, no action was maintainable:—*Held:* the nonsuit was wrong, inasmuch as the risk was not incidental to the service, & there was evidence to go to the jury of the liability of deft. for the injury sustained by pltf.—MANSFIELD *v.* BADDELEY (1876), 34 L. T. 696; 40 J. P. 646, D. C.

1643. Not breach of statutory duty.]—JONES *v.* CANADIAN PACIFIC RY. CO., No. 1818, *post.*

1644. Whether particular risk undertaken by servant—Question of fact.]—WILLIAMS *v.* BIRMINGHAM BATTERY & METAL CO., No. 1590, *ante.*

1645. —— ——.]—BAKER *v.* JAMES, No. 1681, *post.*

B. Negligence of Fellow Servants.

See Sub-sect. 5, C. (*c*), *post.*

SUB-SECT. 3.—WHEN ACTION LIES AGAINST MASTER.

A. In General.

1646. Whether barred by election to accept compensation under Workmen's Compensation Acts—Infant apprentice.]—An apprentice who was an infant, met with an accident in the course of his employment, & he agreed with his employers to accept a weekly payment amounting to half his wages in compensation, & signed a receipt, which stated that he elected to accept this sum under Workmen's Compensation Act, 1897 (c. 37), in full satisfaction & discharge of all claims for compensation. Subsequently he brought an action against his employers at common law for damages in respect of the same injuries, based on their negligence in not having fenced the machine plane:—*Held:* the Act by including an apprentice in the general word "workman" did not alter the law applicable to contracts made by infants, & it not being for the infant's benefit to accept compensation under Workmen's Compensation Act, 1897 (c. 37), his election to accept same did not bind him, & his claim under the Act was therefore no bar to his common law right to sue.—STEPHENS *v.* DUDBRIDGE IRONWORKS CO., [1904] 2 K. B. 225; 73 L. J. K. B. 739; 90 L. T. 838; 68 J. P. 437; 52 W. R. 644; 20 T. L. R. 492; 48 Sol. Jo. 474; 6 W. C. C. 48, C. A.

Annotation:—**Distd.** Cribb *v.* Kynoch (No. 2), [1908] 2 K. B. 551.

——.]—*See, further,* Part XIV., Sect. 25, *post.*

1644 i. *Whether particular risk undertaken by servant—Question of fact.*]—SKOROPATA *v.* YUKON GOLD CO. (Y. T.) (1910), 16 W. L. R. 178.—**CAN.**

1644 ii. —— ——.]—TARIO *v.* WEST CANADIAN COLLIERIES, LTD. (1914), 29 W. L. R. 167; 20 D. L. R. 761.—**CAN.**

1644 iii. —— ——.]—Where there are additional risks to employment created by the employer's fault, & an accident happens to the workman, it is a question of fact to be determined on the evidence whether the workman either expressly or by implication has voluntarily agreed to relieve his employer of the consequences of those risks, & if he has not the employer will be liable.—WALLACE *v.* CULTER PAPER MILLS CO. (1892), 19 R. (Ct. of Sess.) 915; 29 Sc. L. R. 784.—**SCOT.**

t. —— —— *Knowledge of risk.*]—It is not a sufficient defence to show that a person injured had knowledge of the risks of his employment; there must be such knowledge shown as, in the circumstances, leaves no doubt that the risk was voluntarily incurred, & this must be found as a fact.—MCDOUGALL *v.* MONTREAL PARK & ISLAND RY. CO., 25 C. L. T. 98.—**CAN.**

a. —— —— ——.]—A workman who in pursuance of his orders operates a machine which is unguarded, & who knows that in so doing he is incurring a risk, is not guilty of such negligence as would absolve his employer from liability unless it can be found as a fact that the workman has agreed to undertake the risk involved.—FORNELL *v.* NELSON & FOSTER (1916), 34 W. L. R. 658; 10 W. W. R. 650; 26 Man. L. R. 308.—**CAN.**

b. —— —— ——.]—MCGEE *v.* EGLINTON IRON CO. (1883), 10 R. (Ct. of Sess.) 955; 20 Sc. L. R. 649.—**SCOT.**

c. —— *Appreciation of risk.*]—VALCI *v.* SMALL (1913), 24 O. W. R. 529; 4 O. W. N. 1238; 11 D. L. R. 433.—**CAN.**

d. —— *Expectation of removal of risk.*]—MULCAHY *v.* EDMONTON, DUNVEGAN & BRITISH COLUMBIA RY. CO. (Alta.), [1920] 2 W. W. R. 583; 53 D. L. R. 77; 15 Alta. L. R. 464.—**CAN.**

e. *Risks from work outside his employment—Act under orders of superior.*]—A workman ordered by an overseer to do what is clearly beyond the limits of the work for which he is engaged, & thereby expose himself to danger, obeys at his own risk.—SUTHERLAND *v.* MONKLAND RY. CO. (1857), 19 Dunl. (Ct. of Sess.) 1004; 29 Sc. Jur. 475.—**SCOT.**

PART XIII. SECT. 1, SUB-SECT. 3.—A

f. *Whether barred by other statutory remedy—Employers' Liability Act,* 1882.]—Employers' Liability Act, 1882, does not take away the common law remedy of a workman to recover damages for injuries suffered through a breach of duty on the part of the employer.—WELLINGTON & MANAWATU RY. CO., LTD. *v.* MCLEOD (1900), 19 N. Z. L. R. 257.—**N.Z.**

Sect. 1.—*At common law: Sub-sect.* 3, *B., C. & D.* (*a*).]

B. Grounds of Action.

1647. Breach of duty.]—(1) Declaration in case stated that pltf. was a servant of deft. in his trade of a butcher; that deft. had desired & directed pltf., so being his servant, to go with & take certain goods of the deft. in a certain van of deft. then used by him, & conducted by another of his servants, in carrying goods for hire upon a certain journey; that pltf., in pursuance of such desire & direction, accordingly commenced & was proceeding, & being carried & conveyed by the van, with the goods; & it became deft.'s duty to use proper care that the van should be in a proper state of repair, & should not be overloaded, & that pltf. should be safely & securely carried thereby; nevertheless that deft. did not use proper care that the van should not be overloaded, or that pltf. should be safely & securely carried; in consequence of the neglect of which duties, the van gave way & broke down, & pltf. was thrown to the ground, & his thigh fractured:—*Held:* it was sufficiently to be collected from the declaration that deft. directed pltf. to go in the van, but, even in that case, the action was not maintainable.

(2) The servant is not bound to risk his safety in the service of the master & may, if he think fit, decline any service in which he reasonably apprehends injury to himself (LORD ABINGER, C.B.).

(3) The mere relation of master & servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself.

The master is, no doubt, bound to provide for the safety of his servant in the course of his employment (LORD ABINGER, C.B.).—PRIESTLEY *v.* FOWLER (1837), 3 M. & W. 1; Murp. & H. 305; 7 L. J. Ex. 42; 1 Jur. 987; 150 E. R. 1030.

Annotations:—*As to* (1) **Apld.** Couch *v.* Steel (1854), 3 E. & B. 402. **Refd.** Brown *v.* Mallett (1848), 5 C. B. 599; Seymour *v.* Maddox (1851), 16 L. T. O. S. 387; Metcalfe *v.* Hetherington (1855), 11 Exch. 257; Riley *v.* Baxendale (1861), 6 H. & N. 445. *As to* (2) **Apld.** Hutchinson *v.* York, Newcastle & Berwick Ry. (1850), 5 Exch. 343; Wigmore *v.* Jay (1850), 5 Exch. 354; Southcote *v.* Stanley (1856), 1 H. & N. 247; Searle *v.* Lindsay (1861), 11 C. B. N. S. 429. **Distd.** Clarke *v.* Holmes (1862), 7 H. & N. 937. **Apld.** Waller *v.* S. E. Ry. (1863), 2 H. & C. 102; Tunney *v.* Mid. Ry. (1866), L. R. 1 C. P. 291. **Consd.** Fowler *v.* Lock (1872), L. R. 7 C. P. 272. **Apld.** Lovell *v.* Howell (1876), 1 C. P. D. 161; Rourke *v.* White Moss Colliery Co. (1877), 46 L. J. Q. B. 283; Hedley *v.* Pinkney S.S. Co., [1892] 1 Q. B. 58. **Consd.** Groves *v.* Wimborne, [1898] 2 Q. B. 402. **Apld.** Tozeland *v.* West Ham Union, [1906] 1 K. B. 538; Coldrick *v.* Partridge, Jones, [1910] A. C. 77; Heasmer *v.* Pickfords (1920), 36 T. L. R. 818. **Refd.** Wiggett *v.* Fox (1856), 11 Exch. 832; Vose *v.* L. & Y. Ry. (1858), 2 H. & N. 728; Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669; Morgan *v.* Vale of Neath Ry. (1865), 14 W. R. 144; Turner *v.* G. E. Ry. (1875), 33 L. T. 431; Swainson *v.* N. E. Ry. (1878), 3 Ex. D. 341; Murphy *v.* Wilson (1883), 52 L. J. Q. B. 524; Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685; Johnson *v.* Lindsay, [1891] A. C. 371; The Petrel, [1893] P. 320; Marley *v.* Osborn (1894), 10 T. L. R. 388; Young *v.* Hoffmann Manufacturing Co., [1907] 2 K. B. 646; Lees *v.* Dunkerley, [1911] A. C. 5; Watkins *v.* Naval Colliery Co. (1912), 107 L. T. 321. *As to* (3) **Consd.** Mellors *v.* Shaw (1861), 1 B. & S. 437; Hoey *v.* Dublin & Belfast Ry. (1870), 18 W. R. 930; Woodley *v.* Met. Dist. Ry. (1877), 2 Ex. D. 384; Baker *v.* James, [1921] 2 K. B. 674. **Refd.** Dynen *v.* Leach (1857), 26 L. J. Ex. 221; Scott *v.* Manchester Corpn. (1857), 26 L. J. Ex. 132; Bartonshill Coal Co. *v.* McGuire (1858), 31 L. T. O. S. 258; Bartonshill Coal Co. *v.* Reid (1858), 31 L. T. O. S. 255; Griffiths *v.* Dudley (1882), 9 Q. B. D. 357; Gibbs *v.* G. W. Ry. (1883), 11 Q. B. D. 22; Griffiths *v.* London & St. Katharine Docks Co. (1884), 13 Q. B. D. 259; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523. *Generally*, **Refd.** Bland *v.* Ross, The Julia (1861), 14 Moo. P. C. C. 210. **Mentd.** Bamford *v.* Turnley (1862), 3 B. & S. 62.

1648. ——.]—SEYMOUR *v.* MADDOX, No. 1628, *ante*.

1649. ——.]—WILSON *v.* MERRY, No. 1747, *post*.

1650. ——.]—MEMBERY *v.* GREAT WESTERN RY. CO., No. 1566, *ante*.

1651. ——.]—WILLIAMS *v.* BIRMINGHAM BATTERY & METAL CO., No. 1590, *ante*.

—— **What amounts to.**]—*See* Sub-sect. 1, *ante*.

1652. Personal negligence of master.]—DYNEN *v.* LEACH, No. 1608, *ante*.

1653. ——.]—ORMOND *v.* HOLLAND, No. 1800, *post*.

1654. ——.]—THOMAS *v.* QUARTERMAINE, No. 1976, *post*.

1655. ——.]—BUTLER *v.* BIRNBAUM, No. 1610, *ante*.

1656. ——.]—SMITHWHITE *v.* MOORE & SONS, LTD. (1898), 14 T. L. R. 461.

1657. Negligent system of work.]—When a workman engaged in an employment not in itself dangerous is exposed to danger arising from an operation in another department over which he has no control, the danger being created or enhanced by the negligence of the employer, the mere fact that he undertakes or continues in such employment with full knowledge & understanding of the danger is not conclusive to show that he has undertaken the risk so as to make the maxim "*Volenti non fit injuria*" applicable in case of injury. The question whether he has so undertaken the risk is one of fact & not of law, & this is so both at common law & in cases arising under Employers Liability Act, 1880 (c. 42).

Pltf. was employed by railway contractors to drill holes in a rock cutting near a crane worked by men in the employ of the contractors. The crane lifted stones & at times swung them over pltf.' head without warning. Pltf was fully aware of the danger to which he was exposed by thus working near the crane without any warning being given, & had been thus employed for months. A stone having fallen from the crane & injured pltf., he sued his employers in the county ct. under Employers' Liability Act, 1880 (c. 42). The jury found (*a*) that the machinery for lifting the stone, taken as a whole, was not reasonably fit for the purpose for which it was applied; (*b*) that the omission to supply special means of warning was a defect in the ways, works, machinery & plant; (*c*) that the employers, or some person engaged by them to look after the condition of the works, etc., were guilty of negligence in not remedying the defect; (*d*) that pltf. was not guilty of contributory negligence; (*e*) that he did not voluntarily undertake a risky employment with a knowledge of its risks; & returned a verdict for pltf. for damages. Application having been made to enter judgment for defts. on the ground that the case ought not to have gone to the jury, pltf. having admitted that he knew of the risk & voluntarily incurred it:—*Held:* (1) the mere

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PART XIII. SECT. 1, SUB-SECT. 3.—B.

g. Personal negligence — Allottment of unsuitable work—By fellow servant.]—Where a competent person engaged to carry out a certain duty employs another, unfitted by reason of strength or otherwise, to perform such duty, & an accident occurs, through the defect of such latter person, there is evidence of direct personal negligence on the original employer's part.—VALLENDER *v.* VICTORIAN RAILWAYS COMRS. (1896), 22 V. L. R. 141.—AUS.

h. —— —— *By master.*]—When a master orders a labourer to do a piece of work, out of the line of his ordinary employment, which could with safety be done only by a skilled workman, the master is responsible should any accident happen to the workman.—ROBERTSON *v.* BROWN (1876), 3 R. (Ct. of Sess.) 652; 13 Sc. L. R. 436.—SCOT.

1657 *i. Negligent system of work.*]—DAYNES *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. LIABILITY (1912), 17 B. C. R. 498; 49 S. C. R. 578.—CAN.

1657 *ii.* ——.]—THOMSON *v.* BAIRD &

fact that pltf. undertook & continued in the employment with full knowledge & understanding of the danger arising from the systematic neglect to give warning did not preclude him from recovering; the evidence would justify a finding that pltf. did not voluntarily undertake the risk of injury, the maxim "*Volenti non fit injuria*" did not apply.

The principle embodied in the maxim has sometimes been stated thus: A person who is engaged to perform a dangerous operation takes upon himself the risks incident thereto. To the proposition thus stated that is no difficulty in giving an assent, provided that what is meant by engaging to perform a dangerous operation, & by the risks incident thereto, be properly defined. . . . Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it (LORD HERSCHELL).

(2) A negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from Employers' Liability Act, 1880 (c. 42) (LORD HALSBURY, C.). —SMITH *v.* BAKER & SONS, [1891] A. C. 325; 60 L. J. Q. B. 683; 65 L. T. 467; 55 J. P. 660; 40 W. R. 392; 7 T. L. R. 679, H. L.

Annotations:—As to (1) **Folld.** Greenhalgh *v.* Cwmaman Coal Co. (1891), 8 T. L. R. 31. **Apld.** Williams *v.* Birmingham Battery & Metal Co., [1899] 2 Q. B. 338. **Consd.** Smerkinich *v.* Newport Corpn. (1912), 76 J. P. 454. **Apld.** Norman *v.* G. W. Ry., [1914] 2 K. B. 153. **Consd.** Canadian Pacific Ry. *v.* Fréchette, [1915] A. C. 871; Baker *v.* James, [1921] 2 K. B. 674. **Refd.** Wild *v.* Waygood (1892), 66 L. T. 309; Pyner *v.* Bullard, King (1897), 14 T. L. R. 57. *As to* (2) **Apld.** Stanton *v.* Scrutton (1893), 62 L. J. Q. B. 405. **Consd.** Lloyd *v.* Woolland (1902), 19 T. L. R. 32. **Apld.** Monoghan *v.* Rhodes, [1920] 1 K. B. 487. **Consd.** Nimmo *v.* Connell, [1924] A. C. 594. **Refd.** Thomas *v.* Great Western Colliery Co. (1894), 10 T. L. R. 244; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523; Abbott *v.* Isham (1920), 90 L. J. K. B. 309. *Generally*, **Mentd.** Brannigan *v.* Robinson, [1892] 1 Q. B. 344; Willetts *v.* Watt (1892), 61 L. J. Q. B. 540; Ultzen *v.* Nicol (1893), 63 L. J. Q. B. 289; Neptune Steam Navigation Co. *v.* Sclater & Proctor, The Delano (1894), 71 L. T. 544; L. & N. W. Ry. *v.* Donellan, Same *v.* Billington (1898), 78 L. T. 575; Wohlgemuth *v.* Coste, [1899] 1 Q. B. 501; Darlow *v.* Singleton (1901), 86 L. T. 529, n.; Darlow *v.* Shuttleworth, [1902] 1 K. B. 721; Stephen *v.* International Sleeping Car Co. (1903), 47 Sol. Jo. 692; Nathan *v.* Rouse (1904), 2 L. G. R. 1304; Hase *v.* London General Omnibus Co. (1907), 23 T. L. R. 616; Barry *v.* Minturn, [1913] A. C. 584; Taylor *v.* National Amalgamated Apprvd. Soc., [1914] 2 K. B. 352; Sales Agency *v.* Elite Theatres, [1917] 2 K. B. 164; Gonsky *v.* Durrell, [1918] 2 K. B. 71; Smith *v.* G. W. Ry. (1920), 37 T. L. R. 117; Kimpson *v.* Markham, [1921] 2 K. B. 157; Moriarty *v.* Regent's Garage Co., [1921] 2 K. B. 766; Waller *v.* Thomas, [1921] 1 K. B. 541; Nelson Murdoch *v.* Wood (1922), 126 L. T. 745; Ward *v.* Sneiman (1925), 133 L. T. 560.

——.]—*See, generally*, NEGLIGENCE.

C. Injury must occur in Course of Employment.

1658. General rule.]—PRIESTLEY *v.* FOWLER, No. 1647, *ante*.

1659. ——.]—RILEY *v.* BAXENDALE, No. 1593, *ante*.

1660. Servant leaving work for own purposes.]—BRYDON *v.* STEWART, No. 1583, *ante*.

1661. —— **Without lawful excuse.**]—A master is liable for accidents occasioned by his neglect towards those whom he employs, while they are engaged in his employment, but great latitude must be given to the phrase "engaged in his employment," *eundo morando et redeundo*; & it makes not the slightest difference, that at the time of the accident the servant was leaving his work without lawful excuse or proper cause.

A., a miner employed to work in the mine of B. went down as usual to his day's work, but he & the other miners, after working a short time, held a meeting amongst themselves to discuss certain supposed grievances, & they resolved before working further, to come up from the pit at twelve o'clock, the usual hour for their coming up being five o'clock & go in a body to represent their grievance to B.'s manager. While so coming up A. was killed by a stone which fell from the top of the shaft, the planking there being in an unsafe state. A.'s representatives brought an action of damages against B., & the judge told the jury that B. was not responsible for the accident, if A. was at the time leaving his work without proper cause & for a purpose of his own. The jury found that A. was leaving his work without proper cause, but that he was killed owing to the unsafe state of the planking at the mouth of the pit:—*Held*: the ruling of the judge was wrong, & whether A. had just cause for leaving his work or not, & was coming up for a purpose of his own, still B. was responsible, being bound to take A. up just as safely as he let him down.—MARSHALL *v.* STEWART (1855), 25 L. T. O. S. 58; 19 J. P. 259, H. L.

D. Accidents caused by Defective Plant, etc.

(a) In General.

1662. Whether knowledge of master material.]—Declaration stated that defts. were owners of a coal mine, & pltf. was employed by defts. as a collier in the mine, & in the course of his employment it was necessary for him to descend & ascend through a shaft constructed by defts.; that by the negligence of defts. the shaft was constructed unsafely, & was, by reason of not being sufficiently lined or cased, in an unsafe condition, which defts. well knew; & by reason of the premises, & also by reason, as defts. well knew, of no sufficient or proper apparatus having been provided by defts. to protect pltf. from injuries arising from the unsafe state of the shaft, a stone fell from the side of the shaft on the head of pltf., & he was dangerously wounded. Plea, not guilty. At the trial it was proved that S., one of the two defts., was manager of the mine, & that it was

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Co. (1903), 6 F. (Ct. of Sess.) 142; 41 Sc. L. R. 152; 11 S. L. T. 510.—**SCOT.**

k. *Constructive negligence of master.*]—Negligence on the part of a manager or foreman is not constructive negligence on the part of the master. Actual personal negligence of the master must be established, as a foreman is but a fellow servant, though it may be of a higher grade.—RUDD *v.* BELL (1887), 13 O. R. 47.—**CAN.**

PART XIII. SECT. 1, SUB-SECT. 3.—C.

1658 i. *General rule.*]—KNOX *v.* STEPHENS (1870), 1 V. R. (Law) 102.—**AUS.**

1658 ii. ——.]—KING *v.* NORTHERN NAVIGATION CO. (1912), 22 O. W. R. 697; 3 O. W. N. 1538; 27 O. L. R. 79; 6 D. L. R. 69.—**CAN.**

1658 iii. ——.]—GORDON *v.* CANADIAN NORTHERN RY. CO. (1912), 20 W. L. R. 705; 2 W. W. R. 114; 5 Sask. L. R. 169; 2 D. L. R. 183.—**CAN.**

1658 iv. ——.]—A master is not liable where the workman was not acting within the scope of his employment at the time he was injured.—BERGE *v.* MACKENZIE, MANN & CO. (1914), 30 W. L. R. 231; 7 W. W. R. 866; 20 D. L. R. 1.—**CAN.**

1658 v. ——.]—BILTON *v.* MACKENZIE (1914), 25 O. W. R. 714; 5 O. W. N. 818; 31 O. L. R. 585; 19 D. L. R. 633; 6 O. W. N. 572.—**CAN.**

1658 vi. ——.] — GALLAGHER *v.* BURRELL & SON (1883), 11 R. (Ct. of Sess.) 53; 21 Sc. L. R. 38.—**SCOT.**

PART XIII. SECT. 1, SUB-SECT. 3.—D. (a).

1662 i. *Whether knowledge of master material.*]—JARVIS *v.* MAY (1876), 26 C. P. 523.—**CAN.**

1662 ii. ——.]—Where a master has such a personal supervision of work on which a servant is engaged, so that he knows, or ought to know, of the condition of the materials employed in the work, he is liable for injuries resulting to the servant from the materials being defective, even though he has employed a competent foreman, unless the servant, by the exercise of

Sect. 1.—*At common law: Sub-sect.* 3, *D.* (*a*).]

worked under his personal superintendence; & that pltf. was not aware of the state of the shaft. The jury found that defts. were guilty of personal negligence. On motion to enter a non-suit:—*Held:* (1) on this finding of the jury S. was liable, & therefore the other deft. was liable also; (2) the declaration must be taken to allege personal knowledge in defts. of the state of the shaft, & therefore the action was maintainable.—MELLORS *v.* SHAW (1861), 1 B. & S. 437; 30 L. J. Q. B. 333; 25 J. P. 806; 7 Jur. N. S. 845; 9 W. R. 748; 121 E. R. 778.

Annotations:—*As to* (1) **Refd.** Davies *v.* England & Curtis (1864), 33 L. J. Q. B. 321; Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669; Abbott *v.* Isham (1920), 90 L. J. K. B. 309. *As to* (2) **Refd.** Clarke *v.* Holmes (1862), 7 H. & N. 937; Brown *v.* Accrington Cotton Co. (1865), 3 H. & C. 511; Watling *v.* Oastler (1871), L. R. 6 Exch. 73; Williams *v.* Birmingham Battery & Metal Co., [1899] 2 Q. B. 338. *Generally*, **Refd.** Britton *v.* Great Western Cotton Co. (1872), L. R. 7 Exch. 130.

1663. ——.]—OGDEN *v.* RUMMENS, No. 1690, *post.*

1664. ——.]—FELTHAM *v.* ENGLAND, No. 1759, *post.*

1665. ——.]—In an action for negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew, but that the servant was ignorant of, the danger.—GRIFFITHS *v.* LONDON & ST. KATHARINE DOCKS CO. (1884), 13 Q. B. D. 259; 53 L. J. Q. B. 504; 51 L. T. 533; 49 J. P. 100; 33 W. R. 35, C. A.

Annotations:—**Consd.** Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685; Yarmouth *v.* France (1887), 19 Q. B. D. 647; Williams *v.* Birmingham Battery & Metal Co., [1899] 2 Q. B. 338; Lloyd *v.* Woolland (1902), 87 L. T. 73; Abbott *v.* Isham (1920), 90 L. J. K. B. 309; Monaghan *v.* Rhodes, [1920] 1 K. B. 487. **Dbtd.** Baker *v.* James, [1921] 2 K. B. 674. **Refd.** Sayer *v.* Hatton (1885), 1 Cab. & El. 492; Groves *v.* Fuller (1888), 4 T. L. R. 474.

1666. ——.]—GROVES *v.* FULLER (1888), 4 T. L. R. 474, D. C.

1667. ——.]—It is perfectly clear that the master was bound to supply fit & proper machinery, & to supply competent persons to superintend it, & equally in a case where it might be machinery was not used at all, he was responsible for the system under which the business was conducted, if that system itself involved danger, & he was the author of, or was responsible for the system. How far does that apply to the present case? There is no evidence, as regards this machine, that the master was aware of any danger at all, & the particular danger which it was suggested he was aware of was not anything in the machine itself, the only defect being the oiling of the floor of the lift, & as to that, I fail to find any evidence that the master knew anything about it (COLLINS, M.R.).—LLOYD *v.* WOOLLAND BROTHERS (1902), 19 T. L. R. 32, C. A.

Annotation:—**Refd.** Baker *v.* James, [1921] 2 K. B. 674.

1668. ——.]—COLE *v.* DE TRAFFORD (No. 2), No. 1621, *ante.*

1669. —— **When defect ought to have been discovered.**]—WEBB *v.* RENNIE, No. 1635, *ante.*

1670. —— ——.]—MURPHY *v.* PHILLIPS, No. 1619, *ante.*

1671. —— ——.]—MARNEY *v.* SCOTT, No. 1620, *ante.*

1672. —— ——.]—BAKER *v.* JAMES, No. 1681, *post.*

1673. What constitutes knowledge of master—Not knowledge of general foreman.]—Pltf., a labourer in the employ of defts., builders in a large way of business, being engaged in raising a scaffolding, found that there was an insufficient supply of flat boards for the purpose. He complained to the foreman of the scaffolders & also defts.' general manager or foreman. In consequence of the absence of flat boards pltf. was obliged to stand on a round putlog & his foot slipping he fell & was much hurt. Having brought an action against defts., the jury found that there had been no negligence on pltf.'s part, & that the scaffold was insecure & insufficient to the knowledge not of defts., but of the general foreman & the foreman of the scaffolders:—*Held:* such labourer & foreman were fellow servants, & consequently no action was maintainable against the builders for the injury the labourer sustained from the fall, without negligence on their part in appointing the foreman; & notice to the general manager of the insufficiency of the materials for the construction of the scaffolding was not in contemplation of law notice to defts. so as to render them liable for an injury sustained by pltf. in consequence of the insufficiency of such materials.—LOVEGROVE *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO., GALLAGHER *v.* PIPER (1864), 16 C. B. N. S. 669; 4 New Rep. 291; 33 L. J. C. P. 329; 10 L. T. 718; 10 Jur. N. S. 879; 12 W. R. 988; 143 E. R. 1289.

Annotations:—**Consd.** Murphy *v.* Smith (1865), 19 C. B. N. S. 361. **Folld.** Feltham *v.* England (1866), L. R. 2 Q. B. 33. **Consd.** Wilson *v.* Merry (1868), L. R. 1 Sc. & Div. 326. **Refd.** Hall *v.* Johnson (1865), 3 H. & C. 589; Applebee *v.* Percy (1874), L. R. 9 C. P. 647; Allen *v.* New Gas Co. (1876), 1 Ex. D. 251; Cribb *v.* Kynoch, [1907] 2 K. B. 548.

1674. Whether ignorance of servant material.]—WILLIAMS *v.* CLOUGH, No. 1688, *post.*

1675. ——.]—Declaration by the administratrix of G., that defts. were owners of a factory & machine, & G. was employed by them to work therein, & in the course of his employment it was necessary for him to enter the machine to clean it; that by the negligence of defts. it was unsafely constructed & in a defective condition, & was, by reason of not being sufficiently guarded, unfit to be used & entered, as defts. well knew; & by reason of the premises, & also by reason, as defts. well knew, of no sufficient apparatus having been provided by them to protect G., it was suddenly put in motion whilst he was at work in the machine, & he thereby sustained injuries from which he afterwards died:—*Held:* the declaration sufficiently showed that the machine was set in motion by defts.' negligence, & it therefore disclosed a cause of action, although there was no

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reasonable & ordinary care, could have seen the defect.—WOOD *v.* PITTFIELD (1887), 26 N. B. R. 210.—**CAN.**

1662 iii. ——.]—MCINTYRE *v.* HOLLIDAY (1909), 10 W. L. R. 558.—**CAN.**

1662 iv. ——.]—MCENTEE *v.* GRAND TRUNK PACIFIC RY. CO., [1918] 2 W. W. R. 253; 11 Sask. L. R. 145; 40 D. L. R. 322.—**CAN.**

1662 v. ——.]—WRIGHT & DUNLOP & CO., LTD. (1893), 20 R. (Ct. of Sess.) 363; 30 Sc. L. R. 417.—**SCOT.**

1674 i. *Whether ignorance of servant material.*]—A declaration against a master for negligently & improperly providing defective appliances for the use of the servant, in consequence whereof he was injured, need not allege servant's ignorance of the defect.—LAKE *v.* DRURY (1893), 32 N. B. R. 82.—**CAN.**

i. *Effect of knowledge of servant.*]—Where a servant knows, from his own inspection & experience, that a machine is dangerous, that it needs caution & firmness in operating, & the risks are open to his observation; & his opportunities & means of judging of the danger are at least as good as those of his employers, the latter are not liable.—RUDD *v.* BELL (1887), 13 O. R. 47.—**CAN.**

m. ——.]—MILLER *v.* REID (1884), 10 O. R. 419.—**CAN.**

n. ——.]—M'NEILL *v.* WALLACE & Co. (1853), 15 Dunl. (Ct. of Sess.)

allegation that G. was ignorant of the dangerous & defective character of the machine. *Semble:* defts. would, under the circumstances alleged, be liable, even if the machine had been set in motion by a stranger.—WATLING *v.* OASTLER (1871), L. R. 6 Exch. 73; 40 L. J. Ex. 43; 23 L. T. 815; 19 W. R. 388.

Annotations:—**Consd.** Griffiths *v.* London & St. Katharine Docks Co. (1884), 13 Q. B. D. 259; Baker *v.* James, [1921] 2 K. B. 674. **Reld.** King *v.* G. W. Ry. (1871), 44 L. T. 583.

1676. ——.]—GRIFFITHS *v.* LONDON & ST. KATHARINE DOCKS CO., No. 1665, *ante*.

1677. ——.]—BAKER *v.* JAMES, No. 1681, *post*.

1678. Effect of knowledge of servant—When complaint made to master—Promise to repair.]—Where a servant, knowing of a defect in machinery he has to work in his master's employ, complains of it to him, but continues in the use of it, in the reasonable expectation of its being repaired, & an accident happens through its defective condition, he is not precluded from recovering against his master for negligence.

If knowledge may mean belief on sufficient grounds, as he [pltf.] had his master's assurance that the defect should be remedied, he might well be said to have had no knowledge at the time of the accident that the defect existed (WILLES, J.).—HOLMES *v.* WORTHINGTON (1861), 2 F. & F. 533.

1679. —— —— ——.]—CLARKE *v.* HOLMES, No. 1588, *ante*.

1680. —— ——.]—ABBOTT *v.* ISHAM, No. 1617, *ante*.

1681. —— ——.]—(1) Pltf., a commercial traveller, was employed by defts., who were wholesale grocers. His duties were to travel round the district, show samples, take orders, & deliver goods, & for that purpose he was supplied by defts. with a motor car, the starting gear of which was defective. He complained of this on several occasions to defts., who admitted that it was defective but failed to remedy the defect. While pltf. was upon one of his journeys the car stopped &, in trying to restart it, he was severely injured. In an action brought by pltf. to recover damages in respect of personal injury resulting from the negligence of defts.:—*Held:* pltf., notwithstanding his knowledge of the defect in the starting gear, had never undertaken or consented to take upon himself the risks arising from continuing to use the car, he had sustained the injury owing to the personal negligence of the defts., & that, not having been guilty of contributory negligence, he was entitled to recover.

(2) The question is ever one of fact, namely, whether pltf. has voluntarily undertaken & contracted to accept the risk for himself (MCCARDIE, J.).

(3) A master may be liable for a danger or defect, causing hurt to his servant, not only where he knew but what he ought to have known of it. . . . I came to the conclusion upon the authorities that the first branch of the proposition in *Griffiths* v. *London & St. Katharine Docks Co.*, No. 1665, *ante*, is not now law. A servant need not aver the actual knowledge of the danger or defect by his master. It suffices to allege that he knew or ought to have known (MCCARDIE, J.).

(4) I also think the second branch of the proposition in *Griffiths* v. *London & St. Katharine Docks Co.*, No. 1665, *ante*, is to be treated as erroneous at the present day. It is, I feel, opposed to principle to say that because a servant knows of the defect he is therefore debarred from damages for injury through his master's negligence (MCCARDIE, J.).—BAKER *v.* JAMES, [1921] 2 K. B. 674; 90 L. J. K. B. 1190; 125 L. T. 414; 37 T. L. R. 591; 19 L. G. R. 551.

1682. —— **When danger obvious.**]—Pltf., a dock labourer in the employment of defts., a firm of stevedores, was, with other servants of defts., working on the loading of a ship in a dock. During the loading defts.' servants so blocked up the iron hold ladders that they could not be used, & in consequence some of them obtained from the ship a rope ladder which was fastened at the top of the coamings of the hatch & swung loose some feet from the bottom of the hold. Pltf. was going up this ladder when it swung & caught his hand between the ladder & the coamings, & in trying to free himself he fell to the bottom of the hold & was seriously injured. There was evidence that after the rope ladder had been supplied pltf. complained to defts.' foreman that the ladder was unsafe, & that one of defts. himself came & saw the ladder in use & did not interfere. Pltf. based his claim (*a*) on the ground that defts. were guilty of statutory negligence under reg. 6 of Part II. of the Order of 1904, under Factory & Workshop Act, 1901 (c. 22); (*b*) on common law negligence. The judge held that the claim on ground (*a*) failed, as the statutory duty was imposed by the regulation upon the shipowners, & not on defts.; & also failed on ground (*b*) as defts. were not guilty of such negligence as to make them liable to pltf. On an appeal by pltf. on the second ground:—*Held:* when once it was ascertained that the original safe mode of access had gone, that another one of obvious danger had been substituted, & defts. had seen the obviously dangerous substitute & did not interfere, it followed that defts. were negligent, & were therefore responsible to pltf. for the accident.—MONAGHAN *v.* RHODES (W. H.) & SON, [1920] 1 K. B. 487; 89 L. J. K. B. 379; 122 L. T. 537.

Annotations:—**Reld.** Abbott *v.* Isham (1920), 90 L. J. K. B. 309; Baker *v.* James, [1921] 2 K. B. 674.

——.]—*See, generally*, Sub-sect. 5, C., *post*.

818; 25 Sc. Jur. 492; 2 Stuart, 241.—**SCOT.**

o. —— *When complaint made to foreman.*]—DEAN *v.* ONTARIO COTTON MILLS CO. (1887), 14 O. R. 119.—**CAN.**

p. —— ——.]—MCMULLEN *v.* COUGHLAN (1912), 22 W. L. R. 543; 3 W. W. R. 158; 17 B. C. R. 491; 7 D. L. R. 718.—**CAN.**

q. —— ——.]—M'AULAY *v.* BROWNLIE (1860), 22 Dunl. (Ct. of Sess.) 975; 32 Sc. Jur. 415.—**SCOT.**

r. —— —— *Expectation of repair.*]—M'MONAGLE *v.* BAIRD & CO. (1881), 9 R. (Ct. of Sess.) 364; 19 Sc. L. R. 256.—**SCOT.**

t. *Effect of ignorance of both master & servant.*]—ROSS *v.* CROSS (1889), 17 A. R. 29.—**CAN.**

a. *Evidence of defect — Expert evidence.*]—BADCOCK *v.* FREEMAN (1897), 21 A. R. 633.—**CAN.**

b. *Presumption of cause of injury —Where plant defective.*]—WILSON *v.* LINCOLN PAPER MILLS CO. (1900), 4 O. W. R. 521; 25 C. L. T. 14; 9 O. L. R. 119.—**CAN.**

c. —— ——.]—WALKER *v.* OLSEN (1882), 9 R. (Ct. of Sess.) 946; 19 Sc. L. R. 708.—**SCOT.**

d. —— ——.]—Where the cause of an accident to a workman is not ascertained, the fact that it has taken place will not raise a presumption that it was caused by a defect in the machinery or plant for which the master was responsible.—MACFARLANE *v.* THOMPSON (1884), 12 R. (Ct. of Sess.) 232; 22 Sc. L. R. 179.—**SCOT.**

e. *Whether negligence of fellow servant material.*]—Where an employer fails to maintain its premises in a condition suitable for carrying on their works with reasonable safety, he is liable for the injuries sustained by an employee, although the explosion causing the injuries may have been attributable to neglect of duty by fellow-workmen.—GRANT *v.* ACADIA COAL CO. (1901), 32 S. C. R. 427.—**CAN.**

f. *Workman in unauthorised place.*]—It is no defence to a party who uses insufficient machinery, by which bodily injury is inflicted upon another that the latter was at the time in a place where he had no right to be, & where if he had not been, no injury would have been inflicted on him.—WHITELAW *v.* MOFFAT (1849), 12 Dunl. (Ct. of Sess.) 434.—**SCOT.**

Sect. 1.—*At common law: Sub-sect.* 3, *D.* (*b*) *&* (*c*), *E. & F.; sub-sects.* 4 *&* 5, *A., B. & C.* (*a*).]

(*b*) *Defective Construction.*

1683. Servant must prove employment of incompetent persons.]—In order to render a master liable for an injury to his servant caused by the breaking of a machine belonging to the master, it is not sufficient to show that the machine was defectively constructed, but there must also be evidence that the master employed incompetent persons to construct the machine.—POTTS *v.* PORT CARLISLE DOCK & RY. CO. (1860), 2 L. T. 283; 8 W. R. 524.

Annotation:—**Refd.** Brown *v.* Accrington Co-operative Cotton Spinning & Manufacturing Co. (1865), 13 L. T. 94.

1684. —— Or personal interference.]—A workman cannot recover damages from his employers for injury sustained by him while at work in their mill, & resulting from the building having been originally negligently constructed, unless personal negligence be proved against his employers themselves, or against some person acting by their orders, either in having given directions how the building should be constructed, or in having knowingly entrusted the execution of the work to an incompetent person.—BROWN *v.* ACCRINGTON COTTON SPINNING & MANUFACTURING CO., LTD. (1865), 3 H. & C. 511; 34 L. J. Ex. 208; 13 L. T. 94; 29 J. P. 744; 159 E. R. 631.

Annotations:—**Refd.** Griffiths *v.* London & St. Katherine's Docks Co. (1884), 50 L. T. 755; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523. **Mentd.** Smyly *v.* Glasgow & Londonderry Steam Packet Co. (1868), 16 W. R. 483.

1685. ——.]—FELTHAM *v.* ENGLAND, No. 1759, *post.*

(*c*) *Danger Concealed from Servant.*

1686. Master liable.]—WOODLEY *v.* METROPOLITAN DISTRICT RY. CO., No. 1638, *ante.*

1687. —— Rotten scaffolding.]—Although a master is not in general responsible for an injury to a servant from the negligence of a fellow servant in the course of their common employment, if the master interferes with one of his servants in the course of his employment, & knowing that the materials to be used by him for the erection of scaffolding are unfit for the purpose & dangerous directs him to use them, & another servant thereby is injured, the master is responsible.—ROBERTS *v.* SMITH (1857), 2 H. & N. 213; 26 L. J. Ex. 319; 29 L. T. O. S. 167; 3 Jur. N. S. 469; 5 W. R. 581; 157 E. R. 89, Ex. Ch.

Annotations:—**Apld.** Ormond *v.* Holland (1858), E. B. & E. 102. **Distd.** Vose *v.* L. & Y. Ry. (1858), 27 L. J. Ex. 249. **Expld.** Mellors *v.* Shaw (1861), 1 B. & S. 437. **Refd.** Griffiths *v.* Gidlow (1858), 3 H. & N. 648; Williams *v.* Clough (1858), 3 H. & N. 258; Ashworth *v.* Stanwix & Walker (1861), 30 L. J. Q. B. 183; Riley *v.* Baxendale (1861), 30 L. J. Ex. 87; Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669; Fowler *v.* Lock (1872), L. R. 7 C. P. 272; Groves *v.* Fuller (1888), 4 T. L. R. 474.

1688. —— Defective ladder.]—Declaration that deft. was possessed of a granary & ladder leading up to it; that the ladder was wholly unfit & unsafe for use; that pltf. was a servant for hire of deft.; that deft. knowing the premises, wrongfully & deceitfully ordered pltf. to carry corn up the ladder into the granary; that pltf. believing the ladder to be fit for use, & not knowing the contrary, did carry corn up the ladder to the granary, & by reason of the ladder being unsafe pltf. fell from it:—*Held:* the declaration was sufficient. *Semble:* if pltf. had the means of knowing that the ladder was unsafe it would have been a defence, but deft. should have pleaded it.—WILLIAMS *v.* CLOUGH (1858), 3 H. & N. 258; 27 L. J. Ex. 325; 31 L. T. O. S. 89; 157 E. R. 468.

Annotations:—**Dbtd.** Baker *v.* James, [1921] 2 K. B. 674. **Refd.** Davies *v.* England & Curtis (1864), 33 L. J. Q. B. 321; Fowler *v.* Lock (1872), L. R. 7 C. P. 272; Griffiths *v.* London & St. Katharine Docks Co. (1884), 13 Q. B. D. 259.

1689. —— Unsafe mine shaft.]—MELLORS *v.* SHAW, No 1662, *ante.*

1690. —— Unsafe archway.]—In an action by the widow of a labouring man, who had been employed, with others, by deft., to shore up an arch, which had sunk, & was killed by its falling upon him:—*Held:* the question was not as to the original construction of the arch, but as to the knowledge of the danger at the time of the accident, & whether deft. had any better means of knowing of it than deceased; & if not, then the jury should find for deft.

If the contractor, whether or not he had anything to do with the foundations, knew of the danger, & knowing it, put a man who did not know of it upon the work of shoring up, the contractor would be responsible. But if he did not know of the danger, or if the man did not know of it, then he would not be liable (BRAMWELL, B.).—OGDEN *v.* RUMMENS (1863), 3 F. & F. 751.

1691. —— Diseased meat.]—The first count alleged that deft. E. was a contractor for the supply of beef to the Royal Navy, & supplied beasts to be slaughtered at one of the dockyards, at which deft. C. was the superintendent of E.'s business, & that it was defts.' duty to take care that healthy & sound beasts were supplied & slaughtered; yet defts. supplied & slaughtered certain diseased cattle, whereby pltf., who had been employed to cut up the carcasses of the cattle, was infected by the disease & suffered damage therefrom. The second count alleged that defts. by representing certain carcasses of beasts to be sound & healthy procured pltf. to cut them up, & the carcasses being diseased pltf. contracted the disease & was permanently injured. The third count alleged that defts. well knowing that certain carcasses were diseased & infectious, employed pltf., who was ignorant of their being diseased, to cut them up, whereby pltf. became infected & was injured:—*Held:* the first & second counts did not disclose a cause of action, but the third did.—DAVIES *v.* ENGLAND & CURTIS (1864), 33 L. J. Q. B. 321; 10 Jur. N. S. 1235.

1692. —— Unsafe wall.]—M'MANUS *v.* GREENWOOD (1886), 2 T. L. R. 588, C. A.

E. Accidents caused by Negligence of Fellow Servants.

See Sub-sect. 5, C. (*e*), *post.*

F. Accidents caused by Breach of Statutory Duties.

Coal Mines Regulation Acts.]—*See* MINES.

Factory Acts.]—*See* FACTORIES, Vol. XXIV., pp. 908–911.

Merchant Shipping Act, 1894 (c. 60).]—*See* SHIPPING.

PART XIII. SECT. 1, SUB-SECT. 3.—D. (b).

1683 i. *Servant must prove employment of incompetent persons.*]—WILSON *v.* BOTSFORD-JENKS CO. (1902), 22 C. L. T. 95.—**CAN.**

1683 ii. ——.]—DAY *v.* MILES (1906), 2 E. L. R. 254.—**CAN.**

PART XIII. SECT. 1, SUB-SECT. 3.—D. (c).

g. *Master liable — Scaffolding — Not fit for its purpose.*]—MICHAUD *v.* EDWARDS (Sask.), [1920] 3 W. W. R. 186; 53 D. L. R. 426.—**CAN.**

h. —— *Defective crane.*]—WELSH *v.* MOIR (1885), 12 R. (Ct. of Sess.) 590; 22 Sc. L. R. 381.—**SCOT.**

k. —— *Unsecured door.*]—THOMSON *v.* SCOTT & CO. (1897), 25 R. (Ct. of Sess.) 54; 35 Sc. L. R. 93.—**SCOT.**

PART XIII. SECT. 1, SUB-SECT. 3.—F.

l. *Building Trades Protection Act, 1910.*]—HUNT *v.* WEBB (1913), 28 O. L. R. 589; 4 O. W. N. 1225.—**CAN.**

SUB-SECT. 4.—AGAINST WHOM ACTION LIES.

1693. Partner—Act of negligence by one partner within scope of partnership business—Liability of other partner.]—ASHWORTH *v.* STANWIX, No. 1819, *post.*

1694. —— —— ——.]—MELLORS *v.* SHAW, No. 1662, *ante.*

1695. Limited liability company.]—KAY *v.* BRITISH WESTINGHOUSE ELECTRIC & MANUFACTURING CO., LTD. (1905), 49 Sol. Jo. 296, C. A.

1696. Guardians of the poor.]—TOZELAND *v.* WEST HAM UNION, No. 1823, *post.*

Husband.]—*See* HUSBAND & WIFE, Vol. XXVII., pp. 217, 218, No. 1891.

Shipowner.]—*See* SHIPPING.

Personal representative of master.] — *See, generally,* EXECUTORS, Vol. XXIV., pp. 646-648.

SUB-SECT. 5.—DEFENCES TO ACTION.

A. Contributory Negligence.

See NEGLIGENCE.

B. Volenti non fit injuria.

See NEGLIGENCE.

C. Common Employment.

(a) In General.

1697. General rule—Common employment a good defence.]—(1) A master is not in general responsible to his servant for injury occasioned by the negligence of a fellow servant while acting in one common service, provided the master shall have taken due care not to expose his servant to unreasonable risks. But, in such a case, the master is not exempt from responsibility where the servant injured was not at the time of the injury acting in the service of the master.

H., a servant of a railway co., in the discharge of his duty, was in a train under the guidance of others of their servants, & by the neglect of those servants, whilst they were engaged together in a common service, a collision took place, & H. was killed:—*Held:* his administratrix could not maintain an action against the co., under Fatal Accidents Act, 1846 (c. 93).

(2) A declaration under Fatal Accidents Act, 1846 (c. 93), stated that H. was in the service of defts., & that, in the discharge of his duty as such servant, he became a passenger in a carriage of defts., drawn by a steam engine under the guidance of defts.; that defts. were possessed of another steam engine, which then was drawing other carriages, under the guidance of defts., by their servants; yet defts. conducted themselves so negligently in & about the guidance of the first-mentioned engine & carriage, & in & about the guidance of the other engine & carriages, that a collision took place, & H. was thereby killed. Plea, that the collision took place solely through the carelessness, negligence, etc., of the servants of defts.; & that the engines & carriages were under the guidance of the servants of defts., who were fit & competent persons to have the guidance of the same; & that the negligence was unauthorised by defts., & without their leave, licence or knowledge:—*Held:* no ground of action appeared on the face of the declaration, & the plea did not amount to the general issue.

(3) The principle upon which a master is in general liable to answer for accidents resulting from the negligence or unskilfulness of his servant, is, that the act of his servant is in truth his own act. . . . If instead of driving the carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was the master's will that the servant should drive; & whatever the servant does in order to give effect to his master's will may be treated by others as the act of the master: *qui facit per alium, facit per se* (ALDERSON, B.).

(4) Though a stranger may treat the act of the servant as the act of his master, yet the servant himself, by whose negligence or want of skill the accident has occurred, cannot, & therefore he cannot defend himself against the claim of a third person; nor, if by his unskilfulness he is himself injured, can he claim damages from his master upon an allegation that his own negligence was, in point of law, the negligence of his master (ALDERSON, B.).

(5) The difficulty is as to the principle applicable to the case of several servants employed by the same master, & injury resulting to one of them from the negligence of another. In such a case the master is not in general responsible when he has selected persons of competent care & skill (ALDERSON, B.).

(6) A servant, when he engages to serve a master undertakes, as between himself & his master, to run all the ordinary risks of the service, & this includes the risk of negligence on the part of a fellow servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both (ALDERSON, B.).

(7) A master is not exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured was not, at the time of the injury, acting in the service of his master. In such a case the

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PART XIII. SECT. 1, SUB-SECT. 5.—C. (a).

1697 i. *General rule—Common employment a good defence.*]—MCLAUGHLAN *v.* CALEDONIAN COAL CO., LTD. (1906), 6 S. R. N. S. W. 109; 23 N. S. W. W. N. 38.—**AUS.**

1697 ii. ——— ———.]—PLANT *v.* GRAND TRUNK RY. CO. (1867), 27 U. C. R. 78.—**CAN.**

1697 iii. —— ——.]—Where the accident has been caused by the negligence of a fellow servant, the employers are not liable.—MCFARLANE *v.* GILMOUR (1883), 5 O. R. 302.—**CAN**

1697 iv. —— ——.]—MCINNIS *v.* MALAGA MINING CO. (1893), 25 N. S. R. 345.—**CAN.**

1697 v. ——— ———.]—TAYLOR *v.* CITY OF HALIFAX (1894), 26 N. S. R. 490.—**CAN.**

1697 vi. —— ——.]—LAKE ERIE & DETROIT RIVER RY. CO. *v.* SCOTT (1901), Cout. 211.—**CAN.**

1697 vii. —— ——.]—O'REGAN *v.* CANADIAN PACIFIC RY. CO. (1912), 11 E. L. R. 457; 9 D. L. R. 849; 41 N. B. R. 347.—**CAN.**

1697 viii. ———.]—The protection given to the master under the rule as to common employment is not based on the theory that the injured servant had in fact some opportunity of observing & guarding against the conduct of his negligent fellow servant; for the immunity of the master is not limited to cases where the two servants have been actually engaged at the same work. —KLEM *v.* PUGET SOUND LUMBER CO. (1913), 24 W. L. R. 61; 4 W. W. R. 516; 11 D. L. R. 83.—**CAN.**

1697 ix. ——— ———.]—SLATER *v.* VANCOUVER POWER CO. (1913), 25 W. L. R. 66; 4 W. W. R. 1311; 13 D. L. R. 143; 18 B. C. R. 429.—**CAN.**

1697 x. —— ——.]—BECK *v.* GUTHRIE, MCDOUGAL & CO. (1913), 18 B. C. R. 482.—**CAN.**

1697 xi. ——— ———.]—HALL *v.* CANADIAN PACIFIC RY. CO. (1914), 20 B. C. R. 293.—**CAN.**

1697 xii. —— ——.]—HVYNCZAK *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (1914), 28 W. L. R. 970; 20 D. L. R. 127; 20 B. C. R. 31.—**CAN.**

1697 xiii. —— ——.]—CANADIAN PACIFIC RY. CO. *v.* CHEESEMAN (1918), 57 S. C. R. 439; 45 D. L. R. 257; 23 Can. Ry. Cas. 429.—**CAN.**

1697 xiv. —— ——.]—The non-liability of a master to a servant where the cause of injury is the negligence of a fellow-servant, is only an example of the general rule, that a master is not liable unless he has neglected that which he has contracted to do; & in general he does not contract to execute

Sect. 1.—At common law: Sub-sect. 5, C. (a).]

servant injured is substantially a stranger & entitled to all the privileges he would have had, if he had not been a servant (ALDERSON, B.).—HUTCHINSON *v.* YORK, NEWCASTLE, & BERWICK RY. CO. (1850), 5 Exch. 343; 6 Ry. & Can. Cas. 580; 19 L. J. Ex. 296; 15 L. T. O. S. 230; 14 Jur. 837; 155 E. R. 150.

Annotations:—As to (1) **Apld.** Morgan *v.* Vale of Neath Ry. (1864), 5 B. & S. 570. **Refd.** The Petrel, [1893] P. 320. *As to* (5) **Apld.** Wiggett *v.* Fox (1856), 11 Exch. 832. **Apprvd.** Bartonshill Coal Co. *v.* Reid (1858), 31 L. T. O. S. 255. **Consd.** Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523. **Refd.** Tarrant *v.* Webb (1856), 18 C. B. 797; Bartonshill Coal Co. *v.* McGuire (1858), 31 L. T. O. S. 258; Hoey *v.* Dublin & Belfast Ry. (1870), 18 W. R. 930; Johnson *v.* Lindsay (1889), 61 L. T. 864. *As to* (6) **Folld.** Morgan *v.* Vale of Neath Ry. (1864), 5 B. & S. 570. **Consd.** Tozeland *v.* West Ham Union, [1906] 1 K. B. 538. **Refd.** Wiggett *v.* Fox (1856), 11 Exch. 832; Riley *v.* Baxendale (1861), 30 L. J. Ex. 87; Swainson *v.* North Eastern Ry. (1878), 3 Ex. D. 341.

1698. —— ——.]—A servant injured by the negligence of a fellow servant in the course of their common employment is not entitled to sue his master for compensation if such fellow servant was a person of skill & care.

Therefore, where an action was brought under Fatal Accidents Act, 1846 (c. 93), to recover damages, deceased having been killed by the fall of some scaffolding which had been erected by persons of competent skill in the employment of his master who was not guilty on that occasion of negligence:—*Held:* the action was not maintainable.—WIGMORE *v.* JAY (1850), 5 Exch. 354; 6 Ry. & Can. Cas. 589; 19 L. J. Ex. 300; 15 L. T. O. S. 206; 14 J. P. 387; 14 Jur. 837; 155 E. R. 155.

Annotations:—**Consd.** Waller *v.* S. E. Ry. (1863), 32 L. J. Ex. 205; Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 4 New Rep. 291. **Folld.** Feltham *v.* England (1866), L. R. 2 Q. B. 33. **Consd.** Wilson *v.* Merry (1868), L. R. 1 Sc. & Div. 326. **Refd.** Dynen *v.* Leach (1857), 26 L. J. Ex. 221; Scott *v.* Manchester (1857), 26 L. J. Ex. 132; Bartonshill Coal Co. *v.* Reid (1858), 31 L. T. O. S. 255; Potts *v.* Port Carlisle Dock & Ry. (1860), 2 L. T. 283; Murphy *v.* Smith (1865), 12 L. T. 605; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523.

1699. —— ——.]—PATERSON *v.* WALLACE & Co., No. 1586, *ante*.

1700. —— ——.]—TARRANT *v.* WEBB, No. 1791, *post*.

1701. —— ——.]—WIGGETT *v.* FOX, No. 1770, *post*.

1702. —— ——.]—The mere relation of master & servant does not create any implied duty on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. . . . The reason for the rule is that the servant undertakes to run all the ordinary risks of service, including those arising from the negligence of his fellow servants. The rule applies to all the members of a domestic establishment, so that the master is not in general liable to a servant for injury resulting from the negligence of a fellow servant. . . . The same principle applies in the case of a visitor at the house; whilst he remains there he is in the same position as any other member of the establishment, so far as regards the negligence of the master or his servants (POLLOCK, C.B.).—SOUTHCOTE *v.* STANLEY (1856), 1 H. & N. 247; 25 L. J. Ex. 339; 27 L. T. O. S. 173; 156 E. R. 1195.

Annotations:—**Consd.** Degg *v.* Mid. Ry. (1857), 26 L. J. Ex. 171; Watling *v.* Oastler (1871), L. R. 6 Exch. 73; Burr *v.* Theatre Royal, Drury Lane, [1907] 1 K. B. 544. **Refd.** Chapman *v.* Rothwell (1858), E. B. & E. 168; Corby *v.* Hill (1858), 4 C. B. N. S. 556; Gallagher *v.* Humphery (1862), 27 J. P. 5; White *v.* Phillips (1863), 15 C. B. N. S. 245; Indermaur *v.* Dames (1866), L. R. 1 C. P. 274; Tebbutt *v.* Bristol & Exeter Ry. (1870), L. R. 6 Q. B. 73; Sandys *v.* Florence (1878), 47 L. J. Q. B. 598; Tolhausen *v.* Davies (1888), 57 L. J. Q. B. 392; Lees *v.* Dunkerley, [1911] A. C. 5; Latham *v.* Johnson & Nephew, [1913] 1 K. B. 398. **Mentd.** Cornman *v.* Eastern Counties Ry. (1859), 29 L. J. Ex. 94.

1703. —— ——.]—ROBERTS *v.* SMITH, No. 1687, *ante*.

1704. —— ——.]—Pltf., a workman, employed with others in sinking a pit, being at the bottom, was injured by the fall of a tub of water which was being drawn up by machinery. Evidence was given that the tackle was improper, not being fitted with a safe hook, & that a jiddy should have been used. Pltf. worked with the hook making no complaint of it. A jiddy had been provided by the master, who had directed that it should be used when earth was raised. Pltf., in his master's presence, had complained that the jiddy was not used for water. The master was at the workings several times each day:—*Held:* the master was not liable; because, assuming the injury to have arisen from the neglect to use the jiddy, the master, having provided a proper apparatus, was not liable for the neglect of pltf.'s fellow workmen in omitting to use it.—GRIFFITHS *v.* GIDLOW (1858), 3 H. & N. 648; 27 L. J. Ex. 404; 31 L. T. O. S. 300; 22 J. P. 675; 157 E. R. 628.

Annotation:—**Refd.** Weblin *v.* Ballard (1886), 17 Q. B. D. 122.

1705. —— ——.]—BARTONSHILL COAL CO. *v.* MCGUIRE, No. 972, *ante*.

1706. —— ——.]—(1) A servant has no right of action against his master for injury done to him in the course of his employment by the acts of his fellow servant; & if killed no action under Fatal Accidents Act, 1846 (c. 93), can be maintained by his representative.

(2) *Semble:* these rules do not hold where the master has personally interfered to direct the act which caused the injury or death.—VOSE *v.* LANCASHIRE & YORKSHIRE RY. CO. (1858), 2 H. & N. 728; 27 L. J. Ex. 249; 30 L. T. O. S. 289; 4 Jur. N. S. 364; 6 W. R. 295; 157 E. R. 300.

Annotations:—**Refd.** Griffiths *v.* Gidlow (1858), 3 H. & N. 648; Swainson *v.* N. E. Ry. (1878), 3 Ex. D. 341. **Mentd.** Spaight *v.* Tedcastle (1881), 6 App. Cas. 217.

1707. —— ——.]—SEARLE *v.* LINDSAY, No. 1761, *post*.

1708. —— ——.]—SMITH *v.* DOWELL (1862), 3 F. & F. 238.

1709. —— ——.]—Where servants are engaged in one common object the injury sustained by one servant in consequence of the negligence of another servant does not give a right of action against the master.

The guard of a train & the plate layers, whose duty it is to attend to the rails over which the train passes, are engaged in one common object: the safe conduct & transit of the train; & therefore no action can be maintained against the co. by

in person the work connected with his business.—WEIR (OR WILSON) *v.* MERRY & CUNNINGHAM (1868), 40 Sc. Jur. 486.—**SCOT.**

1697 xv. —— ——.]—The rule of law which imposes upon a master responsibility for injury caused by his servant's fault, while employed in his service, applies only in cases where the person injured is a stranger, not connected with the work in which the servant is engaged, & in other cases the master is only responsible for personal fault.—WOODHEAD *v.* GARTNESS MINERAL CO. (1877), 4 R. (Ct. of Sess.) 469; 14 Sc. L. R. 320.—**SCOT.**

1697 xvi. —— ——.]—BAXTER *v.* ABERNETHY & Co. (1893), 21 R. (Ct. of Sess.) 159; 31 Sc. L. R. 125; 1 S. L. T. 334.—**SCOT.**

1697 xvii. —— ——.]—FERGUSON *v.* NORTH BRITISH RY. CO., [1915] S. C. 566.—**SCOT.**

m. *Question of fact.*]—ST. JOHN GAS LIGHT CO. *v.* HATFIELD (1894), 23 S. C. R. 164.—**CAN.**

n. *Defence by Crown.*]—In Manitoba the Crown may, in an action for damages for injuries to an employee,

the representative of a guard of a train killed by the train running off the line in consequence of the neglect of the "ganger" of the plate layers to renew the decayed metals which fasten the chairs to the slecpers of the railways.—WALLER *v.* SOUTH EASTERN RY. Co. (1863), 2 H. & C. 102; 2 New Rep. 179; 32 L. J. Ex. 205; 8 L. T. 325; 27 J. P. 665; 9 Jur. N. S. 501; 11 W. R. 731; 159 E. R. 43.

Annotations:—**Apld.** Morgan *v.* Vale of Neath Ry. (1864), 5 B. & S. 570. **Consd.** The Petrel, [1893] P. 320. **Refd.** Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669.

1710. —— ——.]—LOVEGROVE *v.* LONDON, BRIGHTON & SOUTH COAST RY. Co., GALLAGHER *v.* PIPER, No. 1673, *ante*.

1711. —— ——.]—WEBB *v.* RENNIE, No. 1635, *ante*.

1712. —— ——.]—Where through the negligence of an underlooker of a mine employed by defts. the mine owners, to examine &, when necessary, to prop the roof of the mine, a stone fell from the roof upon pltf., a labourer in defts.' employ, & there was no evidence showing want of care on the part of defts. in the selection of the underlooker, or in putting the mine into proper order for mining operations before the miners were sent down, or that defts. personally knew the dangerous state of the roof:—*Held*: (1) defts. were not liable to pltf. in an action for the bodily injury inflicted on him by the stone so falling upon him; (2) pltf. & the underlooker were fellow-labourers, & the underlooker was not in the position of a deputy-master whose negligence had made his principal responsible.—HALL *v.* JOHNSON (1865), 3 H. & C. 589; 5 New Rep. 447; 34 L. J. Ex. 222; 11 L. T. 779; 29 J. P. 245; 11 Jur. N. S. 180; 13 W. R. 411; 159 E. R. 662, Ex. Ch.

Annotations:—*Generally*, **Refd.** Johnson *v.* Lindsay, [1891] A. C. 371; Williams *v.* Linotype & Machinery (1914), 84 L. J. K. B. 1620.

1713. —— ——.]—EDWARDS *v.* LONDON & BRIGHTON RY. Co., No. 1805, *post*.

1714. —— ——.]—MORGAN *v.* VALE OF NEATH RY. Co., No. 1750, *post*.

1715. —— ——.]—A hole had been made in the floor of a factory for the repair of a shaft by one of the servants of deft. Pltf., a fellow servant, ignorant of this, opened a door close to the gap, fell through it & was injured. The master was not liable for the injury so done to a servant in the same employ by the negligence of a fellow servant.—BOTTOMLEY *v.* BROOKS (1866), 15 L. T. 19, N. P.

1716. —— ——.]—A railway station, which was used both by the G. W. Ry. Co. & the L. & N. W. Ry. Co., was under the charge of a servant of the L. & N. W. Ry. Co. A train belonging to the G. W. Ry. Co., & driven by one of their engine drivers, having been improperly & negligently shunted into a siding, injured pltf., a servant of the L. & N. W. Ry. Co., who was there engaged in cleaning carriages on such siding:—*Held*: the injury was caused by the negligence of the engine driver in the discharge of his ordinary duty to the G. W. Ry. Co. alone, & not in the course of any common employment with pltf., & therefore pltf. could maintain an action for damages against the G. W. Ry. Co.

Where two or more persons are servants of one master, or engaged in one common employment, the master is not liable in an action for any injury sustained by one servant by reason of any negligence of another servant engaged in the work or employment common to both, as incidental to the carrying on of the general business, or the operations in which the one & the other are engaged; & the ground on which these decisions have been pronounced is, that it must be presumed as true that the servant takes upon himself the risk of any injury he may sustain by the negligent behaviour of another servant, under the same master, in the same employment, & such risk is part of the consideration for wages he is entitled to receive (KELLY, C.B.).—WARBURTON *v.* GREAT WESTERN RY. Co. (1866), L. R. 2 Exch. 30; 4 H. & C. 695; 36 L. J. Ex. 9; 15 L. T. 361; 31 J. P. 57; 15 W. R. 108.

Annotations:—**Consd.** Rourke *v.* White Moss Colliery Co. (1876), 1 C. P. D. 556; Swainson *v.* N. E. Ry. (1878), 3 Ex. D. 341. **Refd.** Thomas *v.* Quartermaine (1886), 34 W. R. 741; Johnson *v.* Lindsay (1889), 23 Q. B. D. 508.

1717. —— ——.]—Pltf. was employed by a railway co. as a labourer to assist in loading what is called a "pick-up train" with materials left by platelayers & others upon the line. One of the terms of his engagement was that he should be carried by the train from Birmingham, where he resided, & whence the train started, to the spot at which his work for the day was to be done, & be brought back to Birmingham at the end of each day. As he was returning to Birmingham, after his day's work was done, the train in which pltf. was, through the negligence of the guard who had charge of it, came into collision with another train, & pltf. was injured:—*Held*: inasmuch as pltf. was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule which exempts a master from responsibility for an injury to a servant through the negligence of a fellow servant when both are acting in pursuance of a common employment.—TUNNEY *v.* MIDLAND RY. Co. (1866), L. R. 1 C. P. 291; 12 Jur. N. S. 691.

Annotations:—**Apld.** Hando *v.* L. C. & D. Ry. (1867), L. R. 2 Q. B. 439, n.; Lovell *v.* Howell (1876), 1 C. P. D. 161. **Distd.** Holness *v.* Mackay & Davis, [1899] 2 Q. B. 319. **Consd.** Coldrick *v.* Partridge, Jones, [1910] A. C. 77.

1718. —— ——.]—HANDO *v.* LONDON, CHATHAM & DOVER RY. Co. (1866), L. R. 2 Q. B. 439, n.; 36 L. J. Q. B. 195, n.

Annotation:—**Refd.** Readhead *v.* Mid. Ry. (1867), L. R. 2 Q. B. 412.

1719. —— ——.]—WILSON *v.* MERRY, No. 1747, *post*.

1720. —— ——.]—Pltf. was employed by deft. to work at a steam saw. It was necessary that he should have an assistant in the performance of his work, & M., deft.'s foreman, engaged a boy for this purpose, who proved to be incompetent, & who, although pltf. complained to M. of his incompetency, was retained in his service. It was M.'s duty as foreman to engage or discharge the person employed for the purpose of assisting pltf. An accident happened to pltf. while working at the steam saw, through the incompetence of the boy, & for the injuries occasioned thereby he brought an action against deft., his employer:—*Held*: in the absence of any evidence to show that M. was incompetent for the position of foreman, pltf. could not recover; it being M.'s duty to engage & discharge the boy, his retaining him after knowing of his incompetence, was merely

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rely on the defence of common employment.—RYDER *v.* R. (1905), 36 S. C. R. 462.—CAN.

o. ——.]—COLEMAN *v.* R. (B. C.) (1918), 18 Exch. C. R. 263; 44 D. L. R. 675.—CAN.

p. *Plea barred by statute — Application of doctrine of res ipsa loquitur.*]—Where the defence of common employment has been abolished by statute the doctrine of *res ipsa loquitur* applies between master & servant.—HORNER *v.* CANADIAN NORTHERN RY., [1921] 1 W. W. R. 969; 55 D. L. R. 340; 61 S. C. R. 547; 58 D. L. R. 154.—CAN.

Sect. 1.—*At common law: Sub-sect.* 5, *C.* (*a*), (*b*), (*c*) & (*d*) *i.*]

an act of negligence by pltf.'s fellow servant for which deft. was not responsible.—SMITH *v.* HOWARD (1870), 22 L. T. 130.

1721. ——.]—HOWELLS *v.* LANDORE STEEL CO., No. 1767, *post.*

1722. ——.]—The N. co. had running powers over defts.' line, the signals being under the control of defts. The train of the N. co. being late, defts. shunted some trucks. The driver of the N. train, disregarding the danger signal, ran into the trucks. Pltf., a servant of the N. co., being in the train was injured & sued defts. The jury found a negligence in both cos.:—*Held:* pltf. could not recover.—ARMSTRONG *v.* LANCASHIRE & YORKSHIRE RY. CO. (1875), L. R. 10 Exch. 47; 44 L. J. Ex. 89; 33 L. T. 228; 39 J. P. 136; 23 W. R. 295.

Annotations:—**Refd.** Mills *v.* Armstrong, The Bernina (1888), 13 App. Cas. 1; S.S. Tongariro *v.* S.S. Drumlanrig, The Drumlanrig, [1911] A. C. 16; The Koursk, [1924] P. 140. **Mentd.** Hall *v.* N. E. Ry. (1875), 33 L. T. 306; The City of Manchester (1879), 40 L. T. 591; Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521.

1723. ——.]—LOVELL *v.* HOWELL, No. 1751, *post.*

1724. ——.]—AILLEN *v.* NEW GAS CO., No. 1807, *post.*

1725. ——.]—The owners of a colliery engaged a contractor to sink a shaft & supplied two engine men of their own to work at the shaft & assist. In the course of the work P., one of the contractor's servants was injured by one of the engine men:—*Held:* the owners of the colliery were not liable because their engine men were at the time acting as the contractor's servants & not as their own, nor was the contractor liable because the two men were fellow servants.—ROURKE *v.* WHITE MOSS COLLIERY CO. (1877), 2 C. P. D. 205; 46 L. J. Q. B. 283; 36 L. T. 49; 41 J. P. 580; 25 W. R. 263, C. A.

Annotations:—**Consd.** Jones *v.* Liverpool Corpn. (1885), 14 Q. B. D. 890; Moore *v.* Palmer (1886), 51 J. P. 196. **Apld.** Donovan *v.* Laing, Wharton, & Down Construction Syndicate, [1893] 1 Q. B. 629. **Distd.** Jones *v.* Scullard, [1898] 2 Q. B. 565. **Consd.** Waldock *v.* Winfield, [1901] 2 K. B. 596; Dewar *v.* Tasker (1906), 23 T. L. R. 259. **Refd.** Swainson *v.* N. E. Ry. (1878), 3 Ex. D. 341; Roberts *v.* Tottenham Lager Beer Brewery & Ice Factory (1889), 6 T. L. R. 4; Johnson *v.* Lindsay, [1891] A. C. 371; Perkins *v.* Stead (1907), 23 T. L. R. 433; Hill *v.* Beckett (1914), 84 L. J. K. B. 458; Poulson *v.* Jarvis (1919), 89 L. J. K. B. 305.

1726. ——.]—The master of a vessel is the servant of the owner, & engaged in the common employment with the crew during the voyage. The owner is consequently exempt from liability for the master's negligence causing injury to one of the seamen.—HEDLEY *v.* PINKNEY & SONS S.S. CO., [1894] A. C. 222; 63 L. J. Q. B. 419; 70 L. T. 630; 42 W. R. 497; 10 T. L. R. 347; 7 Asp. M. L. C. 483; 6 R. 106, H. L.

Annotations:—**Apld.** Burr *v.* Theatre Royal, Drury Lane, [1907] 1 K. B. 544. **Mentd.** Dobell *v.* Steamship Rossmore Co., [1895] 2 Q. B. 408; Morris & Morris *v.* Oceanic Steam Navigation Co. (1900), 16 T. L. R. 533; Leonard *v.* Leyland (1902), 18 T. L. R. 727; Ingram & Royle *v.* Services Maritimes du Tréport, [1913] 1 K. B. 538.

1727. ——.]—REDGRAVE *v.* BELSEY (1897), 13 T. L. R. 484, C. A.

1728. ——.]—(1) Pltf. was engaged by defts., a theatre co., to perform in the chorus in a pantomime. On the close of a performance, pltf. was, in leaving the stage, passing by a place where scene shifters were shifting the scenery, when she was injured by something which fell on her head. At the trial of an action brought by pltf. against defts. to recover damages in respect of the injury so occasioned to her, evidence was given for pltf. of the above facts, but there was in effect no evidence to show how or by whose negligence, the accident was caused:—*Held:* the case came within the rule that a person employed impliedly undertakes, as incidental to his employment, the risk of negligence on the part of a fellow employee engaged in the same employment, & inasmuch as pltf. had adduced no evidence to show that the accident had been caused by the negligence of deft. co., or of any person for whose negligence they would be responsible, the action was not maintainable.

(2) A clause in a written contract of employment, providing that, notwithstanding anything contained in the Employers' Liability Act, 1880 (c. 42), the employer shall not be liable to the employee for injury occasioned to him through the negligence of any person in the service of the employer who is entrusted with superintendence, or to whose orders the employee was bound to conform, does not rebut the legal implication that the employee undertakes the risk of negligence by any fellow employee in the same employment.—BURR *v.* THEATRE ROYAL, DRURY LANE, LTD., [1907] 1 K. B. 544; 76 L. J. K. B. 459; 96 L. T. 447; 23 T. L. R. 299; 51 Sol. Jo. 265, C. A.

Annotations:—*As to* (1) **Consd.** Coldrick *v.* Partridge, Jones, [1909] 1 K. B. 530. *Generally,* **Refd.** Heasmer *v.* Pickfords (1920), 36 T. L. R. 818.

1729. ——.]—COLDRICK *v.* PARTRIDGE, JONES & CO., LTD., No. 1741, *post.*

When defence not available.]—*See* Sub-sect. 5, *C.* (*e*), *post.*

(*b*) *In Case of Infants.*

1730. Whether defence to action by infant.]—CRIBB *v.* KYNOCH, LTD., No. 1742, *post.*

1731. ——.]—Where a master employs an inexperienced workman upon dangerous work it is his duty to instruct & caution him; but the master may delegate that duty to a competent person, &, if he does so, he will not be liable for an injury to the workman resulting from the negligence of the delegate in not properly instructing or cautioning him. There is no difference in this respect between an adult & an infant workman. Consequently, in an action for negligence against an employer by an infant who has been injured owing to the negligence of the employer's foreman in not fully instructing or cautioning him, it is open to the employers to raise the defence of common employment.

A contract of service is regarded as beneficial to an infant; & it is no objection that the contract contains stipulations & provisions usual in the particular trade, & such as a master may reasonably impose as a protection to himself (COZENS-HARDY, M.R.).—YOUNG *v.* HOFFMAN MANUFACTURING CO., LTD., [1907] 2 K. B. 646; 76 L. J. K. B. 993; 97 L. T. 230; 23 T. L. R. 671, C. A.

Annotations:—**Refd.** Greenwood *v.* Greenwood (1907), 97 L. T. 771; Toronto Power Co. *v.* Paskwan, [1915] A. C. 734; Cole *v.* De Trafford, [1918] 2 K. B. 523; Heasmer *v.* Pickfords (1920), 36 T. L. R. 818.

1732. ——.]—Pltf., a boy of fourteen, who had been invited by defts.' firemen to assist along with other boys in pulling defts.' fire escape home after it had been used in fire drill, was injured in so doing. In an action claiming damages from defts. the jury found that defts. were not themselves guilty of negligence; that the fire escape was a fit & proper one for its purpose; that defts.' servants were guilty of negligence in the management of the fire escape or in allowing pltf. to pull it; & that pltf. was not aware of the danger:—*Held:* the doctrine of common employment applied, & judgment should be entered

for defts.—BASS *v.* HENDON URBAN DISTRICT COUNCIL (1912), 28 T. L. R. 317, C. A.
Annotation :—**Consd.** Heasmer *v.* Pickfords (1920), 36 T. L. R. 818.

1733. ——.]—HEASMER *v.* PICKFORDS, LTD., No. 1789, *post*.

(*c*) *Risk Undertaken by Servants.*

1734. General rule—Servant undertakes risk of negligence of fellow servant.]—HUTCHINSON *v.* YORK, NEWCASTLE, & BERWICK RY. CO., No. 1697, *ante*.

1735. —— ——.]—WIGGETT *v.* FOX, No. 1770, *post*.

1736. —— ——.]—SOUTHCOTE *v.* STANLEY, No. 1702, *ante*.

1737. —— ——.]—HALL *v.* JOHNSON, No. 1712, *ante*.

1738. —— ——.]—MORGAN *v.* VALE OF NEATH RY. CO., No. 1750, *post*.

1739. —— ——.]—WARBURTON *v.* GREAT WESTERN RY. CO., No. 1716, *ante*.

1740. —— ——.]—JOHNSON *v.* LINDSAY & CO., No. 1773, *post*.

1741. —— ——.]—Colliery proprietors, who possessed a railway in connection with the colliery, ran a train thereon for the carriage of their colliers, free of charge, from the colliery towards their homes after the day's work. One of the colliers while being so carried met his death through an accident occasioned by the negligence of servants of his employers engaged in the repair of a bridge over the railway :—*Held :* (1) the deceased must as between himself & his employers be deemed to have undertaken the risk of such an accident, & an action could not be maintained against his employers under Fatal Accidents Act, 1846 (c. 93), in respect of his death : (2) the defence of common employment was a good answer to the claim, as the accident had been caused by the negligence of a fellow servant while deceased was still in the position of a workman employed by resps.—COLDRICK *v.* PARTRIDGE, JONES & CO., LTD., [1910] A. C. 77 ; 79 L. J. K. B. 173 ; 101 L. T. 835 ; 26 T. L. R. 164 : 54 Sol. Jo. 132, H. L.

1742. —— —— **Though servant an infant.**]—Pltf., a girl fifteen years old, was employed in defts.' cartridge factory in the work of testing the gauge of loaded cartridges. She worked under a forewoman, whose duty it was to give her proper instructions & warning as to the dangerous nature of the work, & in consequence of the forewoman's negligent failure to do so pltf. caused a cartridge to explode, thereby sustaining personal injuries, in respect of which she sued defts. :—*Held :* the doctrine of common employment applied & defts. were not liable, because, although there is a duty on an employer to give instructions to a young or inexperienced person employed by him in dangerous work, that duty is one which may be delegated by him to a foreman, & the negligence of the foreman is a risk which a fellow servant, even though an infant, takes upon himself.—CRIBB *v.* KYNOCH, LTD., [1907] 2 K. B. 548 ; 76 L. J. K. B. 948 ; 97 L. T. 181 ; 23 T. L. R. 550, D. C.
Annotations :—**Apprvd.** Young *v.* Hoffmann Manufacturing Co., [1907] 2 K. B. 646. **Refd.** Greenwood *v.* Greenwood (1907), 97 L. T. 771 ; Toronto Power Co. *v.* Paskwan, [1915] A. C. 734 ; Heasmer *v.* Pickfords (1920), 36 T. L. R. 818.

1743. —— —— **Though servant contracting out of Employers' Liability Act, 1880 (c. 42).**]—BURR *v.* THEATRE ROYAL, DRURY LANE, LTD., No. 1728, *ante*.

(*d*) *Who are Fellow Servants.*

i. *In General.*

1744. Question for jury.]—Pltf. having been engaged by wharfingers to land bags of guano, at so much a ton, & carry them into a warehouse, where they were piled by their day labourers, & pltf. having been injured by the fall of some of the bags through bad piling :—*Held :* it was for the jury, in an action by him against the wharfingers, whether the piling was done by their men under a separate & distinct employment, & if so, whether the fall of the bags was caused by their negligence, or that of their men & pltf. combined, & in the former case the verdict should be for pltf. ; in the latter case, for defts.—FLETCHER *v.* PETO (1862), 3 F. & F. 368, N. P.

1745. Depends on risk undertaken by servant.]—BARTONSHILL COAL CO. *v.* REID, No. 971, *ante*.

1746. Servant acting in service of master at time of accident.]—HUTCHINSON *v.* YORK, NEWCASTLE & BERWICK RY. CO., No. 1697, *ante*.

1747. Necessity for relationship of master & servant at time of accident.]—(1) The liability or non-liability of a master to his workmen cannot depend upon the question whether the author of the accident is or is not in any technical sense the fellow workman or collaborator of the sufferer. The case of the fellow workman is an example of the rule, not the rule itself ; the rule stands on broader grounds. The master is not, & cannot be liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. A master does not contract or undertake with his servant to execute in person the works connected with his business. What the master is bound to his servant to do in the event of his not personally superintending the work, is to select proper & competent persons to do so, & to furnish them with adequate materials & resources for the work. When he has done this, he has done all that he is bound to do ; & if the persons so selected are guilty of negligence, it is not the negligence of the master ; & if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful & competent, who was formerly, but is no longer, in the service of the master, the master is not liable, though the two workmen cannot technically be described as fellow workmen. A master cannot warrant the competency of his servants.

(2) The fact that the servant occasioning the injury is placed in authority, control, or superintendence of the others does not prevent the exoneration of the master from liability.—WILSON *v.* MERRY (1868), L. R. 1 Sc. & Div. 326 ; 19 L. T. 30 ; 32 J. P. 675, H. L.
Annotations :—*As to* (1) **Expld.** Johnson *v.* Lindsay, [1891] A. C. 371. **Consd.** Burr *v.* Theatre Royal, Drury Lane, BOWEN *v.* MATCHETT (W. G.) & CO., LTD. (1925), 25 S. R. N. S. W. 367 ; 42 N. S. W. W. N. 133.—**AUS.**

t. —— *Casual labourer — Wages not paid at time of accident—Presumption of relationship.*]—PERCY *v.* DONALDSON BROTHERS, [1909] S. C. 267 ; 46 Sc. L. R. 199 ; 16 S. L. T. 536.—**SCOT.**

a. *Question of fact.*] — WILKINSON

PART XIII. SECT. 1, SUB-SECT. 5.—C. (c).

q. *Mere knowledge of incompetence of fellow servant insufficient.*]—The mere fact of knowledge of the incompetency of a fellow-servant is not in itself a defence in an action for damages against the employer.—HOEY *v.* DUBLIN & BELFAST RY. CO. (1870), 18 W. R. 930.—**IR.**

r. *Drunkenness of fellow servant — Known to injured servant—Master not liable.*]—M'TERNAN *v.* WHITE & BEE (1890), 17 R. (Ct. of Sess.) 368 ; 27 Sc. L. R. 291.—**SCOT.**

PART XIII. SECT. 1, SUB-SECT. 5.—C. (d) i.

1747 l. *Necessity for relationship of master & servant at time of accident.*]—

Sect. 1.—*At common law: Sub-sect.* 5, *C.* (*d*) *i., ii. & iii.*]

[1907] 1 K. B. 544. **Refd.** Smith *v.* Steele (1875), L. R. 10 Q. B. 125; Allen *v.* New Gas Co. (1876), 1 Ex. D. 251; Charles *v.* Taylor, Walker (1878), 38 L. T. 773; Kiddle *v.* Lovett (1885), 16 Q. B. D. 605; Hedley *v.* Pinkney S.S. Co., [1894] A. C. 222; Lloyd *v.* Woolland (1902), 19 T. L. R. 32; Kay *v.* British Westinghouse Electric & Manufacturing Co. (1905), 49 Sol. Jo. 296; Tozeland *v.* West Ham Union, [1906] 1 K. B. 538; Cribb *v.* Kynoch, 1907] 2 K. B. 548; Young *v.* Hoffmann Manufacturing Co., [1907] 2 K. B. 646; Toronto Power Co. *v.* Paskwan, [1915] A. C. 734; Heasmer *v.* Pickford (1920), 36 T. L. R. 818. *As to* (2) **Refd.** Howells *v.* Landore Steel Co. (1874), L. R. 10 Q. B. 62; Swainson *v.* N. E. Ry. (1878), 3 Ex. D. 341; Cole *v.* De Trafford, [1918] 2 K. B. 523. *Generally,* **Refd.** Griffiths *v.* Dudley (1882), 9 Q. B. D. 357; Groves *v.* Wimborne, [1898] 2 Q. B. 402; Laubach *v.* Cooptimists' Entertainment Syndicate (1926), 43 T. L. R. 30. **Mentd.** Smith *v.* Baker (1891), 60 L. J. Q. B. 683; Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; Watkins *v.* Naval Colliery Co. (1912), 107 L. T. 321.

Necessity for common master.]—*See* Sub-sect. 5, C. (*d*) iv., *post.*

ii. *Servants in Different Departments of Duty.*

1748. Whether in common employment.]—BARTONSHILL COAL CO. *v.* REID, No. 971, *ante.*

1749. ——.]—When two persons are working for the same master for a common general object, there is no liability upon the master to answer to either of them for damage resulting from the negligence of the other, although the actual piece of work on which they are engaged is not the same.

Pltf. was hired by a man, who had contracted to unload a coal barge at defts.' brewery, to assist in unloading; he was paid by defts., & defts. alone could discharge him. While employed in carrying coal he was injured through the negligence of defts.' servants, who were moving barrels in the brewery:—*Held:* there was evidence to justify a finding that pltf. was defts.' servant, he was engaged in a common employment with the person who caused the injury, & therefore, he could not recover.—CHARLES *v.* TAYLOR, WALKER & CO. (1878), 3 C. P. D. 492; 38 L. T. 773; 42 J. P. 724; 27 W. R. 32, C. A.

Annotations:—**Consd.** Johnson *v.* Lindsay (1889), 53 J. P. 599; Burr *v.* Theatre Royal, Drury Lane, [1907] 1 K. B. 544. **Refd.** Juggins *v.* G. W. Ry. (1885), 1 T. L. R. 393; The Petrel, [1893] P. 320.

1750. —— **When risk a natural consequence of employment.**]—The rule which exempts a master from liability to his servant for injury arising to such servant from the negligence of his fellow servant employed with him for a common object, is not confined to a common immediate object, but embraces all cases where the risk of injury from the negligence of the one is so much a natural & necessary consequence of the employment which the other accepts that it must be included in the risks which are to be considered in his wages.

A carpenter employed to do work for a railway co., & amongst other things paint a shed at their station, is so necessarily brought into contact with the traffic of the line that risk of injury from the carelessness of porters employed to turn carriages on the turn-tables on the line is naturally incident to such an employment & within the rule.—MORGAN *v.* VALE OF NEATH RY. CO. (1865), L. R. 1 Q. B. 149; 5 B. & S. 736; 35 L. J. Q. B. 23; 13 L. T. 564; 30 J. P. 36; 14 W. R. 144; 122 E. R. 1004, Ex. Ch.

Annotations:—**Folld.** Lovell *v.* Howell (1876), 1 C. P. D. 161; Charles *v.* Taylor (1878), 3 C. P. D. 492. **Consd.** Coldrick *v.* Partridge, Jones, [1909] 1 K. B. 530. **Refd.** Feltham *v.* England (1866), L. R. 2 Q. B. 33; Tunney *v.* Mid. Ry. (1866), L. R. 1 C. P. 291; Warburton *v.* G. W. Ry. (1866), L. R. 2 Exch. 30; Hando *v.* L. C. & D. Ry. (1867), L. R. 2 Q. B. 439, n.; Howells *v.* Landore Steel Co. (1874), L. R. 10 Q. B. 62; Smith *v.* Steele (1875), L. R. 10 Q. B. 125; Woodley *v.* Met. Dist. Ry. (1877), 2 Ex. D. 384; Swainson *v.* N. E. Ry. (1878), 3 Ex. D. 341; Murphy *v.* Wilson (1883), 52 L. J. Q. B. 524; The Petrel, [1893] P. 320.

1751. —— ——.]—The principle which exempts a master from liability to his servant for injury caused by the negligent act of a fellow servant or fellow workman, is, that the servant must be assumed to have contemplated & tacitly assented to encounter the ordinary risks incident to the service or employment, at the time of entering into the contract.

Pltf., who was a licenced waterman & lighterman, was in the employ at weekly wages of deft., a corn merchant & warehousekeeper, his ordinary duty being to attend at the waterside of the premises every tide for about an hour & a half before & after highwater, for the purpose of bringing barges to & from the wharf & there mooring & unmooring them. It was no part of his duty to load or unload the barges or to assist in any way in the work of the warehouse; but it was his habit to go to the office on the land side of the warehouse for orders, or when sent for by deft.'s manager. There were two ways of going there, *viz.*, by landing from his boat at stairs at the end of the street next adjoining the warehouse, or by stepping from the barges into & going through the warehouse & out by a door to the street. He usually went by this latter way. Being on the barges at a time when his actual duty did not require him to be there, he was sent for to the office, & was proceeding thither by his accustomed route, when, in passing out from the warehouse door to the street, he was knocked down & injured by a sack of grain which another of deft.'s men was in a negligent manner hoisting by means of a crane from a waggon:—*Held:* this was an injury caused by the negligence of a fellow workman, within the above-mentioned exception, & consequently the master was not liable.

When a man enters into the service of a master, he tacitly agrees to take upon himself to bear all ordinary risks which are incident to his employment, & amongst others the possibility of injury happening to him from the negligent acts of his fellow servants or fellow workmen (ARCHIBALD, J.).—LOVELL *v.* HOWELL (1876), 1 C. P. D. 161; 24 W. R. 672; *sub nom.* LAVELL *v.* HOWELL, 45 L. J. Q. B. 387; 34 L. T. 183; 40 J. P. 422.

Annotations:—**Refd.** Rourke *v.* White Moss Colliery Co. (1876), 1 C. P. D. 556; Swainson *v.* N. E. Ry. (1878), 3 Ex. D. 341; The Petrel, [1893] P. 320.

1752. Railway guard & platelayer.]—WALLER *v.* SOUTH EASTERN RY. CO., No. 1709, *ante.*

1753. Drivers of different trains.]—WALLER *v.* SOUTH EASTERN RY. CO. (1863), 2 H. & C. 102; 2 New Rep. 179; 32 L. J. Ex. 205; 8 L. T. 325; 27 J. P. 665; 9 Jur. N. S. 501; 11 W. R. 731; 159 E. R. 43.

Annotations:—**Refd.** Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669; Morgan *v.* Vale of Neath Ry. (1864), 5 B. & S. 570; The Petrel, [1893] P. 320.

1754. Carpenter in service of railway company & porter.]—MORGAN *v.* VALE OF NEATH RY. CO., No. 1750, *ante.*

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v. BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1911), 16 B. C. R. 113; 45 S. C. R. 263.—**CAN.**

b. Contractor & servants of employer.] — FORD *v.* OAMARU CORPN. (1881), 1 N. Z. L. R. 97 (S. C.).—**N.Z.**

PART XIII. SECT. 1, SUB-SECT. 5.—C. (d) ii.

c. Shipwright in service of railway company, & engine attendant.]—CHANDLER *v.* MELBOURNE & HOBSON'S BAY RY. CO. (1871), 2 V. R. (Law) 71.—**AUS.**

d. Mate & engineer.] — MORGAN *v.* BRITISH YUKON NAVIGATION CO. (1905), 11 B. C. R. 316; 1 W. L. R. 294.—**CAN.**

e. Employees of departmental stores.]

1755. Miner & underlooker.]—HALL *v.* JOHNSON, No. 1712, *ante*.

1756. Pilot & crew.]—When a pilot is compulsorily employed under the Merchant Shipping Act, 1854 (c. 104), & gives orders to the seamen on board, he is not a fellow servant with such seamen; & hence if through the negligence of such seamen he is killed, his personal representatives may sue the owner of the ship for damages.—SMITH *v.* STEELE (1875), L. R. 10 Q. B. 125; 44 L. J. Q. B. 60; 32 L. T. 195; 39 J. P. 326; 23 W. R. 388; 2 Asp. M. L. C. 487.

Annotations:—**Reld.** Tozeland *v.* West Ham Union, [1906] 1 K. B. 538. **Mentd.** Heaven *v.* Pender (1882), 9 Q. B. D. 302.

1757. Crews of different ships of same owner.]—A collision occurred in the river Thames, between two steamships, the *Petrel* & the *Cormorant*, belonging to the same owners, & the *Cormorant* sank, but there was no loss of life. In an action brought by some of the owners of cargo on board the *Cormorant* against the *Petrel*, the latter vessel was found alone to blame. Thereupon the owners of the *Petrel* instituted proceedings for limiting their liability to £5,658 5*s.* on 707·28 tons, being £8 per ton on the gross tonnage of the *Petrel* without deduction of engine room, but deducting 31·80 tons crew space under Merchant Shipping Act, 1867 (c. 127), s. 9, &, in respect of their claim for lost effects, making the master, officers, & crew of the *Cormorant* defts. with cargo owners & others On objection to the claim of the master, officers & crew of the *Cormorant* & to the deduction from the tonnage of the *Petrel* of the crew space:—*Held*: the master, officers, & crew of the *Cormorant* were entitled to claim against the fund in respect of their lost effects, for, though they had a common employer with the master, officers, & crew of the *Petrel*, in the sense that both crews were making money for him, they were not in common employment in the sense that injury from the negligence of one crew was an ordinary risk of the service of the other, for the safety of the crew of one of these two vessels did not depend on the skill & care of the crew of the other, more than on the skill & care of other vessels navigating the Thames.—THE PETREL, [1893] P. 320; 62 L. J. P. 92; 70 L. T. 417; 9 T. L. R. 566; 7 Asp. M. L. C. 434; 1 R. 651.

Annotations:—**Reld.** Young *v.* Hoffman Manufacturing Co. (1907), 76 L. J. K. B. 993; Coldrick *v.* Partridge Jones (1909), 78 L. J. K. B. 452.

1758. Colliers & servants of colliery railway.]—COLDRICK *v.* PARTRIDGE, JONES & CO., LTD., No. 1741, *ante*.

iii. *Servants in Superior Positions.*

1759. General rule.]—(1) The rule that a master is not liable to a servant for injuries sustained from the negligence of a fellow servant in their common employment, is not altered by the fact that the servant guilty of negligence is a servant of superior authority, whose lawful directions the other is bound to obey.

(2) Deft. was a maker of locomotive engines, & pltf. was in his employ. An engine was being hoisted, for the purpose of being carried away, by a travelling crane moving on a tramway resting on beams of wood supported by piers of brickwork. The piers had been recently repaired, & the brickwork was fresh. Deft. retained the general control of the establishment, but was not present; his foreman or manager directed the crane to be moved on, having just before ordered pltf. to get on the engine to clean it. Pltf. having got on the engine, the piers gave way, the engine fell, & pltf. was injured. This was the first time the crane had been used & pltf. employed in this manner:—*Held*: there was no evidence to fix deft. with liability to pltf.; for that, assuming the foreman to have been guilty of negligence on the present occasion, he was not the representative of the master so as to make his acts the acts of the master; he was merely a fellow servant of pltf., though with superior authority; & there was nothing to show that he was not a fit person to be employed as foreman; neither was there any evidence of personal negligence on the part of deft., as there was nothing to show that he had employed unskilful or incompetent persons to build the piers, or that he knew, or ought to have known, that they were insufficient.—FELTHAM *v.* ENGLAND (1866), L. R. 2 Q. B. 33; 7 B. & S. 676; 36 L. J. Q. B. 14; 31 J. P. 212; 15 W. R. 151.

Annotations:—*As to* (2) **Apld.** Hardo *v.* L. C. & D. Ry. (1867), L. R. 2 Q. B. 439, n. **Reld.** Wilson *v.* Merry (1868), L. R. 1 Sc. & Div. 326; Allen *v.* New Gas Co. (1876), 1 Ex. D. 251; Cole *v.* De Trafford (No. 2), [1918] 2 K. B. 523.

1760. ——.]—WILSON *v.* MERRY, No. 1747, *post*.

1761. Chief engineer.]—Pltf. shipped, under the ordinary articles, as engineer on board defts.' vessel, a screw steamer. During the voyage pltf. was required by the chief engineer to work a winch used to raise or lower the screw of the steamer. In so doing, & without any fault of pltf., one of the handles of the winch came off, & pltf. was severely injured. The handle ought to have been fastened on; & there was a screw on board for that purpose, but it had never been fastened, although the chief engineer had several times before the accident promised to have it done when spoken to on the subject:—*Held*: the chief engineer stood in the relation of fellow servant to pltf., & that there was nothing in the above facts to take the case out of the ordinary rule of non-responsibility of a master for injury to his servant from the negligence of a fellow servant & consequently deft. was not liable for the injury to pltf. either in an action for negligence or for breach of an implied undertaking to provide the ship, with good & sufficient machinery; the obligation implied by law not amounting to such an undertaking but only to take due care to provide proper machinery & competent servants to work it.—SEARLE *v.* LINDSAY (1861), 11 C. B. N. S. 429; 31 L. J. C. P. 106; 5 L. T. 427; 8 Jur. N. S. 746; 10 W. R. 89; 142 E. R. 863.

Annotations:—**Reld.** Waller *v.* S. E. Ry. (1863), 32 L. J. Ex. 205; Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669.

1762. Foreman.]—LOVEGROVE *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO., GALLAGHER *v.* PIPER, No. 1673, *ante*.

1763. ——.]—An employer of labour, hiring a foreman to superintend the work, is not liable to a labourer employed by him for injuries sustained in consequence of an accident which happened through the negligence of deft.'s foreman in erecting a scaffold, there being no proof

—WALDRON *v.* JUNIOR ARMY & NAVY STORES, [1910] 2 I. R. 381.—**IR.**

f. Engineman at pit mouth & collier.]—The engineman at the mouth of a coal pit, & the collier who works in the mine, are engaged in a common employment.—REID *v.* BARTONSHILL COAL CO. (1858), 20 Dunl. (Ct. of Sess.) 13; 3 Macq. 266; 30 Sc. Jur. 597.—**SCOT.**

PART XIII. SECT. 1, SUB-SECT. 5.—C. (d) iii.

1762 *f. Foreman.*]—DUTHIE *v.* CALEDONIAN RY. CO. (1898), 25 R. (Ct. of Sess.) 934; 35 Sc. L. R. 726; 6 S. L. T. 44.—**SCOT.**

g. Manager of mine.]—BAND OF HOPE & ALBION CONSOLS *v.* MACKAY (1871), 2 V. R. (Law) 158.—**AUS.**

Sect. 1.—*At common law: Sub-sect.* 5, *C.* (*d*) *iii., iv. & v.*]

of incompetence on the part of the foreman, or want of care on the part of deft. in appointing him, or of personal interference by deft. in the practical carrying out of the work; there being at the same time evidence that pltf. was acquainted with deft.'s foreman before he went to work, & made no complaint either of the foreman's incompetence, or of insecure scaffolding during the time he was employed.—LYNCH *v.* MARCHMONT (1865), 29 J. P. 375.

1764. ——.]—EDWARDS *v.* LONDON & BRIGHTON RY. CO., No. 1805, *post.*

1765. ——.]—FELTHAM *v.* ENGLAND, No. 1759, *ante.*

1766. ——.]—SMITH *v.* HOWARD, No. 1720, *ante.*

1767. Manager of mine—Statutory appointment.]—Defts. were the owners of a colliery within 35 & 36 Vict. c. 76, & they had appointed a certificated manager as required by sect. 26. A miner employed in the colliery was killed by an explosion of fire-damp, the death being caused by the negligence of the manager:—*Held:* the fact that the manager was appointed pursuant to the Act did not put him in any different position from that he would have held had he been simply appointed manager; & he was a fellow servant with deceased; & defts. were, therefore, not liable to the representatives of deceased for his death.—HOWELLS *v.* LANDORE STEEL CO. (1874), L. R. 10 Q. B. 62; 44 L. J. Q. B. 25; 31 L. T. 433; 32 L. T. 19; 38 J. P. 806; 23 W. R. 3[illegible].

Annotations:—**Apprvd.** Johnson *v.* Lindsay, [1891] A. C. 371. **Consd.** Hedley *v.* Pinkney S.S. Co., [1892] 1 Q. B. 58; Cribb *v.* Kynoch, [1907] 2 K. B. 548; David *v.* Britannic Merthyr Coal Co., [1909] 2 K. B. 146. **Refd.** Allen *v.* New Gas Co. (1876), 45 L. J. Q. B. 668; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899.

1768. Master of ship.]—HEDLEY *v.* PINKNEY & SONS S.S. CO., No. 1726, *ante.*

iv. *Servants of Different Masters.*

1769. Necessity for control by common master.]—A person who is injured by the negligence of another's servant cannot be a fellow servant with the servant whose negligence causes the injury, so as to exempt the master from liability, unless he is under the control & orders of the master.

Defts. & the G. N. co. owned adjoining stations, which were worked by a "joint station staff," the cost of whose salaries was borne equally by the two cos. S., one of such staff, was hired by the G. N. co., & received his salary from them. While engaged in his duty as signalman, S. was killed by the negligence of defts.' engine driver:—*Held:* S. was not defts.' servant, so as to be a fellow servant with the engine driver; & therefore his widow could recover damages from defts. for his death.—SWAINSON *v.* NORTH EASTERN RY. CO. (1878), 3 Ex. D. 341; 47 L. J. Q. B. 372; 38 L. T. 201; 42 J. P. 357; 26 W. R. 413, C. A.

Annotations:—**Consd.** Johnson *v.* Lindsay, [1891] A. C. 371. **Distd.** Williams *v.* Linotype & Machinery (1914), 84 L. J. K. B. 1620. **Refd.** Page *v.* Met. Ry., Heard *v.* Met. Ry. (1887), 4 T. L. R. 103; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899.

1770. —— Servant of contractor.]—Defts. having contracted with the Crystal Palace co. to erect a tower, manufactured the materials, & made a sub-contract with M. & other persons to do, by piece work particular portions of the hoisting & fixing the materials, the scaffolding & tools being provided by defts. The workmen employed by the sub-contractors were paid weekly, by defts. according to the time they worked, an account of which was kept by defts.' foreman. M., the sub-contractor employed W., pltf.'s husband; & whilst he was at work at the bottom of the tower, defts.' men, who were at work on the top, negligently let fall an instrument called a rymer which struck pltf.'s husband on the head, & caused his death:—*Held:* (1) the sub-contractor & his workmen were servants of defts., engaged in one common employment with their other servants, & consequently, defts. were not liable under Fatal Accidents Act, 1846 (c. 93), for the injury caused by the negligence of the latter.

(2) A master is not responsible to one servant for an injury occasioned to him by the negligence of a fellow servant whilst they are acting in one common service; but this rule does not hold where the person doing the injury is not a person of ordinary skill & care.

(3) A servant may however decline any service in which he apprehends injury to himself.—WIGGETT *v.* FOX (1856), 11 Exch. 832; 25 L. J. Ex. 188; 26 L. T. O. S. 309; 2 Jur. N. S. 955; 4 W. R. 254; 156 E. R. 1069.

Annotations:—*As to* (1) **Distd.** Abraham *v.* Reynolds (1860), 5 H. & N. 143; Turner *v.* G. E. Ry. (1874), 33 L. T. 431. **Dbtd.** Rourke *v.* White Moss Colliery Co. (1877), 2 C. P. D. 205. **Consd.** Johnson *v.* Lindsay, [1891] A. C. 371. **Refd.** Degg *v.* Mid. Ry. (1857), 1 H. & N. 773; Bartonshill Coal Co. *v.* McGuire (1858), 31 L. T. O. S. 258; Vose *v.* L. & Y. Ry. (1858), 27 L. J. Ex. 249; Morgan *v.* Vale of Neath Ry. (1865), L. R. 1 Q. B. 149; Charles *v.* Taylor (1878), 3 C. P. D. 492; Swainson *v.* N. E. Ry. (1878), 3 Ex. D. 341; Thrussell *v.* Handyside (1888), 20 Q. B. D. 359; Cooper & Crane *v.* Wright, [1902] A. C. 302; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899.

1771. —— ——.]—Pltf., a servant of J. & co., who were employed by defts. to carry cotton from a warehouse was receiving the cotton into his lorry when, in consequence of the negligence of defts.' porters, in lowering the bales from the upper floor of the warehouse, a bale fell upon him:—*Held:* pltf. & defts.' servants not being under the same control, or forming part of the same establishment,

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1768 i. *Master of ship.*]—GORDON *v.* PYPER, [1892] W. N. 169.—**SCOT.**

1768 ii. ——.]—GILLIES *v.* CAIRNS (1905), 8 F. (Ct. of Sess.) 174; 43 Sc. L. R. 218; 13 S. L. T. 586.—**SCOT.**

h. *Mate superviving unloading by lumpers.*]—SANDERSON *v.* SMITH (1882), 3 N. S. W. L. R. 31.—**AUS.**

k. *Underground manager of mine.*]—JENKINS *v.* GREAT FINGAL GOLD MINE (1904), 6 W. A. L. R. 122.—**AUS.**

l. ——.]—WRIGHT *v.* ROXBURGH & MORRIS (1861), 2 Macph. (Ct. of Sess.) 748; 36 Sc. Jur. 371.—**SCOT.**

m. *Town reeve acting as foreman of works.*]—DREW *v.* TOWNSHIP OF EAST WHITBY (1881), 46 U. C. R. 107.—**CAN.**

n. *Director as foreman.*]—FAIRWEATHER *v.* OWEN SOUND STONE QUARRY CO. (1895), 26 O. R. 604.—**CAN.**

o. *Track master of railway company.*]—DAY *v.* CANADIAN PACIFIC RY. CO. (1903), 36 N. B. R. 323.—**CAN.**

p. *Manager of hotel.*]—JUNOR *v.* INTERNATIONAL HOTEL CO., LTD. (1914), 26 O. W. R. 646; 6 O. W. N. 690; 29 D. L. R. 960; 32 O. L. R. 399; 7 O. W. N. 420.—**CAN.**

q. *Superintendent engineer.*]—WESTERN POWER CO. *v.* BERGKLINT (B. C.), [1917] 1 W. W. R. 1262; 54 S. C. R. 285.—**CAN.**

r. *Traffic manager of railway company.*]—CONWAY *v.* BELFAST & NORTHERN COUNTIES RY. CO. (1877), I. R. 11 C. L. 345.—**IR.**

t. *Railway inspector.*]—MACFARLANE *v.* CALEDONIAN RY. CO. (1867), 6 Macph. (Ct. of Sess.) 102; 40 Sc. Jur. 41.—**SCOT.**

a. *Manager of limited company.*]—CONNOLLY *v.* YOUNG'S PARAFFIN LIGHT & MINERAL CO., LTD. (1894), 22 R. (Ct. of Sess.) 80; 32 Sc. La R. 61; 2 S. L. T. 306.—**SCOT.**

PART XIII. SECT. 1, SUB-SECT. 5.—C. (d) iv.

1770 i. *Necessity for control by common master—Servant of contractor.*]—DELONG *v.* BURRELL-JOHNSON COUNTY IRON CO. (1885), 25 N. B. R. 140.—**CAN.**

1770 ii. —— ——.]—HASTINGS *v.* LE ROI (No. 2) (1903), 34 S. C. R. 177.—**CAN.**

1770 iii. —— ——.]—SMYTH *v.* TURNBULL (1890), 17 R. (Ct. of Sess.) 877; 27 Sc. L. R. 715.—**SCOT.**

were not so employed upon a common object, as to deprive pltf. of a right of action against defts. for such negligence.—ABRAHAM *v.* REYNOLDS (1860), 5 H. & N. 143; 1 L. T. 330; 24 J. P. 327; 6 Jur. N. S. 53; 8 W. R. 181; 157 E. R. 1133.

Annotations:—**Consd.** Turner *v.* G. E. Ry. (1875), 33 L. T. 431. **Distd.** Charles *v.* Taylor (1878), 3 C. P. D. 492. **Refd.** Rourke *v.* White Moss Colliery Co. (1877), 2 C. P. D. 205; Swainson *v.* N. E. Ry. (1878), 3 Ex. D. 341; Johnson *v.* Lindsay, [1891] A. C. 371.

1772. —— ——.]—Defts., a railway co., employed a contractor to unload their coal trucks at shoots on sidings constructed for the purpose. The contractor employed his own labourers, among whom was pltf., whom he engaged & paid, & over whom he had entire control. Pltf., while engaged in the work, was injured by the negligent shunting of an engine managed by the servants of defts., which was bringing coal trucks on to the sidings to the shoots:—*Held:* there was no such common employment between pltf. & the shunter as would disentitle the former from bringing an action against defts., for the negligence of their servants.—TURNER *v.* GREAT EASTERN RY. CO. (1875), 33 L. T. 431; 40 J. P. 8.

1773. —— ——.]—In an action to recover damages for injury caused by the negligence of the defendant's servant, the defence of common employment is not applicable unless the injured person & the servant whose negligence caused the injury were not only engaged in a common employment, but were in the service of a common master.

Builders contracted to build a block of houses, under a specification prepared by the owners' architect, certain fire proof portions of the houses to be executed by resps., who were iron founders. Resps. contracted with the architect to do their portion of the work, & had no contract with the builders & were not under their direction or control. While resps. were carrying out their contract workmen employed by them in raising concrete to the upper storey of the building negligently let a bucket fall on applt., who was working in the lower storey in the employment of the builders. In respect of the injury thus caused applt. brought an action against resps.:—*Held:* since the relation of master & servant did not exist between resps. & applt. the doctrine of collaborateur did not apply & the action was maintainable.

The general servant of A. may for a time or on a particular occasion be the servant of B., & a person who is not under any paid contract of service may nevertheless have put himself under the control of an employer to act in the capacity of servant, so as to be regarded as such. . . . It must be remembered that whilst a servant contracts with his master to bear the risks of the negligence of his fellow servants, there is, as has more than once been laid down, a corresponding duty on the part of the employer to take due care to select competent servants (LORD HERSCHELL).

The immunity extended to a master in the case of injuries caused to each other by his servants whilst they are working for him to a common end is an exception from the general rule, & rests upon an implied undertaking by the servant to bear the risks arising from the possible negligence of a fellow servant who has been selected with due care by his master (LORD WATSON).—JOHNSON *v.* LINDSAY & Co., [1891] A. C. 371; 61 L. J. Q. B. 90; 65 L. T. 97; 55 J. P. 644; 40 W. R. 405; 7 T. L. R. 715, H. L.

Annotations:—**Followed.** Cameron *v.* Nystrom, [1893] A. C. 308. **Apld.** Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899. **Refd.** Donovan *v.* Laing Wharton & Down Construction Syndicate, [1893] 1 Q. B. 629; Hedley *v.* Pinkney S.S. Co., [1894] A. C. 222; Stamp *v.* Williams (1896), 12 T. L. R. 516; Cooper & Crane *v.* Wright, [1902] A. C. 302; Kay *v.* British Westinghouse Electric & Manufacturing Co. No. 1 (1905), 49 Sol. Jo. 296; Burr *v.* Theatre Royal, Drury Lane, [1907] 1 K. B. 544; Cribb *v.* Kynoch, [1907] 2 K. B. 548; Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13; Williams *v.* Linotype & Machinery (1914), 84 L. J. K. B. 1620; Heasmer *v.* Pickfords (1920), 36 T. L. R. 818.

1774. —— ——.]—In an action to recover damages for injury caused by deft.'s servant, the defence of common employment is not applicable unless pltf. was at the time of the injury in deft.'s actual employment in the relationship of master & servant. Where defts. were stevedores & pltf. a servant of the shipmaster on whose ship the injury was caused & the person whose negligence caused the injury was a servant of the stevedores:—*Held:* the defence of common employment was not available.—CAMERON *v.* NYSTROM, [1893] A. C. 308; 62 L. J. P. C. 85; 68 L. T. 772; 57 J. P. 550; 7 Asp. M. L. C. 320; 1 R. 362, P. C.

1775. —— ——.]—It was one common employment which both sets of men were engaged upon. But though this is so, there is still the question whether M.'s gang of which pltf. was one, were working with deft.'s men under one common master. That this is so the law is clear from *Johnson* v. *Lindsay & Co.*, No. 1773, *ante* (A. L. SMITH, L.J.).—STAMP *v.* WILLIAMS (1896), 12 T. L. R. 516, C. A.

1776. —— **Servant of another.**]—ROURKE *v.* WHITE MOSS COLLIERY CO., No. 1725, *ante*.

1777. —— ——.]—Applts. contracted with a stevedore to unload their ship, & the contract provided that the owners should "provide for each hatch being discharged, one winch driver, & one hatch man." Resp., who was one of the stevedore's labourers, was injured during the unloading by the negligence of one of the winchmen, who was one of the crew of the ship:—*Held:* the winchman & resp. were not in a common employment, & applts. were liable for the negligence of the winchman.—UNION S.S. CO., LTD. *v.* CLARIDGE, [1894] A. C. 185; 63 L. J. P. C. 56; 70 L. T. 177; 58 J. P. 366; 7 Asp. M. L. C. 412; 6 R. 434, P. C.

Annotations:—**Refd.** Marrow *v.* Flimby & Broughton Moor Coal & Fire Brick Co., [1898] 2 Q. B. 588; Poulson *v.* Jarvis (1919), 122 L. T. 471.

1778. —— **Servant hired to another.**]—A stevedore contracted to load a ship, & hired an engine from P., who sent his servant, N., to work it. M., a servant of the stevedore, gave the signals to N., & by N.'s negligence a sack fell & killed M. The wages of N. were paid by P.:—*Held:* N. was the servant of P., & P. was liable to M.'s representatives for compensation.—MOORE *v.* PALMER (1886), 51 J. P. 196; 2 T. L. R. 781, C. A.

Annotations:—**Refd.** Wilmerson *v.* Lynn & Hamburg S.S. Co. (1913), 109 L. T. 53; Poulson *v.* Jarvis (1919), 89 L. J. K. B. 305.

1779. —— **Servant of another railway company.**]—WARBURTON *v.* GREAT WESTERN RY. CO., No. 1716, *ante*.

1780. —— ——.]—SWAINSON *v.* NORTH EASTERN RY. CO., No. 1769, *ante*.

1781. —— ——.]—PAGE *v.* METROPOLITAN RY. CO., HEARD *v.* METROPOLITAN RY. CO. (1887), 4 T. L. R. 103.

v. *Volunteers.*

1782. Whether defence available against volunteer—General rule.]—The rule of law, that a master

PART XIII. SECT. 1, SUB-SECT. 5.—C. (d) v.

1782 i. *Whether defence available against volunteer—General rule.*]—Where a person has voluntarily assisted one of co.'s servants he is, as regards claims of damages against the co., in no better position than a servant employed by the co., & the defence

Sect. 1.—*At common law: Sub-sect.* 5, *C.* (*d*) *v.*, & (*e*) *i.*]

is not in general responsible to his servant for injury occasioned by the negligence of a fellow servant in the course of their common employment, applies to the case of a person who is injured whilst voluntarily assisting the servants in their work.

Therefore, where the servants of defts., a railway co., were turning a truck on a turntable, & a person not in the employment of defts. volunteered to assist them, & whilst so engaged, other servants of defts. negligently propelled a steam engine & thereby caused the death of the person who so volunteered: & the servants were persons of competent skill & defts. did not authorise the negligence:—*Held:* defts. were not liable to an action by the personal representative of the deceased.—DEGG *v.* MIDLAND RY. CO. (1857), 1 H. & N. 773; 26 L. J. Ex. 171; 28 L. T. O. S. 357; 3 Jur. N. S. 395; 5 W. R. 364; 156 E. R. 1413.

Annotations:—**Distd.** Abraham *v.* Reynolds (1860), 5 H. & N. 143. **Folld.** Potter *v.* Faulkner (1861), 1 B. & S. 860. **Distd.** Wright *v.* L. & N. W. Ry. (1876), 1 Q. B. D. 252. **Folld.** Bass *v.* Hendon U. D. C. (1912), 28 T. L. R. 317. **Distd.** Hayward *v.* Drury Lane Theatre & Moss' Empires [1917] 2 K. B. 899. **Expld.** Heasmer *v.* Pickfords (1920), 36 T. L. R. 818. **Refd.** Bartonshill Coal Co. *v.* McGuire (1858), 31 L. T. O. S. 258; Swainson *v.* N. E. Ry. (1878), 3 Ex. D. 341; Houghton *v.* Pilkington, [1912] 3 K. B. 308. **Mentd.** Ruck *v.* Williams (1858), 3 H. & N. 308.

1783. —— ——.]—If a stranger invited by a servant to assist him in his work, is, while engaged in giving such assistance, injured by the negligence of another servant of the same master in the course of his employment, the stranger cannot hold the master responsible. The stranger, by volunteering his assistance, cannot impose upon the master a greater liability than that in which he stands towards his own servant; & if the master takes care that his servants are persons of competent skill & ordinary carefulness, he is not liable for any injury that one of them may receive from the negligence of another.—POTTER *v.* FAULKNER (1861), 1 B. & S. 800; 31 L. J. Q. B. 30; 5 L. T. 455; 26 J. P. 116; 8 Jur. N. S. 259; 10 W. R. 93; 121 E. R. 911, Ex. Ch.

Annotations:—**Distd.** Wright *v.* L. & N. W. Ry. (1876), 1 Q. B. D. 252. **Folld.** Bass *v.* Hendon U. D. C. (1912), 28 T. L. R. 317. **Distd.** Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899. **Expld.** Heasmer *v.* Pickfords (1920), 36 T. L. R. 818. **Refd.** Tebbutt *v.* Bristol & Exeter Ry. (1870), L. R. 6 Q. B. 73; Houghton *v.* Pilkington, [1912] 3 K. B. 308.

1784. —— **Stranger appealed to for information.**]—A passer by who is casually appealed to by a workman for information respecting a thing which the latter is doing in a public thoroughfare, is not to be considered a volunteer assistant, so as to exonerate the workman's master from responsibility for an injury resulting to the former from the workman's negligent mode of doing the work.—CLEVELAND *v.* SPIER (1864), 16 C. B. N. S. 399; 143 E. R. 1183.

1785. —— **Where common interest with master—Plaintiff assisting railway porter.**]—Pltf. was the consignee of a heifer, which was to be carried by defts. & delivered at their station at Penrith. On the arrival of the loose box containing the heifer at the station, there was only one porter to shunt the box to a place where the heifer could be taken out. Pltf., therefore, with the assent of the station master, assisted in the shunting, & while so engaged was injured through the negligence of the co.'s servants:—*Held:* pltf. was not a mere licencee, nor was he in the position of a fellow servant. His true position was that of a consignee taking delivery from the co. in a manner assented to by the co., & as such was entitled to recover, if while so engaged he was injured by the negligence of the co.'s servants.—WRIGHT *v.* LONDON & NORTH WESTERN RY. CO. (1876), 1 Q. B. D. 252; 45 L. J. Q. B. 570; 33 L. T. 830; 40 J. P. 628, C. A.

Annotations:—**Consd.** Houghton *v.* Pilkington, [1912] 3 K. B. 308. **Folld.** Williams *v.* Linotypo & Machinery (1914), 84 L. J. K. B. 1620; Hayward *v.* Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899. **Refd.** Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746.

1786. —— —— **Plaintiff assisting for benefit of own master.**]—Pltf.'s employers engaged defts. to repair a linotype machine. Defts. sent one of their servants to the premises of pltf.'s employers for that purpose. Pltf., at the request of deft.'s servant, was assisting in the work when a chip of metal flew into his eye & injured him. In an action brought by pltf. to recover damages from defts. in respect of the injury, the jury found that defts.' servant was guilty of negligence in executing the work; that pltf. did not voluntarily assist defts.' servant for the benefit of defts., but that he assisted him for the benefit of his own employers in order to expedite the work:—*Held:* having regard to the findings of the jury, the doctrine as to common employment was not applicable, & pltf. was entitled to recover.—WILLIAMS *v.* LINOTYPE & MACHINERY, LTD. (1914), 84 L. J. K. B. 1620; 112 L. T. 558.

1787. —— —— **Dancer attending rehearsals.**]—Defts. had under agreement the use of Drury Lane Theatre for the production of a revue. Pltf., a principal dancer, attended rehearsals of the revue; she was under no contract with defts. to attend them & was not paid for her attendances, but attended in the hope & expectation of obtaining an employment for the run of the revue when it was ready for production. At one of the rehearsals a staircase which formed part of the scenery was fixed upon the stage by the direction of the producer of the revue, who was a servant of defts., in such a way as to be unsafe. Pltf., with others, took up a position on the staircase by the direction of the producer, when the staircase collapsed, with the result that pltf. sustained serious injuries, to recover damages for which she brought the present action. The jury found that pltf. was not in the employment of defts., & that the accident was caused by the negligence of one of their servants, & judgment was given against defts.:—*Held:* on the facts the finding of the jury that pltf. was not a servant of defts. was right; &, further, pltf. was not a mere volunteer who could not be in a better position to recover damages from defts. than their own servants, but was a volunteer in a service in which she had a common interest with defts., & therefore the doctrine of common employment had no application & pltf. was entitled to recover.—HAYWARD *v.* DRURY LANE THEATRE & MOSS' EMPIRES, [1917] 2 K. B. 899; 87 L. J. K. B. 18; 33 T. L. R. 557; 61 Sol. Jo. 665; 117 L. T. 523, C. A.

Annotations:—**Refd.** Kimber *v.* Gas Light & Coke Co. (1918), 87 L. J. K. B. 651; Hardy *v.* C. L. Ry., [1920] 3 K. B. 459; Heasmer *v.* Pickfords (1920), 36 T. L. R. 818; Sutcliffe *v.* Clients Investment Co., [1924] 2 K. B. 746.

1788. —— **Infant.**]—BASS *v.* HENDON URBAN DISTRICT COUNCIL, No. 1732, *ante*.

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of common employment applies.—LUNNIE *v.* GLASGOW & SOUTH WESTERN RY. CO. (1906), 8 F. (Ct. of Sess.) 546.—**SCOT.**

b. —— *Assistance at request of foreman.*]—MURPHY *v.* ROSS, [1920] 2 I. R. 199.—**IR.**

1789. —— —— **Though no intention to make contract of service.**]—The doctrine of common employment is too well established in the fabric of English law to be disturbed or departed from even where pltf. is an infant & had no idea of making any contract of service.—HEASMER *v.* PICKFORDS, LTD. (1920), 36 T. L. R. 818.

(c) *When Defence Not Available.*

i. *Employment of Incompetent Fellow Servants.*

1790. Duty of master to select competent fellow-servant.]—HUTCHINSON *v.* YORK, NEWCASTLE, & BERWICK RY. CO., No. 1697, *ante*.

1791. ——.]—It is a well established rule of law that a servant cannot ordinarily sue his master for an injury sustained through the negligence of a fellow servant; but the master is bound to use due care in the selection of competent servants, & is liable for negligence in employing incompetent persons. He is not bound to warrant the competency of his servants; & in an action against him for an injury done by one of his servants to another, the question for the jury is, not whether the servant was incompetent, but whether the master did not exercise due care in employing him. —TARRANT *v.* WEBB (1856), 18 C. B. 797; 25 L. J. C. P. 261; 27 L. T. O. S. 202; 20 J. P. 711; 4 W. R. 640; 139 E. R. 1585.

Annotations :—**Apld.** Wilson *v.* Merry (1868), L. R. 1 Sc. & Div. 326. **Refd.** Roberts *v.* Smith (1857), 2 H. & N. 213; Mellors *v.* Shaw (1861), 1 B. & S. 437; Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 33 L. J. C. P. 329; Hoey *v.* Dublin & Belfast Ry. (1870), 18 W. R. 930; Cribb *v.* Kynoch, [1907] 2 K. B. 548; Watkins *v.* Naval Colliery Co. (1907), Ltd. (1911), 104 L. T. 439. **Mentd.** Smyly *v.* Glasgow & Londonderry Steam Packet Co. (1868), 16 W. R. 483.

1792. ——.]—SEARLE *v.* LINDSAY, No. 1761, *ante*.

1793. ——.]—WILSON *v.* MERRY, No. 1747, *ante*.

1794. ——.]—JOHNSON *v.* LINDSAY & CO., No. 1773, *ante*.

1795. ——.]—LLOYD *v.* WOOLLAND BROTHERS, No. 1667, *ante*.

1796. ——.]—BUTLER (OR BLACK) *v.* FIFE COAL CO., LTD., No. 1809, *post*.

1797. ——.]—POTTER *v.* FAULKNER, No. 1783, *ante*.

1798. Incompetent fellow servants employed—Defence not available.]—HUTCHINSON *v.* YORK, NEWCASTLE, & BERWICK RY. CO., No. 1697, *ante*.

1799. —— ——.]—TARRANT *v.* WEBB, No. 1791, *ante*.

1800. —— ——.]—A master is responsible to his servant for the injury received in the course of his service, if it be shown to have been occasioned by the personal negligence of the master. Such negligence may be brought home to the master by showing either his personal interference to be the cause of the accident, or that he negligently retained incompetent servants, whose incompetency was the cause of the accident: but, in the absence of a special contract, the master is not liable for an accident not proved to have been occasioned by his personal negligence.—ORMOND *v.* HOLLAND (1858), E. B. & E. 102; 31 L. T. O. S. 83; 120 E. R. 445.

Annotations :—**Refd.** Mellors *v.* Shaw (1861), 1 B. & S. 437; Fowler *v.* Lock (1872), L. R. 7 C. P. 272. **Mentd.** Murphy *v.* Phillips (1876), 35 L. T. 477.

1801. —— ——.]—BARTONSHILL COAL CO. *v.* MCGUIRE, No. 972, *ante*.

1802. —— ——.]—After the passing of 18 & 19 Vict. c. 108, special rules were framed & approved for the regulation of a coal mine, of which deft. was the proprietor & manager; by one of these rules for the direction of enginemen & banksmen, every morning, before any one descended the shaft, the cage by which they were let down was to be twice run slowly up & down, loaded, in order to test the sufficiency of the rope & tackling; this rule had been habitually neglected for many weeks, to deft.'s knowledge. One night the rope by which the cage was suspended, being before in good repair, was, as it was afterwards discovered, injured by an accidental fire in the mine; the next morning A., who was a miner employed by deft. in the colliery, & other miners, & who all knew of the rule for testing the rope, & of its being habitually violated, presented themselves at the pit to be let down to work, & there not having been any previous testing of the rope, etc., according to the rule, were told by the banksman that they had better examine the rope before they went down; they, however, got immediately into the cage, & the rope breaking as they descended they were all killed. An action having been brought by A.'s representative against deft.:— *Held*: the action was not maintainable, for A.'s own negligence had materially contributed to the accident. *Semble*: but for deceased's negligence, deft., notwithstanding deceased & the banksman were both employed by deft. in the colliery as fellow labourers, would have been liable by reason of his personal negligence in neglecting the rule & keeping in his employ a banksman who he knew habitually violated it.—SENIOR *v.* WARD (1859), 1 E. & E. 385; 28 L. J. Q. B. 139; 32 L. T. O. S. 252; 5 Jur. N. S. 172; 7 W. R. 261; 120 E. R. 954.

Annotations :—**Refd.** Baker *v.* G. W. Ry. (1859), 32 L. T. O. S. 256; Clarke *v.* Holmes (1862), 7 H. & N. 937. **Mentd.** Smyly *v.* Glasgow & Londonderry Steam Packet Co. (1868), 16 W. R. 483.

1803. —— ——.]—SEARLE *v.* LINDSAY, No. 1761, *ante*.

PART XIII. SECT. 1, SUB-SECT. 5.—C. (c) i.

1790 i. *Duty of master to select competent fellow servant.*]—DEVERILL *v.* GRAND TRUNK RY. CO. (1866), 25 U. C. R. 517.—**CAN.**

1790 ii. ——.]—CAMPBELL *v.* GENERAL MINING ASSOCN. (1868), 7 N. S. R. 415.—**CAN.**

1790 iii. ——.]—SMITH *v.* INTERCOLONIAL COAL MINING CO. (1877), 2 R. & C. 556.—**CAN.**

1790 iv. ——.]—O'SULLIVAN *v.* VICTORIA RY. CO. (1879), 44 U. C. R. 128. —**CAN.**

1790 v. ——.]—MAY *v.* ONTARIO & QUEBEC RY. CO. (1885), 10 O. R. 70.—**CAN.**

1790 vi. ——.]—RAJOTTE *v.* CANADIAN PACIFIC RY. (1889), 5 Man. L. R. 365.—**CAN.**

1790 vii. ——.]—WHITE *v.* SYDNEY & LOUISBURG COAL & RY. CO. (1893), 25 N. S. R. 384.—**CAN.**

1790 viii. ——.]—BAIRD *v.* DUNN & GREGORY (1895), 33 N. B. R. 156.—**CAN.**

1790 ix. ——.]—LAWRENCE *v.* KELLY (1910), 19 Man. L. R. 359.—**CAN.**

1790 x. ——.]—KELLETT *v.* BRITISH COLUMBIA MARINE RYS. CO., LTD. (1911), 16 B. C. R. 196.—**CAN.**

1790 xi. ——.]—DICKEY *v.* CANADIAN NATIONAL RY., [1921] 1 W. W. R. 1196; 58 D. L. R. 528.—**CAN.**

1790 xii. ——.]—Where an employer retains incompetent & unqualified servants & an accident occurs he is responsible to his employee, though not so under ordinary circumstances, when the act is by his fellow-servant.—BULGER *v.* SIMPSON (1886), 7 Nfld. L. R. 130.—**NFLD.**

1790 xiii. ——.]—A master is bound, in the event of his not personally superintending & directing the work, to select proper & competent persons to do so.—WILSON *v.* MERRY (1868), L. R. 1 Sc. & Div. 326.—**SCOT.**

c. —— *Delegation of selection.*]—A master may among other duties, delegate to another the duty of selecting fellow workmen or servants, & in such a case the master's obligation is limited to the exercise of a reasonable care in selecting a competent person for such purpose.—WILSON *v.* HUME (1880), 30 C. P. 542.—**CAN.**

d. —— *Negligent selection — Onus of proof.*]—ANDERSON *v.* CANADIAN NORTHERN RY. (1911), 45 S. C. R. 355.—**CAN.**

e. —— —— ——.]—When it is shown that a servant is incompetent,

Sect. 1.—*At common law: Sub-sect.* 5, *C.* (*e*) *i. & ii.*]

1804. —— ——.]—LOVEGROVE *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO., GALLAGHER *v.* PIPER, No. 1673, *ante.*

1805. —— ——.]—In an action against an employer, for an injury caused by the negligence of a fellow servant, in the position of a foreman, the negligence imputed to the employer being, the employment of a person not of competent skill to direct the work, although evidence that the work required skill, & was being done unskilfully & improperly under his direction, may be some evidence that it was improper to employ him to direct it, it is evidence so slight as to be scarcely sufficient, & is amply met by positive evidence that persons of knowledge deemed him a person of competent skill & experience.

The master is not liable to one of his servants for the consequence of the negligence of another, unless he himself, the master, has been guilty of personal negligence. That is, some particular negligence. It is not enough to infer or presume negligence on his part from the negligence of the servant; but some particular negligence on the part of the master must be shown. This principle has been applied to cases like the present, where the injury is suggested to have arisen from the negligence of a fellow servant in the position of a foreman or manager (CROMPTON, J.).—EDWARDS *v.* LONDON & BRIGHTON RY. CO. (1865), 4 F. & F. 530, N. P.

1806. —— ——.]—LYNCH *v.* MARCHMONT, No. 1763, *ante.*

1807. —— ——.]—Defts. had on their premises gates which were safe when opened & wedged up, but liable to fall when closed. The attention of the manager had been directed to the unsafe condition of the gates & orders had been given, but not carried out, to remedy this. Pltf., a workman in the employ of defts., passed through the gates when open, but on his return one of them was closed, & shortly afterwards, while he was working near the gates, they fell on & injured him. There was no evidence to show how this happened, nor any evidence that the manager & other persons employed by defts. were incompetent:—*Held:* defts. were not liable, as pltf. had not shown that the persons employed by defts. were incompetent, & the negligence, if any, which caused the accident was that of a fellow workman of pltf.—ALLEN *v.* NEW GAS CO. (1876), 1 Ex. D. 251; 45 L. J. Q. B. 668; 34 L. T. 541.

Annotation:—**Refd.** Swainson *v.* N. E. Ry. (1877), 37 L. T. 102.

1808. —— ——.]—KAY *v.* BRITISH WESTINGHOUSE ELECTRIC & MANUFACTURING CO., LTD., No. 1602, *ante.*

1809. —— ——.]—(1) The husband of pursuer was killed by an outbreak of poisonous gas while working in the employment of defenders, a limited co., in a coal mine of which they were owners. In an action for damages at common law & alternatively under Employers' Liability Act, 1880 (c. 42), the sheriff-substitute found that defenders were liable inasmuch as they had failed to appoint officials competent for the working of the mine, & he assessed the damages at £400. On appeal the ct. of sess. held that defenders were not liable at common law, having used reasonable care in appointing managers of the necessary qualification & experience; that although there had been a breach of the special rules applicable to the mine under Coal Mines Regulation Act, 1887 (c. 58), s. 49, these rules prescribed the duties of the managers & firemen & imposed no duties directly on the owners of the mine; but, that defenders were liable under the Employers' Liability Act, 1880 (c. 42), in respect of the negligence of their servants & their failure to comply with the rules in question, & the ct. awarded as damages £282:—*Held:* there was a duty on defenders as owners of the mine to appoint & keep in charge persons competent to deal with the dangers arising in the mine; they had not discharged this duty, & were therefore liable at common law for the sum awarded by the sheriff-substitute.

(2) The defence of common employment cannot be pleaded to an action for breach of a statutory duty.—BUTLER (OR BLACK) *v.* FIFE COAL CO., LTD., [1912] A. C. 149; 81 L. J. P. C. 97; 106 L. T. 161; 28 T. L. R. 150; 5 B. W. C. C. 217, H. L.

Annotations:—*As to* (1) **Consd.** Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13. **Refd.** Abbott *v.* Isham (1920), 37 T. L. R. 7; Hemmings *v.* Stoke Poges Golf Club, [1920] 1 K. B. 720; Nimmo *v.* Connell, [1924] A. C. 595. *As to* (2) **Refd.** Hemmings *v.* Stoke Pogos Golf Club, [1920] 1 K. B. 720. *Generally,* **Mentd.** Lennard's Carrying Co. *v.* Asiatic Petroleum Co. (1915), 84 L. J. K. B. 1281; Harrison *v.* Wythenoor Colliery Co., [1922] 2 K. B. 674; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406.

ii. *Other Cases.*

1810. Interference by master.]—ROBERTS *v.* SMITH, No. 1687, *ante.*

1811. ——.]—VOSE *v.* LANCASHIRE & YORKSHIRE RY. CO., No. 1706, *ante.*

1812. ——.]—ORMOND *v.* HOLLAND, No. 1800, *ante.*

1813. ——.]—LYNCH *v.* MARCHMONT, No. 1763, *ante.*

1814. Breach of statutory duty.]—SENIOR *v.* WARD, No. 1802, *ante.*

1815. ——.]—The defence of common employment is not applicable in a case where injury has

& that through his incompetency injury results to his fellow-servant, the mere fact of his incompetency throws the onus on the master of showing that he exercised due & reasonable care in selecting him.—SKERRITT *v.* SCALLAN (1877), I. R. 11 C. L. 389.—**IR.**

f. —— —— ——.]—M'CARTHY *v.* BRITISH SHIPOWNERS' CO. (1883), 10 L. R. Ir. 384.—**IR.**

g. —— —— ——.]—HILFERT *v.* CASTLE MAIL PACKETS CO. (1887), 12 E. D. C. 38.—**S. AF.**

h. —— *Reasonable care necessary.*]—A master is not liable for the fault of those employed by him, where he has taken reasonable care to employ competent workmen.—BALLENY *v.* CREE (1873), 11 Macph. (Ct. of Sess.) 626; 45 Sc. Jur. 396.—**SCOT.**

k. Effect of negligence of master—Defence not available.]—Where the negligence of a master combines with that of a fellow servant & both contribute to the accident, the servant injured may recover from the master.—MCKEEGAN *v.* CAPE BRETON COAL, ETC. CO. (1906), 40 N. S. R. 566.—**CAN.**

PART XIII. SECT. 1, SUB-SECT. 5.—C. (e) ii.

1814 i. *Breach of statutory duty.*]—MCMULLIN *v.* NOVA SCOTIA STEEL & COAL CO. (1907), 39 S. C. R. 593.—**CAN.**

1814 ii. ——.]—An employer cannot rely on the doctrine of common employment, where the accident was caused by breach of a statutory duty to which that doctrine does not apply.—TEMISKAMING MINING CO. *v.* SIVEN (1912), 23 O. W. R. 312; 46 S. C. R. 643; 8 D. L. R. 1030.—**CAN.**

1814 iii. ——.]—THACKER SINGH *v.* CANADIAN PACIFIC RY. CO. (1913), 19 B. C. R. 575.—**CAN.**

l. —— *General statute not protecting particular class.*]—Where the statute broken is designed to protect the public & not merely a particular class of persons, employers are entitled to set up the defence of common employment & to succeed thereon.—SINGH *v.* CANADIAN PACIFIC RY. CO. (1914), 29 W. L. R. 692; 20 D. L. R. 511.—**CAN.**

m. Personal care & supervision of master.]—MACDONALD *v.* DICK (1874), 34 U. C. R. 623.—**CAN.**

n. Interference of director—Immaterial.]—MATTHEWS *v.* HAMILTON

been caused to a servant by the breach of an absolute duty imposed by statute upon his master for his protection.—GROVES *v.* WIMBORNE (LORD), [1898] 2 Q. B. 402; 67 L. J. Q. B. 862; 79 L. T. 284; 47 W. R. 87; 14 T. L. R. 493; 42 Sol. Jo. 633, C. A.

Annotations :—**Consd.** David *v.* Britannic Merthyr Coal Co., [1909] 2 K. B. 146. **Folld.** Gibson *v.* Dunkerley, Lees & Sykes, Third Parties (1910), 102 L. T. 587. **Apld.** Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13. **Refd.** Watkins *v.* Naval Colliery Co. (1897), Ltd., [1911] 2 K. B. 162; Butler (or Black) *v.* Fife Coal Co., [1912] A. C. 149; Pursell *v.* Clement Talbot (1914), 111 L. T. 827; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 2 K. B. 832. **Mentd.** Crossfield *v.* Manchester Ship Canal Co. (1904), 73 L. J. Ch. 345; Woods *v.* Winskill, [1913] 2 Ch. 303; R. *v.* Marshland Smeeth & Fen District Comrs., [1920] 1 K. B. 155; Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1920] 3 K. B. 131; Fowler *v.* Kibble, [1922] 1 Ch. 487.

1816. ——.]—A master is liable to his servant for the consequences of an accident caused to that servant by the breach of a statutory duty imposed directly & absolutely upon the master, & the master cannot shelter himself behind another servant to whom he has delegated the performance of the duty. In such a case the negligence is the master's negligence & the doctrine of common employment has no application (COZENS HARDY, M.R.).—DAVID *v.* BRITANNIC MERTHYR COAL CO., [1909] 2 K. B. 146; 78 L. J. K. B. 659; 100 L. T. 678; 25 T. L. R. 431; 53 Sol. Jo. 398, C. A.; *on appeal, sub nom.* BRITANNIC MERTHYR COAL CO., LTD. *v.* DAVID, [1910] A. C. 74, H. L.

Annotations :—**Consd.** Butler (or Black) *v.* Fife Coal Co., [1912] A. C. 149; Watkins *v.* Naval Colliery Co. (1897), Ltd., [1912] A. C. 693. **Apld.** Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13. **Refd.** Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858; Gibson *v.* Dunkerley, Lees & Sykes, Third Parties (1910), 102 L. T. 587; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 2 K. B. 832. **Mentd.** Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1920] 3 K. B. 131.

1817. ——.]—BUTLER (OR BLACK) *v.* FIFE COAL CO., LTD., No. 1809, *ante*.

1818. ——.]—The breach of a statutory duty by an employer is not one of the risks which a servant must be assumed to have undertaken to run when he entered the employers' service, & therefore, where an employer has employed an unqualified person in breach of his statutory duty, he cannot rely on the defence of common employment, in the case of an accident to a servant caused, or contributed to, by the conduct of such unqualified person.

A railway co. employed a person who had not passed the tests required by an order of the Railway Comrs. which had the force of a statute, to work a train. He allowed the train to run past danger signals, & an accident resulted :—*Held :* there was evidence that the breach of the statutory duty caused, or contributed to, the accident.—JONES *v.* CANADIAN PACIFIC RY. CO. (1913), 83 L. J. P. C. 13; 110 L. T. 83; 29 T. L. R. 773, P. C.

1819. Master acting as fellow servant.]—(1) The principle that a servant sustaining an injury from the negligence of a fellow servant while engaged in the common employment cannot recover in an action against the common master, does not exempt from liability to action a master who himself takes part in the servant's work, & whilst so doing injures the servant through negligence.

(2) If the master is a member of a partnership by whom the servant is employed, & the work in which he so takes part is within the scope of the common undertaking of the partnership, his co-partners are jointly liable with him for the injury thus caused to the servant by his negligence.—ASHWORTH *v.* STANWIX (1861), 3 E. & E. 701; 30 L. J. Q. B. 183; 4 L. T. 85; 25 J. P. 406; 7 Jur. N. S. 467; 121 E. R. 606.

Annotations :—**Refd.** Mellors *v.* Shaw (1861), 1 B. & S. 437; Lovegrove *v.* L. B. & S. C. Ry., Gallagher *v.* Piper (1864), 16 C. B. N. S. 669.

1820. Servant acting as master's deputy—Foreman—Dangerous machinery.]—The absence of proper means for stopping the machine could not alone sustain the action; the delay in stopping the machine could only have aggravated the injury & could not have caused it. . . . The foreman was put by defts. in their place to employ this young person in & about dangerous machinery of which she was quite ignorant, & any negligence of his in the matter would be negligence for which they would be responsible. There is evidence both of negative & positive negligence on his part, negative, in not giving the girl proper instructions as to the use of the machine, positive in expressly directing her to do the very thing she had done, & which it was admitted was dangerous, so dangerous, indeed, that the case for the defence was, that she had been told not to do it. . . . If the owners of dangerous machinery, by their foreman, employ a young person about it quite inexperienced in its use, either without proper directions as to its use or with directions which are improper & which are likely to lead to danger, of which the young person is not aware, & of which they are aware; as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery (COCKBURN, C.J.).—GRIZZLE *v.* FROST (1863), 3 F. & F. 622, N. P.

Annotations :—**Refd.** Feltham *v.* England (1866), 7 B. & S. 676; Cribb *v.* Kynoch, [1907] 2 K. B. 548; Young *v.* Hoffman Manufacturing Co., [1907] 2 K. B. 646.

1821. —— —— **Match factory.**]—A boy employed in a lucifer match factory was killed by the explosion of certain materials which he was engaged in stirring, his father having expressly contracted with the master that he should not be put to such work, which was very dangerous. In an action by the father against the master under Fatal Accidents Act, 1846 (c. 93), it was stated by a girl employed in the factory, that the foreman was absent, & that during his absence D. acted as manager, but there was no other evidence on this point. D. had been stirring, & was present while the boy was stirring the mixture which exploded :—*Held :* to take the case out of the principle of the cases in which a master is held not to be responsible to his servants for the negligence of fellow servants, it should have been shown that D. was placed by the master in his place to represent him as vice-principal; the statement of the girl was no evidence that he was so placed, & he was therefore a fellow workman

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POWDER CO. (1887), 14 A. R. 260.—**CAN.**

o. *When taken away by statute.*]—LINDSAY *v.* DAVIDSON (1911), 19 W. L. R. 433; 1 W. W. R. 125; 4 Sask. L. R. 351.—**CAN.**

p. ——.]—SCOTNEY *v.* SMITH BROTHERS & WILSON (1913), 26 W. L. R. 163; 5 W. W. R. 660; 14 D. L. R. 786; 6 Sask. L. R. 390.—**CAN.**

q. ——.]—MARTIN *v.* RUSSELL & BIGNELL, LTD. (1914), 33 N. Z. L. R. 1466.—**N.Z**

r. *Personal negligence of employer.*]—SLATER *v.* VANCOUVER POWER CO. & WAUGH-MILBURN CONSTRUCTION CO. (1913), 18 B. C. R. 429; 48 S. C. R. 609.—**CAN.**

t. *Defective system of work.*]—The doctrine that an employer is not liable at common law for injuries caused to a workman by the negligence of a fellow-servant does not apply to actions for injuries resulting from defective places in which to work, defective machinery with which to work, or defective or dangerous

Sect. 1.—*At common law: Sub-sect.* 5, *C.* (*c*) *ii. Sect.* 2: *Sub-sects.* 1 & 2.]

with the deceased.—MURPHY *v.* SMITH (1865), 19 C. B. N. S. 361; 12 L. T. 605; 144 E. R. 827.

Annotations:—**Refd.** Hedley *v.* Pinkney S.S. Co., [1894] A. C. 222; Cribb *v.* Kynoch, [1907] 2 K. B. 548; Young *v.* Hoffmann Manufacturing Co., [1907] 2 K. B. 646.

1822. —— Underlooker of mine.]—HALL *v.* JOHNSON, No. 1712, *ante*.

1823. Statutory employment—Employment of pauper by guardians.]—The employment of a pauper set to work by the guardians of the poor under the powers given to them by the Poor Law Acts & Orders is not contractual, but statutory, & therefore the defence of common employment is no answer to an action by a pauper so employed against the guardians to recover damages for injury suffered in such employment through the negligence of an officer of the guardians. But the setting the paupers to work is part of the administrative duties imposed on the guardians by statute, & an action by the pauper against the guardians for negligence of their officer in discharge of these duties will not lie.—TOZELAND *v.* WEST HAM UNION, [1907] 1 K. B. 920; 76 L. J. K. B. 514; 96 L. T. 519; 71 J. P. 194; 23 T. L. R. 325; 5 L. G. R. 507, C. A.

Annotations:—**Refd.** Ching *v.* Surrey County Council, [1910] 1 K. B. 736. **Mentd.** Barns *v.* St. Mary, Islington Grdns. (1911), 10 L. G. R. 113.

1824. Negligence of fellow servant in supply of appliances.]—Pltf., a member of the orchestra at a theatre, sued his employers for damages for injuries suffered by him by reason of a club supplied by the employers to a performer slipping from the performer's hand during a performance & striking pltf. The jury (*inter alia*) found that the employers were not guilty of negligence in supplying the club, that the employers' stage manager was guilty of negligence, & that the employers were not negligent in employing the stage manager:—*Held*: on these findings, the fact of the stage manager's negligence being in respect of the supply of appliances did not in the circumstances exclude the application of the doctrine of common employment, & deft. employers were not liable to pltf.—LAUBACH *v.* CO-OPTIMISTS ENTERTAINMENT SYNDICATE, LTD. (1926), 43 T. L. R. 30.

SECT. 2.—UNDER EMPLOYERS' LIABILITY ACT.

SUB-SECT. 1.—THE EMPLOYER.

See Employers' Liability Act, 1880 (c. 42), s. 8.

1825. Who is—Question for jury.]—MASTERS *v.* JONES & Co. (1894), 10 T. L. R. 403, D. C.

Annotation:—**Refd.** Page *v.* Bowdler (1894), 10 T. L. R. 423.

1826. Employment terminated on Saturday—Returning for tools on Monday—Accident on the Monday.]—By the rules of a mine workmen upon their discharge were not entitled to receive their wages until they had returned the tools the property of the mine owner. A miner was discharged on a Saturday, & had no opportunity to go down for his tools on that day. On the following Monday he went down the pit to get the tools & was injured:—*Held*: he was at the time of the injury acting in the employment of the mine owner.—COWLER *v.* MORESBY COAL CO. (1885), 1 T. L. R. 575; 49 J. P. Jo. 441, D. C.

Annotation:—**Refd.** Riley *v.* Holland, [1911] 1 K. B. 1029.

1827. Loan of workman.]—In an action for compensation for personal injury founded on above Act, s. 1 (3), the negligence must be proved of a person in the employ of deft. to whose orders or directions pltf. was bound to conform; & it must further be proved that the injury to pltf. resulted from his having conformed to those orders or directions; but it is not essential to show that such conformity to the orders or directions was the *causa causans* of the injury. Pltf. was in the employ of certain builders who were erecting a house in which an hydraulic lift was being constructed by defts. D. was employed by defts. in constructing the lift, & was the only person on the premises for that purpose. D. asked the foreman of the builders to lend him a workman to assist him in work connected with the lift, & the foreman lent him pltf. While pltf. was so assisting D. he was directed by D. to place a plank across the well of the lift, one end resting on a crate on the landing & the other on the balance-weight of the lift. Pltf. did so, & D. then told him to stand on the plank; whilst both D. & pltf. were on the plank, the former pulled the rope, & thus started the lift. D. immediately jumped off, but pltf. had not time to do so before the plank tilted up. In order to save himself from falling down the well of the lift, he had no alternative but to cling to one of the pulley ropes of the lift, & was drawn up to the top girders & his hands were crushed. Pltf. sued defts. for compensation under above Act:—*Held*: pltf. was a workman of defts.; D. was a person to whose orders or directions pltf. was bound to conform within above Act, s. 1 (3); the injury to pltf. was caused by the negligence of D.; & defts. were consequently liable.—WILD *v.* WAYGOOD, [1892] 1 Q. B. 783; 61 L. J. Q. B. 391; 66 L. T. 309; 56 J. P. 389; 40 W. R. 501; 8 T. L. R. 410; 36 Sol. Jo. 326, C. A.

1828. Sub-contractor—Coal mine—"Butty" men.]—Defts. were owners of a coal mine worked under the "butty" system. In mines so worked "butty" men contract with the owners of the mine to bring coal up at so much per ton, & for this purpose employ men under them. Deceased had been so employed, & had been killed by an explosion while working in the mine:—*Held*: deceased had been a workman in the employ of the owners of the mine within above Act, & his wife would be entitled to damages if the case came within the terms of above Act, s. 1 (3).—BROWN *v.* BUTTERLEY COAL CO. (1885), 53 L. T. 964; 50 J. P. 230; 2 T. L. R. 159, D. C.

Annotations:—**Consd.** Marrow *v.* Flimby & Broughton Moor Coal & Fire Brick Co., [1898] 2 Q. B. 588. **Distd.** Fitzpatrick *v.* Evans, [1902] 1 K. B. 505. **Refd.** Pollard *v.* Goole & Hull Steam Towing Co. (1910), 3 B. W. C. C. 360.

1829. —— Dock company.]—LEVERING *v.* ST. KATHARINE'S DOCK CO., DOE *v.* ST. KATHARINE'S DOCK CO. (1887), 3 T. L. R. 607, D. C.

Annotations:—**Refd.** Marrow *v.* Flimby & Broughton Moor Coal & Fire Brick Co., [1898] 2 Q. B. 588; Pollard *v.* Goole & Hull Steam Towing Co. (1910), 3 B. W. C. C. 360.

1830. Executors of employer.]—An action under above Act cannot be maintained against the exors. of an employer.—GILLETT *v.* FAIRBANK (1887), 3 T. L. R. 618, D. C.

See, generally, EXECUTORS, Vol. XXIII., pp. 26 *et seq.*

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ystems of carrying on work, deliberately adopted by the employer or those entrusted by him with the superintendence of the work.—WEPPLER *v.* CANADIAN NORTHERN RY. Co. (1913), 25 W. L. R. 858; 5 W. W. R. 472; 14 D. L. R. 729; 23 Man. L. R. 665.—**CAN.**

a. ——.] — HITCHIN *v.* BRITISH COLUMBIA SUGAR REFINING CO. (1913), 24 W. L. R. 960; 4 W. W. R. 1326; 12 D. L. R. 552; 18 B. C. R. 397.—**CAN.**

SUB-SECT. 2.—THE WORKMAN.

See Employers' Liability Act, 1880 (c. 42), s. 8; Employers & Workmen Act, 1875 (c. 90), s. 10; *see, also*, Part VI., Sect. 8, sub-sect. 2, B. (*b*), *ante*.

1831. Who is a workman—Question of fact.]—PEARCE *v.* LANSDOWNE, No. 1837, *post*.

1832. —— Workman employed by "butty" men.] — BROWN *v.* BUTTERLEY COAL CO., No. 1828, *ante*.

1833. —— Independent contractor—Slater providing own tools.]—Pltf.'s husband S. was a slater; deft. was a builder, & had on several occasions employed S. to slate houses for him. Deft. provided the slates, poles, & scaffolding, but S. had his own tools, & was paid by the piece.

On the occasion of the accident the scaffolding erected by deft. was in a manifestly unsafe state, & the defect in it was known to deft. or his superintendent, & S. knew that it was so known to them. S., notwithstanding the defect, ascended a ladder to finish the slating, but the scaffolding gave way, & S., who was on the ladder at the time, fell to the ground sustaining injuries from which he died:—*Held:* (1) deceased was a workman within above Act, s. 8; (2) although deceased was aware of the defect in the scaffolding, yet, as he knew that deft. or his superintendent was aware of it also, above Act, s. 2 (3), would enable pltf. to recover compensation for his death. *Semble:* contributory negligence is a defence under above Act as before.—STUART *v.* EVANS (1883), 49 L. T. 138; 31 W. R. 706, D. C.

Annotations:—As to (2) **Refd.** Weblin *v.* Ballard (1886), 17 Q. B. D. 122; Thomas *v.* Quartermaine (1887), 56 L. J. Q. B. 340.

1834. —— —— Chargeman in coal mine.]—By the special rules of a colliery made, under Coal Mines Regulation Act, 1887 (c. 58), s. 51, the manager of the mine was made responsible for the control, management & direction of the mine, & was to appoint such competent persons as might be necessary for carrying out the provisions of the Act & all persons employed in or about the mine were to obey his directions; & the chargeman in each shift was to have charge of the sinking operations. E. entered into a contract with the owners of the colliery to sink a shaft in their coal mine. By the contract E., who was therein called the contractor, was to provide such sinkers, etc., as might be necessary for the execution of the work, & was to be paid a certain sum per fathom sunk. E. employed & paid the sinkers, he himself acting as "chargeman" in charge of the sinking operations. One of the sinkers, while engaged upon the work, was killed by a block of wood falling upon him & his administratrix brought an action against the colliery owners under Employers' Liability Act, 1880 (s. 96), to recover damages for his death:—*Held:* (1) E. was an independent contractor; (2) deceased was not a "workman" who had entered into or worked under a contract with the colliery owners as his employers within the Employers & Workmen Act, 1875 (c. 90), s. 10, & therefore Employers' Liability Act, 1880 (c. 42), did not apply; (3) the control given by Coal Mines Regulation Act, 1887 (c. 58), & by the special rules of the mine, to the manager over all persons in the mine did not make E. & the sinkers employed by him "workmen" in the employment of the colliery owners within Employers & Workmen Act, 1875 (c. 90), s. 10.—MARROW *v.* FLIMBY & BROUGHTON MOOR COAL & FIRE BRICK CO., [1898] 2 Q. B. 588; 67 L. J. Q. B. 976; 79 L. T. 397; 14 T. L. R. 583, C. A.

Annotations:—As to (1) **Consd.** Richards *v.* Wrexham & Acton Collieries, Davies *v.* Wrexham & Acton Collieries, [1914] 2 K. B. 497; Hill *v.* Beckett, [1915] 1 K. B. 578. *As to* (2) **Refd.** Hill *v.* Beckett, [1915] 1 K. B. 578. *As to* (3) **Folld.** Fitzpatrick *v.* Evans, [1902] 1 K. B. 505. **Refd.** Richards *v.* Wrexham & Acton Collieries, Davies *v.* Wrexham & Acton Collieries, [1914] 2 K. B. 497.

1835. —— —— Servant of.]—The owners of a colliery entered into an agreement with a contractor by which the latter contracted to sink & wall a shaft in the colliery. One of the workmen employed upon the work by the contractor, & paid by him, was fatally injured by an explosion of gas in the mine. Deceased had, like all the other men employed by the contractor, signed the "record book" kept by the colliery owners, by which, in consideration of being employed in the mine, he became bound to observe the regulations & conditions laid down for the safety of the mine & for the guidance of the persons employed therein. The administrator of deceased having brought an action against the colliery owners under above Act to recover damages for his death:—*Held:* the signature of the conditions by deceased did not create a contract of service between him & the colliery owners; deceased was not a "workman" who had entered into or worked under a contract with the colliery owners as his employers within Employers & Workmen Act, 1875 (c. 90), s. 10, & above Act did not therefore apply.—FITZPATRICK *v.* EVANS & CO., [1902] 1 K. B. 505; 71 L. J. K. B. 302; 86 L. T. 141; 50 W. R. 290; 18 T. L. R. 290; 46 Sol. Jo. 264, C. A.

Annotations:—**Consd.** Richards *v.* Wrexham & Acton Collieries, Davies *v.* Wrexham & Acton Collieries, [1914] 2 K. B. 497. **Refd.** Smith *v.* General Motor Cab Co., [1911] A. C. 188.

1836. —— Superintendent also engaged in manual work.]—An overlooker or superintendent was engaged half his time in supervision & the other half in manual labour. While engaged in supervision he was injured by the defective machinery of his employer:—*Held:* he was a workman within above Act & entitled to recover damages for the injury.—LEECH *v.* GARTSIDE (1885), 1 T. L. R. 391, D. C.

1837. —— Engaged in work of domestic or menial nature—Potman in public-house.]—(1) Where the duties of a potman in a public-house, although manual, are substantially of a menial or domestic nature, he is not a workman within above Act.

(2) Although the facts of the case were admitted, yet it was the duty of the judge to leave to the jury the question whether pltf. was a workman & not a domestic servant.—PEARCE *v.* LANSDOWNE (1893), 62 L. J. Q. B. 441; 69 L. T. 316; 57 J. P. 760, D. C.

Annotations:—As to (1) **Apld.** *Re* Junior Carlton Club's Appln., [1922] 1 K. B. 166. **Refd.** L. C. C. *v.* Perry (1915), 79 J. P. 312.

PART XIII. SECT. 2, SUB-SECT. 2.

1835 *a. Who is a workman — Independent contractor — Servant of.*]—SWEENEY *v.* DUNCAN & CO. (1892), 19 R. (Ct. of Sess.) 870; 29 Sc. L. R. 777.—**SCOT.**

b. —— Seaman.] — Employers' Liability Act, 1911, does not apply to a seaman.—CLOUGH *v.* CANADIAN PACIFIC RY. CO. (B. C.), [1918] 2 W. W. R. 416; 40 D. L. R. 512.—**CAN.**

c. —— ——.] — WALL *v.* NEW WALRUS CO. (1902), 8 Nfld. L. R. 499.—**NFLD.**

d. —— ——.] — *Held:* a fireman employed on board a steam canal barge was not a "seaman" within Employers & Workmen Act, 1875, s. 13, & therefore he was not excluded from the operation of Employers' Liability Act, 1880.—OAKES *v.* MONKLAND IRON CO., LTD. (1884), 11 R. (Ct. of Sess.) 579; 21 Sc. L. R. 407.—**SCOT.**

e. —— Engineer of ferry boat.] — An engineer of a steam ferry boat running with n the harbour is not within Employers' Liability Act, s. 9.—FRAY *v.* BALMAIN STEAM FERRY CO.

Sect. 2.—Under Employers' Liability Act: Subsects. 2 & 3, A. & B.]

1838. —— Employers & Workmen Act, 1875 (c. 90), s. 10—Bus conductor.]—An omnibus conductor engaged at daily wages, paid daily, is not a "person to whom the Employers & Workmen Act, 1875 (c. 90), applies," & therefore is not entitled to the benefit of Employers' Liability Act, 1880 (c. 42).—MORGAN *v.* LONDON GENERAL OMNIBUS CO. (1884), 13 Q. B. D. 832; 53 L. J. Q. B. 352; 51 L. T. 213; 48 J. P. 503; 32 W. R. 759, C. A.

Annotations:—**Apld.** Cook *v.* North Metropolitan Tram. Co. (1887), 18 Q. B. D. 683. **Consd.** Hunt *v.* G. N. Ry., [1891] 1 Q. B. 601. **Apld.** Rushbrook *v.* Grimsby Palace Theatre Co. (1908), 99 L. T. 18. **Consd.** *Re* Dairymen's Foremen, *Re* Tailors' Cutters (1912), 28 T. L. R. 587. **Refd.** Jackson *v.* Hill (1884), 13 Q. B. D. 618; Lamb *v.* G. N. Ry. (1891), 65 L. T. 225; Bound *v.* Lawrence, [1892] 1 Q. B. 226; Maynard *v.* Peter Robinson (1903), 19 T. L. R. 492; Hoare *v.* Green (1907), 76 L. J. K. B. 730; Smith *v.* Associated Omnibus Co., [1907] 1 K. B. 916; Whelan *v.* Great Northern Steam Fishing Co. (1909), 100 L. T. 913. **Mentd.** Kirkdale Burial Board *v.* Liverpool Corpn., [1904] 1 Ch. 829.

1839. —— —— Driver of tramcar.]—The driver of a tramcar is not "a person to whom Employers & Workmen Act, 1875 (c. 90), applies," & therefore is not entitled to the benefit of Employers' Liability Act, 1880 (c. 42).—COOK *v.* NORTH METROPOLITAN TRAMWAYS CO. (1887), 18 Q. B. D. 683; 56 L. J. Q. B. 309; 57 L. T. 476; 51 J. P. 630; 35 W. R. 577; 3 T. L. R. 523, D. C.

Annotations:—**Consd.** Hunt *v.* G. N. Ry., [1891] 1 Q. B. 601. **Distd.** Smith *v.* Associated Omnibus Co., [1907] 1 K. B. 916. **Apld.** *Re* Lithographic Artists, &c. Engravers (1913), 108 L. T. 894. **Refd.** Bound *v.* Lawrence (1891), 61 L. T. 470; Rushbrook *v.* Grimsby Palace Theatre Co. (1908), 99 L. T. 18; Whelan *v.* Great Northern Steam Fishing Co. (1909), 100 L. T. 913.

1840. —— —— Driver of motor bus—Duty to do repairs.]—The driver of a motor omnibus who has, when out with the omnibus, to do such necessary repairs to it as he is able to do, is a person "otherwise engaged in manual labour" within Employers & Workmen Act, 1875 (c. 90), s. 16, & is, therefore, entitled to the benefit of Employers' Liability Act, 1880 (c. 42).—SMITH *v.* ASSOCIATED OMNIBUS CO., [1907] 1 K. B. 916; 76 L. J. K. B. 574; 96 L. T. 675; 71 J. P. 239; 23 T. L. R. 381, D. C.

Annotations:—**Refd.** Hoare *v.* Green, [1907] 2 K. B. 315; Rushbrook *v.* Grimsby Palace Theatre Co. (1908), 99 L. T. 18.

1841. —— —— Driver of wharfinger's cart—Duty to load & unload.]—YARMOUTH *v.* FRANCE, No. 1884, *post*.

1842. —— —— Foreman engineer.]—DENNIS *v.* FORBES (1896), 41 Sol. Jo. 144, D. C.

1843. —— —— Sempstress—With other incidental duties.]—A sempstress who works at a sewing machine, & heats irons on a stove & irons materials, is a person "engaged in manual labour" within the definition of "workman" in Employers & Workmen Act, 1875 (c. 90), s. 10, & therefore entitled to the benefit of Employers' Liability Act, 1880 (c. 42).—MAYNARD *v.* PETER ROBINSON, LTD. (1903), 89 L. T. 136; 19 T. L. R. 492; 67 J. P. Jo. 211, D. C.

1844. —— —— Stage manager & scene shifter—Scene shifting principal employment.]—A person was employed at a theatre as stage manager but his principal duty was to shift the furniture & scenes & to do rough stage carpentry:—*Held:* a "person engaged in manual labour" & consequently a "workman" within above Act.—RUSHBROOK *v.* GRIMSBY PALACE THEATRE & BUFFET, LTD. (1909), 100 L. T. 253; 25 T. L. R. 258, C. A.

—— ——.]—*See, also*, Part VI., Sect. 8, subsect. 2, B. (*b*), *ante*.

1845. —— Seaman—Bargeman employed in loading & unloading—Employers & Workmen Act, 1875 (c. 90), sect. 10.]—The term "seaman" in Employers & Workmen Act, 1875 (c. 90), s. 13, means "seaman" as defined by M. S. Act, 1854 (c. 104), s. 2.

Pltf. was one of the crew of two hands employed on board a sailing barge to navigate her in the estuary & upper tidal waters of the Thames. Pltf. acting under the orders of the other hand, assisted in navigating the barge, though his main duty was to assist in loading & unloading her:—*Held:* pltf. was a "seaman" & was consequently excluded from the operation of Employers' Liability Act, 1880 (c. 42).—CORBETT *v.* PEARCE, [1904] 2 K. B. 422; 73 L. J. K. B. 885; 90 L. T. 781; 68 J. P. 387; 20 T. L. R. 473, D. C.

Annotation:—**Overd.** Chislett *v.* Macbeth, [1909] 2 K. B. 811.

1846. —— —— Whether employee a seafaring man & working in that vocation—Merchant Shipping Acts.]—The definition of "seaman" in Merchant Shipping Acts, 1854 & 1894, ought not to be imported into Employers' Liability Act, 1880 (c. 42), which excludes seamen from its operation.

Resp. was injured while employed on board a steamship in helping to unmoor & warp her from one berth to another across a large dock in Liverpool. She was taken across by means of a tug & a rope & was at no moment entirely free from a quay, & did not use her steam or any motive power of her own. Resp. was not one of the ship's crew & had not been to sea for several years:—*Held:* resp. was not a "seaman" & was not excluded from Employers' Liability Act, 1880 (c. 42).—MACBETH & CO. *v.* CHISLETT, [1910] A. C. 220; 79 L. J. K. B. 376; 102 L. T. 82; 26 T. L. R. 268, H. L.; *affg.* S. C. *sub nom.* CHISLETT *v.* MACBETH & CO., [1909] 2 K. B. 811, C. A.

1847. Position of workman under the Act.]—THOMAS *v.* QUARTERMAINE, No. 1976, *post*.

SUB-SECT. 3.—DEFECT IN CONDITION OF WAYS, WORKS, MACHINERY OR PLANT.

A. Defect Must Arise from Negligence of Employer or His Servants.

See, generally, Employers' Liability Act, 1880 (c. 42), s. 1.

1848. General rule.]—WALSH *v.* WHITELEY, No. 1904, *post*.

1849. ——.]—PAGE *v.* BOWDLER, No. 1863, *post*.

1850. Negligence of employer—Or some person in his service—Employment of competent independent contractor.]—A "boat staging" or suspended platform, put up for pltfs. by deft. under a contract between them, to enable pltfs. to paint a house, fell, through being insecurely fastened by

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(1886), 7 N. S. W. L. R. 146; 2 N. S. W. W. N. 23, 100.—**AUS.**

f. —— *Stevedore's labourer.*]—A stevedore's labourer, employed in unloading a ship at the wharf, who is injured whilst so employed on board the ship, is a workman within Employers' Liability Act, s. 9.—HALLEN *v.* KING (1896), 17 N. S. W. L. R. 13; 12 N. S. W. W. N. 90.—**AUS.**

g. —— *Miner.*]—HOLLAND *v.* STOCKTON COAL CO. (1898), 19 N. S. W. L. R. 100; 14 N. S. W. W. N. 218.—**AUS.**

h. —— *Sawyer.*]—LYONS *v.* NICOLA VALLEY PINE LUMBER CO., [1917] 1 W. W. R. 237; 23 B. C. R. 141.—**CAN.**

k. —— *Onus of proof.*]—HANRAHAN *v.* PIM & MALCOLMSON (trading as LIMERICK S.S. CO.) (1887), 18 L. R. Ir. 135.—**IR.**

deft. & hurt a painter in the employment of pltfs. He brought an action under above Act against pltfs. for injuries sustained in consequence of the defective state of the boat staging. Pltfs. settled the action by paying to the painter £125, & then sued deft. for breach of his contract:—*Held:* deft. was liable under the contract; but inasmuch as pltfs. had employed a competent contractor to put up the boat staging, & there was, on the facts, no evidence of negligence by pltfs. they were not liable to their servant for the injury he had sustained, & therefore the money which they had paid to settle his action was not recoverable as damages from deft. for his breach of contract.—KIDDLE *v.* LOVETT (1885), 16 Q. B. D. 605; 34 W. R. 518.

Annotations:—**Consd.** Mowbray *v.* Merryweather, [1895] 1 Q. B. 857. **Refd.** Mowbray *v.* Merryweather, [1895] 2 Q. B. 640; Biddle *v.* Hart, [1907] 1 K. B. 649; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

1851. —— —— ——.]—The action is not against the contractor but against pltfs.' employers, & the only question is whether there is any evidence of negligence to affect them, & I am clearly of opinion that there is none. It would be a great hardship if employers were to be held liable in such a case as the present, in which their foreman desired a competent person to remove the danger, & in which that person had, either from neglect or want of skill, or from an error of judgment, allowed a disaster to take place (LORD COLERIDGE, C.J.).—MOORE *v.* GIMSON (1889), 58 L. J. Q. B. 169; *sub nom.* MOORE *v.* GIMSON, NECOMBE *v.* SAME, TETSALL *v.* SAME, 5 T. L. R. 177, D. C.

1852. —— —— ——.]—ROBERTS *v.* TOTTENHAM LAGER BEER BREWERY & ICE FACTORY, LTD. (1889), 6 T. L. R. 4.

1853. Evidence of negligence essential.]—SUTTON *v.* STEAD (1887), 3 T. L. R. 499, D. C.

1854. ——.]—WALSH *v.* WHITELEY, No. 1904, *post.*

1855. ——.]—KAY *v.* BRIGGS (1889), 5 T. L. R. 233, D. C.

1856. ——.]—Under above Act pltf. has to make out that there was a defect in the plant, etc., not supplied through the negligence of his employers or some person whose duty it was to supply it, but here, even assuming the first point in favour of pltf. a defect in the plant, etc., there is no evidence of any negligence either in the employers or any one in their service (HUDDLESTON, B.).—POOLEY *v.* HICKS (1889), 5 T. L. R. 353, D. C.

1857. ——.]—PERRY *v.* BRASS & SON (1889), 5 T. L. R. 253, D. C.

1858. ——.]—The question in all these cases is whether the accident was caused by the negligence of defts. (HAWKINS, J.).—M'SHANE *v.* BAXTER (1890), 7 T. L. R. 58, D. C.

1859. Evidence as to negligence — Hired machinery used without inquiry or inspection.]—BIDDLE *v.* HART, No. 1888, *post.*

1860. —— **Long immunity from accident.**]—That this particular brake frequently emits sparks is well known, as well as that other brakes of the same kind do so. There is no danger in the emission of sparks unless they fall upon something inflammable. The fact that this particular brattice cloth was inflammable was well known. It was also well known that this brattice cloth was in proximity to the engine. What was unknown is said to be that there was any danger. Long immunity from accident does not prove absence of carelessness. It only proves long continued habitual negligence. It is gross negligence not to know the existence of this danger & the case falls within above Act (LINDLEY, L.J.).—THOMAS *v.* GREAT WESTERN COLLIERY CO. (1894), 10 T. L. R. 244, C. A.

Annotation:—**Mentd.** Potter *v.* Great Western Colliery Co. (1894), 10 T. L. R. 380.

1861. —— **New machine ordered—Accident happening before old one replaced.**]—PALEY *v.* GARNETT, No. 1911, *post.*

1862. Duty of employer—To discover defect—& to remedy it.]—BAXTER *v.* WYMAN & SONS (1888), 4 T. L. R. 255, D. C.

1863. —— —— ——.]—Under above Act to establish a cause of action it is necessary that pltf. should make out three points, that the relation of employer & employed existed between him & deft., that he suffered personal injury by reason of a defect in the condition of the plant connected with deft.'s business, that the defect had not been discovered & remedied owing to the negligence of the employer (CHARLES, J.).—PAGE *v.* BOWDLER (1894), 10 T. L. R. 423, D. C.

1864. —— **To warn young servant of danger—& instruct in proper use of dangerous machine.**]—GREENWOOD *v.* GREENWOOD, No. 1901, *post.*

B. Ways.

See Employers' Liability Act, 1880 (c. 42), ss. 1 (1), 2 (1).

1865. "Way"—Definition of.]—WILLETTS *v.* WATT & Co., No. 1867, *post.*

1866. —— **Temporary hole covered by planks.**]—BROMLEY *v.* CAVENDISH SPINNING CO., LTD. (1886), 2 T. L. R. 881, C. A.

1867. —— **Undefined route across workshop.**]—The expression "way" in above Act is the course which a workman would, in ordinary circumstances, take in order to go from one part of a shop, where a part of the business is done, to another part where business is done, when the business of the employer requires him to do so.

By above Act a right of compensation is given

PART XIII. SECT. 2, SUB-SECT. 3.—A.

1853 i. *Evidence of negligence essential.*]—A count framed under Employers' Liability Act, 1886, s. 1 (1), is bad unless it contains an allegation of negligence either in the employer or some one entrusted by him with seeing that the works, etc., are in proper condition.—DAVIES *v.* DYER (1890), 11 N. S. W. L. R. (L.) 431; 7 N. S. W. W. N. 49.—**AUS.**

1853 ii. ——.]—Pltf. in an action under Employers' Liability Act, for damages caused by a defect in his employers' "works & ways" cannot succeed if on the facts proved the jury can only conjecture how the injury occurred.—STAMER *v.* HALL MINES (1899), 6 B. C. R. 579.—**CAN.**

1853 iii. ——.]—CAMPBELL *v.* DONALDSON (1911), 40 N. B. R. 525.—**CAN.**

1853 iv. ——.]—MCGOWAN *v.* WARNER (1913), 41 N. B. R. 524; 14 E. L. R. 47; 15 D. L. R. 134.—**CAN.**

1853 v. ——.]—LE BLANC *v.* MOONEY & SONS, HATTY *v.* MOONEY & SONS (1914), 14 E. L. R. 379.—**CAN.**

1853 vi. ——.]—KOSKI *v.* CANADIAN NORTHERN RY. CO. (1916), 34 W. L. R. 146; 10 W. W. R. 272; 26 Man. L. R. 214.—**CAN.**

1853 vii. ——.]—O'NEILL *v.* REID NEWFOUNDLAND CO. (1904), 9 Nfld. L. R. 51.—**NFLD.**

1853 viii. ——.]—In an action for damages raised by the workman under Employers' Liability Act, 1880, s. 1, against his employer, the ct., after a proof, being of opinion that no fault on the employer's part or that of the foreman was established, assoilzied defender.—WILSON *v.* LOVE (1897), 25 R. (Ct. of Sess.) 280; 35 Sc. L. R. 223; 5 S. L. T. 217.—**SCOT.**

PART XIII. SECT. 2, SUB-SECT. 3.—B.

1866 i. *"Way" — Temporary hole covered by planks.*]—*Held:* the open joists of a floor of a house in course of construction, across which a labourer had to pass in carrying out an order by his foreman, did not constitute a "way" in the sense of Employers' Liability Act, 1880 (c. 42), s. 1 (1).—M'GOWAN *v.* SMITH, [1907] S. C. 548.—**SCOT.**

l. —— *Plank used as gangway.*]—POWER *v.* DALGETY & CO., LTD., [1920] V. L. R. 592.—**AUS.**

m —— *Manhole in coal mine.*]—FERRIS *v.* COWDENBEATH COAL CO. (1897), 24 R. (Ct. of Sess.) 615; 34 Sc. L. R. 492; 4 S. L. T. 335.—**SCOT.**

Sect. 2.—Under Employers' Liability Act: Subsect. 3, B., C. & D. (a) & (b).]

to a workman for personal injury caused to him by reason of any defect in the condition of the ways connected with or used in the business of the employer. Pltf. was employed as a steam hammerman in the service of defts., a firm of engineers, upon whose premises was a large covered workshop about 150 feet long & 50 feet wide, over the floor of which were scattered certain machinery & other appliances used in their business. Near the centre of the workshop was a well with a cover which had not been used for about seven years. Pltf. who worked at one end of the workshop, whilst walking across it to make some inquiry of a workman at the other end with regard to the steam power, fell into the well, which had been uncovered by defts.' foreman for the purpose of emptying water from an iron cylinder into it. There was no defined way where pltf. crossed, but he went the most direct line across the workshop. Defts.' workmen also used to pass up & down the workshop. No warning was given by the foreman that the well had been uncovered. In an action under above Act to recover damages for the injury sustained:—*Held:* the place where the accident happened was a "way" within sect. 1 of the Act; the accident was not caused by "any defect in the condition of the way" within sect. 1 (1), but was caused by the negligence of defts.' foreman in the user of the way within sect. 1 (2).—WILLETTS *v.* WATT & CO., [1892] 2 Q. B. 92; 61 L. J. Q. B. 540; 66 L. T. 818; 56 J. P. 772; 40 W. R. 497; 8 T. L. R. 533; 36 Sol. Jo. 502, C. A.

Annotations:—**Consd.** Tate *v.* Latham, [1897] 1 Q. B. 502; Nimmo *v.* Connell, [1924] A. C. 595.

1868. "Defect"—Definition of.]—MCGIFFIN *v.* PALMER'S SHIPBUILDING & IRON CO., LTD., No. 1869, *post.*

1869. —— Temporary obstruction—Fall of substance upon the "way."]—A workman was employed in defts.' ironworks, & part of his duty was to take iron in balls, by means of a two wheeled car, along a roadway of iron plates. While he was so engaged the car struck against a piece of a substance used for lining the furnaces, which had been negligently placed projecting into the roadway, & a ball fell on him, causing personal injuries from which he died. In an action against the employers: *Held:* the obstruction caused by the substance projecting into the roadway was not a defect in the condition of the way within above Act & defts. were not liable.—MCGIFFIN *v.* PALMER'S SHIPBUILDING & IRON CO., LTD. (1882), 10 Q. B. D. 5; 52 L. J. Q. B. 25; 47 L. T. 346; 47 J. P. 70; 31 W. R. 118, D. C.

Annotations:—**Distd.** Giles *v.* Thames Ironworks Shipbuilding Co. (1885), 1 T. L. R. 469. **Folld.** Pegram *v.* Dixon (1886), 55 L. J. Q. B. 447. **Apld.** Willetts *v.* Watt, [1892] 2 Q. B. 92. **Dbtd.** Nimmo *v.* Connell, [1924] A. C. 595.

1870. —— —— Plank thrown down by workman.]—During the building of a house the workmen obtained access to the upper part by ladders placed in a well intended for a staircase. There was another well through the house intended for a lift, down which rubbish had been thrown during the building. Upon the staircase being completed it was closed to the workmen as a means of access, & the ladders were transferred to the lift well. No precautions had been taken to prevent workmen from throwing rubbish down the lift well after the ladders had been so transferred. Pltf. was ascending one of the ladders when a boy threw a plank down from the third floor, which struck pltf. & broke his collar-bone:—*Held:* this was not a "defect in the condition of the way" within above Act; & the fact of no notice or warning being given to stop the practice of throwing materials down the lift hole did not have the effect of bringing the case within sect. 1 (1).—PEGRAM *v.* DIXON (1886), 55 L. J. Q. B. 447; 51 J. P. 198; 2 T. L. R. 801, D. C.

1871. —— Temporary removal of protection—Removal of well cover.]—WILLETTS *v.* WATT & CO., No. 1867, *ante.*

1872. —— Improper construction of temporary work—Staging insecurely laid.]—GILES *v.* THAMES IRONWORKS SHIPBUILDING CO. (1885), 1 T. L. R. 469, D. C.

1873. —— —— Covering of hole.]—BROMLEY *v.* CAVENDISH SPINNING CO., LTD. (1886), 2 T. L. R. 881, C. A.

1874. —— Improper protection—Unprotected aperture to staircase.]—WOOD *v.* DORRALL & CO. (1886), 2 T. L. R. 550, D. C.

Annotation:—**Distd.** Thomas *v.* Quartermaine (1886), 2 T. L. R. 796.

1875. —— —— Roof of mine.]—WOODS *v.* CARRON IRON CO. (1892), 8 T. L. R. 376, C. A.

1876. —— Presence of explosive gas in mine.]—The accumulation of inflammable gas in a section of a mine which is being worked & traversed by workmen, in such quantities as to become explosive if a light is applied to it, is a defect in the condition of the ways & works connected with or used in the business of the mine owner within above Act.—NIMMO (JAMES) & CO., LTD. *v.* CONNELL, [1924] A. C. 595; 93 L. J. P. C. 147; 131 L. T. 97; 40 T. L. R. 522, H. L.

1877. Provision of safe way—Choice of dangerous way.]—PRITCHARD *v.* LANG (1889), 5 T. L. R. 639, D. C.

C. Works.

See Employers' Liability Act, 1880 (c. 42), ss. 1 (1), 2 (1).

1878. Not confined to factories, workshops or permanent premises.]—BRANNIGAN *v.* ROBINSON, No. 1880, *post.*

1879. Construction of new buildings—Uncompleted buildings—Whether works of builder.]—I cannot see how the carcase of a house could be said to be the builder's plant (MANISTY, J.).—CONWAY *v.* CLEMENCE (1885), 2 T. L. R. 80, D. C.

1880. —— —— ——.]—Deft., a builder, was engaged in pulling down an old house. After removal of the roof & pulling down of part of the walls, a workman received injuries owing to the fall of a wall which had not been properly shored up:—*Held:* the dangerous condition of the wall was "a defect in the condition of the works connected with or used in the business of deft., for which deft. was liable under above Act.

The term "works" is not confined to factories, workshops or permanent premises of an employer.

Deft. was a builder, whose business it was to pull down walls as well as build them up. The wall he deals with must be just as much works connected with his business in the one case as in the other (LAWRANCE, J.).—BRANNIGAN *v.* ROBINSON, [1892] 1 Q. B. 344; 61 L. J. Q. B. 202; 66 L. T. 647; 56 J. P. 328; 8 T. L. R. 244, D. C.

1881. —— —— Whether works of employer.]—In above Act, s. 1, defining the liability of employers for personal injury caused to their workmen "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer"

the expression "works" must be taken to mean works already completed & not works in course of construction which are, on completion, to be connected with or used in the business of the employer.—HOWE *v.* FINCH (1886), 17 Q. B. D. 187; 51 J. P. 276; 34 W. R. 593, D. C.

Annotations:—**Consd.** Brannigan *v.* Robinson, [1892] 1 Q. B. 344. **Refd.** Thompson *v.* City Glass Bottle Co., [1901] 2 K. B. 483; Biddle *v.* Hart, [1907] 1 K. B. 649.

1882. Demolition of old house—Works of builder.]—BRANNIGAN *v.* ROBINSON, No. 1880, *ante*.

1883. What amounts to defect—Brake emitting sparks — Danger of fire.]—THOMAS *v.* GREAT WESTERN COLLIERY CO., No. 1860, *ante*.

D. Machinery or Plant.

(a) What is "Plant."

House carcase.]—*See* No 1879, *ante*.

1884. Apparatus used for carrying on business—All goods & chattels—Except stock-in-trade.]—In an action to recover compensation under above Act, it appeared that pltf. was in the employment of deft., who was a wharfinger, & for the purposes of his business the owner of carts & horses. It was the duty of pltf. to drive the carts & to load & unload the goods which were carried in them. Among the horses was one of a vicious nature & unfit to be driven even by a careful driver. Pltf. objected to drive this horse, & told the foreman of the stable that it was unfit to be driven, to which the foreman replied that pltf. must go on driving it, & that if any accident happened his employer would be responsible. Pltf. continued to drive the horse, & while sitting on his proper place in the cart was kicked by the animal, & his leg was broken:—*Held:* (1) pltf. was a "workman" within the definition in sect. 8 of above Act; (2) the horse which injured pltf. was "plant" used in the business of deft. & the vice in the horse was a "defect" in the condition of such plant, within sect. 1 of above Act.

There is no definition of plant in the Act; but in the ordinary sense it includes whatever apparatus is used by a business man for carrying on his business, not his stock-in-trade . . . but all goods & chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business (LINDLEY, L.J.).

(3) Upon the facts a jury might find deft. to be liable, for there was evidence of negligence on the part of his foreman, & the circumstances did not conclusively show that the risk was voluntarily incurred by pltf.—YARMOUTH *v.* FRANCE (1887), 19 Q. B. D. 647; 57 L. J. Q. B. 7; 36 W. R. 281; 4 T. L. R. 1, D. C.; *on appeal* (1888), 4 T. L. R. 561, C. A.

Annotations:—*As to* (1) **Expld.** Hunt *v.* G. N. Ry., [1891] 1 Q. B. 601. **Refd.** Bound *v.* Lawrence (1891), 60 L. J. M. C. 137; Corbett *v.* Pearce, [1904] 2 K. B. 422; Smith *v.* Associated Omnibus Co. (1907), 96 L. T. 675. *As to* (2) **Expld.** *Re* Squier, Creasy (1897), 41 Sol. Jo. 243. **Consd.** London & Eastern Counties Loan & Discount Co. *v.* Creasey, [1897] 1 Q. B. 768; Thompson *v.* City Glass Bottle Co., [1901] 2 K. B. 483. **Refd.** National Provincial & Union Bank of England *v.* Charnley, [1924] 1 K. B. 431. *As to* (3) **Consd.** Osborne *v.* L. & N. W. Ry. (1888), 21 Q. B. D. 220; Thrussell *v.* Handyside (1888), 20 Q. B. D. 359; Sanders *v.* Barker (1890), 6 T. L. R. 324. **Expld.** Amos *v.* Duffy (1890), 6 T. L. R. 339. **Consd.** Smith *v.* Baker, [1891] A. C. 325. **Refd.** Walsh *v.* Whiteley (1888), 21 Q. B. D. 371; Membery *v.* G. W. Ry. (1889), 14 App. Cas. 179; Baker *v.* James, [1921] 2 K. B. 674; Letang *v.* Ottawa Electric Ry., [1926] A. C. 725.

1885. Horse.]—YARMOUTH *v.* FRANCE, No. 1881, *ante*.

1886. Machine out of use.]—A machine, though out of use, may be "plant connected with the business of the employer" within above Act, s. 1 (1).

A machine used by defts. for making glass stoppers was in a defective & dangerous condition. The foreman gave orders that it should not be used again, & it was being removed with his sanction by pltf. & others to a corner of defts.'s works, when part of it became detached & fell, & injured pltf.:—*Held:* (1) there was evidence that the machine was "plant connected with the business" of defts. within above Act, s. 1 (1); (2) there was evidence that pltf. had been injured by the negligence of the foreman, being "a person in the service of the defts. to whose orders the workman was bound to conform" within above Acts, s. 1 (3).—THOMPSON *v.* CITY GLASS BOTTLE CO., [1902] 1 K. B. 233; 71 L. J. K. B. 115; 85 L. T. 661; 18 T. L. R. 69, C. A.

(b) Ownership of Plant.

See Employers' Liability Act, 1880 (c. 42), ss. 1 (1), 2 (1).

1887. Need not be in employer—Ship's machinery or plant—Plant of stevedore.]—BACON *v.* DAWES & CO. (1887), 3 T. L. R. 557, D. C.

1888. —— —— —— Inquiry & inspection.]—A stevedore's workman while engaged in unloading a ship was injured by the fall of a bale of cargo. Part of the tackle used for the unloading was supplied by the ship, & the accident was caused by a defect in this part of the tackle. The workman having brought an action in the county ct. against the stevedore for compensation under above Act, the judge withdrew the case from the jury on the ground that the stevedore was not responsible for a defect in the ship's tackle, & his decision was affirmed by the Div. Ct.:—*Held:* the stevedore owed a duty to the workman to take reasonable care in seeing that this tackle was in proper condition, & the action must be sent back for a new trial. If the employer uses hired plant without inquiry or inspection there is *primâ facie* evidence to go to the jury of negligence.—BIDDLE *v.* HART, [1907] 1 K. B. 649; 76 L. J. K. B. 418; 97 L. T. 66; 23 T. L. R. 262; 51 Sol. Jo. 229; 10 Asp. M. L. C. 469, C. A.

Annotation: **Apld.** Monaghan *v.* Rhodes, [1920] 1 K. B. 487.

1889. —— —— Plant of coal contractor—Improper ventilation of hold.]—Defts. were coal contractors & contracted to supply coal to the L. B. & S. C. Ry. co. They shipped coal at Cardiff in vessels belonging to a Navigation co. to be carried to Newhaven. Defts. had to unload the coal there, & engaged agents to employ a gang to carry out the work. One of their agents, W., had a gang unloading the Bluebell, amongst whom was pltf. C. Owing to the hold of the Bluebell not being properly ventilated there was an accumulation of gas, & when the hatch was removed a violent explosion took place, & pltf. was injured:—*Held:* the injury was caused by the defective "plant" of defts.—CARTER *v.* CLARKE (1898), 78 L. T. 76; 14 T. L. R. 172, D. C.

1890. —— Employer must authorise its use.]—A bricklayer ordered to do certain work used for

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PART XIII. SECT. 2, SUB-SECT. 3.—D. (a).

1885 i. *Horse.*]—A horse used by a carting contractor in his business is "plant" in the sense of Employers' Liability Act, 1880 (c. 42), s. 1.—FRASER *v.* HOOD (1887), 15 R. (Ct. of Sess.) 178.—**SCOT.**

1885 ii. ——.]—HASTON *v.* EDINBURGH STREET TRAMWAYS CO., LTD. (1887), 14 R. (Ct. of Sess.) 621; 24 Sc. L. R. 435.—**SCOT.**

PART XIII. SECT. 2, SUB-SECT. 3.—D. (b).

1890 i. *Need not be in employer—Employer must authorise its use.*]—

Sect. 2.—Under Employers' Liability Act: Sub-sect. 3, D. (b) & (c) i., ii., iii., iv. & v.]

this purpose a defective ladder, which the foreman & another workman, had both previously used, but which neither the foreman nor anybody else with authority from deft. had borrowed so as to make it part of the employer's plant. The bricklayer having sustained injuries in consequence of the defective condition of such ladder brought an action in the county ct. under Employers' Liability Act, 1880 (c. 42), & recovered damages:—*Held:* pltf. was not entitled to succeed in the action, inasmuch as the ladder had not been borrowed of the owner in such a way as to make it a part of the plant of the employer.—JONES *v.* BURFORD (1884), 1 T. L. R. 137, D. C.

(c) *Defects.*

i. *In General.*

1891. Defect in original construction.]—WALSH *v.* WHITELEY, No. 1901, *post*.

1892. Defect in subsequent condition.]—WALSH *v.* WHITELEY, No. 1904, *post*.

ii. *Recurring Defects.*

1893. Crane.]—BACON *v.* DAWES & CO. (1887), 3 T. L. R. 557, D. C.

1894. Slipping band on shafting.]—BAXTER *v.* WYMAN & SONS (1888), 4 T. L. R. 255, D. C.

1895. Shuttle of loom.]—SMITH *v.* HARRISON & CO. (1889), 5 T. L. R. 406, D. C.

iii. *Absence of Safeguard.*

1896. General rule.]—STANTON *v.* SCRUTTON & SONS, No. 1905, *post*.

1897. Absence of rails on barge.]—GILL *v.* THORNYCROFT (1894), 10 T. L. R. 316, D. C.

1898. Unfenced machinery.]—Pltf. brought an action to recover damages for the loss sustained by herself & her children in the death of her husband, who had been killed while in the service of the defts. He had been employed by them for eight years as a millwright's labourer, & had met with his death by falling into the pit where the machinery was sunk. His superior officer, N., had ordered him constantly to oil the machinery in the pit, to which there had been no railing. Pltf. having had judgment in the county ct., defts. had obtained a rule *nisi* to set aside the judgment, on the ground that there was no evidence of negligence in them or N., & that deceased had voluntarily undertaken work of a dangerous character:—*Held:* there had been evidence of negligence by defts., & although the county ct. judge had failed to ask the jury if the pit for the machinery was a "wheel-race" under Factories Act, 1878 (c. 16), s. 52, the rule *nisi* to set aside the judgment must be discharged.—CHAPMAN *v.* NITRO-PHOSPHATE CO. (1885), 1 T. L. R. 493, D. C.

1899. —— Unguarded cogs.]—A leather pressing machine, in every way perfect & in no way defective, for the simple purpose of pressing leather, had at its side a wheel & cogs unguarded. The unguarded condition of this wheel & the possible danger likely to arise from it were within the knowledge of the employers. A boy who fed the machine with leather by some means entangled his hand in this wheel & received injuries:—*Held:* taking sects. 1 (1) & 2 (1) of above Act together, the danger caused by this wheel was a defect in the condition of the machine within the first of these sub-sects. since, the danger being within the knowledge of the employers, they were negligent in allowing the wheel to remain unguarded.—MORGAN *v.* HUTCHINS (1890), 59 L. J. Q. B. 197; 38 W. R. 412; 6 T. L. R. 219, D. C.

1900. —— Guard temporarily removed.]—Pltf. was employed at deft.'s saw mills to assist one of their sawyers who was engaged at a circular saw. Deft. had provided the saw with a sufficient guard or fence under the bench for the prevention of accidents. The guard was movable for the purpose of removing the sawdust which collected under the bench. The sawyer for his own purposes improperly removed the guard, & whilst the guard was off pltf. fell against the saw & was injured:—*Held:* the absence of the guard was a defect in the condition of the machinery within above Act, s. 1 (1).—TATE *v.* LATHAM & SON, [1897] 1 Q. B. 502; 66 L. J. Q. B. 349; 76 L. T. 336; 45 W. R. 400; 13 T. L. R. 251, C. A.

Annotation:—**Consd.** Nimmo *v.* Connell, [1924] A. C. 595.

1901. —— Machine not requiring guard if properly used.]—Pltf. who was twenty years of age & was in the employment of deft., a farmer, was engaged in working a straw pressing machine, when he received an injury. In an action to recover damages under above Act, upon the ground that there was a defect in the condition of the machine, in that it was not properly fenced, the county ct. judge found that there was a defect in the machine in that, although perfectly made & not requiring a guard, it was a dangerous machine, & that being so it was the duty of deft. to instruct those who used it as to its dangers, there being no foreman to do so, & that he had failed in that duty:—*Held:* this did not constitute a defect in the condition of the machine within above Act & deft. was entitled to judgment.—GREENWOOD *v.* GREENWOOD (1907), 97 L. T. 771; 24 T. L. R. 21, D. C.

Annotation:—**Mentd.** Harrison *v.* Wythenoor Colliery Co., [1922] 2 K. B. 674.

iv. *Unfit for Use Authorised by Employer.*

1902. Unsuited for purpose used—Calculated to cause injury—Not defective in construction.]—

WATSON *v.* M'LEISH & M'TAGGART (1898), 25 R. (Ct. of Sess.) 1028.—**SCOT.**

n. *Plant owned by independent contractor.*]—ROBINSON *v.* WATSON, LTD. (1892), 20 R. (Ct. of Sess.) 144; 30 Sc. L. R. 144.—**SCOT.**

PART XIII. SECT. 2, SUB-SECT. 3.—D. (c) i.

o. *Defect must be proximate cause of injury.*]—BEAN *v.* HARPER & CO. (1892), 18 V. L. R. 388.—**AUS.**

p. *Defect due to failure of servant to make statutory inspection.*]—*Held:* a dangerous accumulation of gas in the workings of a mine, which was not detected owing to the failure of the fireman in charge to make the statutory inspection, was a defect in the condition of the ways & works within Employers' Liability Act, 1880, s. 1 (1).—CONNELL *v.* NIMMO (JAMES) & CO., LTD., [1923] S. C. 737.—**SCOT.**

PART XIII. SECT. 2, SUB-SECT. 3.—D. (c) iii.

1898 i. *Unfenced machinery.*]—DAVIS *v.* LANGDON (1911), 11 S. R. N. S. W. 149.—**AUS.**

1898 ii. ——.]—GODWIN *v.* NEWCOMBE (1901), 21 C. L. T. 228; 1 O. L. R. 525.—**CAN.**

1898 iii. ——.]—SNOW *v.* CROW'S NEST PASS COAL CO. (1907), 6 W. L. R. 494; 13 B. C. R. 145.—**CAN.**

1898 iv. ——.]—ZWICKER *v.* MCKAY (1913), 47 N. S. R. 144; 13 E. L. R. 1; 11 D. L. R. 616.—**CAN.**

1901 i. —— *Machine not requiring guard if properly used.*]—MILLIGAN *v.* MUIR & CO. (1891), 19 R. (Ct. of Sess.) 18; 29 Sc. L. R. 36.—**SCOT.**

q. *Absence of platform in mine.*]—In an action under Employers' Liability Act, the jury found that defts. were guilty of negligence in not having a platform so fixed as to prevent drills which were thrown down from bounding into the tunnel in a mine.—PENDER *v.* WAR EAGLE CONSOLIDATED MINING & DEVELOPMENT CO., LTD. (1899), 7 B. C. R. 162.—**CAN.**

r. *Unfenced tank.*]—JAMIESON *v.* RUSSELL & CO. (1892), 29 Sc. L. R. 790.—**SCOT.**

Above Act which gives a workman a right of action against his employer for personal injury by reason of any defect in the condition of the machinery used in the business of the employer, applies to a case where the machine, though not defective in its construction, was, under the circumstances in which it was used, calculated to cause injury to those using it. Deceased, a workman in the employment of defts., was killed by a piece of coke falling from a lift used at a blast furnace belonging to them. The lift consisted of two platforms which ascended & descended alternately, & at the time when deceased was injured he was removing empty barrows from the platform which was at rest at the bottom of the lift. There was evidence that the accident arose either from the sides of the lift not being fenced so as to prevent coke from falling over, or from the lower platform not being roofed so as to protect those working on it from falling coke:—*Held:* under the circumstances there was a "defect in the condition" of the lift for which defts. were liable.—HESKE *v.* SAMUELSON (1883), 12 Q. B. D. 30; 53 L. J. Q. B. 45; 49 L. T. 474; 32 W. R. 595, D. C.

Annotations:—**Folld.** Cripps *v.* Judge (1884), 13 Q. B. D. 583. **Consd.** Paley *v.* Garnett (1885), 16 Q. B. D. 52. **Distd.** Walsh *v.* Whiteley (1888), 21 Q. B. D. 371. **Consd.** Morgan *v.* Hutchins (1890), 59 L. J. Q. B. 197. **Refd.** Weblin *v.* Ballard (1886), 17 Q. B. D. 122; Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685.

1903. —— No part unsound.]—Above Act which gives a workman a right of action against his employer for personal injury by reason of any defect in the condition of the plant used in the business of the employer, applies to a case where the plant is unfit for the purpose for which it is used, though no part of it is shown to be unsound. Pltf., a workman in defts.' employment, was injured by reason of the breaking of a ladder, which was being used to support a scaffold. The ladder was insufficient for the purpose for which it was being used, & the scaffold & ladder had been placed & were being used under the directions of one of defts.:—*Held:* under the above circumstances, there was evidence that pltf. had been injured by reason of a defect in the condition of the plant, owing to the negligence of his employer, within above Act.—CRIPPS *v.* JUDGE (1884), 13 Q. B. D. 583; 53 L. J. Q. B. 517; 51 L. T. 182; 49 J. P. 100; 33 W. R. 35, C. A.

Annotations:—**Distd.** Walsh *v.* Whiteley (1888), 21 Q. B. D. 371. **Refd.** Weblin *v.* Ballard (1886), 17 Q. B. D. 122; Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685.

1904. Mere danger from use.]—The mere fact that a machine is dangerous to a workman employed to work with it does not show that there is a defect in the condition of the machine within above Act, s. 1 (1), inasmuch as by sect. 2 (1) of the Act the only defects in respect of which the employer is liable are defects implying negligence of the employer or some one in his service entrusted by him with the duty of seeing that the machine is in proper condition. Pltf. in an action under above Act was employed by defts. to work at a carding machine. Part of the machine consisted of a wheel or pulley upon which, while in motion, pltf. had to place a band. The disc of the wheel had holes in it, &, while pltf. was putting on the band, his thumb slipped through one of these holes, the result being that it was caught between the wheel & the bed plate of the machine & cut off. It was proved that, though these wheels were sometimes made without such holes, they were very commonly made with them, the object being to reduce the weight of the wheel & consequent friction. In defts.' mill there were machines of both sorts, & it did not appear that any complaint had previously arisen with regard to the wheels with holes, pltf. himself stating that he had never complained of the machine because it had never entered into his head that it was dangerous:—*Held:* there was no evidence of any defect in the machine implying negligence in defts. or anyone in their service, & therefore defts. were not liable.

It must be a defect in the original construction or subsequent condition of the machine rendering it unfit for the purposes to which it is applied when used with reasonable care & caution, & a defect arising from the negligence of the employer (LOPES, L.J.).—WALSH *v.* WHITELEY (1888), 21 Q. B. D. 371; 57 L. J. Q. B. 586; 53 J. P. 38; 36 W. R. 876; 4 T. L. R. 694, C. A.

Annotations:—**Distd.** Morgan *v.* Hutchins (1890), 59 L. J. Q. B. 197. **Consd.** Nimmo *v.* Connell, [1924] A. C. 595. **Refd.** Willetts *v.* Watt, [1892] 2 Q. B. 92.

1905. Reasonable fitness to secure safety.]—Defect in the condition of machinery for the purpose of above Act, s. 1 (1), means the absence of reasonable fitness to secure safety in the operation for which it is intended.

An employer who uses an arrangement of machinery, not in itself defective, the handling of which, as he knows, is entrusted to such men as stevedores' labourers, is not entitled to have excluded from the consideration of its "reasonable fitness" an obvious chance of danger through their want of care.

The absence, in the conditions of the machinery taken as a whole, of any sufficient safeguard against danger arising from an ordinary & probable occurrence, as a slip in the management of a winch, is a defect.—STANTON *v.* SCRUTTON & SONS (1893), 62 L. J. Q. B. 405; 9 T. L. R. 236; 5 R. 244, D. C.

1906. State of fitness required—Reasonable fitness to secure safety—In intended operation.]—STANTON *v.* SCRUTTON & SONS, No. 1905, *ante*.

1907. Unfenced lift.]—HESKE *v.* SAMUELSON, No. 1902, *ante*.

1908. Ladder not defective in itself—Of insufficient strength for purpose used.]—CRIPPS *v.* JUDGE, No. 1903, *ante*.

1909. Machine-wheel.]—WALSH *v.* WHITELEY, No. 1904, *ante*.

1910. Hold of vessel improperly ventilated.]—CARTER *v.* CLARKE, No. 1889, *ante*.

v. *Other Defects.*

1911. Clogged machinery.]—Pltf., a lad of nineteen, was employed in defts.' paper-mill at a machine for cutting jute. The material passed under a roller which conveyed it to the cutter; but the roller being in several pieces or sections, with interstices between them into which the jute sometimes got & so impeded the action of the machine, it was necessary, or usual, to remove it by the hand. In doing this pltf. lost three fingers. The defect had been pointed out to defts., who to remedy it procured a roller in one piece; but the accident happened before the new roller was placed. The maker swore that, with care, both rollers were equally safe. The jury having found that

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PART XIII. SECT. 2, SUB-SECT. 3.—D. (c) iv.

1904 i. *Mere danger from use.*]—KILOH *v.* COLONIAL GOVERNMENT (1909), 30 N. L. R. 493.—S. AF.

t. *Defective lift.*]—McKELVEY *v.* LE ROI MINING CO. (1902), 23 C. L. T. 61; 32 S. C. R. 664.—CAN.

a. ——.]—Leaving one of two counter-balancing lifts unlocked constitutes a defect in plant & machinery.—HATCH *v.* POWELL RIVER PAPER CO., LTD. (1913), 18 B. C. R. 1.—CAN.

Sect. 2.—Under Employers' Liability Act: Sub-sects. 5, 6 & 7.]

1936. —— ——.]—HOOPER *v.* HOLME (1896), 13 T. L. R. 6, C. A.

Annotation:—**Consd.** Reynolds *v.* Holloway (1898), 14 T. L. R. 551.

1937. —— **Implied order—Act done previously without objection.**]—Pltf., a boy of fourteen, was in the service of defts., & acted as guard of a van driven by H., a carman, also in defts.' employ. Inside this van were three large iron window-frames, which were placed upright in the van, & were secured in that position by two pieces of string, one piece being tied at each end round the hoops supporting the covering of the van. H. commenced unloading the frames by untying the string near the tail end of the van, & pltf., who was inside at the front of the van, untied the other string. H. then pulled one of the frames away without retying the other two, leaving them standing. Directly afterwards the two frames fell upon pltf., inflicting upon him severe injuries. Pltf. stated that he untied the string at one end without any orders from H., because he, pltf., had done so on other occasions, & that H. saw him untie it & made no objection. Pltf. having sued defts. for damages under above Act:—*Held:* on the above facts, there was evidence to go to the jury of liability on the part of defts. under above Act, s. 1 (3).—MILLWARD *v.* MIDLAND RY. CO. (1884), 14 Q. B. D. 68; 54 L. J. Q. B. 202; 52 L. T. 255; *sub nom.* MILWARD *v.* MIDL ND RY. CO., 49 J. P. 453; 33 W. R. 366, D. C.

Annotations:—**Distd.** Kellard *v.* Rooke (1887), 19 Q. B. D. 585. **Consd.** Wild *v.* Waygood, [1892] 1 Q. B. 783. **Refd.** Snowden *v.* Baynes (1890), 24 Q. B. D. 568.

1938. Workman must be bound to conform to order.]—BUNKER *v.* MIDLAND RY. CO., No. 1958, *post.*

1939. ——.]—HOOPER *v.* HOLME (1896), 12 T. L. R. 537; 40 Sol. Jo. 712; *affd.*, 13 T. L. R. 6, C. A.

Annotation:—**Consd.** Reynolds *v.* Holloway (1898), 14 T. L. R. 551.

1940. —— **Workman employed by "butty" men.**]—BROWN *v.* BUTTERLEY COAL CO., No. 1828, *ante.*

1941. Whether injury must result from order.]—HOWARD *v.* BENNETT & SONS, No. 1935, *ante.*

1942. ——.]—ELLIOTT *v.* TEMPEST (1888), 5 T. L. R. 154, D. C.

1943. ——.]—SNOWDEN *v.* BAYNES, No. 1933, *ante.*

1944. ——.]—WILD *v.* WAYGOOD, No. 1827, *ante.*

1945. ——.]—REYNOLDS *v.* HOLLOWAY (1898), 14 T. L. R. 551, C. A.

1946. Negligence of person giving order—General rule.]—WILD *v.* WAYGOOD, No. 1827, *ante.*

1947. —— **Must be proved by plaintiff.**]—It was necessary for pltf. to prove some negligence on the part of the co.'s foreman, but no such negligence was shown (LORD COLERIDGE).—CONNELL *v.* SURREY COMMERCIAL DOCK CO. (1887), 3 T. L. R. 630, D. C.

1948. —— ——.]—BOOKER *v.* HIGGS (1887), 3 T. L. R. 618, D. C.

1949. —— ——.]—HARRIS *v.* TINN (1889), 5 T. L. R. 221, D. C.

1950. —— **What amounts to—Insufficient time for order to be obeyed.**]—KELLARD *v.* ROOKE, No. 1920, *ante.*

1951. —— —— **Failure to ascertain danger.**]—DRINKWATER *v.* BOND (1891), 36 Sol. Jo. 13, C. A.

1952. —— —— ——.]—REYNOLDS *v.* HOLLOWAY (1898), 14 T. L. R. 551, C. A.

1953. —— —— ——.]—THOMPSON *v.* CITY GLASS BOTTLE CO., No. 1886, *ante.*

1954. —— —— **Failure to give necessary direction.**] — MILLWARD *v.* MIDLAND RY. CO., No. 1937, *ante.*

1955. —— —— **Order to one man to do work of two.**]—There was an order to "go on" with the work in a manner which had not been usual—with one workman instead of two. If the order thus given was rash . . . that was a case for pltf. (CAVE, J.).—BARBER *v.* BURT, [1894] 2 Q. B. 437; 63 L. J. Q. B. 700; 71 L. T. 295; 42 W. R. 572; 10 T. L. R. 383; 10 R. 397, D. C.

1956. —— —— **Instruction in dangerous method of using machine.**]—MEDWAY *v.* GREENWICH INLAID LINOLEUM CO., LTD. (1898), 14 T. L. R. 291, C. A.

1957. Order contrary to written rules of employers.]—Where injury is caused to a workman by reason of his conforming to an order which, though contrary to the written rules of the employer, was given by a person to whose orders he was bound to conform, the case comes within above Act, s. 1 (3).—MARLEY *v.* OSBORN (1894), 10 T. L. R. 388, D. C.

1958. Contributory negligence of employee.]—Pltf., by next friend, sued defts. under above Act, 1880, for damages sustained through the negligence of their foreman. Pltf., a vanguard in the service of defts., was at the time of the accident under the age of fifteen. There was a rule of the co. known to pltf. that no vanguard under the age of fifteen was ever to drive a van. Defts.' foreman, on the occasion in question ordered pltf. to drive a van load of fish to B. market, & he would be paid extra money for so doing. The boy did drive the van, & in consequence was thrown down from his seat & seriously injured. Pltf. at the trial was nonsuited on the ground that he was offered & accepted extra money to drive, & was not obliged to obey in that respect the foreman who offered the money. Pltf. obtained a rule *nisi* for a new trial:—*Held:* pltf. had been rightly nonsuited,

1938 i. *Workman must be bound to conform to order.*]—A person employed in a mine, whose duty it was to notify by signal when conditions were such that work, which the miners were bound to do, might be safely proceeded with, is not a person "to whose orders & directions a workman is bound to conform" within Employers' Liability Act.—METCALF *v.* GREAT BOULDER PROPRIETARY GOLD MINES (1905), 3 C. L. R. 543.—**AUS.**

1938 ii. ——.]—To make Employers' Liability Act, 1880, s. 1 (3), apply, it is necessary that the order from conforming to which the injury resulted should be particular to the effect of superseding the exercise of the workman's own private judgment & discrimination, & substituting therefore the behest of the person to whose directions he is bound to conform.—CANAVAN *v.* GREEN (1905), 8 F. (Ct. of Sess.) 275.—**SCOT.**

1941 i. *Whether injury must result from order.*]—MCGRAW *v.* HALL (1914), 19 B. C. R. 441.—**CAN.**

1941 ii. ——.]—BOWRON BROTHERS *v.* STACE (1901), 21 N. Z. L. R. 91.—**N.Z.**

1941 iii. ——.]—MANSON *v.* MACNAMCE (1911), 32 N. L. R. 509.—**S. AF.**

1946 i. *Negligence of person giving order—General rule.*]—Deft. was held liable to pltf., under Employers' Liability Act, for an injury sustained by pltf. while logging for deft., by reason of an accident which arose out of a negligent order given by another servant of deft., who was authorised to give the order.—JOHANSON *v.* ANDERSON (1914), 27 W. L. R. 884; 17 D. L. R. 514.—**CAN.**

1947 i. —— *Must be proved by plaintiff.*]—M'MANUS *v.* HAY (1882), 9 R. (Ct. of Sess.) 425; 19 Sc. L. R. 345.—**SCOT.**

c. —— *What amounts to—Failure to provide usual safeguard.*]—M'MILLAN *v.* BARCLAY, CURLE & CO., LTD., [1912] S. C. 263.—**SCOT.**

1958 i. *Contributory negligence of employee.*]—SHONDRA *v.* WINNIPEG ELECTRIC RY. CO. (Man.) (1911), 19 W. L. R. 578; 1 W. W. R. 49.—**CAN.**

for the foreman was not a person to whose orders he was bound to conform; & he had been guilty of contributory negligence disentitling him to recover.—BUNKER *v.* MIDLAND RY. CO. (1882), 47 L. T. 476; 31 W. R. 231, D. C.

SUB-SECT. 6.—DEFECTIVE BYE-LAWS AND PARTICULAR INSTRUCTIONS.

See Employers' Liability Act, 1880 (c. 42), ss. 1 (4), 2 (2).

1959. "Act or omission"—Must be in obedience to an instruction.]—CLAXTON *v.* MOWLEM & CO. (1888), 4 T. L. R. 756, C. A.

1960. —— ——.]—Pltf. was employed by deft., the owner of a saw-mill, containing saws driven by steam power, & on a certain day he was told by deft.'s foreman to cut some wood in specified lengths with the circular saw. This work was generally performed by two men, one "feeding" the saw & the other taking the wood out from it. A. was engaged by deft. to attend to the engine & boiler, & to assist generally in the saw-mill, & was also told "not to neglect the engine." At the time in question pltf. was at one end of the saw frame pushing the wood through it, & A. was at the other end receiving the wood coming out from the saw. Hearing steam blowing off, A. suddenly & without notice to pltf., let go the wood & ran to the engine room, whereupon the wood, becoming unsteady, shook pltf.'s hand against the saw, which cut & injured his fingers:—*Held:* pltf. was not entitled to recover, on the ground that, although the injury was caused by "the act or omission" of A. in leaving the saw without notice to pltf., there was no evidence that such "act or omission" was "done or made in obedience to any rule or bye-law of the employer, or to instructions by any delegate of his."—WHATLEY *v.* HOLLOWAY (1890), 62 L. T. 639; 54 J. P. 645; 6 T. L. R. 190, D. C.; *affd.*, 6 T. L. R. 353, C. A.

1961. "Instruction"—Must be by person in authority—Instruction by fellow workman.]—CLAXTON *v.* MOWLEM & CO. (1888), 4 T. L. R. 756, C. A.

SUB-SECT. 7.—NEGLIGENT MANAGEMENT OF SIGNALS, POINTS AND TRAINS.

See Employers' Liability Act, 1880 (c. 42), s. 1 (5).

1962. "Charge or control of" train—Capstan man on goods siding.]—H., who was in the employ of a railway co. as a "capstan man," without giving the usual warning, propelled a series of trucks along a line of rails in a goods station, & injured pltf., who was engaged in similar work at the other end of the line about 100 yards off. The capstan was set in motion by hydraulic power communicated to it by H. from a stationary engine at a distance:—*Held:* there was evidence to warrant the jury in finding that H. was a person who had the charge or control of "a train upon a railway" under above Act, s. 1 (5).—COX *v.* GREAT WESTERN RY. CO. (1882), 9 Q. B. D. 106; 47 J. P. 116; 30 W. R. 816, D. C.

1963. —— Fireman scotching uncoupled wagon.]—Above Act by s. 1 (5), enacts that where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer "who has the charge or control of any . . . locomotive engine or train upon a railway, there shall be the same right of compensation against the employer as if the workman had not been in his service. A "person who has the charge or control of a train" does not necessarily cease to have charge of it, within the meaning of the Act, because some of the carriages are uncoupled from one another & from the engine in order that they may be separately dealt with, & those words do not necessarily point only to one person who is in charge of the whole train, but may include persons who have duties to perform in respect of parts of the train.

An engine driver, employed with his fireman in the discharge of loaded wagons on a railway, took a locomotive engine & several wagons to a point on an incline, & there proceeded with the engine & one of the wagons to the place of discharge, intending to return for the other wagons in due course. The fireman uncoupled the remaining wagons & scotched them to prevent them running down the incline. One of the wagons broke away, ran down the incline, & killed a workman in the service of the same employers. There was evidence that the method of scotching adopted was unsafe & was known to & approved by the engine driver. The representative of deceased having brought an action for compensation against the employers:—*Held:* there was evidence for the jury that the death was caused by reason of the negligence of a person who had the charge or control of a train within above Act, since either the engine driver had the charge or control, or the fireman had, & there was evidence of negligence in both.—MCCORD *v.* CAMMELL & CO., [1896] A. C. 57; 65 L. J. Q. B. 202; 73 L. T. 631; 60 J. P. 180; 12 T. L. R. 98, H. L.

1964. —— Negligence of more than one person—Different persons with different duties.]—MCCORD *v.* CAMMELL & CO., No. 1963, *ante*.

1965. "Train"—Single wagon.]—MCCORD *v.* CAMMELL & CO., No. 1963, *ante*.

1966. "Railway"—Temporary railway for construction of works.]—The meaning of the term "railway" as used in above Act, s. 1 (5), is not confined to railways belonging to railway cos. such as are subject to the provisions of the Railways Regulation Acts; but the sub-sect. applies also to a temporary railway laid down by a contractor for the purposes of the construction of works.—DOUGHTY *v.* FIRBANK (1883), 10 Q. B. D. 358; 52 L. J. Q. B. 480; 48 L. T. 530; 48 J. P. 55, D. C.

1967. "Locomotive"—Steam crane on temporary rails.]—In extending a railway a temporary line of rails was laid down on which a steam crane worked for moving & raising stones for builders:—*Held:* the crane was not a locomotive on a railway, & therefore a workman injured by negligence of driver of crane was not entitled to compensation from the common master.—MURPHY *v.* WILSON & SON (1883), 52 L. J. Q. B. 524; 48 L. T. 788; 47 J. P. 565; 48 J. P. 24, D. C.

1968. "Charge or control of points"—Control must be actual—Workman employed to oil & adjust.]—In an action for compensation under above Act, the evidence showed that it was the duty of F., a workman employed in the signal department of defts.' railway, to clean, oil, & adjust the points & wires of the locking apparatus

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PART XIII. SECT. 2, SUB-SECT. 7.

d. "*Railway*"—"*Rake of cars*" *in coal mine.*]—BELL *v.* INVERNESS COAL & RY. CO. (1908), 42 N. S. R. 265; 4 E. L. R. 405.—**CAN.**

e. *Absence of head-light.*]—GRAHAM *v.* GRAND TRUNK RY. CO. (1912), 20 O. W. R. 965; 3 O. W. N. 123; 1 D. L. R. 554.—**CAN.**

f. *Failure to clear line.*]—CAIRNS *v.* CALEDONIAN RY. CO. (1889), 16

Sect. 2.—Under Employers' Liability Act: Sub-sects. 7 & 8, A., B., C. & D.]

at various places along a portion of the line, & to do slight repairs, that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the points & locking gear, which were moved & worked by men in the signal boxes, being kept in proper condition, & that F. having taken the cover off some points & locking gear in order to oil them, negligently left it projecting over the metals of the line, where injury was caused to a fellow workman: *—Held:* there was no evidence for the jury that F. had "charge or control" of the points within above Act, s. 1 (5), so as to make defts. liable for his negligence.—GIBBS *v.* GREAT WESTERN RY. CO. (1884), 12 Q. B. D. 208; 53 L. J. Q. B. 543; 50 L. T. 7; 48 J. P. 230; 32 W. R. 329, C. A.

SUB-SECT. 8.—DEFENCES.

A. In General.

1969. Employers defences restricted—To those available against one of the public.]—WEBLIN *v.* BALLARD, No. 1984, *post.*

1970. —— But workman has no additional rights.]—THOMAS *v.* QUARTERMAINE, No. 1976, *post.*

Injured servant a trespasser or bare licencee.]—*See* NEGLIGENCE.

Volenti non fit injuria.]—*See* Sub-sect. 8, C., *post.*

B. Contributory Negligence.

See, generally, NEGLIGENCE.

1971. Action for breach of statutory duty.]—*Held:* a deft. who has been guilty of a breach of a statutory duty is not debarred from setting up a defence of contributory negligence in pltf.—ILES *v.* ABERCARN WELSH FLANNEL CO. (1886), 2 T. L. R. 547, D. C.

1972. Defect in ways.]—AYRES *v.* BULL (1889), 5 T. L. R. 202, D. C.

Knowledge of defect.]—*See* Sub-sect. 8, D., *post.*

C. Volenti non fit injuria.

See, generally, NEGLIGENCE.

1973. General rule.]—To bring a pltf. suing under Employers' Liability Act within the maxim *volenti non fit injuria*, it is not sufficient to show that he had gone on with his work; it must be shown that he was perfectly contented to go on with his work, that he made no complaint, but understood & acquiesced in the danger.—BACON *v.* DAWES & CO. (1887), 3 T. L. R. 557, D. C.

1974. ——.]—Where a workman knows of a defect in the condition of his employer's plant, & notwithstanding such knowledge still continues to use the plant, there is some evidence to warrant a jury in finding that he voluntarily incurred the risk thereby occasioned; so disentitling him to recover compensation for injuries caused by such defect.—CHURCH *v.* APPLEBY BROTHERS (1888), 58 L. J. Q. B. 144; 60 L. T. 542; 5 T. L. R. 88, D. C.

1975. ——.]—It seems to me that the law is now settled that the mere fact of a workman undertaking that which he knows to be dangerous is not of itself conclusive proof that he has brought himself within the doctrine of *volenti non fit injuria*. It must depend in each case, upon the nature of the risk to the workman in connection with it, as well as upon considerations which must vary according to the circumstances of each case (A. L. SMITH, J.). —GREENHALGH *v.* CWMAMAN COAL CO. (1891), 8 T. L. R. 31, D. C.

Annotation:—**Mentd.** Goddard *v.* Mid. Ry., [1899] 80 L. T. 624.

1976. Whether maxim applicable under Act.]—(1) Pltf. was employed in a cooling room in deft.'s brewery. In the room were a boiling vat, & a cooling vat, & between them ran a passage which was in part only 3 feet wide. The cooling vat had a rim raised 16 inches above the level of the passage, but it was not fenced or railed in. Pltf. went along this passage to pull a board from under the boiling vat. This board stuck fast & then came away suddenly so that he fell back into the cooling vat & was scalded. In an action under above Act:—*Held:* the defence arising from the maxim *volenti non fit injuria* had not been affected by above Act, & applied to the present case, & there was therefore no evidence of negligence arising from a breach of duty on the part of deft. towards pltf., & pltf. was not entitled to recover.

(2) By entering into a contract of service the common law inferred that he had taken on himself the ordinary risks incident to such business as was lawfully carried on upon his master's premises (BOWEN, L.J.).

(3) For his own personal negligence a master was always liable & still is liable at common law both to his own workmen & to the general public who came upon his premises on business (BOWEN, L.J.).

(4) An enactment which distinctly declares that the workman is to have the same rights as if he were not a workman, cannot . . . be strained into an enactment that the workman is to have the same rights as if he were not a workman & other rights in addition. . . . In my opinion the Act

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R. (Ct. of Sess.) 618 26 Sc. L. R. 485. —SCOT.

PART XIII. SECT. 2, SUB-SECT. 8.—B.

1972 i. *Defect in ways.*]—BRITISH COLUMBIA MILLS CO. *v.* SCOTT (1894), 24 S. C. R. 702. —CAN.

1972 ii. — —.]—FAWCETT *v.* CANADIAN PACIFIC RY. CO. (1901), 22 C. L. T. 244; 8 B. C. R. 393.—CAN.

1972 iii. ——.]—DOMINION IRON & STEEL CO. *v.* OLIVER (1905), 25 C. L. T. 54; 35 S. C. R. 517.—CAN.

1972 iv. ——.]—GRAY *v.* THOMSON (1889), 27 Sc. L. R. 113.—SCOT.

g. Breach of instructions.]—O'HARE *v.* BOOKER, [1901] S. R. Q. 232. —AUS.

h. ——.]—LAMONTAGNE *v.* R. (1909), 12 Exch. C. R. 284.—CAN.

k. ——.]—Where dangerous machinery is properly fenced or guarded for the prevention of accidents & a workman, after having been warned not to do so, gets inside the fence & attempts to do his work from a position not intended for that purpose, the employer is not responsible for an accident causing death resulting from disobedience to the instructions given.—MCSORLEY *v.* DOMINION COAL CO. (1915), 48 N. S. R. 552.—CAN.

l. ——.]—A workman employed in defts.' quarry was notified that a shot was about to be fired & had orders, under such circumstances, to go to a place of safety. In violation of his orders & without the knowledge of deft. he remained in the place where he ordinarily performed his duties & received injuries causing death:—*Held:* the action must fail on account of the contributory negligence of deceased.—RUDLAND *v.* SMITH (1917), 50 N. S. R. 434; 33 D. L. R. 536.—CAN

m. Defect in machinery.]—WARMINGTON *v.* PALMER (1902), 22 C. L. T. 199; 32 S. C. R. 126.—CAN.

n. ——.]—CALNECK *v.* VANCOUVER TIMBER & TRADING CO. (1911), 18 W. L. R. 318.—CAN.

o. Failure to take reasonable precautions.]—MACPHERSON *v.* MACLACHLAN (1904), 36 N. S. R. 435.—CAN.

p. ——.]—MITCHELL *v.* RAT PORTAGE LUMBER CO. (1911), 19 W. L. R. 314; 1 W. W. R. 78.—CAN.

q. ——.]—ZWICKER *v.* MCKAY (NO. 2) (1913), 14 E. L. R. 69; 15 D. L. R. 491.—CAN.

r. ——.]—RAMAGE & FERGUSON *v.* FORSYTH (1890), 28 Sc. L. R. 26.—SCOT.

t. Duty of servant to save life.]—WILKINSON *v.* KINNEIL CANNEL & COKING COAL CO. (1897), 24 R. (Ct. of Sess.) 1001; 34 Sc. L. R. 533; 4 C. L. T. 349 —SCOT.

with certain exceptions has placed the workman in a position as advantageous as but no better than that of the rest of the world who use the master's premises at his invitation on business (BOWEN, L.J.).—THOMAS *v.* QUARTERMAINE (1887), 18 Q. B. D. 685; 56 L. J. Q. B. 340; 57 L. T. 537; 51 J. P. 516; 35 W. R. 555; 3 T. L. R. 495, C. A.

Annotations:—As to (1) **Consd.** Baddeley *v.* Granville (1887), 19 Q. B. D. 423. **Distd.** Yarmouth *v.* France (1887), 19 Q. B. D. 647; Thrussell *v.* Handyside (1888), 20 Q. B. D. 359. **Consd.** Osborne *v.* L. & N. W. Ry. (1888), 21 Q. B. D. 220; Amos *v.* Duffy (1890), 6 T. L. R. 339; Smith *v.* Baker, [1891] A. C. 325; Brackley *v.* Mid. Ry. (1915), 85 L. J. K. B. 1596. **Refd.** Church *v.* Appleby (1888), 60 L. T. 542; Membery *v.* G. W. Ry. (1889), 14 App. Cas. 179; Sanders *v.* Barker (1890), 6 T. L. R. 324; Young *v.* Hoffmann Manufacturing Co., [1907] 2 K. B. 646; Canadian Pacific Ry. *v.* Fréchette, [1915] A. C. 871; Davies *v.* Owen, [1919] 2 K. B. 39; Letang *v.* Ottawa Electric Ry., [1926] A. C. 725. *As to* (2) **Refd.** Mersey Docks & Harbour Board *v.* Procter, [1923] A. C. 253. *As to* (3) **Refd.** Evans *v.* M. S. & L. Ry. (1887), 36 Ch. D. 626; Walsh *v.* Whiteley (1888), 21 Q. B. D. 371; Sanders *v.* Barker (1890), 6 T. L. R. 324; Brannigan *v.* Robinson (1892), 66 L. T. 647; Canadian Pacific Ry. *v.* Fréchette, [1915] A. C. 871. *As to* (4) **Refd.** Yarmouth *v.* France (1887), 19 Q. B. D. 647.

1977. —— Breach of statutory duty.]—The defence of *volenti non fit injuria* is not applicable in cases where the injury arises from the breach of a statutory duty on the part of the employer, & pltf. is entitled to recover.—BADDELEY *v.* GRANVILLE (EARL) (1887), 19 Q. B. D. 423; 56 L. J. Q. B. 501; 57 L. T. 268; 51 J. P. 822; 36 W. R. 63; 3 T. L. R. 759, D. C.

Annotation:—**Refd.** Davies *v.* Owen, [1919] 2 K. B. 39.

1978. Question of fact—Questions to be left to jury.]—YARMOUTH *v.* FRANCE, No. 1881, *ante*.

1979. ——.]—SMITH *v.* BAKER & SONS, No. 1657, *ante*.

1980. Necessity for thorough comprehension of risk.]—Judgment for pltf., on ground that the jury were justified in finding that he did not undertake his work with full knowledge of the danger which he was incurring.—AMOS *v.* DUFFY (1890), 6 T. L. R. 339, C. A.

1981. ——.]—B., a workman, whose duty it was to attend to & work at a machine which was defective, & of which defect he had knowledge, continued to work at the machine, notwithstanding the master's refusal to repair it when the defect was brought to his notice by the workman. In consequence of the defect B. was obliged to step upon the "bed" or plate of the machine, to adjust part of it, & whilst doing so received injuries. In an action to recover compensation for such injuries the county ct. judge nonsuited pltf. because he continued to work a machine which he knew to be in a defective condition:—*Held:* pltf.'s knowledge of the defect did not amount to that thorough comprehension of the risk incurred which alone would have justified the withdrawal of the case from the jury.—BROOKE *v.* RAMSDEN (1890), 63 L. T. 287; 55 J. P. 262, D. C.

1982. ——.]—SANDERS *v.* BARKER & SON (1890), 6 T. L. R. 324, D. C.

D. Servant's Knowledge of Defect.

See Employers' Liability Act, 1880 (c. 42), s. 2 (3).

1983. Whether amounting to contributory negligence—Master also aware of defect.]—STUART *v.* EVANS, No. 1838, *ante*.

1984. —— ——.]—The meaning of above Act, sect. 1, as qualified by sect. 2, is that a workman, when he sues his master under the provisions of the statute, shall be in the position of one of the public suing, & shall not be in the position in which a servant before the passing of the statute was placed when he sued his master; in other words, that the master shall have all the defences he theretofore had against any of the public suing him, but shall not have the special defences he theretofore had when sued by his servant. Accordingly, the defence of contributory negligence is still open to an employer; but the defence of common employment, & also the defence that the workman had contracted to take upon himself the known risks attending the service, are taken away from him when sued by a workman under the above statute. But while these two defences are taken away, an employer may, when sued for a defect in the plant or machinery, set up as a statutory defence, under sect. 2 (3), that the servant knew of the defect & did not communicate it to the employer or to some other person superior to himself in the service of the employer.

W., whilst employed in deft.'s brewery, went to a valve in the engine room for the purpose of turning on steam to a donkey engine. The valve could only be reached by ascending a ladder resting upon a pipe, which was not level, & on which the ladder could not safely rest. W. was found dead on the floor, having apparently, whilst ascending the ladder, lost his balance from the ladder having shifted owing to the inequality of the pipe against which it rested. The ladder was perfect, though without any hooks or stays, but, placed as it was, was manifestly a most dangerous method of getting at the valve. Both W. & others among deft.'s workmen had frequently ascended the ladder before, for the purpose of turning off the valve, without accident. W.'s widow having brought an action against the defendant under above Act:—*Held:* (1) upon the above facts there was a defect in the condition of the plant within above Act, sect. 1 (1); & although W. knew of the defect, he was excused from informing deft. of it, being aware that deft. knew of it; (2) the mere fact that deceased knew that the work on which he was engaged was manifestly dangerous did not of itself constitute contributory negligence.—WEBLIN *v.* BALLARD (1886), 17 Q. B. D. 122; 55 L. J. Q. B. 395; 54 L. T. 532; 50 J. P. 597; 31 W. R. 455; 2 T. L. R. 444, D. C.

Annotations:—As to (1) **Refd.** Walsh *v.* Whiteley (1888), 21 Q. B. D. 371. *As to* (2) **Refd.** Peagram *v.* Dickson (1886), 2 T. L. R. 603; Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685.

1985. —— Knowledge of safe method of using—Use of dangerous method.]—Where a wagon was in a defective state, of which a workman was aware, & he used it in such a way as to cause injury to himself, when he knew how to use & might have used it so as not to cause injury to himself, he cannot recover under Employers' & Workmen Act, 1875 (c. 42), ss. 1 (1), 2 (1).

PART XIII. SECT. 2, SUB-SECT. 8.—C.

1977 i. *Whether maxim applicable under Act—Breach of statutory duty.*]—PATTERSON *v.* STEVENS (1890), 11 N. S. W. L. R. (L.) 83; 6 N. S. W. W. N. 138.—**AUS.**

1978 i. *Question of fact—Questions to be left to jury.*]—JOHNSON *v.* NORSEMAN GOLD MINES, LTD. (1901), 3 W. A. L. R. 147.—**AUS.**

1979 i. ——.]—MCPHEE *v.* ESQUIMALT & NANAIMO RY. CO. (1913), 27 W. L. R. 444; 5 W. W. R. 926; 16 D. L. R. 756; 49 S. C. R. 43.—**CAN.**

1979 ii. ——.]—SMITH *v.* FORBES & CO. (1897), 24 R. (Ct. of Sess.) 699; 34 Sc. L. R. 513; 4 S. L. T. 341.—**SCOT.**

PART XIII. SECT. 2, SUB-SECT. 8.—D.

1983 i. *Whether amounting to contributory negligence—Master also aware of defect.*]—DAY *v.* DOMINION IRON & STEEL CO. (1903), 36 N. S. R. 113; 34 S. C. R. 387.—**CAN.**

1985 i. —— *Knowledge of safe method of using—Use of dangerous method.*]—Pltf. was injured by the giving way of a piece of machinery which he himself had fixed under instructions from his employer. Pltf. admitted this was a

Sect. 2.—Under Employers' Liability Act: Sub-sect. 8, D.; sub-sects. 9 & 10.]

MARTIN *v.* CONNAH'S QUAY ALKALI CO. (1884), 33 W. R. 216, D. C.

1986. —— —— —— Promise of master to repair defect.]—Pltf., knowing that the machinery which he had to clean could be prevented from getting into motion if stopped in a certain way, used another method which to his knowledge & that of the foreman over him was dangerous. The foreman had promised to remedy the defect, but had failed to do so. In an action in the county ct. no evidence was called for defts. to show that the workman had not relied on the promise of the foreman, & the jury had found for pltf.:—*Held:* pltf. was entitled to judgment.—WILLIAMS *v.* WHITTALL (1885), 2 T. L. R. 165, D. C.

1987. —— Persisting in attempt to rescue fellow miner.]—R., an underviewer at one part of a coal mine, having reason to suppose that the life of H., a fellow workman in another part of the mine, was in danger, lost his own life in the attempt to save that of H. R. did not at the time of going to the place where H. had been at work, know that there was a poisonous gas there, but he was seriously affected by it on his way to rescue H. R. had, nevertheless proceeded to where H. was lying, & on returning with H.'s body had himself been killed by the gas. R. had gone on the occasion in question to a part of the mine where he had not been sent by any superior servant of his employer:—*Held:* the fact that R., after he had been affected by the gas, persisted in his attempt to rescue H. was no evidence of his having been guilty of contributory negligence.—ROEBUCK *v.* NORWEGIAN TITANIC CO. (1884), 1 T. L. R. 117, D. C.

SUB-SECT. 9.—NOTICE OF INJURY.

See Employers' Liability Act, 1880 (c. 42), ss. 4, 7.

1988. Necessity for—Employer in possession of all particulars.]—(1) In order to maintain an action against an employer under above Act, the workman must in all cases give a written notice, within the time specified in sect. 4, containing his name & address, the cause of the injury, & the date at which it was sustained. The necessity for such written notice is not dispensed with by the fact that the employer is already in possession of all the particulars required by sect. 7 to be contained in the notice.

(2) Above Act, sect. 4, merely deals with the time within which a notice must be given. Sect. 7 contains the requisites of such notice.—MOYLE *v.* JENKINS (1881), 8 Q. B. D. 116; 51 L. J. Q. B. 112; 30 W. R. 324, D. C.

Annotation:—As to (1) **Apprvd.** Keen *v.* Millwall Dock Co. (1882), 8 Q. B. D. 482.

Time for.]—*See* Employers' Liability Act, 1880 (c. 42), s. 4.

1989. ——.]—MOYLE *v.* JENKINS, No. 1988, *ante.*

1990. Must be in writing.]—MOYLE *v.* JENKINS, No. 1988, *ante.*

1991. —— One writing referring to another.]—KEEN *v.* MILLWALL DOCK CO., No. 1992, *post.*

1992. Sufficiency of—All particulars required by statute to be stated.]—The notice of injury sustained by a workman which is to be given to an employer under above Act must contain in writing all the particulars required by sect. 7 in order to fulfil the condition precedent to bringing an action enacted by sect. 4. *Qu.:* if such notice can be made by one writing referring to another writing.

Where a workman, on the day he had been injured, made a verbal report of such injury to his employer's inspector, who took the details down in writing & sent them to the employer's superintendent, & afterwards the workman's solr. wrote a letter to the employer, stating that he was instructed by such workman to apply for compensation for injuries received on the employer's premises, "particulars of which have already been communicated to your superintendent":—*Held:* such letter did not refer to any other writing, & was not a notice in compliance with the Act.—KEEN *v.* MILLWALL DOCK CO. (1882), 8 Q. B. D. 482; 51 L. J. Q. B. 277; 46 L. T. 472; 46 J. P. 435; 30 W. R. 503, C. A.

Annotations:—**Distd.** Previdi *v.* Gatti (1888), 58 L. T. 762. **Reid.** Carter *v.* Drysdale (1883), 12 Q. B. D. 91; Hughes *v.* Coed Talon Colliery Co., [1909] 1 K. B. 957.

1993. —— Particulars required substantially conveyed—Technical language unnecessary.]—The notice under above Act, s. 7, need not be expressed in strictly technical language: it is enough if it substantially conveys to the mind of the person to whom it is given, the name & address of the person injured & the cause & date of the injury. A letter from pltf.'s solr. gave only the date of the injury, & stated that pltf. was & had for some time past been under treatment at a hospital "for injury to his leg":—*Held:* having regard to the proviso at the end of sect. 7 the defect in the notice did not render it invalid.—STONE *v.* HYDE (1882), 9 Q. B. D. 76; 51 L. J. Q. B. 452; 46 L. T. 421; 46 J. P. 788; 30 W. R. 816, D. C.

Annotation:—**Consd.** Previdi *v.* Gatti (1888), 58 L. T. 762.

1994. —— Cause of injury.]—In an action to recover compensation for injuries under above Act, pltf.'s notice of action stated that she was injured in consequence of defts.' negligence in leaving a certain hoist in their warehouse unprotected whereby her foot was caught in the casement of the hoist & crushed. At the trial, the jury found that the accident occurred through the negligence of a superintendent in the warehouse, in allowing pltf., a young girl, to go in the hoist alone:—*Held:* the notice of action sufficiently stated

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dangerous & imperfect mode of fixing it, & that any one would have known it was dangerous but said he had never thought of it himself but would have known it if his attention had been drawn to it:—*Held:* there was evidence of contributory negligence which should have been left to the jury.—DAVIDSON *v.* WRIGHT (1887), 13 V. L. R. 351.—**AUS.**

1985 ii. —— —— ——.]—NOONAN *v.* DUBLIN DISTILLERY CO. (1893), 32 L. R. Ir. 399.—**IR.**

a. ——.]—*Held:* a stableman who undertook the management of a horse which he knew to be vicious, was not entitled to reparation for injuries caused by a bite from the horse.—FRASER *v.* HOOD (1887), 25 Sc. L. R. 164.—**SCOT.**

PART XIII. SECT. 2, SUB-SECT. 9.

1989 i. *Time for.]*—A workman injured on May 7 sent notice to his employers which they could not receive before June 19:—*Held:* notice had not been given within six weeks of the accident in terms of Employers' Liabilities Act, 1880, ss. 4, 7.—M'DONAGH *v.* MACHELLAN (1886), 13 R. (Ct. of Sess.) 1000; 23 Sc. L. R. 717.—**SCOT.**

b. *Sufficiency of.]*—The wife of a workman who had been injured wrote to his employer as follows: "I find I shall need some more money, & will you please oblige me with 10*s.* It is now five weeks since my husband's accident":—*Held:* this letter was a sufficient notice under the Act.—THOMSON *v.* ROBERTSON & CO. (1884), 12 R. (Ct. of Sess.) 121; 22 Sc. L. R. 97.—**SCOT.**

c. ——.]—*Held:* a notice making a claim for compensation under Workmen's Compensation Act, 1897, which stated the name & address of the injured man & the nature of the accident, could not be regarded as a notice under Employers' Liability Act, 1880.—THOMSON *v.* BAIRD & CO. (1903), 6 F. (Ct. of Sess.) 142.—**SCOT.**

d. *Service of.]*—M'GOVAN *v.* TANCRED, ARROL & CO. (1886), 13 R. (Ct. of Sess.) 1033; 23 Sc. L. R. 737.—**SCOT.**

e. —— *On cashier of company.]*—Notice of the injury addressed to the co. enclosed in an envelope directed to A. who was the co.'s cashier & in charge of one of the offices of the co,

the cause of the injury within above Act, s. 7.—CLARKSON *v.* MUSGRAVE (1882), 9 Q. B. D. 386; 51 L. J. Q. B. 525; 31 W. R. 47, D. C.

Annotations:—**Mentd.** Smith *v.* Baker, [1891] A. C. 325; Wohlgemuth *v.* Coste (1899), 68 L. J. Q. B. 373; Taylor *v.* National Amalgamated Apprvd. Soc., [1914] 2 K. B. 352; Smith *v.* G. W. Ry. (1920), 37 T. L. R. 117.

1995. "Defect or inaccuracy"—Omission—Date of injury.]—Above Act, s. 4, provides that an action to recover compensation under the Act shall not be maintainable unless notice of injury is given as provided by the Act. By sect. 7, the notice shall state (*inter alia*) the date of the injury; & "a notice under this sect. shall not be deemed invalid by reason of any defect or inaccuracy therein" unless the judge who tries the action shall be of opinion that deft. is prejudiced in his defence by such defect or inaccuracy, & that it was for the purpose of misleading. A notice of injury given under sect. 4 omitted to state the date of the injury, & the judge at the trial found that deft. was not prejudiced in his defence by the omission, & that it was not for the purpose of misleading:—*Held:* the omission of the date was a "defect or inaccuracy" in the notice within above Act, s. 7, & therefore did not render the notice invalid.—CARTER *v.* DRYSDALE (1883), 12 Q. B. D. 91; 53 L. J. Q. B. 557; 32 W. R. 171, D. C.

1996. —— —— —— & address of injured.]—It is not a fatal objection to an action brought by a servant under above Act against his employer to omit the address & date in the notice required to be given to the employer under s. 7.—BECKETT *v.* MANCHESTER CORPN. (1888), 52 J. P. 346, D. C.

1997. —— —— Cause of injury—& address of injured.]—A notice given to an employer under above Act, ss. 4, 7, omitted to give the address of the person injured, or to state the cause of the injury, & the date at which the injury was sustained was wrongly given. The accident occurred on Aug. 9. The letter giving notice was served on defts. by post by an unregistered letter on Sept. 19 & to this letter defts. replied on Sept. 23. The county ct. judge, before whom the action was tried, found that defts. had not been prejudiced in their defence by the defects & inaccuracy in the notice, & that such defects & inaccuracy were not for the purpose of misleading. It was proved that the notice was posted on Sept. 19:—*Held:* (1) the county ct. judge having found that defts. were not prejudiced in their defence by the said defects & inaccuracy in the notice, & they were not for the purpose of misleading, the notice was good within above Act, ss. 4, 7; (2) it having been proved that the letter containing the notice was posted on Sept. 19, & a reply to it having been received from defts., there was sufficient evidence that the notice had been received by defts. within the time specified in sect. 4 of the Act, although the letter containing the notice was not registered.—PREVIDI *v.* GATTI & CO. (1888), 58 L. T. 762; 52 J. P. 646; 36 W. R. 670; 4 T. L. R. 487, D. C.

1998. —— Error—Wrong initials of employer.]—Pltf., having been injured while in the employ of G. F. V., had served notice of injury on E. V., who carried on business at the same place. The inaccuracy in the initials of the employer having been amended at the trial in the county ct., where G. F. V. was present, deft. obtained a rule *nisi* in the Q. B. Div., calling upon pltf. to show why the verdict & judgment obtained by him in the action should not be set aside:—*Held:* the judge of the county ct. having decided that the notice of the injury had been duly served, & having had power to amend the inaccuracy in it, the judgment in pltf.'s favour ought not to be set aside.—HEARN *v.* PHILLIPS (1885), 1 T. L. R. 475, D. C.

1999. —— —— Date of injury.]—PREVIDI *v.* GATTI & CO., No. 1997, *ante*.

2000. —— Amended at trial.]—HEARN *v.* PHILLIPS, No. 1998, *ante*.

2001. —— Defendants not prejudiced.]—STONE *v.* HYDE, No. 1993, *ante*.

2002. —— ——.]—CLARKSON *v.* MUSGRAVE, No. 1994, *ante*.

2003. —— ——.]—PREVIDI *v.* GATTI & CO., No. 1997, *ante*.

2004. Service of—By unregistered letter—Acknowledged by defendant.]—PREVIDI *v.* GATTI & CO., No. 1997, *ante*.

2005. —— —— Delivery must be proved.]—PIEARS *v.* LOVATT (1897), 41 Sol. Jo. 531, D. C.

2006. Failure to give notice—Statutory defence—Necessity for notice.]—In an action under above Act, deft. cannot rely upon the defence that the notice of injury required by s. 4 of the Act has not been given, unless he has given notice that he intends to rely upon it as a "statutory defence" pursuant to C. C. R., Ord. 10, rr. 10 & 18.—CONROY *v.* PEACOCK, [1897] 2 Q. B. 6; 66 L. J. Q. B. 425; 76 L. T. 465; 61 J. P. 310; 45 W. R. 502; 41 Sol. Jo. 425, D. C.

Annotations:—**Mentd.** Pritchard *v.* Couch (1913), 57 Sol. Jo. 342; Moriarty *v.* Regent's Garage Co., [1921] 2 K. B. 766.

SUB-SECT. 10.—THE ACTION.

See Employers' Liability Act, 1880 (c. 42), s. 6.

2007. Removal into High Court—Difficult questions of fact & law—Discretion.]—MUNDAY *v.* THAMES IRONWORKS CO., No. 2010, *post*.

2008. —— —— ——.]—The right to remove an action into the High Ct. under above Act, s. 6, should only be exercised in exceptional cases, as where some new question of law or very difficult question of fact is raised.—R. *v.* LONDON CITY COURT JUDGE (1885), 14 Q. B. D. 905; 54 L. J. Q. B. 330; 52 L. T. 537; 33 W. R. 700; 1 T. L. R. 434, C. A.; *affg.* S. C. *sub nom.* CLAXTON *v.* LUCAS & AIRD, 51 L. J. Q. B. 301, D. C.

2009. —— —— ——.]—POTTER *v.* GREAT WESTERN COLLIERY CO., LTD. (1891), 10 T. L. R. 380, C. A.

2010. —— For consolidation with action already brought in High Court.]—Pltf. having brought in the county ct. an action against his employers, to recover compensation under the Act for an injury

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& delivered at that office:—*Held:* duly served on the co.—DUNCAN *v.* FIFE COAL CO., LTD. (1905), 7 F. (Ct. of Sess.) 958; 42 Sc. L. R. 822; 13 S. L. T. 370.—**SCOT.**

f. Failure to give notice — Reasonable excuse.]—*Ex p.* HARRIOTT (1906), 6 S. R. N. S. W. 635.—**AUS.**

g. —— ——.] — LEVER *v.* MCARTHUR (1902), 9 B. C. R. 417.—**CAN.**

h. —— ——.] — CONNOLLY *v.* YOUNG'S PARAFFIN LIGHT & MINERAL CO., LTD. (1894), 22 R. (Ct. of Sess.) 80; 32 Sc. L. R. 61; 2 S. L. T. 306.—**SCOT.**

k. Application to proceed without notice—Time for making.]—THOMPSON *v.* SOUTHERN COAL CO. OF N. S. W. (No. 2) (1894), 15 N. S. W. L. R. 166; 10 N. S. W. W. N. 214.—**AUS.**

PART XIII. SECT. 2, SUB-SECT. 10.

l. New trial — When granted.]—To entitle pltf. to judgment in an action under Employers' Liability Act, the jury's findings must show that it was reasonably & practically necessary for him to use the apparatus causing the injury. Where the facts proved show absence of necessity a new trial will not be granted.—DAVIES *v.* LE ROI MINING & SMELTING CO. (1899), 7 B. C. R. 6.—**CAN.**

m. —— ——.] — Action for damages for death of pltf.'s son, an engineer, who, while taking a train down a steep grade, lost control of it, jumped & was killed. At trial judgment given for pltf. for $6,000. New

Sect. 2.—*Under Employers' Liability Act: Sub-sects.* 10, 11 & 12. *Sects.* 3 & 4.]

through the breaking of a chain, applied for a *certiorari* to remove the action into the superior ct. on the grounds that his notice given under the Act was defective; that he desired to consolidate the action with one brought by him in the superior ct. to recover damages for the same injury from defts. on their common law liability, & that the questions arising were of considerable complexity & legal difficulty:—*Held:* the power of removal ought only to be exercised in exceptional cases, & no such special grounds had been shown as to induce the ct. in its discretion to grant the application.—MUNDAY *v.* THAMES IRONWORKS CO. (1882), 10 Q. B. D. 59; 52 L. J. Q. B. 119; 47 L. T. 351, D. C.

—— **Under County Court Act, 1856 (c. 108), s. 39.**]—*See* COUNTY COURTS, Vol. XIII., p. 483, No. 323.

2011. Service of summons by bailiff—Time for—Waiver.]—Pltf., having brought an action under above Act, sent the summons to the bailiff of the county ct. forty-two days before the hearing. The bailiff neglected to serve it until twenty-five instead of thirty days before the hearing. Defts. appeared & cross-examined pltf., but the county ct. judge non-suited pltf., on the ground that the summons had been served too late:—*Held:* the non-suit must be set aside, as defts. had waived the irregularity.—DUNN *v.* BUTLER (1885), 1 T. L. R. 476, D. C.

2012. Demand for jury—Notice of—Time for.]—Under C. C. R., 1875, Ord. 39, r. 9, which directs that notice of a demand for a jury in actions brought under above Act shall be given to the registrar of the ct. fifteen clear days at least before the return day—the notice must be given fifteen clear days before the day originally fixed for the return of the summons & not before a day to which the hearing has been adjourned.—R. *v.* LEEDS COUNTY COURT REGISTRAR (1886), 16 Q. B. D. 691; 55 L. J. Q. B. 365; 34 W. R. 487; R. *v.* YORKSHIRE COUNTY COURT (LEEDS) REGISTRAR, 54 L. T. 873; 2 T. L. R. 420, D. C.

Annotations:—**Mentd.** Bridge *v.* Adams (1899), 63 J. P. Jo. 394.

See C. C. R. 1903, Ord. 44, r. 4.

2013. Appeal to High Court—Security for costs—Infant suing by next friend.]—An infant, by his next friend brought an action in the county ct. under above Liability Act. Judgment was given for defts. with costs. Execution under the judgment was attempted to be levied on the goods of the next friend for the amount of costs, & a return of *nulla bona* was made. Pltf. gave notice of appeal from the judgment whereupon defts. moved under C. C. R., 1886, r. 255, for an order that the next friend should give security for costs:—*Held:* the order should be made.—SWAIN *v.* FOLLOWS (1887), 18 Q. B. D. 585; 56 L. J. Q. B. 310; 56 L. T. 335; 35 W. R. 408, D. C.

Annotations:—**Foll.** Wilcox *v.* Wallis Crown Cork & Syphon Co. (1914), 78 J. P. Jo. 124. **Consd.** Masding *v.* Motor Hiring Co. (Manchester), [1919] 2 K. B. 538.

2014. —— —— —— Whether merits of appeal considered.]—If it appears to the ct. that there is reasonable ground for the appeal, the ct. will not order the applt. to give security for the costs of the appeal merely on the ground that he has no visible means of paying resp.'s costs should the appeal fail.—PRITCHETT *v.* POOLE (1897), 76 L. T. 472, D. C.

Annotation:—**N.F.** Wilcox *v.* Wallis Crown Cork & Syphon Co. (1914), 58 Sol. Jo. 381.

2015. —— —— ——.]—Infant pltf. by her next friend brought an action in the county ct. under above Act, when judgment was given for defts. Pltfs. by her next friend gave notice of appeal, & defts. applied to the Div. Ct. for an order for security of costs, giving evidence on affidavit that the next friend would be unable, if unsuccessful, to pay defts.' costs.

The ct. without examining into the merits, made an order for security of costs.—WILCOX *v.* WALLIS CROWN CORK & SYPHON CO., LTD. (1914), 58 Sol. Jo. 381; 78 J. P. Jo. 124, D. C.

—— **Action by infant—Agreement by next friend not to appeal if costs not asked for.**]—*See* INFANTS, Vol. XXVIII., p. 330, No. 1979.

—— **From decision granting new trial.**]—*See* COUNTY COURTS, Vol. XIII., p. 526, No. 768.

2016. Joinder of plaintiffs—Causes of action several.]—C. C. R., Ord. 3, r. 1, which is in the same terms as R. S. C., Ord. 46, r. 1, does not enable several pltfs. with separate causes of action to join in one action of tort, although their causes of action should all arise from one act of negligence on the part of deft. No exception to this rule has been made by Employers' Liability Act, 1880 (c. 42), or by C. C. R., 1889, Ord. 44, made thereunder.—CARTER *v.* RIGBY & CO., [1896] 2 Q. B. 113; 65 L. J. Q. B. 537; 74 L. T. 744; 60 J. P. 581; 44 W. R. 566; 12 T. L. R. 471, C. A.

Annotations:—**Refd.** Stroud *v.* Lawson, [1898] 2 Q. B. 44; Oxford & Cambridge Universities *v.* Gill, [1899] 1 Ch. 55; *Re* Beck, Attia *v.* Seed (1918), 34 T. L. R. 286.

—— ——.]—*See, now,* C. C. R., 1903-1925, Ord. 3, r. 1; Ord. 44, r. 18.

2017. Remitted common law action—Addition of claim under Act.]—Pltf., who was employed by defts., commenced an action in the High Ct. at common law to recover damages for personal injuries sustained by him owing to their negligence. The action was remitted to the county ct. under County Courts Act, 1888 (c. 43), s. 66. Pltf. then delivered particulars of his claim, & added, in addition to his claim at common law, an alternative claim under above Act:—*Held:* he was entitled to do so.—WOOD *v.* WEBER (1908), 99 L. T. 195; 24 T. L. R. 587; *sub nom.* WARD *v.* WEBER, 52 Sol. Jo. 482, D. C.

See, generally, COUNTY COURTS, Vol. XIII., pp. 483 *et seq.*

SUB-SECT. 11.—DAMAGES RECOVERABLE.

See Employers' Liability Act, 1880 (c. 42), ss. 3, 5.

Limit of amount.]—*See* Employers' Liability Act, 1880 (c. 42), s. 3.

2018. Effect of sect. 3—Fixes maximum—Does

trial ordered as damages assessed at too high a figure.—WHITE *v.* VICTORIA LUMBER CO. (1909), 11 W. L. R. 480.—**CAN.**

n. —— ——.]—Where a jury under the judge's charge do not consider whether pltf. voluntarily assumed the risk, no damages can be given under the Employers' Liability Act & a new trial must be ordered.—EVERETT *v.* SCHAAKE MACHINE WORKS (1912), 17 B. C. R. 271.—**CAN.**

o. —— ——.]—AIREY *v.* EMPIRE STEVEDORING CO. (1914), 28 W. L. R. 956; 6 W. W. R. 1465; 18 D. L. R. 169; 20 B. C. R. 130.—**CAN.**

p. —— ——.]—SHEARER *v.* CANADIAN COLLIERIES (DUNSMUIR), LTD. (1914), 27 W. L. R. 526; 6 W. W. R. 469; 16 D. L. R. 541; 19 B. C. R. 277.—**CAN.**

q. *Action pending—Bar to action by personal representatives.*]—It is not competent for the relations of a person who has been killed, as is alleged, by negligence, to bring an action for compensation for the loss they have sustained by his death, while an action brought by deceased in his lifetime in respect of the same injury is still pending.—WOOD *v.* GRAY & SONS (1892), 67 L. T. 628.—**SCOT.**

r. *Questions for jury.*]—ADAIR *v.* COLVILLE & SONS, [1924] S. C. 981.—**SCOT.**

PART XIII. SECT. 2, SUB-SECT. 11.

t. *Matters taken into account in assessing.*]—BROOKS, SCANLON, O'BRIEN

not lay down a measure of damages.]—BORTICK *v.* HEAD, WRIGHTSON & CO., No. 2021, *post.*

2019. Matters taken into account in assessing—"Earnings"—Money & things capable of being turned into money.]—In sect. 3 of above Act, the word "earnings" means money or things capable of being turned into money by accurate estimation, such as rent, food, & clothes; but it does not include a thing so vague as tuition which an apprentice receives from his master.

Pltf. was apprenticed to defts., & received a salary of 1*s.* a week for the first year, increasing 1*s.* a week each year. In the fifth year, when he was earning 5*s.* a week, he was injured, & brought an action to recover compensation under the Act. Evidence was given that at the end of the fifth year, when pltf. would be out of his apprenticeship, he would be able to earn from 14*s.* to 18*s.* a week, & the compensation was assessed at £80:—*Held:* the amount which pltf. could earn when out of his apprenticeship could not be taken into consideration, but only the amount of his actual earnings as an apprentice; & the amount of the judgment must therefore be reduced.—NOEL *v.* REDRUTH FOUNDRY CO., [1896] 1 Q. B. 453; 65 L. J. Q. B. 330; 74 L. T. 196; 44 W. R. 407; 12 T. L. R. 248; 40 Sol. Jo. 337, D. C.

Annotations:—**Consd.** Pomphrey *v.* Southwark Press, [1901] 1 K. B. 86. **Refd.** Roper *v.* Hussey-Freke (1915), 113 L. T. 635.

2020. —— —— Not apprentice's education.]—NOEL *v.* REDRUTH FOUNDRY CO., No. 2019, *ante.*

2021. —— Remuneration in other employments—Overtime.]—In actions under above Act the maximum amount of damages merely is fixed, but not the items of which it is made up, & there is nothing to prevent a jury giving pltf. a sum for overtime wages earned from another employer.—BORTICK *v.* HEAD, WRIGHTSON & CO. (1885), 53 L. T. 909; 50 J. P. 327; 2 T. L. R. 103; *sub nom.* BORLICK *v.* HEAD, WRIGHTSON & CO., 34 W. R. 102, D. C.

Action by workman's representatives—Under Fatal Accidents Act, 1846 (c. 93).]—*See* NEGLIGENCE.

SUB-SECT. 12.—CONTRACTING OUT OF ACT.

2022. Valid contract—Not against public policy.]—It is competent to a workman to contract with his employer not to claim compensation for personal injuries under above Act.

A workman having contracted with his employer for himself & his representatives, & any person entitled in case of death, not to claim any compensation under above Act for personal injury whether resulting in death or not:—*Held:* (1) above Act, s. 1, only affected the contract of service so far as to negative the implication of an agreement by the workman to bear the risks of the employment, & therefore did not render the workman's express contract not to claim compensation invalid; (2) the contract was not against public policy, & the workman's widow, suing for damages under Fatal Accidents Act, 1846 (c. 93), was bound by it.—GRIFFITHS *v.* DUDLEY (EARL) (1882), 9 Q. B. D. 357; 51 L. J. Q. B. 513; 47 L. T. 10; 46 J. P. 711; 30 W. R. 797, D. C.

Annotations:—**Consd.** Nunan *v.* Southern Ry. (1923), 130 L. T. 131; Dewhurst *v.* Salford Grdns., [1925] 1 Ch. 655. **Refd.** Davidsson *v.* Hill, [1901] 2 K. B. 606; Williams *v.* Mersey Docks & Harbour Board (1905), 74 L. J. K. B. 481; Miller *v.* Grand Trunk Ry. of Canada, [1906] A. C. 187; British Columbia Electric Ry. *v.* Gentile, [1914] A. C. 1034; Haydock *v.* Goodier, [1921] 2 K. B. 384; Russell *v.* Rudd, [1923] A. C. 309.

2023. —— Supported by good consideration.]—GRIFFITHS *v.* DUDLEY (EARL), No. 2022, *ante.*

2024. —— Freedom of contract not restricted by Act.]—GRIFFITHS *v.* DUDLEY (EARL), No. 2022, *ante.*

2025. Binding against personal representatives.]—GRIFFITHS *v.* DUDLEY (EARL), No. 2022, *ante.*

2026. By infant—Binding if for benefit of infant.]—Pltf. who was an infant under twenty-one years of age, entered the service of defts. as a porter at weekly wages & when he had been in their service a week he became a member of an insurance society connected with defts.' railway, it being a condition of defts.' service that their servants should become members of the society, & entered into an agreement with defts. that, in consideration of their contributing to the funds of the society, he would accept such contribution & any advantages to which he might be entitled under the rules of the society in satisfaction & in *lieu* of any claims which he or his personal representatives might otherwise have under above Act. Under the rules of the society pltf. became entitled to a weekly allowance in case of temporary disablement by accident whilst in the discharge of his duty, & to a lump sum in case of permanent disablement or death. The rules provide that no claim should be recognised if the accident was not, through negligence, reported within a month from its occurrence; that if the accident was caused wilfully or by gross negligence on the part of insured the claim might be disallowed; that if the injured person was out of his house after a certain hour at night a fine not exceeding one week's allowance might be imposed, & if he was intoxicated the allowance would be liable to forfeiture; that any member who was guilty of criminal misconduct should forfeit all claim; & that if the funds of the society should be insufficient to provide for its liabilities a small levy might be made. Pltf. having been injured by an accident while in the discharge of his duty, brought an action against defts. under above Act. At the time of the action pltf. was still an infant:—*Held:* the agreement not to sue under above Act was a part of the contract of service; the agreement taken as a whole was for the benefit of the infant; & therefore it was binding upon him & afforded a defence to the action.—CLEMENTS *v.* LONDON & NORTH WESTERN RY. CO., [1894] 2 Q. B. 482; 63 L. J. Q. B. 837; 70 L. T. 896; 58 J. P. 818; 42 W. R. 663; 10 T. L. R. 539; 38 Sol. Jo. 562; 9 R. 611, C. A.

Annotations:—**Apld.** Roberts *v.* Gray, [1913] 1 K. B. 520. **Mentd.** Biggs *v.* Dagnall, [1895] 1 Q. B. 207.

2027. Effect of—Revives defence of common employment by master.]—GRIFFITHS *v.* DUDLEY (EARL), No. 2022, *ante.*

2028. —— ——.]—BURR *v.* THEATRE ROYAL, DRURY LANE, LTD., No. 1728, *ante.*

2029. —— To deprive representatives of remedy under Fatal Accidents Act, 1846 (c. 93).]—GRIFFITHS *v.* DUDLEY (EARL), No. 2022, *ante.*

See, generally, NEGLIGENCE.

SECT. 3. UNDER FATAL ACCIDENTS ACT, 1846.

See NEGLIGENCE.

SECT. 4.—UNDER WORKMEN'S COMPENSATION ACTS.

See Part XIV., *post.*

CO., LTD. *v.* FAKKEMA (1911), 16 B. C. R. 351.—**CAN.**

a. ——.]—PATTERSON *v.* SASKATCHEWAN CREAMERY CO., [1921] 3 W. W. R. 554; 62 D. L. R. 387; 14 Sask. L. R. 544.—**CAN.**

Part XIV.—Workmen's Compensation Acts.

SECT. 1.—CONSTRUCTION OF ACTS.

See, now, Workmen's Compensation Act, 1925 (c. 84).

2030. Acts not construed technically.]—It appears to me that the statute [Workmen's Compensation Act, 1897 (c. 37)] deliberately & designedly avoided anything like technology (LORD HALSBURY, C.).—POWELL *v.* MAIN COLLIERY CO., No. 2971, *post*.

2031. ——.]—The only way to construe the Act [Workmen's Compensation Act, 1897 (c. 37)] is to read it fairly, taking the words in their common & ordinary significance, & the ct. ought not to strain the language in order to bring in or exclude any particular case however arbitrary or unscientific the line of demarcation drawn by the Act may seem to be (LORD MACNAGHTEN).—HODDINOTT *v.* NEWTON, CHAMBERS & CO., LTD., [1901] A. C. 49; 70 L. J. Q. B. 150; 84 L. T. 1; 49 W. R. 380; 17 T. L. R. 134; 3 W. C. C. 74, H. L.; *revsg.*, [1899] 1 Q. B. 1018, C. A.

Annotations:—**Reld.** Veazey *v.* Chattle, [1902] 1 K. B. 494; Elvin *v.* Woodward, [1903] 1 K. B. 838. **Mentd.** Mason *v.* Dean (1900), 82 L. T. 139; Maude *v.* Brook, [1900] 1 Q. B. 575; Dredge *v.* Conway Jones, [1901] 2 K. B. 42; Ferguson *v.* Green, [1901] 1 K. B. 25; McGregor *v.* Wright (1901), 3 W. C. C. 121; Cooper & Crane *v.* Wright, [1902] A. C. 302; McGrath *v.* Neill, [1902] 1 K. B. 211; Marshall *v.* Rudeforth (1902), 71 L. J. K. B. 781; Fenton *v* Thorley, [1903] A. C. 443; Crowther *v.* West Riding Window Cleaning Co., [1904] 1 K. B. 232; O'Brien *v.* Dobbie, [1905] 1 K. B. 346; Bagnall *v.* Levinstein, [1907] 1 K. B. 531.

2032. ——.]—The first thing one has to do is to apply one's mind to what is the substantive intention & meaning of the statute (LORD HALSBURY, C.).—LYSONS *v.* KNOWLES (ANDREW) & SONS, LTD., STUART *v.* NIXON & BRUCE, No. 3433, *post*.

2033. ——.]—The Workmen's Compensation Acts are not to be construed in a narrow or technical spirit (ROMER, L.J.).—ROGERS *v.* CARDIFF CORPN., [1905] 2 K. B. 832; 75 L. J. K. B. 22; 93 L. T. 683; 70 J. P. 9; 54 W. R. 35; 22 T. L. R. 9; 4 L. G. R. 1; 8 W. C. C. 51, C. A.

Annotation:—**Mentd.** Back *v.* Dick, Kerr (1906), 94 L. T. 802.

2034. ——.]—(1) It ought to be remembered that the Workmen's Compensation Acts are expressed not in technical but in popular language & ought to be construed not in a technical but in a popular sense (ROMER, L.J.).

(2) This ct. would be slow to adopt an interpretation of the Act which would introduce exceptions that have not been made by the legislature (MATHEW, L.J.).—SMITH *v.* COLES, [1905] 2 K. B. 827; 75 L. J. K. B. 16; 93 L. T. 754; 54 W. R. 81; 22 T. L. R. 5; 8 W. C. C. 116, C. A.

Annotations:—**Mentd.** *Re* Fuller (1921), 19 L. G. R. 756; Hampton *v.* Winward, [1921] 2 K. B. 669.

2035. ——.]—The language of the statute we are called upon to construe must be interpreted in its ordinary & popular meaning. The use of language preceded scientific investigation (LORD HALSBURY, C.).—BRINTONS, LTD. *v.* TURVEY, No. 3799, *post*.

2036. Exceptions not introduced.]—SMITH *v.* COLES, No. 2034, *ante*.

2037. ——.]—This is a remedial Act & we ought not to read into it an exception without bearing in mind the nature of the remedy which is proposed by the Act itself (LORD LOREBURN).—COSTELLO *v.* PIGEON (OWNERS), No. 2069, *post*.

2038. Acts not cut down by schedule.]—The right being given by the statute there is nothing in the schedule to take away the right & the ct. must find some other means of arriving at the amount & conditions upon which it was to be enjoyed so far as the schedule was inapplicable to the case (LORD DAVEY).—LYSONS *v.* KNOWLES (ANDREW) & SONS, LTD., STUART *v.* NIXON & BRUCE, No. 3433, *post*.

2039. ——.]—You must not resort to the schedule for the purpose of cutting down the right to compensation (LORD MACNAGHTEN).—BALL *v.* HUNT (WILLIAM) & SONS, LTD., No. 3228, *post*.

2040. Previous decisions merely illustrations—Words of Act decisive.]—Having regard to the conflict which exists between judicial opinions expressed in some of the decided cases the only safe guide appears to me to be the language of the Act of Parliament itself (LORD HALDANE, C.).—TRIM JOINT DISTRICT SCHOOL BOARD OF MANAGEMENT *v.* KELLY, No. 2300, *post*.

2041. —— ——.]—The words of the Act itself rule in every case. Previous decisions are illustrations of the way in which judges look at cases & in that sense are useful & suggestive; but I think we ought to beware of allowing tests or guides which have been suggested by the ct. in one set of circumstances or in one class of cases to be applied to other surroundings & thus by degrees to substitute themselves for the words of the Act itself (LORD LOREBURN).—BLAIR & CO., LTD. *v.* CHILTON, No. 2541, *post*.

2042. Exceptions in Act—Construed against those putting them forward.]—I am rather disposed to think, though I do not know of any express authority for it, that when you have an Act which is

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PART XIV. SECT. 1.

2036 i. *Exceptions not introduced.*]—The argument that there is an implied exception from Workmen's Compensation Act, 1916, s. 13, of claims which arise from accidents creating rights under sect. 385 of the Railway Act because otherwise the provincial & Dominion Acts would be in conflict, cannot be maintained.—MCCOLL *v.* CANADIAN PACIFIC RY. CO., [1922] 3 W. W. R. 859; 69 D. L. R. 593.—**CAN.**

2038 i. *Acts not cut down by schedule.*]—The measures of compensation provided by Workers' Compensation Act, 1915, sched. 4, are applicable only in assessing compensation for injuries falling expressly & literally within the provisions of the sched. itself.—ARNOLD *v.* BARTLING, [1919] V. L. R. 293.—**AUS.**

b. *Intention of legislature.*]—It is not to be inferred that it was the intention of the legislature, by the insertion of words in the Nova Scotia Act, which are not to be found in the English Act, to make two different kinds of employment, one of which would be considered in determining whether the Act applied while the other would not be considered in determining that question, but would, nevertheless, be such as to afford ground for awarding compensation.—O'TOOLE *v.* BRANDRAM-HENDERSON (1915), 48 N. S. R. 293.—**CAN.**

c. ——.]—Workmen's Compensation Act of Ontario only creates a liability to pay compensation for an accident & not damages for a wrongful act.—MCMILLAN *v.* CANADIAN NORTHERN RY. CO., [1922] 3 W. W. R. 904; 70 D. L. R. 229.—**CAN.**

d. "*Railway.*"]—The word railway in the Workmen's Compensation Act of Saskatchewan, 1910-11, applies to a municipal street railway.—WESTERN TRUST CO. *v.* CITY OF REGINA (Sask.), [1917] 3 W. W. R. 1055; 55 S. C. R. 628; 39 D. L. R. 759.—**CAN.**

e. "*Factory.*"]—The basement of a city fire hall wherein no machinery driven by steam, water or mechanical power is used is not a factory within Workmen's Compensation Act, 1910-11 (Sask.).—HOOK *v.* CITY OF PRINCE ALBERT, [1918] 1 W. W. R. 922; 11 Sask. L. R. 85; 40 D. L. R. 1.—**CAN.**

f. ——.]—GARRETT *v.* CITY OF MOOSE JAW, [1918] 2 W. W. R. 1058; 11 Sask. L. R. 307; 42 D. L. R. 621.—**CAN.**

intended to lay down a general principle you construe the exceptions rather against those who put them forward (SCRUTTON, L.J.).—WOOD *v.* WOOD, No. 2231, *post.*

SECT. 2.—PERSONS ENTITLED TO COMPENSATION.

SUB-SECT. 1.—WORKMEN.

A. General Rule—Necessity for Contract of Service.

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 3 (1).

2043. What amounts to contract of service—Charitable organisation—Relief work for unemployed.]—Resps. were a charitable organisation carrying on philanthropic work. They instituted a labour yard, & in return for work done therein by persons out of employment who applied to them for relief they provided such persons with board & lodging. Appct. having so applied for relief, work was given to him to perform in resps.' labour yard, & during such occupation he met with an accident which caused personal injury to him, for which he claimed compensation under the Workmen's Compensation Act, 1906 (c. 58):—*Held:* without deciding the question whether resps. carried on a "trade or business" within the meaning of sect. 13 of the Act, appct. had not established that there was any "contract of service" between him & respondents within the meaning of that sect.—BURNS *v.* MANCHESTER & SALFORD WESLEYAN MISSION (1908), 99 L. T. 579; 1 B. W. C. C. 305, C. A.

2044. —— Lecturer at exhibition.]—By an agreement entered into between applt. corpn. & one L., the latter was to keep an airship on exhibition in the corpn.'s grounds & was to pay the wages of a turnstile man who was to be the servant of the corpn. Admission to the inclosure to view the airship was only to be obtained by ticket through registering turnstiles or by tickets to be provided by the corpn. & all moneys were to be collected daily by the money-takers employed by the corpn. L. was to receive 50 per cent. of the gross receipts, & thereout he had to pay the persons engaged by him. The corpn. were to receive the remaining 50 per cent. L. was not to acquire any legal interest or estate in the place allotted to him, but was merely permitted to use the same for the special purpose. For the purpose of carrying out his part of the agreement L. engaged a lecturer whose duties were to explain the various parts of the airship & the exploits of L. After the airship had been on exhibition for some time it exploded & the lecturer was so severely burned that he died as the result of the accident. In a claim for compensation by his widow:—*Held:* (1) the lecturer was not a "workman" within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 13; (2) assuming the lecturer was a workman his widow's remedy was against L. & not against the corpn.—WAITES *v.* FRANCO-BRITISH EXHIBITION (1909), 25 T. L. R. 441; 2 B. W. C. C. 199, C. A.

Annotation:—**Consd.** Hockley *v.* West London Timber & Joinery Co. (1914), 112 L. T. 1.

2045. —— Professional football player.]—Appct., a professional football player, had entered into a written agreement to serve resps. for one year at a weekly wage by playing football with resps.' team when required & attend regularly to training & observe the training & general instructions of the club. The training regulations required the players to attend at the ground every day at 10.30 & to be under the orders of the trainer for the day. Appct. met with an accident while playing in a match. Resps. paid him his wages to the end of the year, & he then claimed compensation for permanent incapacity:—*Held:* appct. was a "workman" within the meaning of the Workmen's Compensation Act, 1906 (c. 58).—WALKER *v.* CRYSTAL PALACE FOOTBALL CLUB, LTD., [1910] 1 K. B. 87; 79 L. J. K. B. 229; 101 L. T. 645; 26 T. L. R. 71; 54 Sol. Jo. 65; 3 B. W. C. C. 53, C. A.

Annotations:—**Distd.** Scottish Insce. Comrs. *v.* Royal Infirmary of Edinburgh (1913), 6 B. W. C. C. N. 120. **Refd.** Simmons *v.* Heath Laundry Co., [1910] 1 K. B. 543.

2046. —— Music teacher—Principal earnings gained at other employment.]—SIMMONS *v.* HEATH LAUNDRY CO., No. 3469, *post.*

2047. —— Usher in private school.]—SIMMONS *v.* HEATH LAUNDRY CO., No. 3469, *post.*

2048. —— Teacher—In provided or non-provided school.]—SIMMONS *v.* HEATH LAUNDRY CO., No. 3469, *post.*

2049. —— Nursery governess.]—SIMMONS *v.* HEATH LAUNDRY CO., No. 3469, *post.*

2050. —— Meters engaged by dock authority—Paid by ship owners.]—WILMERSON *v.* LYNN & HAMBURG S.S. CO., LTD., No. 3871, *post.*

2051. —— Football referee—Employed by club.]—A person employed by a football club to act as referee at matches is not employed by the club under a contract of service, & in the event of his being injured during his duties, he is not entitled to compensation under the Workmen's Compensation Act, 1906 (c. 58), notwithstanding that the injury is suffered in the course of his employment.—WILLIAMS *v.* SOUTH WALES & MONMOUTHSHIRE FOOTBALL ASSOCN. (1913), 57 Sol. Jo. 228.

2052. —— Voluntary work—In expectation of gratuity.]—Appct., a quarryman, was accustomed occasionally during hay harvest to assist a farmer in the evening in getting in his crops. He did not receive any money payment for his services, but the farmer gave him beer & sometimes a supper when the work was over. While thus engaged in

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PART XIV. SECT. 2, SUB-SECT. 1.—A.

2043 i. *What amounts to contract of service—Charitable organisation—Relief work for unemployed.*]—A man employed on temporary work by a distress committee under Unemployed Workmen Act, 1905, was injured by accident arising out of & in the course of the employment:—*Held:* the injured man was in the employment of the Committee within the Workmen's Compensation Act, 1906, & was entitled to compensation.—GILROY *v.* MACKIE (LEITH DISTRESS COMMITTEE), [1909] S. C. 466; 2 B. W. C. C. 269.—**SCOT.**

g. —— *Pieceworker.*]—ELOFF *v.* LEWIS & REID, LTD. (1922), 24 W. A. L. R. 134.—**AUS.**

h. —— *Workgang collected by its members.*]—SHEPHEARD *v.* UNION S.S. CO. OF NEW ZEALAND, LTD. (1915), 11 Tas. L. R. 116.—**AUS.**

k. —— *Marine engineer.*]—A marine engineer may or may not be a workman within Workmen's Compensation Act, 1910, according to the circumstances of his employment.—OATS *v.* FENWICK, ETC. (1916), 16 S. R. N. S. W. 377; 33 N. S. W. W. N. 123.—**AUS.**

l. —— *Working pile-driver.*]—MCMILLAN *v.* WESTERN DREDGING CO. (1895), 4 B. C. R. 122.—**CAN.**

m. —— *Longshoreman.*]—LOGAN *v.* LEE (1907), 39 S. C. R. 311.—**CAN.**

n. —— *Agricultural worker.*]—The care of stallions kept for breeding purposes is, in Ireland, an agricultural employment within the definition contained in Workmen's Compensation Act, 1906, s. 1.—FROST *v.* DESTERRE (1905), 39 I. L. T. 152.—**IR.**

o. —— ——.]—PROCTOR *v.* CUMISKY (1904), 6 F. (Ct. of Sess.) 832; 41 Sc. L. R. 636; 12 S. L. T. 172.—**SCOT.**

p. —— *Medical officer.*]—A dispensary medical officer of the E. Union whilst discharging his duties sustained personal injury by accident from which he subsequently died. Upon an application by his widow for compensation under Workmen's Compensation Act, 1906:—*Held:* he was

Sect. 2.—Persons entitled to compensation: Sub-sect. 1, E. (a) & (b).]

declaratory award notwithstanding that it has not been asked for by either of the parties.—ASHRODY *v.* CITY OF EDINBURGH (OWNERS), [1920] 1 K. B. 301; 89 L. J. K. B. 99; 122 L. T. 230; 36 T. L. R. 38; 12 B. W. C. C. 387, C. A.

2064. —— —— Contract of apprenticeship subsisting.]—An apprentice was serving on board ship, under arts. of apprenticeship, when he met with an accident in Feb. 1913. His term of apprenticeship did not expire until June, 1915, &, under the conditions thereof, the employers were bound to pay wages & provide maintenance, subject to the apprentice obeying proper orders. In Nov. 1913, the apprentice was found by arbn. to be a workman within the Act, & a declaration of liability was granted, the employers in the meantime paying wages & an agreed amount for maintenance. In June, 1914, they considered the lad able to resume work, & ordered him to join a ship. This he refused to do on the ground that he was still unfit for work. The employers thereupon stopped payment, & the lad applied to the county ct. for compensation. The county ct. judge held that the question was one arising under the arts. of apprenticeship, & that he had not, during the continuance of the term of apprenticeship, jurisdiction to deal with the matter. He consequently dismissed the application:—*Held:* the application was properly dismissed, & there was no misdirection.—TURNER *v.* PAULWEN (OWNERS) (1915), 8 B. W. C. C. 242, C. A.

2065. Claim brought under particular statutory provision—Workman not a workman within such provision—Foreign seaman claiming as workman.]—A foreign seaman on a foreign ship in an English port met with an accident. He obtained in the county ct. an order for detention of the ship under Workmen's Compensation Act, 1906 (c. 58), s. 11, & also obtained an award of compensation against the owners of the ship, proceeding against them & serving the master of the ship as provided by sect. 7, but claiming to be entitled to compensation, not under sect. 7, but as a workman apart from that sect. The employers appealed from both the order for detention & the award of compensation:—*Held:* (1) as to the order for detention, an appeal therefrom lay to the Div. Ct., & not to the Ct. of Appeal; (2) as to the award of compensation, that, as the proceedings were brought in manner only allowed by sect. 7, the workman could only succeed if he came within sect. 7, which he did not in this case.—PANAGOTIS *v.* PONTIAC (OWNERS), [1912] 1 K. B. 74; 81 L. J. K. B. 286; 105 L. T. 689; 28 T. L. R. 63; 56 Sol. Jo. 71; 5 B. W. C. C. 147; 12 Asp. M. L. C. 92, C. A.

Annotation :- As to (1) **Distd.** Bonney *v.* Hoyle, [1914] 2 K. B. 257.

2066. Determination of ship's nationality—Application of Merchant Shipping Acts.]—(1) *Semble:* in determining whether a ship is a "British ship . . . of which the owner . . . resides . . . in the United Kingdom," within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 7 (1), it is not material to consider whether the ship is to be recognised as a "British ship" under M. S. Act, 1894 (60), s. 2 (2).

(2) *Semble:* in Workmen's Compensation Act, 1906 (c. 58), s. 7 (1) (*a*), "The notice of accident . . . . may . . . be served on the master of the ship," the words "may be served" are not to be read as "shall be served."—THE RIGEL, [1912] P. 99; 81 L. J. P. 86; 106 L. T. 648; 28 T. L. R. 251; 12 Asp. M. L. C. 192.

2067. Registration of ship cancelled—Before commencement of voyage—Cancellation conclusive.]—A seaman was employed on a smack which sailed from Lowestoft for Norway on Mar. 18, 1913, & was never heard of again. His dependants claimed compensation under the Workmen's Compensation Act, 1906 (c. 58). Resp. repudiated liability on the ground that he was not the owner of the smack or the employer of deceased, & deceased was not a workman to whom the Act applied. It appeared that resp. had been the registered owner of the smack, but the registration was cancelled on Mar. 8, 1913, with a view to the sale of the ship by C., who was alleged to be the true owner, to foreigners. Resp. contended that inasmuch as when the ship sailed she was no longer registered in the United Kingdom deceased was not a member of the crew of a ship registered in the United Kingdom or of any other ship or vessel of which the owner resided in the United Kingdom within s. 7 (1) of the Act. The judge refused to accept the submission that the registration had been properly cancelled & awarded compensation to the dependants:—*Held:* inasmuch as the registration was vacated before the ship sailed deceased was not within the protection of the Act; & whatever the judge might have thought of the merits of the case, it was not open to him to go behind the cancellation of registration.—MORTIMER *v.* WISKER, [1914] 3 K. B. 699; 83 L. J. K. B. 1245; 111 L. T. 732; 30 T. L. R. 592; 7 B. W. C. C. 494, C. A.

(*b*) *Fishing Crews Sharing Profits.*

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 35 (2).

2068. Right to compensation.]—Claimant under Workmen's Compensation Act, 1906 (c. 58), was employed as engineer upon a steam fishing boat & was paid by a share in the profits with a guarantee from the owners that his share in the profits should never be less than 30*s.* a week:—*Held:* he was remunerated by a share in the profits within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 7 (2), & was therefore excepted from the Act & not entitled to compensation.—ADMIRAL FISHING CO. *v.* ROBINSON, [1910] 1 K. B. 510; 79 L. J. K. B. 551; 102 L. T. 203; 26 T. L. R. 299; 54 Sol. Jo. 305; 3 B. W. C. C. 247, C. A.

Annotations :- **Apld.** Costello *v.* Kelsall, Canwell *v.* Same, Tindall *v.* Great Northern S.S. Fishing Co. (1912), 56 Sol. Jo. 720. **Refd.** Newstead *v.* Steam Trawler Labrador (1915), 114 L. T. 27.

(OWNERS) (1913), 47 L. L. T. 155; 6 B. W. C. C. 916.—**IR.**

k. ——.]—*Held:* a member of the crew of a small cargo boat, who were remunerated by a share of the gross earnings of the vessel, was a workman within Workmen's Compensation Act, 1906.—CLARK *v.* JAMIESON, [1909] S. C. 132; 46 Sc. L. R. 73; 16 S. L. T. 450.—**SCOT.**

l. ——.]—SHARPE *v.* CARSWELL, [1910] S. C. 391.—**SCOT.**

PART XIV. SECT. 2, SUB-SECT. 1.—E. (b).

2068 i. *Right to compensation.*]—A member of a crew of a fishing vessel, being remunerated by a share in the profits or gross earnings of the working of the vessel:—*Held:* excluded from the Act.—ABERDEEN STEAM TRAWLING & FISHING CO., LTD. *v.* GILL, [1908] S. C. 328; 45 Sc. L. R. 247; 15 S. L. T. 641; 1 B. W. C. C. 274.—**SCOT.**

2068 ii. ——.]—JAMIESON *v.* CLARK, [1909] S. C. 132; 46 Sc. L. R. 73; 16 S. L. T. 450; 2 B. W. C. C. 228.—**SCOT.**

2068 iii. ——.] — COLQUHOUN *v.* WOOLFE, [1912] S. C. 1190.—**SCOT.**

2068 iv. ——.]—A fireman on board a steam-drifter was entitled to share in the profits realised from the "scum" & "stoker," & thereby participate in the gross earnings of the working of

2069. ——.]—(1) Claimant under Workmen's Compensation Act, 1906 (c. 58), was employed as boatswain on a steam fishing trawler & was remunerated by wages, maintenance & poundage dependent on the profits of the fishing expedition: —*Held:* he was remunerated by a share in the profits within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 7 (2), & was therefore excluded from the Act & not entitled to compensation.

(2) Construction of the Acts (*see* No. 2037, *ante*). —COSTELLO *v.* PIGEON (OWNERS), [1913] A. C. 407; *sub nom.* COSTELLO *v.* KELSALL BROTHERS, 82 L. J. K. B. 873; 108 L. T. 929; 29 T. L. R. 595; 57 Sol. Jo. 609; 6 B. W. C. C. 480, H. L.

Annotations:—As to (1) **Apld.** Stephenson *v.* Rossall Steam Fishing Co. (1915), 84 L. J. K. B. 677. **Distd.** Newstead *v.* Steam Trawler Labrador, [1916] 1 K. B. 166; Meader *v.* Danum Steam Trawler Co. (1921), 14 B. W. C. C. 236. **Folld.** Burgess *v.* S.S. Angolia (1923), 129 L. T. 12. **Refd.** Burman *v.* Zodiac Steam Fishing Co., Williams *v.* Duncan (Owners), McCord *v.* City of Liverpool (Owners) (1914), 83 L. J. K. B. 1683.

2070. ——.]—A member of the crew of a fishing vessel was remunerated by a fixed wage of 42*s.* per week & 2*d.* in the £ on the net earnings of the vessel:—*Held:* he was remunerated within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 7 (2), & the Act did not apply to him.— BURGESS *v.* ANGOLIA (OWNERS) (1923), 129 L. T. 12; 16 B. W. C. C. 50; 16 Asp. M. L. C. 208, C. A.

2071. —— **Wages only remuneration mentioned in agreement.**]—A fisherman who receives liver money & stocker money in addition to his wages receives them from the owner of the vessel out of her gross earnings, & they form part of his remuneration although wages are the only things mentioned in his running agreement. He is therefore remunerated by a share in the gross earnings within Workmen's Compensation Act, 1906 (c. 58), s. 7 (2), & is not entitled to compensation under that Act.

In cases where the stocker money & liver money are so small as to be of no importance it is open to the county ct. judge to find that the fisherman was not remunerated by a share of gross earnings. —BURMAN *v.* ZODIAC STEAM FISHING CO., WILLIAMS *v.* DUNCAN (OWNERS), MCCORD *v.* CITY OF LIVERPOOL (OWNERS), [1914] 3 K. B. 1039; 83 L. J. K. B. 1683; 112 L. T. 58; 30 T. L. R. 651; 7 B. W. C. C. 767.

Annotations:—**Apld.** Stephenson *v.* Rossall Steam Fishing Co. (1915), 84 L. J. K. B. 677. **Distd.** Newstead *v.* Steam Trawler Labrador, [1916] 1 K. B. 166.

2072. —— **Subject-matter of profit producing small sum—Stocker money.**]—BURMAN *v.* ZODIAC STEAM FISHING CO., WILLIAMS *v.* DUNCAN (OWNERS), MCCORD *v.* CITY OF LIVERPOOL (OWNERS), No. 2071, *ante*.

2073. —— **Subject-matter of profit not on board at time of accident—Stocker money.**]—A fishing vessel was lost with all hands a day after leaving port. Compensation was claimed for the death of a seaman on board her. In addition to his wages deceased was entitled, by the custom of the port, to a share of "stocker." There was no stocker on board the vessel when she went down. She was proceeding to fishing grounds, where on former trips a considerable amount of stocker had been taken:—*Held:* it was a term of the contract of service that deceased should be remunerated by a share of "stocker," & he was therefore "remunerated by shares in the profits or the gross earnings" within Workmen's Compensation Act, 1906 (c. 58), s. 7 (2), so that his dependants were not entitled to compensation under the Act.— STEPHENSON *v.* ROSSALL STEAM FISHING CO., LTD. (1915), 84 L. J. K. B. 677; 112 L. T. 891; 8 B. W. C. C. 209, C. A.

2074. —— **Voluntary work at extra remuneration—Arising out of profit sharing contract.**]—A share hand or fisherman, that is, a member of the crew of a trawler who is remunerated by a share of profits or gross earnings & therefore excluded from the benefit of Workmen's Compensation Act, 1906 (c. 58), s. 7 (2), cannot claim compensation under the Act in respect of an accident which happened to him while voluntarily employed at an extra remuneration, which was shared between himself & the other members of the trawler's crew, in stowing fish boxes on another vessel belonging to the same employers, which carried the day's catch to market, such additional employment arising out of & being incidental to his engagement as a share fisherman.—WHELAN *v.* GREAT NORTHERN STEAM SHIPPING CO. (1909), 78 L. J. K. B. 860; 100 L. T. 913; 25 T. L. R. 619; 2 B. W. C. C. 235, C. A.

Annotation:—**Refd.** Stephenson *v.* Rossall Steam Fishing Co. (1915), 84 L. J. K. B. 677.

2075. What amounts to sharing profits—Wages plus bonus.]—A claim for compensation by the widow of a member of the crew of a fishing vessel, which was lost with all hands, was resisted by the owners on the ground that deceased was remunerated by a share in the profits or gross earnings of the vessel within Workmen's Compensation Act, 1906 (c. 58), s. 7 (2), & therefore that the Act did not apply to him. He was employed as chief engineer on board a steam trawler at a fixed weekly wage of £2 5*s.* It was the custom of the owners when the gross earnings of the boat exceeded £100 for any one trip, each trip being usually of about a week's duration, to allow a sum of £2 by way of bonus, of which £1 went to the captain & 2*s.* 6*d.* to each of the remaining eight members of the crew. If the gross earnings of the boat exceeded £125 the bonus was proportionately increased & so on, but it was not further increased if the gross earnings realised more than £175:—*Held:* the bonus was not a share in either the profits or the gross earnings of the vessel, but was an additional sum for wages determined by the amount of the gross earnings. Appct. was therefore entitled to compensation.— NEWSTEAD *v.* LABRADOR (OWNERS), [1916] 1 K. B. 166; 85 L. J. K. B. 93; 114 L. T. 27; 9 B. W. C. C. 63, C. A.

Annotations:—**Folld.** Duck *v.* North Sea Steam Trawling Co. (1915), 9 B. W. C. C. 83; Meader *v.* Danum Steam Trawler Co. (1921), 14 B. W. C. C. 236. **Distd.** Burgess *v.* S.S. Angolia (1923), 129 L. T. 12.

2076. —— ——.]—DUCK *v.* NORTH SEA STEAM TRAWLING CO., LTD., No. 2100, *post*.

2077. —— ——.]—A trimmer on board a fishing vessel, whose duty it was to help to get the fish out, met with an accident while doing so. In addition to his wages & food, he was paid at the rate of £1 in every £100 up to £200; 10*s.* in every subsequent £100 on the catch, & also 10*s.* for every £100 in lieu of stockabait:—*Held:* the right of appct. was to receive a sum of money by way of remuneration measured by the gross earnings of the vessel & not a share in the profits or gross earnings of the vessel; he was not therefore taken out of the benefit of Workmen's Compensation Act, 1906 (c. 58).—MEADER *v.* DANUM STEAM TRAWLER CO. (1921), 14 B. W. C. C. 236, C. A.

Annotation:—**Distd.** Burgess *v.* S.S. Angolia (1923), 129 L. T. 12.

the vessel:—*Held:* the widow was not entitled to compensation under Workmen's Compensation Act, 1906 (c. 58).—BUCHAN *v.* SCOTTISH STEAM HERRING FISHING CO., LTD. (1917), 10 B. W. C. C. 726.—**SCOT.**

Sect. 2.—Persons entitled to compensation: Sub-sect. 1, F.; sub-sect. 2, A. & B.]

F. Workmen in Employment of Crown.

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 33.

2078. Royal Naval Reservist—Employed in mercantile marine.]—A stoker on board a merchant ship, who was entitled to wages from the shipowners, & also as a stoker in the Royal Naval Reserve to £6 a year as a retainer, was injured by an accident on the ship which disabled him from continuing to serve in the Royal Naval Reserve:—*Held:* the stoker was entitled under Workmen's Compensation Act, 1906 (c. 58), to compensation from the shipowners not only in respect of his wages but also of the retainer, which must be taken into account as earnings under a concurrent contract of service.—BRANDY *v.* RAPHAEL (OWNERS), [1911] 1 K. B. 376; 80 L. J. K. B. 217; 103 L. T. 746, 27 T. L. R. 127; 4 B. W. C. C. 6; 11 Asp. M. L. C. 541, C. A.; *affd. sub nom.* RAPHAEL (OWNERS) *v.* BRANDY, [1911] A. C. 413, H. L.

Annotation:—**Apld.** Port of London Authority *v.* Gray, [1919] 1 K. B. 65.

SUB-SECT. 2.—DEPENDANTS.

A. Who are Dependants.

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 4.

2079. Posthumous child.]—WILLIAMS *v.* OCEAN COAL CO., LTD., No. 2134, *post.*

—— Illegitimate.]—*See* Nos. 2083, 2152, *post.*

2080. Illegitimate child.]—SMITH'S DOCK CO. *v.* READHEAD (JOHN) & SONS, LTD., No. 4095, *post.*

2081. ——.]—HARRIS *v.* POWELL DUFFRYN STEAM COAL CO., LTD., No. 2152, *post.*

2082. —— En ventre sa mère—At time of accident.]—A workman, who had admitted that he was the father of a child *en ventre sa mère* & had promised to marry the mother & intended to provide for the child, was killed by an accident for which his employers were liable to pay compensation. The child was born some months afterwards:—*Held:* the child was a "dependant" within the meaning of Workmen's Compensation Act, 1906 (c. 58), & entitled to compensation.—ORRELL COLLIERY CO. *v.* SCHOFIELD, [1909] A. C. 433; 78 L. J. K. B. 677; 100 L. T. 786; 25 T. L. R. 569; 2 B. W. C. C. 294; *sub nom.* SCHOFIELD *v.* ORRELL COLLIERY CO., LTD., 53 Sol. Jo. 518, H. L.

Annotation:—**Consd.** Lloyd *v.* Powell Duffryn Steam Coal Co., [1914] A. C. 733.

2083. —— Evidence of intention of deceased to marry the mother—Acknowledgment of paternity—Admissibility & relevance of evidence.]—(1) Upon a claim for compensation under the Workmen's Compensation Act, 1906 (c. 58), by a posthumous illegitimate child as a dependant of its putative father, who was killed by accident arising out of & in the course of his employment with resps., evidence of statements made by deceased to the effect that he acknowledged the paternity of the child & that he intended to marry the mother before the child was born is admissible both on the issue of paternity & on the issue of dependency, as evidence of the state of mind of deceased in relation to the child. *Semble:* the fact of dependency, whether in the case of legitimate or illegitimate children, & whether born or to be born, does not necessarily rest upon any promise of support by the father.

(2) Where a claim has been made on the basis of partial dependency, & no application to amend has been made, the county ct. judge had no power to make an award, on the basis of total dependency, for a larger sum than that claimed.—LLOYD *v.* POWELL DUFFRYN STEAM COAL CO., LTD., [1914] A. C. 733; 83 L. J. K. B. 1054; 111 L. T. 338; 30 T. L. R. 456; 58 Sol. Jo. 514; 7 B. W. C. C. 330, H. L.; *revsg.* S. C. *sub nom.* WARD *v.* PITT (H. S.) & CO., LLOYD *v.* POWELL DUFFRYN STEAM COAL CO., [1913] 2 K. B. 130, C. A.

Annotation:—**Mentd.** *Re* Wright, Hogan *v.* Bloor, [1920] 1 Ch. 108.

2084. ——.]—A woman who had been deserted by her husband went with her three children by him to live with another man, by whom she had an illegitimate child. This man earned 45*s.* a week, which he paid to her & which she applied in the maintenance of the household. Her husband subsequently joined the Army, & she then received from the War Office a separation allowance of 23*s.* a week. The man with whom she was living was killed by an accident arising out of & in the course of his employment by resps. Upon an application by his infant illegitimate child for compensation under Workmen's Compensation Act, 1906 (c. 58):—*Held:* in the absence of evidence that the mother of appct. placed any part of her separation allowance to a common fund for the maintenance of the family, appct. was totally dependent upon her father & entitled to compensation upon that footing.—TAYLOR *v.* POWELL DUFFRYN STEAM COAL CO., LTD., [1916] 2 K. B. 765; 85 L. J. K. B. 1680; 115 L. T. 409; 60 Sol. Jo. 665; 9 B. W. C. C. 477, C. A.

2085. —— Grandchild—Payment of increased compensation.]—PRITCHARD *v.* BETTISFIELD COLLIERY, LTD., No. 3357, *post.*

2086. —— Of widow of workman—Workman not the father.]—Workmen's Compensation Act, 1923 (c. 42), s. 2, does not include illegitimate children of the widow of a workman killed by an accident arising out of & in the course of his employment, of whom the workman was not the father.—SCOTT *v.* LONDON & NORTH EASTERN RY. CO., [1926] 2 K. B. 204; 95 L. J. K. B. 510; 134 L. T. 618; 42 T. L. R. 292; 70 Sol. Jo. 403; 19 B. W. C. C. 49, C. A.; *affd.*, 43 T. L. R. 32, H. L.

Annotation:—**Consd.** Faulkner *v.* Sutton (Owners), [1927] 1 K. B. 207.

B. Nature and Derivation of Right.

See Workmen's Compensation Act, 1925 (c. 84), s. 2.

2087. Direct statutory right—Not derived from workman.]—A workman, who was accidentally killed in the course of his employment, died intestate, leaving a widow & children, who as

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PART XIV. SECT. 2, SUB-SECT. 2.—A.

2080 l. *Illegitimate child.*]—BRIGGS *v.* MITCHELL (1911), 4 B. W. C. C. 400. —**SCOT.**

m. *Alien dependent resident abroad.*]—*Semble:* the benefits given by Workmen's Compensation Act, 1902, enure to the benefit of all those who, irrespective of race or residence, stand to a deceased workman in any of the relationships mentioned in the Act; &, therefore, it is no objection to a claim for compensation by dependants that such dependants are aliens resident in a foreign country.—VARESICK *v.* BRITISH COLUMBIA COPPER CO., LTD. (1906), 1 B. W. C. C. 446.—**CAN.**

n. ——.]—*Held:* the widow of an alien workman who lost his life by an accident in the course of his employment by resps. was entitled to compensation as a dependant of the deceased, notwithstanding that she was residing in a foreign country at the dates both of the accident & the death.—KRZUS *v.* CROW'S NEST PASS COAL CO., LTD., [1912] A. C. 590, P. C.—**CAN.**

his dependants were entitled to be paid compensation by his employers under Workmen's Compensation Act, 1897 (c. 37). The amount of compensation was agreed upon between the widow & the employers, but the employers refused to pay this amount to her unless she first took out letters of administration. The widow refused this condition & commenced proceedings against the employers to obtain compensation under the Act. The employers paid the agreed amount of compensation into ct. The county ct. judge ordered the employers to pay to the widow the costs of her application up to the date of the payment into ct. Against this order the employers appealed:—*Held:* (1) the employers were not entitled to insist on the widow taking out letters of administration before they paid over to her the agreed amount of compensation; (2) the proceedings for compensation having been rightly commenced, the county ct. judge had jurisdiction to order the employers to pay the widow the costs of her application up to the date of the payment into ct.—CLATWORTHY *v.* GREEN (R. & H.), LTD. (1902), 86 L. T. 702; 66 J. P. 596; 50 W. R. 610; 18 T. L. R. 641; 4 W. C. C. 152, C. A.

2088. ——— ———.]—A workman was injured by accident. He gave notice of injury, asking his employers to treat it as a notice under the Employers' Liability & Workmen's Compensation Acts. His employers settled with him for a lump sum, obtaining a receipt releasing them from all liability under the Employers' Liability Act & at common law. The workman died, & his dependants claimed under the Workmen's Compensation Act, 1906 (c. 58), subject to the deduction of the sum paid under the settlement. The county ct. judge found as a fact that there was no *bonâ fide* settlement & made an award in favour of the dependants:—*Held:* the right of the dependants was independent of, & not derived from, that of deceased, & they were therefore entitled to recover.—HOWELL *v.* BRADFORD & CO. (1911), 104 L. T. 433; 4 B. W. C. C. 203, C. A.

Annotation:—**Folld.** Jobson *v.* Cory (1911), 4 B. W. C. C. 284.

2089. ——— ———.] — Statements made by deceased workman, a blacksmith, to the general manager of his employers as to the nature & cause of an injury to his thumb which ultimately resulted in his death:—*Held:* (1) not admissible on behalf of the employers in an application by deceased's dependants for compensation under the Workmen's Compensation Act, 1906 (c. 58), as admissions by deceased, inasmuch as appts. had, as dependants, a direct statutory right against the employers under Sched. I. (1) (*a*); (2) deceased workman was not a party to the litigation; & appts. did not derive their title to compensation by derivation from him.—TUCKER *v.* OLDBURY URBAN DISTRICT COUNCIL, [1912] 2 K. B. 317; 81 L. J. K. B. 668; 106 L. T. 669; 5 B. W. C. C. 296, C. A.

Annotations:—*As to* (1) **Folld.** Harper *v.* Dick, Kerr (1920), 90 L. J. K. B. 1313. **Refd.** Ward *v.* Pitt, Lloyd *v.* Powell Duffryn Steam Coal Co., [1913] 2 K. B. 130; Beare *v.* Garrod (1915), 8 B. W. C. C. 474.

2090. ——— ———.]—MANTON *v.* CANTWELL, No. 2199, *post*.

2091. ——— ———.]—A workman, who was in the employment of resps., suffered "personal injury by accident" in respect of which he claimed compensation from them under Workmen's Compensation Act, 1906 (c. 58), s. 1, which was followed in due course by a request for arbn. by the workman. His contention was that the accident arose "out of & in the course of" his employment. But the county ct. judge before whom the application came negatived that view. The death of the workman having subsequently resulted, it was said, from that accident, an application was made on behalf of his dependants for compensation under the Act. The application came on before the same county ct. judge, who decided that he had not jurisdiction to hear the application on the ground that the matter was *res judicata*. The dependants appealed:—*Held:* the dependants of deceased workman had a direct & independent statutory right against his employer under s. 1 of the Act of 1906; deceased workman was not a party to that litigation, nor did his dependants derive their title to compensation by derivation from him; that this being so, there could not be a plea of *res judicata*, when the previous litigation on which the decision was reached was between parties entirely different from those concerned in the subsequent litigation, & there could not be an estoppel against the dependants, who were no parties to deceased workman's claim for compensation, & did not derive their title from the person who brought it.—HARPER *v.* DICK, KERR & CO. (1920), 90 L. J. K. B. 1313; 124 L. T. 438; 13 B. W. C. C. 250, C. A.

Annotation:—**Apld.** Wilson *v.* Maple Mill (1925), 95 L. J. K. B. 666.

2092. Independent of previous claims by deceased workman—Payment of compensation to workman.]—Where an award of a weekly sum had been made to a workman who was injured by an accident, & some months afterwards he died, & his dependants applied for compensation under the Act, claiming three years' wages after giving credit for the weekly payments already made to the workman:—*Held:* there was jurisdiction to entertain the claim.—O'KEEFE *v.* LOVATT (1901), 18 T. L. R. 57; 46 Sol. Jo. 67; 4 W. C. C. 109, C. A.

2093. ——— ———.] — WILLIAMS *v.* VAUXHALL COLLIERY CO., LTD., No. 3335, *post*.

2094. ——— ——— .]—A workman was injured & received compensation. A memorandum of agreement to pay him compensation was filed, & on an application to review the payments thereunder were terminated. Subsequently, the man died, & his dependants applied for compensation:—*Held:* the award terminating the rights of the workman was no bar to the claim by the dependants.—JOBSON *v.* CORY (W.) & SONS, LTD. (1911), 4 B. W. C. C. 284, C. A.

2095. ——— ———.]—MANTON *v.* CANTWELL, No. 2199, *post*.

2096. ——— ——— **Subsequent death not due to accident — No estoppel against employers.**] — A workman met with an accident in the course of his employment, & tumours on the neck ensued. He was incapacitated for work, & his employers paid him half his weekly wages under an agreement to that effect, a memorandum of which was registered under Workmen's Compensation Act, 1897 (c. 37). The workman continued incapable of working, & died in a year. His widow claimed compensation under the Act, & the county ct. judge found that the workman's death was not caused or accelerated by the accident, the sole cause of his incapacity for work being the disease from which he was suffering, & of which disease alone he died; but he held that the employers were estopped from denying that the disease which caused his death was the result of the accident by reason of the agreement & the payments made by them:—*Held:* the agreement did not amount to an admission that the death was caused by the accident, & therefore there was no estoppel.—CLEVERLEY *v.* GAS, LIGHT & COKE CO.

Sect. 2.—*Persons entitled to compensation: Sub-sect.* 2, *B. & C.* (*a*) *&* (*b*).]

(1907), 24 T. L. R. 93; 52 Sol. Jo. 75; 1 B. W. C. C. 82, H. L.

Annotation:—**Consd.** Bedford *v.* Cowtan, [1916] 1 K. B. 980.

2097. —— Statements of deceased workman inadmissible.]—TUCKER *v.* OLDBURY URBAN DISTRICT COUNCIL, No. 2089, *ante*.

2098. —— Claim rejected by arbitrator.]—HARPER *v.* DICK, KERR & CO., No. 2091, *ante*.

2099. ——.]—WILSON *v.* MAPLE MILL, LTD., No. 2091, *post*.

C. What Amounts to Dependency.

(*a*) *In General.*

See Workmen's Compensation Act, 1925 (c. 84), s. 4.

2100. Question of fact.]—SIMMONS *v.* WHITE BROTHERS, No. 2114, *post*.

2101. ——.]—MAIN COLLIERY CO. *v.* DAVIES, No. 2115, *post*.

2102. ——.]—The question of dependency is a question of fact (COLLINS, M.R.).—BEVAN *v.* CRAWSHAY BROTHERS (CYFARTHA), LTD., [1902] 1 K. B. 25; 71 L. J. K. B. 49; 85 L. T. 496; 50 W. R. 98; *sub nom.* BEAVAN *v.* CRAWSHAY BROTHERS (CYFARTHFA), LTD., 18 T. L. R. 17; 46 Sol. Jo. 29; 4 W. C. C. 110, C. A.

Annotations:—**Expld.** McLean *v.* Moss Bay Iron & Steel Co., [1909] 2 K. B. 521. **Refd.** Hodgson *v.* West Stanley Colliery, [1910] A. C. 229. **Mentd.** Gourlay *v.* Murray (1908), 1 B. W. C. C. 335; Healy *v.* Reilly (1917), 10 B. W. C. C. 741.

2103. ——.]—A workman who was drowned at sea had been accustomed in previous employments to give money regularly to his parents, who with their family claimed compensation as dependants of deceased. The judge found that the family were partly dependent on the workman's earnings, & awarded compensation. The judge in his note stated that he had not made a note at the time of the hearing, as he was not requested to do so:—*Held*: dependency is a question of fact, & there was evidence to support the decision.

It is the duty of a county ct. judge to take a note, whether he is requested to do so or not.—TURNER *v.* MILLER & RICHARDS (1910), 3 B. W. C. C. 305, C. A.

Annotation:—**Consd.** Robertson *v.* Hall S.S. Co. (1910), 3 B. W. C. C. 368.

2104. ——.]—MCLEAN *v.* MOSS BAY HEMATITE & STEEL CO., LTD., No. 2162, *post*.

2105. ——.]—NEW MONCKTON COLLIERIES, LTD. *v.* KEELING, No. 2143, *post*.

2106. ——.]—TAMWORTH COLLIERY CO., LTD. *v.* HALL, No. 3350, *post*.

2107. ——.]—LEE *v.* BESSIE (OWNER), No. 2146, *post*.

2108. ——.]—BROOK *v.* LODGE (HENRY), LTD., No. 2165, *post*.

2109. ——.]—PEART *v.* BOLCKOW, VAUGHAN & CO., No. 2118, *post*.

2110. ——.]—YOUNG *v.* LONDONDERRY COLLIERIES, No. 3355, *post*.

2111. ——.]—The workman was killed in the course of his employment. At the time of his death he was living with his father, aged seventy-seven, his mother, aged seventy-one, & his two sisters, both over twenty-one years old. The father earned about £7 per week, & one sister earned £2 2*s.* per week. The family expenditure was £5 18*s.* per week, of which the father in fact only contributed £3, deceased £2, & the sister 18*s.* The father spent his surplus earnings in other ways & partly invested it in a savings bank. The mother & the other sister did not earn wages. The county ct. judge found that they were maintained out of a fund to which deceased in fact contributed a sum of about 15*s.* per week in excess of his own actual maintenance & that they were both partially dependent upon deceased workman. The employers appealed on the ground that as the father was well able to maintain the mother & daughter they could not be held to be partially dependent upon deceased:—*Held*: the question was one of fact, & there was evidence to support the finding of the county ct. judge, & no misdirection.—PEARCE *v.* SOUTHERN RY. CO. (1925), 95 L. J. K. B. 641; 134 L. T. 401; 18 B. W. C. C. 452, C. A.

2112. ——.]—CHEVERTON *v.* OCEANIC STEAM NAVIGATION CO., LTD., No. 3343, *post*.

2113. Mixed question of law & fact.]—WILLIAMS *v.* OCEAN COAL CO., LTD., No. 2131, *post*.

Presumption of dependency—Of wife.]—*See* Nos. 2133–2135, *post*.

—— **Of children.**]—*See* No. 2146, *post*.

(*b*) *Tests of Dependency.*

See Workmen's Compensation Act, 1925 (c. 84), s. 4.

2114. Class & position in life of parties—Whether relevant consideration.]—In order to bring himself within Workmen's Compensation Act, 1897 (c. 37), as a "dependant," an appct. for compensation must show that he was to some extent dependent upon the earnings of deceased workman for the ordinary necessaries of life, having regard to his class & position in life; it is insufficient that he merely derived pecuniary benefit from such earnings. Whether appct. is in that sense a dependant is a question of fact in each particular case.—SIMMONS *v.* WHITE BROTHERS, [1899] 1 Q. B. 1005; 68 L. J. Q. B. 507; 80 L. T. 344; 47 W. R. 513; 15 T. L. R. 263; 43 Sol. Jo. 332; 1 W. C. C. 89, C. A.

Annotations:—**Consd.** Main Colliery Co. *v.* Davies, [1900] A. C. 358; Peart *v.* Bolckow, Vaughan, [1925] 1 K. B. 399. **Refd.** Hodgson *v.* West Stanley Colliery, [1910] A. C. 229; Sinnertons *v.* Addie (Collieries), Ltd. (1920), 13 B. W. C. C. 500; Kennedy *v.* Hordon Collieries, Bamford *v.* Charlow & Sacriston Collieries, Bevan *v.* Joicey, [1925] 2 K. B. 438; Pearce *v.* Southern Ry. (1925), 95 L. J. K. B. 641.

2115. —— ——.]—A father earning wages may be in part dependent upon the earnings of his child within the meaning of Workmen's Compensation Act, 1897 (c. 37), & there is evidence upon which the father may be found to be in fact so dependent

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PART XIV. SECT. 2, SUB-SECT. 2.—B.

20991. *Independent of previous claims by deceased workman.*]—Under Workmen's Compensation Act, where notice of injury is given & a claim for compensation made, within the proper time, by a workman who has been injured, the proceedings may, upon the death of the workman, be continued on behalf of his dependants, without a fresh notice of claim.—*Re* MOFFATT & CROW'S NEST PASS COAL CO. (1913), 35 W. L. R. 126; 4 W. W. R. 1249; 12 D. L. R. 643; 18 B. C. R. 303.—**CAN.**

c. When right lost.]—MELLIDAY *v.* RAYMOND & DOHERTY CO. (N. B.), [1924] 3 D. L. R. 850.—**CAN.**

PART XIV. SECT. 2, SUB-SECT. 2.—C. (a).

2100i. *Question of fact.*]—Dependency is always a question of fact.—DOBBIE *v.* EGYPT & LEVANT S.S. CO., LTD., [1913] S. C. 364.—**SCOT.**

2100ii. ——.]—YOUNG *v.* NIDDRIE & BENHAR COAL CO., LTD., [1913] S. C. (H. L.) 66.—**SCOT.**

PART XIV. SECT. 2, SUB-SECT. 2.—C. (b).

p. General rule.]—A legal obligation to support, if such an obligation exists, is not of itself sufficient to found dependency.—LINDSAY *v.* M'GLASHAN & SON, LTD., [1908] S. C. 762; 45 Sc. L. R. 559; 15 S. L. T. 1011; 1 B. W. C. C. 85.—**SCOT.**

q. Receipt of money at irregular intervals.]—Appcts. received money at times from deceased in his lifetime, but there was no evidence of the money

& to be entitled to compensation for the death of the child, where it is proved that the child contributed to the family wages fund, that the father received the contribution & spent it in maintaining himself & his family.

Whether there is dependency is entirely a question of fact in each case, irrespective of the standard of living in the neighbourhood or the class to which the family belong. The Act sets up no such standard; the actual means of living & expenditure need alone be regarded.—MAIN COLLIERY CO. *v.* DAVIES, [1900] A. C. 358; 69 L. J. Q. B. 755; 83 L. T. 83; 65 J. P. 20; 16 T. L. R. 460; 2 W. C. C. 108, H. L.; *affg.* S. C. *sub nom.* DAVIES *v.* MAIN COLLIERY CO., LTD. (1899), 80 L. T. 674, C. A.

Annotations:—**Consd.** Howells *v.* Vivian (1901), 85 L. T. 529. **Folld.** French *v.* Underwood (1903), 5 W. C. C. 119. **Distd.** Osmond *v.* Campbell & Harrison, [1905] 2 K. B. 852. **Consd.** Hodgson *v.* West Stanley Colliery, [1910] A. C. 229; Turner *v.* Miller & Richards (1910), 3 B. W. C. C. 305; Briggs *v.* Mitchell (1911), 4 B. W. C. C. 400; Young *v.* Londonderry Collieries (1924), 17 B. W. C. C. 215; Peart *v.* Bolckow, Vaughan, [1925] 1 K. B. 399 **Refd.** Rees *v.* Penrikyber Navigation Colliery Co., [1903] 1 K. B. 259; Senior *v.* Fountains & Burnley (1907), 76 L. J. K. B. 928; McLean *v* Moss Bay Iron & Steel Co., [1909] 2 K. B. 521; New Monckton Collieries *v.* Keeling, [1911] A. C. 648; Tamworth Colliery Co. *v.* Hall, [1911] A. C. 665; Montgomery *v.* Blows, [1916] 1 K. B. 899; Sheldon *v.* Butterley Co., [1919] 2 K. B. 600; Sinnertons *v.* Addie (Collieries), Ltd. (1920), 13 B. W. C. C. 500; Dearie *v.* Barr & Thornton (1925), 18 B. W. C. C. 693; Kennedy *v.* Horden Collieries, Bamford *v.* Charlaw & Sacriston Collieries, Bevan *v.* Joicey, [1925] 2 K. B. 438; Pearce *v.* Southern Ry. (1925), 95 L. J. K. B. 641.

2116. —— ——.]—FRENCH *v.* UNDERWOOD (1903), 19 T. L. R. 416; 5 W. C. C. 119, C. A.

2117. —— ——.]—By Workmen's Compensation Act, 1923 (c. 42), s. 22: "For the purposes of the principal Act, a person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class & position":—*Held:* in applying the sect. to a case of partial dependency under para. 1 (*a*) (ii) of Sched. 1. to the Act of 1906, the following principles were applicable:—(*a*) The ct. must have regard to the standard of living that obtains among persons of the same class & position as the person claiming to be a dependant; (*b*) as a general rule where the ct. finds that appct., as the head of the family, has adopted a certain scale of expenditure, it ought, *primâ facie*, to regard that scale as fixing the standard of living of persons in the same class & position as appct., unless that scale is on the face of it grossly excessive or there is evidence to show that it is in fact higher than the standard at which the persons in that class generally aim; (*c*) there is no common standard for all persons engaged in the same employment. The scale of expenditure must in the case of any particular family depend on a variety of circumstances, such as the number of the children, their sexes & ages, & whether any &, if so, how many of them are working & receiving wages & their amount; (*d*) the word "necessaries" in s. 22 ought to receive the same meaning as has been attached to it in other connections, as, for example, in the case of contracts by infants, & must be held to include all such things as are reasonable necessary to maintain the particular person in his state, station & degree; (*e*) where the whole of the family expenditure, including the contribution to it by deceased, is upon necessaries, dependency is established within the terms of the sect.—KENNEDY *v.* HORDEN COLLIERIES, LTD., BAMFORD *v.* CHARLAW & SACRISTON COLLIERIES, LTD., BEVAN *v.* JOICEY (J.) & CO., [1925] 2 K. B. 438; 95 L. J. K. B. 307; 133 L. T. 502; 18 B. W. C. C. 139, C. A.

2118. —— ——.]—(1) The effect of Workmen's Compensation Act, 1923 (c. 42), s. 22, is to restore the rule for determining dependency adopted by the Ct. of Appeal in *Simmons* v. *White Bros.*, No. 2114, *ante*, but rejected by the House of Lords in *Main Colliery Co.* v. *Davies*, No. 2115, *ante*, namely, that in order to bring himself within the Workmen's Compensation Act, 1906 (c. 58), as a dependant an appct. for compensation must show that he was to some extent dependent on the earnings of deceased workman for the ordinary necessaries of life, having regard to his class & position in life.

(2) Whether a father is partially dependent upon the earnings of his son, a boy living with him & contributing to the common purse maintaining the family, is a question of fact to be decided after taking into consideration all the circumstances of the case.

Appct. was the father of a boy of fourteen years of age who was killed by an accident arising out of & in the course of his employment as a cleaner-out in resps.' pit. Appct. claimed compensation on the ground that he was partially dependent on the earnings of deceased. Appct. was a miner earning £3 11*s.* a week, with a free house & coals. His eldest son, aged sixteen years, worked in the pit & earned £1 0*s.* 6*d.* a week. Deceased earned 15*s.* 3*d.* a week. Neither the mother nor the youngest son, aged eleven years, earned anything. It was admitted that deceased would have advanced by rapid stages, as he grew & gained experience, to higher wages. The county ct. judge thought that the injury to the father at the time of deceased's death was small, & that to that slight extent there was dependency at the time of the death, but having regard to the fact that he was only fourteen years of age at the time, & in the ordinary course would have contributed increasing sums from time to time, he was of opinion that £50 added to the £15 which resps. had already paid for funeral expenses was "reasonable & proportionate to the injury." He accordingly made an award for £65:—*Held:* (3) upon the admitted facts, supplemented by his own knowledge & common sense, there was evidence before the county ct. judge upon which he could find that, after feeding & clothing the boy, there was a sufficient actual contribution by him to the provision of the ordinary necessaries of life for the family to constitute a basis for compensation; (4) the county court judge, having found that the father was a partial dependant of the boy, was entitled, in determining what sum he ought to allow for compensation which was "reasonable & proportionate to the injury" suffered by the father, to take into consideration, as he had done, the possibility of an increase in the earnings of the boy had he lived.

Once dependency had been proved the extent of the injury was not to be measured only by the immediate loss, but by the prospective loss which was involved in losing a son, who, after all, is the hope & promise of the future (POLLOCK, M.R.).—PEART *v.* BOLCKOW, VAUGHAN & CO., [1925] 1

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having been sent at regular intervals or in regular amounts:—*Held:* appcts. were, on the evidence, dependants within Workmen's Compensation Act, 1902.—FOLLIS *v.* SCHAAKE MACHINE WORKS (1908), 13 B. C. R. 471; 1 B. W. C. C. 442.—CAN.

r. *Reasonable expectation of benefit.*]—BROWN *v.* BRITISH COLUMBIA ELECTRIC RY. CO., LTD. (1910), 15 B. C. R. 350.—CAN.

Sect. 2.—Persons entitled to compensation: Sub-sect. 2, C. (b) & (c) i.]

K. B. 399; 94 L. J. K. B. 497; 132 L. T. 267; 69 Sol. Jo. 123; 17 B. W. C. C. 221, C. A.

Annotations:—As to (1) **Refd.** Kennedy v. Horden Collieries, Bamford v. Charlaw & Sacriston Collieries, Bevan v. Joicey, [1925] 2 K. B. 438. *As to* (2) **Refd.** Young v. Londonderry Collieries (1924), 17 B. W. C. C. 215.

2119. Dependency for necessaries—Not merely pecuniary benefit.]—SIMMONS v. WHITE BROTHERS, No. 2114, *ante*.

2120. —— What are necessaries.]—KENNEDY v. HORDEN COLLIERIES, LTD., BAMFORD v. CHARLAW & SACRISTON COLLIERIES, LTD., BEVAN v. JOICEY (J.) & CO., No. 2117, *ante*.

2121. —— Whole expenditure upon necessaries.] KENNEDY v. HORDEN COLLIERIES, LTD., BAMFORD v. CHARLAW & SACRISTON COLLIERIES, LTD., BEVAN v. JOICEY (J.) & CO., No. 2117, *ante*.

2122. —— In accordance with class & position in life.] PEART v. BOLCKOW, VAUGHAN & CO., No. 2118, *ante*.

2123. Means of living & expenditure.]—MAIN COLLIERY CO. v. DAVIES, No. 2115, *ante*.

2124. —— Scale adopted by applicant—Primâ facie reasonable.]—KENNEDY v. HORDEN COLLIERIES, LTD., BAMFORD v. CHARLAW & SACRISTON COLLIERIES, LTD., BEVAN v. JOICEY (J.) & CO., No. 2117, *ante*.

2125. —— No common standard—For all persons engaged in same employment.]—KENNEDY v. HORDEN COLLIERIES, LTD., BAMFORD v. CHARLAW & SACRISTON COLLIERIES, LTD., BEVAN v. JOICEY (J.) & CO., No. 2117, *ante*.

2126. Ability of applicant to support himself.]—The fact that the person alleged to be a "dependant" of a workman killed by an accident can maintain himself & his family without the assistance of deceased does not of itself debar him from being a dependant.—HOWELLS v. VIVIAN & SONS (1901), 85 L. T. 529; 50 W. R. 163; 18 T. L. R. 36; 4 W. C. C. 106, C. A.

Annotations:—**Refd.** French v. Underwood (1903), 5 W. C. C. 119; Hodgson v. West Stanley Colliery, [1910] A. C. 229.

2127. ——.]—Appct. claimed compensation as sole dependant of her father, who was killed by accident at resps.' colliery. Nine years before her father's death appct., who was then in domestic service, left her situation to go home & nurse her mother. The mother died a year afterwards, & appct. then remained at home to keep her father's house. He clothed & provided her with board & lodging & gave her pocket money. She was a strong, healthy woman, & the county ct. judge, being of opinion that she was able to maintain herself by her own work & that her father's earnings were not therefore the sole source to which she could have looked for maintenance either at the time of his death or during the time when she kept his house, held that she was only a partial dependant, & awarded her compensation on that footing:—*Held:* it was irrelevant to consider whether appct. could have supported herself. She was in fact, at the time of her father's death, totally dependent on his earnings.—SIMMS v. LILLESHALL COAL CO., [1917] 2 K. B. 368; 86 L. J. K. B. 965; 117 L. T. 231; 10 B. W. C. C. 321, C. A.

Annotation:—**Distd.** Mitchell v. Scottish Iron & Steel Co. (1920), 13 B. W. C. C. 415.

2128. Money due to dependants—At workman's death.]—In the case of the death of a workman leaving dependants, the test by which to determine whether they were wholly dependent on his earnings at the time of his death, within the meaning of Workmen's Compensation Act, 1897 (c. 37), is whether what the workman was earning at the time of his death was the sole source to which they could look for maintenance at that time, & the fact that money came to them on the death of the workman cannot therefore be taken into consideration.—PRYCE v. PENRIKYBER NAVIGATION COLLIERY CO., LTD., [1902] 1 K. B. 221; 71 L. J. K. B. 192; 85 L. T. 477; 66 J. P. 198; 50 W. R. 197; 18 T. L. R. 54; 46 Sol. Jo. 49; 4 W. C. C. 115, C. A.

Annotation:—**Refd.** Hodgson v. West Stanley Colliery, [1910] A. C. 229.

(c) *In Particular Relationships.*

i. *Wife.*

See Workmen's Compensation Act, 1925 (c. 84), s. 4.

2129. Presumption of dependency.]—COULTHARD v. CONSETT IRON CO., No. 2133, *post*.

2130. ——.]—STANLAND v. NORTH EASTERN STEEL CO., LTD., [1907] 2 K. B. 425, n., C. A.

Annotations:—**Follid.** Williams v. Ocean Coal Co., [1907] 2 K. B. 422. **Refd.** New Monckton Collieries v. Keeling, [1911] A. C. 648.

2131. ——.]—WILLIAMS v. OCEAN COAL CO., LTD., No. 2134, *post*.

2132. ——.]—NEW MONCKTON COLLIERIES, LTD. v. KEELING, No. 2143, *post*.

2133. Existence of dependency—Husband & wife living apart—No contribution to wife's support.]—Upon a claim for compensation under Workmen's Compensation Act, 1897 (c. 37), by the widow of deceased workman, it appeared that she had lived with & been maintained by him from their marriage up to June, 1904, when being out of work he left her & never afterwards contributed to her maintenance. Her only means of subsistence, after her husband left her, consisted of casual work & the charitable gifts of relatives, & she was for a week in the workhouse. About three weeks before his death, which occurred in Oct. 1904, the husband obtained employment, & he was earning wages when his death was occasioned by an accident arising out of & in the course of his employment. The widow stated in evidence that, before her husband's death, she was expecting him back every day to provide a home. The county court judge found that she was dependent on her husband's earnings at the time of his death, & accordingly awarded her compensation:—*Held:* the facts justified his finding.

I think that the primary obligation of the husband to support his wife makes her a dependant unless there are some other means of subsistence upon which she can & does in fact rely in substitution for the legal obligation of the husband to

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PART XIV. SECT. 2, SUB-SECT. 2.—C. (c) i.

2129 i. *Presumption of dependency.*] In workers' compensation cases the legal presumption that a wife is dependent on her husband is sufficiently rebutted by the fact that the wife is living in adultery apart from her husband.—ALLAN v. OROYA BROWNHILL CO., LTD. (1909), 12 W. A. L. R. 1.—**AUS.**

2129 ii. ——.]—KELLY v. HOPKINS, [1908] 2 I. R. 84.—**IR.**

2129 iii. ——.]—On a claim for compensation it was contended that pltf. had deserted her husband without just cause:—*Held:* the onus of proof rested on deft., & in absence of such evidence, pltf. must be presumed to have been a total dependant on her husband.—TURPIN v. RANGATANA TIMBER CO., LTD., [1921] N. Z. L. R. 15.—**N.Z.**

2133 i. *Existence of dependency—Husband & wife living apart—No contribution to wife's support.*]—QUEEN v. CLARKE, [1906] 2 I. R. 135.—**IR.**

2133 ii. ——.]—SNEDDON v. ADDIE (1904), 6 F. (Ct. of Sess.) 992.—**SCOT.**

2133 iii. ——.]—*Held:* a woman who had for fourteen years lived apart from her husband, & was supported by an illegitimate son, was

support her (COLLINS, M.R.).—COULTHARD *v.* CONSETT IRON CO., [1905] 2 K. B. 869; 75 L. J. K. B. 60; 93 L. T. 756; 54 W. R. 139; 22 T. L. R. 25; 50 Sol. Jo. 41; 8 W. C. C. 87, C. A.

Annotations:—**Consd.** Williams *v.* Ocean Coal Co., [1907] 2 K. B. 422; New Monckton Collieries *v.* Keeling, [1911] A. C. 648.

2134. —— —— ——.]—(1) Dependency within the meaning of Workmen's Compensation Act, 1897 (c. 37), s. 7 (2), must always be a mixed question of law & fact. There is a presumption in favour of the dependency of the wife upon her husband's earnings, which is not rebutted by proof that at the time of his death he was not in fact supporting her.

(2) The rule in *Villar* v. *Gilbey*, [1907] A. C. 139, that a child *en ventre sa mère* shall be deemed to have been born, where it is for its benefit that it should be born, applies in the case of a posthumous child, & consequently such child is a dependant within the Act.

Appct. for compensation was the widow of a workman, to whom she had been married in Mar. 1903, & who was killed in Apr. 1906. The husband had not kept up a home for the wife, & had not since 1904 contributed to her support, she having in that year returned to her parents. The wife in Jan. 1906, went into domestic service, receiving £1 a month & board wages, & was in such service at the time of her husband's death. There was also a child *en ventre sa mère* at such time, who was born in Sept. 1906. The county ct. judge having decided that neither the widow nor the child were dependants within the Act, the Ct. of Appeal, reversing his decision, held, that he was wrong: (*a*), in ignoring the presumption of dependency in the case of the wife; & (*b*) in treating as conclusive the fact that the wife was not receiving any part of her husband's earnings at his death; &, instead of sending the case back, the ct. held that, as a matter of legal inference upon the facts in evidence, there was total dependency both in the case of the widow & of the posthumous child.—WILLIAMS *v.* OCEAN COAL CO., LTD., [1907] 2 K. B. 422; 76 L. J. K. B. 1073; 97 L. T. 150; 23 T. L. R. 584; 51 Sol. Jo. 551; 9 W. C. C. 44, C. A.

Annotations:—*As to* (1) **Dbtd.** New Monckton Collieries *v.* Keeling, [1911] A. C. 648. **Refd.** Toole *v.* Isle of Erin (Owners) (1909), 3 B. W. C. C. 110. *As to* (2) **Apld.** Schofield *v.* Orrell Colliery Co., [1909] 1 K. B. 178.

2135. —— —— —— **No application by wife.**]—NEW MONCKTON COLLIERIES, LTD. *v.* KEELING, No. 2143, *post*.

2136. —— —— —— **Except negligible sum.**]—A collier deserted his wife, & made no provision for her, so that she had to go to the workhouse. Seven years afterwards he was killed at a colliery. He had only made her two payments during the whole time, totalling 9*s*. 6*d*. The county ct. judge found the widow was not a dependant:—*Held:* there was evidence to support the finding.—DEVLIN *v.* PELAW MAIN COLLIERIES (1912), 5 B. W. C. C. 349, C. A.

2137. —— —— —— **Wife supporting herself.**]—Several years before a workman's death his wife voluntarily left him, & persistently declined to return. Her daughter, aged sixteen at the time of the death, went with the mother. The mother was supported from property of her own, & the daughter was supported for a time to some extent from her own earnings, & otherwise by her mother. The workman did not contribute. The county ct. judge found that neither wife nor daughter was dependent on the workman at the time of the death:—*Held:* there was evidence to support the finding.—POLLED *v.* GREAT NORTHERN RY. CO. (No. 2) (1912), 1 L. J. C. C. 70; 5 B. W. C. C. 620, C. A.

2138. Whole or partial dependency—Independent income or earnings of wife.]—A widow & children of deceased workman are none the less "dependants wholly dependent upon his earnings" within the meaning of Schedule I., para. 1 (*a*) (i), of the Workmen's Compensation Act, 1897 (c. 37), because the workman has been enabled, by the receipt of moneys from his wage-earning sons or of moneys coming to him from other channels, to augment the fund out of which he has maintained his household. If, however, a workman's wife has, at the time of his death, independent means of support of any kind, which are not derived through him & which he could not have appropriated without her consent, such as private income or earnings of her own, the case is one of partial dependence on her husband's earnings.—SENIOR *v.* FOUNTAINS & BURNLEY, LTD., [1907] 2 K. B. 563; 76 L. J. K. B. 928; 97 L. T. 562; 23 T. L. R. 634; 51 Sol. Jo. 590; 9 W. C. C. 116, C. A.

Annotations:—**Apld.** McLean *v.* Moss Bay Iron & Steel Co., [1909] 2 K. B. 521. **Overd.** Hodgson *v.* West Stanley Colliery, [1910] A. C. 229. **Consd.** Pearce *v.* Southern Ry. (1925), 95 L. J. K. B. 641.

2139. —— —— **Sufficient for own maintenance—No earnings at time of accident.**]—A husband & wife were living together & the husband earned very little, not sufficient to support them both. Some time previously to her husband's death the wife had earned good wages, enough to keep herself, but at the time of the accident she was earning nothing. The county ct. judge found that the wife was not dependent:—*Held:* there being some evidence of partial dependency & no evidence to the contrary the case must be remitted for re-hearing.—SMITH *v.* COPE (1913), 6 B. W. C. C. 569, C. A.

2140. —— **Workmen's income supplemented—By sources other than own savings—Earnings of other members of family.**]—SENIOR *v.* FOUNTAINS & BURNLEY, LTD., No. 2138, *ante*.

2141. —— —— ——.]—MCLEAN *v.* MOSS BAY HEMATITE & STEEL CO., LTD., No. 2162, *post*.

2142. —— —— —— ——.]—HODGSON *v.* WEST STANLEY COLLIERY, No. 2161, *post*.

2143. —— **Refusal of husband to support wife—Probability of enforcement of obligation.**]—Appct. who was married in 1881, left her husband in 1888 on account of his cruelty, & had never since lived with him. There was no agreement for separation; appct. never made any application for maintenance against her husband, who never in fact paid appct. anything for her own or her children's support, & she supported herself by her own exertions. In 1910 the husband met with a fatal accident while employed at resps.' collieries. In a claim by appct. for compensation under Workmen's Compensation Act, 1906 (c. 58), in respect of her husband's death:—*Held:* appct. was not dependent upon her husband & the county ct. judge was

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not wholly or in part dependent of the earnings of her husband, & was not entitled to compensation under Workmen's Compensation Act, 1897.—TURNERS, LTD. *v.* WHITEFIELD (1904), 6 F. (Ct. of Sess.) 822; 41 Sc. L. R. 631; 12 S. L. T. 131.—SCOT.

2133 iv. —— —— ——.]—LINDSAY *v.* M'GLASHAN & SON, LTD., [1908] S. C. 762.—SCOT.

2136 i. —— —— —— *Except negligible sum.*]—CUNNINGHAM *v.* M'GREGOR & CO. (1901), 3 F. (Ct. of Sess.) 775; 38 Sc. L. R. 574; 9 S. L. T. 36.—SCOT.

i. —— ——.]—BAIRD & CO., LTD. *v.* BIRSZTAN (1906), 8 F. (Ct. of Sess.) 438; 43 Sc. L. R. 300; 13 S. L. T. 812.—SCOT.

Sect. 2.—Persons entitled to compensation: Sub-sect. 2, C. (c) i., ii. & iii.]

wrong in making an award of compensation in her favour. There is no presumption of law that a wife is dependent upon her husband's earnings merely because of his legal obligation to maintain her, but the existence of this obligation, the probability that it will be discharged, either voluntarily or under compulsion, & the probability that the wife will ever enforce her right if the obligation be not discharged voluntarily, are all matters proper to be considered by the arbitrator in determining the question of fact whether or not the wife, at the time of her husband's injury, looked to his earnings for her maintenance & support in whole or in part.—NEW MONCKTON COLLIERIES, LTD. *v.* KEELING, [1911] A. C. 648; 80 L. J. K. B. 1205; 105 L. T. 337; 27 T. L. R. 551; 55 Sol. Jo. 687; 4 B. W. C. C. 332, H. L.; *revsg.* S. C. *sub nom.* KEELING *v.* NEW MONCKTON COLLIERIES, LTD., [1911] 1 K. B. 250, C. A.

Annotations:—**Followed.** Dobbles *v.* Egypt & Levant S.S. Co. (1912), 6 B. W. C. C. 348; Lee *v.* Bessie (Owner), [1912] 1 K. B. 83; Polled *v.* G. N. Ry. (No. 2) (1912), 5 B. W. C. C. 620. **Distd.** Potts *v.* Niddrie & Benhar Coal Co., [1913] A. C. 531. **Refd.** Briggs *v.* Mitchell (1911), 4 B. W. C. C. 400; Lloyd *v.* Powell Duffryn Steam Coal Co., [1914] A. C. 733; Montgomery *v.* Blows, [1916] 1 K. B. 899; Fraser *v.* Fairfield Shipbuilding & Engineering Co. (1918), 12 B. W. C. C. 447; Sinnertons *v.* Addie (Collieries), Ltd. (1920), 13 B. W. C. C. 500; Dearie *v.* Barr & Thornton (1925), 18 B. W. C. C. 693.

ii. *Child.*

See Workmen's Compensation Act, 1925 (c. 84), s. 4.

Illegitimate children.] —*See* Sub-sect. 2, A., *ante*.

2144. Legal presumption of dependency—Infant children.]—LEE *v.* BESSIE (OWNER), No. 2146, *post*.

2145. Dependency not established—No contribution from father—Child supported by own earnings & by mother.]—POLLED *v.* GREAT NORTHERN RY. CO. (No. 2), No. 2137, *ante*.

2146. —— ——.]—The widow of a workman applied on behalf of her two infant children for compensation under Workmen's Compensation Act, 1906 (c. 58), in respect of his death in 1909 by an accident arising out of & in the course of his employment. Appct. had been deserted by her husband in 1903 & had gone to live with another man, taking her children with her. There was no evidence that deceased had ever supported the children. The county ct. judge found that the children were dependants & awarded them compensation. An appeal by the employer was allowed on the ground that dependency was now a question of fact, & that there was no evidence to support the decision of the county ct. judge.

The rule that there is no legal presumption of dependency applies to the case of infant children. —LEE *v.* BESSIE (OWNER), [1912] 1 K. B. 83; 81 L. J. K. B. 114; 105 L. T. 659; 5 B. W. C. C. 55; 12 Asp. M. L. C. 89, C. A.

Annotation:—**Refd.** Potts *v.* Niddrie & Benhar Coal Co., [1913] A. C. 531.

2147. —— Applicant married & living with husband—Father a lodger.]—Appct., a married woman living with her husband & five children, claimed to be partially dependent upon her father who was killed by an accident arising out of & in the course of his employment by resp. For five years before his death deceased had lodged with appct. & her husband, paying 13*s.* a week towards the household expenses, rendering certain services, & making occasional presents to his daughter. Her husband earned £2 9*s.* a week, out of which he allowed her 23*s.* for the housekeeping of the family, she being under the mistaken idea that his wages were only 30*s.* a week. The household expenses amounted to 36*s.* a week. In an arbitration under Workmen's Compensation Act, 1906 (c. 58), the county ct. judge estimated that the total profit derived from the excess of the father's payments, services, & gifts was about 3*s.* a week; but he found as a fact that appct. was not a dependant:—*Held:* his award was right. The husband provided the home & the whole means of living; if there was any profit arising from deceased's payments it belonged to the husband & if there was any dependency it was that of the husband, who could not claim as a dependant under the Act.—MONTGOMERY *v.* BLOWS, [1916] 1 K. B. 899; 85 L. J. K. B. 794; 114 L. T. 867; 32 T. L. R. 387; 60 Sol. Jo. 427; 9 B. W. C. C. 347, C. A.

Annotation:—**Distd.** Smith *v.* S.S. Gwendalough (1919), 122 L. T. 228.

2148. Whole or partial dependency—Profit on payment by lodger.]—Appct. who was thirty-nine years of age, was the only daughter of deceased, & lived with her father who was very old & who was the tenant of the house & owned the furniture in it. He earned 18*s.* per week which he gave to appct. The rent & rates of the house came to about 3*s.* 6*d.* per week. Appct. said in evidence, "I had a lodger. He paid 10*s.* for board & lodgings. I kept the house. We had not lodgers often. He had been with me over a year. Out of the 10*s.* 4*s.* or 5*s.*, not more, was profit. After father's death he stayed on. I have kept on the house since with the lodger":—*Held:* appct. was wholly dependent upon the earnings of deceased.—MARSH *v.* BODEN (1905), 7 W. C. C. 110, C. A.

2149. —— Parent's means supplemented—By sources other than own earnings—Earnings of other members of family.]—SENIOR *v.* FOUNTAINS & BURNLEY, LTD., No. 2138, *ante*.

2150. —— —— —— ——.]—HODGSON *v.* WEST STANLEY COLLIERY, No. 2161, *post*.

2151. —— Desertion by father—Decree for alimony.]—In Mar. 1907, a workman deserted his wife & children. Up to 1909 he occasionally made small payments to his wife & two younger children, amounting in all to £2, which was applied towards the support of the family. The payments then ceased, & in Sept. 1909, the wife obtained a decree against him for aliment of the two younger children who were in pupillarity & recovered 17*s.* from his employers by arrestment used on the decree. The workman then disappeared to avoid further diligence & was not traced until his death in April 1911, by accident arising out of & in the course of his employment. The wages due to him on his

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PART XIV. SECT. 2, SUB-SECT. 2.—C. (c) ii.

2149 i. *Whole or partial dependency—Parent's income supplemented—By sources other than own earnings—Earnings of other members of family.]*—SINNERTONS *v.* ADDIE (ROBERT) & SONS, LTD., [1920] S. C. 660; 57 Sc. L. R. 585; [1920] 2 S. L. T. 153; 13 B. W. C. C. 500.—**SCOT.**

2149 ii. —— —— —— ——.]—DEARIE *v.* BARR & THORNTON, LTD., [1925] S. C. 591.—**SCOT.**

a. —— *Desertion by father.]*—YOUNG *v.* NIDDRIE & BENHAR COAL CO., LTD., [1912] S. C. 644; 49 Sc. L. R. 518; [1912] 1 S. L. T. 274.—**SCOT.**

b. —— *Child working for father.]*—A workman's daughter, who had previously been earning wages, remained at home after her mother's death, to keep her father's house, getting from him board, lodging, & clothing, but no wages. The workman was killed by accident in the course of his employment:—*Held:* the daughter was a dependant of the workman in the sense of the Workmen's Compensation Act, 1897.—MOYES *v.* DIXON (1905), 7 F. (Ct. of Sess.) 386.—**SCOT.**

c. *Meaning of "children."]* —

death were paid to his wife. From the date of his desertion the wife & family were supported almost entirely from the earnings of the two elder children. These contributions were not made *ex pietate* & could have been recovered under the decree for aliment. The widow claimed compensation under Workmen's Compensation Act, 1906 (c. 58), on behalf of her two pupil children:—*Held:* there was evidence upon which the arbitrator could find that these children were wholly dependent on the earnings of their father.—POTTS *v.* NIDDRIE & BENHAR COAL CO., LTD., [1913] A. C. 531; 82 L. J. P. C. 147; 109 L. T. 568; 29 T. L. R. 626; *sub nom.* YOUNG *v.* NIDDRIE & BENHAR COAL CO., LTD., 57 Sol. Jo. 685; 6 B. W. C. C. 774, H. L.

Annotation:—**Refd.** Lloyd *v.* Powell Duffryn Steam Coal Co., [1914] A. C. 733.

2152. —— Illegitimate child—Posthumous—Date of mother's marriage fixed.]—A posthumous illegitimate child of a workman killed by accident claimed compensation as a dependant. The workman had been engaged to the mother for two years, & at the time of his death had publicly announced his intention of marrying her, made all arrangements & fixed the date of the ceremony. Four days before this date he was killed. The county ct. judge found that the child was a partial dependant only:—*Held:* he had misdirected himself, & upon the evidence before him the child was wholly dependent.—HARRIS *v.* POWELL DUFFRYN STEAM COAL CO., LTD. (1915), 9 B. W. C. C. 93, C. A.

2153. —— —— Extraneous allowance received by mother in respect of legitimate children.]—TAYLOR *v.* POWELL DUFFRYN STEAM COAL CO., LTD., No. 2084, *ante*.

iii. *Parent.*

See Workmen's Compensation Act, 1925 (c. 84), s. 4.

2154. Partial dependency—Contribution by child to general family wages—Contribution spent in maintenance of family.]—MAIN COLLIERY CO. *v.* DAVIES, No. 2115, *ante*.

2155. —— —— ——.]—Appct. was a boatman. He had a son fifteen years of age who helped him with the boats, earning wages which the father computed to be more than £2 per week. Appct. did not actually pay his son any wages while he was working with him. But he made an estimate of what the son was entitled to receive, deducted therefrom £2, & gave the remainder to the son by way of pocket money.

Appct. who was living apart from his wife had also a daughter six & a half years of age. He was tenant of a house of which he paid the rent. He employed a married woman who had two infant children as his housekeeper. He arranged to pay her £5 a week towards the housekeeping, she bearing the rest of the expense thereof out of the separation allowance which she was receiving owing to her husband being a prisoner in Germany. The £2 per week to which appct. reckoned that the son was entitled went in support of the joint household, including that son & appct. & his other child, as well as the three other occupants of the house. The son subsequently left appct.'s employment & entered that of resps., who were shipowners. While working as a seaman on board one of their steamships he met with his death as the result of an "accident arising out of & in the course of" his employment, within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 1. His wages on the ship had amounted to £3 per week. Thereupon a claim was made by appct. against resps. for compensation to him as a partial dependant upon the earnings of his son, which was followed in due course by a request for arbn. under the Act.

It was decided by the county ct. judge that appct. was entitled to £1 per week for three years, being the amount of the loss which he had sustained through the death of his son, inasmuch as the maintenance of the son did not amount to as much as £2 per week, & the balance went towards the support of appct. & his other child:—*Held:* there was a reasonable expectation of payments equivalent to £2 per week being continued by the son if he had lived, either while he was at sea or when he returned to his father's employment; appct. had therefore been deprived of what remained after the money was expended for the maintenance of the son in the joint household, & to that extent he was a dependant upon the earnings of the son; & accordingly he was entitled to receive the compensation which had been awarded to him.—SMITH *v.* GWENDALOUGH (OWNERS) (1919), 122 L. T. 228; 12 B. W. C. C. 380, C. A.

2156. —— —— —— Father able to maintain family out of own earnings.]—PEARCE *v.* SOUTHERN RY. CO., No. 2111, *ante*.

2157. —— —— Cessation of contribution prior to death.]—A father claimed compensation as a dependant of his son, who had paid considerable sums to the family fund while employed as a fisherman in 1906, 1907 & 1908; the last payment was made early in 1909. In the summer of that year he made two voyages of a month, receiving £2 5*s.* a month wages & his keep. He did not send any part of the £2 5*s.* home to his father, & on the last of these voyages he was drowned:—*Held:* there was evidence to justify the judge in finding that the father was a partial dependant.—ROBERTSON *v.* HALL BROTHERS S.S. CO. (1910), 3 B. W. C. C. 368, C. A.

2158. —— —— ——.]—A marine engineer who lived at home with his mother when not at sea, & contributed regularly to her support, was employed to take a tug out to the Mediterranean. He gave his mother £7 before he left, & while on the voyage wrote to his sister, saying that if he could find work to do, he might stay in Crete. He sent no more money but was drowned on the voyage out. Two years later, on hearing for the first time of his death, his mother claimed compensation. The county ct. judge held there was no dependency proved:—*Held:* there was ample evidence to prove partial dependency, & no evidence that that dependency had ceased.—NASH *v.* MCALPINE (SIR ROBERT) & SONS, LTD. (1925), 133 L. T. 647; 18 B. W. C. C. 268, C. A.

2159. —— —— Equivalent to cost of own maintenance—Voluntary services by child to parent.]—TAMWORTH COLLIERY CO., LTD. *v.* HALL, No. 3350, *post*.

Held: the words "child" & "children" as used in Workmen's Compensation Act, 1923, s. 2, are not limited to the immediate descendants of the workman, but include such of his dependants as are in fact under fifteen years of age.—CAMPBELL *v.* PORTLAND COLLIERY CO., LTD., [1926] S. C. 512. —**SCOT.**

PART XIV. SECT. 2, SUB-SECT. 2.—C. (c) iii.

2154 i. *Partial dependency—Contribution by child to general family wages—Contribution spent in maintenance of family.*]—The father of a boy whose wages were handed each week to his mother & used in keeping the family, held to be a dependant within Workmen's Compensation Act.—MILLS *v.* SHERWOOD STORES, LTD., [1918] 1 W. W. R. 889; 11 Sask. L. R. 119.—**CAN.**

2154 ii. —— —— ——.]—ASHCROFT *v.* CABLE & CO. (NO. 2) (1904), 23 N. Z. L. R. 625.—**N.Z.**

Sect. 2.—Persons entitled to compensation: Sub-sect. 2, C. (c) iii. & iv., & D. Sect. 3: Sub-sect. 1. A.]

2160. —— Parent inmate of workhouse—No contribution to maintenance.]—A pauper inmate of a workhouse, towards whose maintenance no contribution is in fact made by his son, is not as a matter of law in part dependent on the son's earnings within the meaning of Workmen's Compensation Act, 1897 (c. 37), s. 7 (2), notwithstanding the son's indirect obligation under the poor law to contribute to his father's maintenance.—REES *v.* PENRIKYBER NAVIGATION COLLIERY CO., [1903] 1 K. B. 259; 72 L. J. K. B. 85; 87 L. T. 661; 67 J. P. 231; 51 W. R. 247; 19 T. L. R. 113; 1 L. G. R. 173; 5 W. C. C. 117, C. A.

Annotations:—**Distd.** Coulthard *v.* Consett Iron Co., [1905] 2 K. B. 869. **Reid.** Williams *v.* Ocean Coal Co. (1907), 97 L. T. 150; Hodgson *v.* West Stanley Colliery Co. (1910), 102 L. T. 194.

2161. —— Of mother on children—In addition to dependency on husband.]—(1) A father & his two sons, workmen in the same employment, were killed by one & the same accident. The earnings of all three formed a common fund out of which the whole family was maintained. The mother & her surviving children, none of whom earned wages, were as a matter of fact dependent upon the earnings of each & all of the three deceased:—*Held:* the mother & her surviving children were entitled to compensation in respect to each of the three deaths under the Workmen's Compensation Act, 1906 (c. 58).

Senior v. *Fountains*, No. 2138, *ante*, overruled.

(2) There is no warrant in the Workmen's Compensation Act, 1906 (c. 58), for refusing the maximum amount of compensation in cases of partial dependency.—HODGSON *v.* WEST STANLEY COLLIERY, [1910] A. C. 229; 79 L. J. K. B. 356; 102 L. T. 194; 26 T. L. R. 333; 54 Sol. Jo. 403; 3 B. W. C. C. 260; 74 J. P. Jo. 124, H. L.

Annotations:—*As to* (1) **Folld.** McLean *v.* Moss Bay Hematite & Steel Co. (1910), 54 Sol. Jo. 441. **Consd.** Briggs *v.* Mitchell (1911), 4 B. W. C. C. 400; New Monckton Collieries *v.* Keeling, [1911] A. C. 648. **Apld.** Pearce *v.* Southern Ry. (1925), 95 L. J. K. B. 641. **Reid.** Hall *v.* Tamworth Colliery Co., [1911] 1 K. B. 311; Montgomery *v.* Blows, [1916] 1 K. B. 899; Sheldon *v.* Butterley Co., [1919] 2 K. B. 600; Sinnertons *v.* Addie (Collieries), Ltd. (1920), 13 B. W. C. C. 500; Dearie *v.* Barr & Thornton (1925), 18 B. W. C. C. 693. *As to* (2) **Reid.** Potts *v.* Niddrie & Benhar Coal Co., [1913] A. C. 531.

2162. —— —— ——.]—M. had married a woman with an illegitimate son, of whom he was not the putative father. The three lived together, the son paying his wages to his mother, who put them into the common fund out of which the whole family was maintained. The son was killed by accident, & M. & his wife claimed compensation as "dependants":—*Held:* as dependency was a question of fact in each case, & resps., by failing to appear on the appeal, admitted that on the facts in this case the mother was dependent in part on her son's earnings, she was entitled to compensation.—MCLEAN *v.* MOSS BAY HEMATITE & STEEL CO., LTD. (1910, Apr. 15), 54 Sol. Jo. 441; 3 B. W. C. C. 402, H. L.; *revsg.*, [1909] 2 K. B. 521, C. A.

Annotations:—**Overd.** Hodgson *v.* West Stanley Colliery (1910, Mar. 3), [1910] A. C. 229. **Reid.** Toole *v.* Isle of Erin (Owners) (1909), 3 B. W. C. C. 110; New Monckton Collieries *v.* Keeling, [1911] A. C. 648; Scott *v.* L. & N. E. Ry., [1926] 2 K. B. 204.

2163. —— In respect of each member deceased—Several members killed by same accident.]—HODGSON *v.* WEST STANLEY COLLIERY, No. 2161, *ante*.

2164. —— Award not expressly based thereon—Presumption of such basis.]—A widow was solely dependent for the upkeep of herself & two daughters on the money derived from her three children. Each daughter brought 6*s.* a week, & lived with their mother. The son lived apart, & brought 10*s.* a week. The son was killed by accident, & his mother claimed as dependant. There was no direct evidence of total dependency on the son's earnings, & the county ct. judge, without actually finding partial dependency, stated that the only question for him to decide was as to the amount of compensation to be paid, & he awarded £90:—*Held:* the case was clearly dealt with on the basis of partial dependency, & there was no misdirection.—FORD *v.* OAKDALE COLLIERY CO., LTD. (1915), 8 B. W. C. C. 127, C. A.

2165. —— Contribution by two children—Equivalent sum secured to parent on cessation by one child—Death of other child.]—A woman lived at home with her two sons who paid for the upkeep & maintenance of the home. One of the sons married & left his mother. In his place came two lodgers on terms that they contributed to the cost of coal used in the house, rent, & so forth, much as the son had done before he married. A few days later the other son was killed. The mother claimed compensation as a dependant. The county ct. judge found partial dependency only, & awarded compensation on that basis. The mother appealed on the ground that she was wholly dependent:—*Held:* the question was one entirely of fact, & there was evidence to support the county ct. judge's finding.—BROOK *v.* LODGE (HENRY), LTD. (1917), 10 B. W. C. C. 574, C. A.

iv. *Other Relationships.*

See Workmen's Compensation Act, 1925 (c. 84), s. 4.

2166. Sister—Married & living with husband—Brother lodging with applicant—Payments in excess of cost of lodging.]—Appct. who lived with her husband in his house claimed compensation as being a partial dependant of her brother, a seaman who, when at home, boarded & lodged with appct., his sister. He paid her sums of money in excess of the amount required for his board & lodging, as he intended that appct. should spend the surplus as she wished:—*Held:* appct. could not be partially dependent on the brother as she was wholly dependent on her husband with whom she lived.—TOOLE *v.* ISLE OF ERIN (OWNERS) (1909), 3 B. W. C. C. 110, C. A.

2167. —— Under fifteen.]—Under Workmen's Compensation Act, 1923 (c. 42), s. 2 (now contained in Workmen's Compensation Act, 1925 (c. 84), s. 8), where a workman at his death leaves a widow or other member of his family, not being a child under the age of fifteen, wholly or partially

2161i. ——*Of mother on children—In addition to dependency on husband.*]—KILGARIFF *v.* ASSOCIATED GOLD MINES OF WESTERN AUSTRALIA, LTD. (1910), 12 W. A. L. R. 73.—**AUS.**

2161ii. —— —— ——.]—BARRETT *v.* NORTH BRITISH RY. CO. (1899), 1 F. (Ct. of Sess.) 1139; 36 Sc. L. R. 874; 7 S. L. T. 88.—**SCOT.**

d. —— —— ——.]—HEALY *v.* REILLY, [1917] 2 I. R. 446.—**IR.**

e. —— *Of father on child.*]—ARROL & CO., LTD. *v.* KELLY (1905), 7 F. (Ct. of Sess.) 906; 42 Sc. L. R. 695; 13 S. L. T. 261.—**SCOT.**

f. *Total dependency—Of mother—Mother in prison.*]—ADDIE & SONS COLLIERIES, LTD. *v.* TRAINER (1904), 7 F. (Ct. of Sess.) 115; 42 Sc. L. R. 85; 12 S. L. T. 460.—**SCOT.**

g. —— ——.]—RINTOUL *v.* DALMENY OIL CO., LTD., [1908] S. C. 1025.—**SCOT.**

h. *Occasional sums remitted to parents.*]—VARESICK *v.* BRITISH COLUMBIA COPPER CO., LTD. (1906), 12 B. C. R. 286.—**CAN.**

PART XIV. SECT. 2, SUB-SECT. 2.—C. (c) iv.

k. *Sister.*]—DUFFY *v.* MORGANS (1907), 9 W. A. L. R. 203.—**AUS.**

l. *Husband.*]—The value of services rendered by a wife in the management of her husband's house is to be reckoned in determining the extent

dependent upon his earnings, & in addition leaves one or more children under the age of fifteen so dependent, then an extra sum calculated in accordance with the sect. is to be added to the compensation payable as an allowance for the children:—*Held:* the words "child" & "children" are to be construed in both parts of the sect. in the same sense, & are not to be confined to the workman's own lineal descendants, but include any young persons under the age of fifteen who are within the definition of "dependants" & "member of a family" in sect. 13 of the principal Act; therefore, the workman's two sisters, children under the age of fifteen, being partially dependent upon his earnings, & members of his family were entitled to the extra allowance provided by the section.—FAULKNER *v.* SUTTON (OWNERS), [1927] 1 K. B. 207; *sub nom.* FAULKNER *v.* OVERTON S.S. Co., 96 L. J. K. B. 123; 135 L. T. 756, C. A.

D. Devolution of Right.

See 1925 Act (c. 84), s. 2, Sched. II (2).

2168. On death of dependant—To personal representative—Death before award.]—Where the sole dependant of deceased workman, whose death was caused by an accident arising out of & in the course of his employment, made a claim against his employers for compensation under Workmen's Compensation Act, 1897 (c. 37), but died before any award was made in respect of that claim:—*Held:* the right to compensation survived, & passed to the legal personal representative of deceased dependant.—DARLINGTON *v.* ROSCOE & SONS, [1907] 1 K. B. 219; 76 L. J. K. B. 371; 96 L. T. 179; 23 T. L. R. 167; 51 Sol. Jo. 130; 9 W. C. C. 1, C. A.

Annotations:—**Apprvd.** United Collieries *v.* Simpson, [1909] A. C. 383. **Refd.** Tomalin *v.* Pearson, [1909] 2 K. B. 61.

2169. —— —— Death before claim.]—The right of a dependant of a deceased workman to make a claim & take proceedings under Workmen's Compensation Act, 1906 (c. 58), passes to the exor. of the sole dependant who has died without having made a claim.

The maxim *Actio personalis moritur cum persona* is not applicable to cases under the Workmen's Compensation Act, 1906 (c. 58).

A workman in the employment of applts., a colliery co., was knocked down by a waggon while in the course of his employment on July 9, 1907. He died of his injuries on July 14. His mother, alleged to have been dependent upon him, died on Oct. 16, 1907, without making any claim upon applts. The extrix. made a claim on Dec. 10, 1907, under the Workmen's Compensation Act, 1906 (c. 58), as representative of the mother:—*Held:* the claim must be admitted in law.—UNITED COLLIERIES, LTD. *v.* SIMPSON, [1909] A. C. 383; 78 L. J. P. C. 129; 25 T. L. R. 678; 53 Sol. Jo. 630; *sub nom.* UNITED COLLIERIES, LTD. *v.* HENDRY, 101 L. T. 129; 2 B. W. C. C. 308, H. L.

Annotations:—**Apld.** Krzus *v.* Crow's Nest Pass Coal Co., [1912] A. C. 590. **Consd.** Daff *v.* Midland Colliery Owners' Mutual Indemnity Co. (1913), 82 L. J. K. B. 1340; Grime *v.* Fletcher, [1915] 1 K. B. 734; Phillips *v.* Kershaw, Leese, [1920] 3 K. B. 297.

2170. —— —— Death after award.]—IVEY *v.* IVEY, No. 3683, *post.*

SECT. 3.—PERSONS NOT ENTITLED TO COMPENSATION.

SUB-SECT. 1.—EMPLOYMENT OTHER THAN MANUAL LABOUR WHERE REMUNERATION EXCEEDS £350 PER ANNUM.

A. Employment Other than Manual Labour.

See Workmen's Compensation Act, 1925 (c. 84), s. 3 (2).

2171. Whether labour manual or otherwise—Principal work to be considered—Employment including manual work—Expert chemist in dye works.]—A man, who had taken a degree in science, entered the employment of a dye & chemical manufacturing co., under a written agreement for five years' service, & upon terms with regard to salary, commission on profits of inventions or improvements in manufacture discovered by him, restrictions as to employment after the termination of his engagement, & disclosure of matters relating to the business of the co. & his own researches, applicable to employment as a skilled expert in the business of his employers. His employment involved manual labour on his part. In the course of his employment he met with an accident which caused his death. On an application under Workmen's Compensation Act, 1897 (c. 37), an award of compensation was made by a county ct. judge, on the ground that the fact that the man did manual labour brought the case within the Act. On appeal:—*Held:* the governing factor in determining whether the man was a workman within the meaning of Workmen's Compensation Act, 1897 (c. 37), was the question what he was employed to do, & the judge misdirected himself by not taking into consideration the terms of the employment as disclosed in the agreement, & in treating the performance of manual labour in the discharge of his duties as conclusive that the man was a workman within the Act.—BAGNALL *v.* LEVINSTEIN, LTD., [1907] 1 K. B. 531; 76 L. J. K. B. 234; 96 L. T. 184; 23 T. L. R. 165; 51 Sol. Jo. 145; 9 W. C. C. 100, C. A.

Annotations:—**Consd.** Jaques *v.* Steam Tug Alexandria (1920), 13 B. W. C. C. 261. **Refd.** Rushbrook *v.* Grimsby Palace Theatre Co. (1908), 100 L. T. 253; Simmons *v.* Heath Laundry Co., [1910] 1 K. B. 543.

2172. —— —— —— Tug master.]—In considering whether an employee is "employed otherwise than by way of manual labour" within Workmen's Compensation Act, 1906 (c. 58), s. 13, the test is, what is the substantial nature of the employment regarded as a whole. If it be manual labour, the fact that the employment involves

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to which the husband was dependent upon his wife's earnings under Workmen's Compensation Act, 1906.—DIXON *v.* FERGUSON (1924), 58 I. L. T. 129.—**IR.**

m. *(Grandchild.)*—MITCHELL *v.* SCOTTISH IRON & STEEL CO., LTD. (1920), 13 B. W. C. C. 415.—**SCOT.**

PART XIV. SECT. 2, SUB-SECT. 2.—D.

2169 i. *On death of dependant—To personal representative—Death before claim.*]—*Re* O'DONOVAN & CAMERON, SWANN & Co., [1901] 2 I. R. 633.—**IR.**

2169 ii. —— —— ——.]—BODELL *v.* CABLE, [1921] N. Z. L. R. 211.—**N.Z.**

PART XIV. SECT. 3, SUB-SECT. 1.—A.

n. *Whether labour manual or otherwise—Principal work to be considered—Employment including manual work.*]—BRISBANE STEVEDORING & WOOLDUMPING CO., LTD. *v.* MCDONALD, [1913] S. R. Q. 203.—**AUS.**

o. —— —— ——.]—In deciding whether or not an employee was engaged in manual labour within the definition of workman in Workmen's Compensation Act, 1908, s. 2, the real test is whether the substantial nature of the employment was or was not manual labour. If the substantial part of the employment could not be described as manual labour, the fact that manual labour had to be performed would entitle him to the benefits of a manual labourer.—*Re* DILLEY & CANADIAN PACIFIC RY. CO., *Re* WORKMEN'S COMPENSATION ACT (Alta.), [1924] 2 W. W. R. 377.—**CAN**

p. —— —— ——.]—Deceased employed as an engineer on an auxiliary boat, & was drowned when the

Sect. 3.—Persons not entitled to compensation: Sub-sect. 1, A. & B.; sub-sect. 2, A.]

duties which are not manual labour does not exclude the employee from the benefit of the Act; if it be not manual labour, the fact that the employment necessitates some amount of manual labour does not bring him within the Act.—JAQUES *v.* STEAM TUG ALEXANDRA, [1921] 2 A. C. 339; 126 L. T. 46; 37 T. L. R. 881; 14 B. W. C. C. 148; *sub nom.* JACQUES *v.* ALEXANDRA (OWNERS), 90 L. J. K. B. 1325, H. L.

Annotation :—**Apld.** Reid *v.* British & Irish Steam Packet Co., [1921] 2 K. B. 319.

2173. —— —— Principal duty supervision—Quay foreman.]—The test whether a foreman is outside the definition of a "workman" in Workmen's Compensation Act, 1906 (c. 58), s. 13, which excludes "any person employed otherwise than by way of manual labour whose remuneration exceeds £250 a year," is not whether he is engaged only in supervision but whether his principal work is supervision & not manual labour, & the words "whose remuneration exceeds £250 a year" cover the case of an employee who is being paid at a monthly rate which, if the contract should continue for a year, would amount to more than £250.

Appct. was a quay foreman in the employ of resps. His duty was to supervise gangs of dock labourers. While so engaged he was wilfully assaulted by one of the men & sustained a severe injury to his eye whereby he was totally incapacitated, & for which he sought compensation under Workmen's Compensation Act, 1906 (c. 58). At the time of the injury he was receiving £21 a month from resps., by whom he had been employed for twenty years, his engagement being determinable by one month's notice. The county ct. judge made an award in his favour. Resps. appealed on the grounds: (*a*) that the injury was not due to an accident arising out of the employment; (*b*) that appct. was not a "workman" within sect. 13 of the Act. There was evidence that he occasionally lent a hand to the men, but his substantial duty was that of supervision only:—*Held:* (1) the injury was caused by an accident arising out of & in the course of the employment; (2) appct. was not a "workman" within the Act, his substantial employment being supervision & not manual labour, & his remuneration exceeding £250 a year.—REID *v.* BRITISH & IRISH STEAM PACKET CO., [1921] 2 K. B. 319; 90 L. J. K. B. 480; 125 L. T. 67; 37 T. L. R. 362; 65 Sol. Jo. 326; 14 B. W. C. C. 20, C. A.

Annotations :—*As to* (1) **Folld.** Parker *v.* Federal Steam Navigation Co. (1925), 95 L. J. K. B. 661. *As to* (2) **Apld.** Kerswell *v.* Perry (1924), 132 L. T. 238.

2174. Manager of coal mine—Presence required in mine.]—The certificated manager of a coal mine, who is paid a yearly salary, & who, although his duties require his presence in the mine, is not required to engage in manual labour, is not a "workman" within Workmen's Compensation Act, 1897 (c. 37).—SIMPSON *v.* EBBW VALE STEEL, IRON & COAL CO., [1905] 1 K. B. 453; 74 L. J. K. B. 347; 92 L. T. 282; 53 W. R. 390; 21 T. L. R. 209; 49 Sol. Jo. 221; 7 W. C. C. 101, C. A.

Annotations :—**Consd.** Bagnall *v.* Levinstein, [1907] 1 K. B. 531; Simmons *v.* Heath Laundry Co., [1910] 1 K. B. 543. **Reld.** Jacques *v.* Steam Tug Alexandria (1920), 90 L. J. K. B. 473.

B. Remuneration Exceeding £350 per annum.

See Workmen's Compensation Act, 1925 (c. 84), s. 3 (2).

2175. What included in remuneration — All "earnings."]—"Remuneration" in Workmen's Compensation Act, 1906 (c. 58), s. 13, which excepts from the definition of "workman" any person employed otherwise than by way of manual labour whose remuneration exceeds £250 a year, is synonymous with "earnings" as used in the Act.

A claim for compensation by the widow of the purser of a ship which was lost with all hands was resisted on the ground that the purser's remuneration exceeded £250 a year. In addition to his regular wages, at the end of each voyage, whenever everything was reported to be satisfactory, the purser received, at a fixed rate per month, a bonus or extra wages. He also made a profit by the sale on board ship of whisky in nips. He was debited with so much per bottle, & nips were sold at a fixed price which produced a larger sum per bottle than the sum debited. This balance was kept by the purser with the knowledge & consent of his employers:—*Held:* both the bonus & the profit on the whisky ought to be taken into account in estimating the purser's remuneration.—SKAILES *v.* BLUE ANCHOR LINE, LTD., [1911] 1 K. B. 360; 80 L. J. K. B. 442; 103 L. T. 741; 27 T. L. R. 119; 55 Sol. Jo. 107; 4 B. W. C. C. 16, C. A.

Annotations :—**Reld.** Brandy *v.* S.S. Raphael, [1911] 1 K. B. 376; Stephenson *v.* Rossall Steam Fishing Co. (1915), 84 L. J. K. B. 677; Williams *v.* S.S. Maritime, [1915] 2 K. B. 137; G. W. Ry. *v.* Helps, [1918] A. C. 141.

2176. —— Value of board.]—Workmen's Compensation Act, 1906 (c. 58), s. 13, provides that "workman" does not include any person employed otherwise than by way of manual labour whose remuneration exceeds £250 a year.

Upon a claim for compensation by the widow & children of a ship's captain, who was accidentally killed by a tramcar at a port where his ship was in dock, it appeared that the remuneration of deceased was £216 a year in cash in addition to his board:—*Held:* in considering whether the remuneration exceeded the limit prescribed by the sect., the test of the money value of the board provided by the owners was not what the captain saved by the arrangement, or, in other words, what he could have boarded himself for, but what the reasonable style of board provided by the owners would have cost him if he had had to purchase it himself.—DOTHIE *v.* MACANDREW (ROBERT) & CO., [1908] 1 K. B. 803; 77 L. J. K. B. 388; 98 L. T. 495; 24 T. L. R. 326; 1 B. W. C. C. 308, C. A.

Annotations :—**Reld.** Rosenqvist *v.* Bowring, [1908] 2 K. B. 108; Skailes *v.* Blue Anchor Line, [1911] 1 K. B. 360; Poulton *v.* Kelsall (1912), 106 L. T. 522.

2177. —— ——.]—The captain of a ship was employed under an agreement dated Mar. 13, 1914, to take command at the rate of wages of £20 per month, & it was provided in the agreement that if he kept the ship free of all damage & claims he was to receive a gratuity of £48 *per annum*, but that if he failed to do so he was to forfeit the gratuity & his remuneration reduced to £16 per month. The ship was lost with all hands on Apr. 12, 1914, & the widow applied on behalf of herself & the other dependants of deceased for compensation under Workmen's

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same was wrecked. His work included, in addition to running the engine, duties which were a mechanic's:—*Held:* the manual labour performed by deceased was not merely incidental or accessory to but was the real substantial work for which he was engaged.—WEEKES *v.* ECHFORD BROTHERS, [1921] N. Z. L. R. 824.—**N.Z.**

q. ——.]—HEWITT *r.* HUDSON'S BAY Co. (1910), 15 W. L. R. 372; 20 Man. L. R. 126.—**CAN.**

r. *Pit boss.*]—TEPPO *v.* WEST CANADIAN COLLIERIES (1911), 1 W. W. R. 257.—**CAN.**

Compensation Act, 1906 (c. 58). In the course of the proceedings the value of deceased's board & accommodation on his ship was assessed at £45 10*s.* *per annum*, & no question arose as to this :—*Held :* (1) the captain's remuneration did not exceed £250 a year, & he was therefore a "workman" within Workmen's Compensation Act, 1906 (c. 58), s. 13, & his dependants were entitled to compensation ; (2) in determining the remuneration, regard must be had only to the existing agreement & what had happened under it, & seeing that the ship had been lost, she had not been kept free of damage, & deceased's salary must be taken as £16 per month, which, with £45 10*s.* for board & lodging was less than £250 a year.—WILLIAMS *v.* MARITIME (OWNERS), [1915] 2 K. B. 137 ; 84 L. J. Ch. 633 ; 112 L. T. 907 ; 31 T. L. R. 218 ; 8 B. W. C. C. 207, C. A.

2178. —— Bonus & perquisites.]—SKAILES *v.* BLUE ANCHOR LINE, LTD., No. 2175, *ante*.

2179. —— Bonus or penalty—Dependent on how contract performed.]—WILLIAMS *v.* MARITIME (OWNERS), No. 2177, *ante*.

2180. Calculation of statutory limit—Remuneration at higher rate at time of accident—Actual or possible remuneration for year within limit.]—An employee not engaged in manual labour, whose remuneration was at the rate of £10 a month, was given other employment by his employers, in which his remuneration amounted to £24 10*s.* a month. The probable duration of this employment would be about six months after which he was to resume his old work at the former rate of pay. While in this more lucrative employment he met his death by accident, & his dependant claimed compensation :—*Held :* although his remuneration at the time of his death under his then contract of service was at a rate exceeding £250 a year, as the total amount which he would earn for the year would not exceed that sum, he was not excluded from the definition of "workman" in Workmen's Compensation Act, 1906 (c. 58), s. 13, & his dependant was entitled to compensation.

If the contract of service is one which may continue for more than a year, & the servant as incident to that contract earns, or but for some circumstance determining his earning power would be able to earn, in a year a sum exceeding £250 he will be within the exception in sect. 13, although at the moment of the accident the remuneration he is actually earning may be at a lower rate than £250 *per annum*. On the other hand, if the actual or assumed earnings be less than £250 *per annum*, the man will be a "workman" although at the moment the remuneration he is actually earning is at a higher rate (WARRINGTON, L.J.).—GRIFFITH *v.* PENRHYN CASTLE (OWNERS), [1917] 1 K. B. 474 ; 86 L. J. K. B. 449 ; 116 L. T. 169 ; 10 B. W. C. C. 111, C. A.

Annotations :—**Consd.** Mackay *v.* S.S. Cramond (1920), 89 L. J. K. B. 1036 ; Reid *v.* British & Irish Steam Packet Co., [1921] 2 K. B. 319. **Apld.** Kerswell *v.* Perry (1924), 132 L. T. 238. **Refd.** Round *v.* Wathen (1916), 86 L. J. K. B. 1011.

2181. —— —— Evidence of continuance of higher rate—For period of year.]—The rules in Workmen's Compensation Act, 1906 (c. 58), Sched. 1. (2) (*a*) as to computing average weekly earnings do not apply to cases under sect. 13 of the Act.

A man, employed otherwise than by way of manual labour, met with an accident arising out of & in the course of his employment. He had only been engaged in the employment, which was of a permanent nature, for a few weeks, & there was evidence that during that period his remuneration had been at a rate exceeding £250 a year, & that during the preceding year men in the same employment had earned on an average more than £250 a year. In proceedings for compensation under Workmen's Compensation Act, 1906 (c. 58) :—*Held :* the arbitrator had not misdirected himself in holding that it was not proved that if appt. had continued in the employment for a year, his remuneration would have exceeded £250 a year, so as to bring him within sect. 13 of the Act.—THOMSON (W.) & CO. *v.* MACKAY (1921), 90 L. J. K. B. 1337 ; 126 L. T. 33 ; 37 T. L. R. 861 ; 14 B. W. C. C. 143 ; *sub nom.* THOMAS & CO. *v.* MACKAY, 65 Sol. Jo. 695, H. L. ; *affg.* S. C. *sub nom.* MACKAY *v.* CRAMOND (OWNERS) (1920), 89 L. J. K. B. 1036, C. A.

Annotations :—**Distd.** Reid *v.* British & Irish Steam Packet Co., [1921] 2 K. B. 319. **Consd.** Twidale *v.* L. & N. E. Ry., [1925] 2 K. B. 455. **Refd.** Kerswell *v.* Perry (1924), 132 L. T. 238.

2182. —— —— —— ——.]—REID *v.* BRITISH & IRISH STEAM PACKET CO., No. 2173, *ante*.

2183. —— —— —— ——.]—Resp. to this appeal in Feb. 1922, was engaged by applts. as a foreman for supervision work on the enlarging of the City & South London Tube railway at six guineas a week & was so employed until Nov. 10, 1922, when he was totally incapacitated by an accident during the employment & was paid compensation. Recently applts. refused to continue the payment of compensation on the ground that he was not a workman within the definition of workman in Workmen's Compensation Act, 1906 (c. 58), s. 13, but fell within the exception therein mentioned of a person whose remuneration exceeded £250 a year. Up to the time of the accident he had received remuneration amounting to £248 17*s.* 0*d.* The county ct. judge held that at the date of the accident resp.'s remuneration was under £250 a year & awarded him £1 & statutory additions per week :—*Held :* resp. was within the exception in sect. 13 as he was employed on a contract which but for some untoward incident would have continued for a year & would have been able in that year to earn a sum exceeding £250 a year, & therefore not being a workman within the definition of workman in sect. 13 could not claim compensation under the Act.—KERSWELL *v.* PERRY & CO., LTD. (1924), 132 L. T. 238 ; 17 B. W. C. C. 198, C. A.

2184. —— Remuneration at lower rate at time of accident—Actual or possible remuneration for year beyond limit.]—GRIFFITH *v.* PENRHYN CASTLE (OWNERS), No. 2180, *ante*.

SUB-SECT. 2.—EMPLOYMENT OF CASUAL NATURE AND OTHERWISE THAN FOR EMPLOYER'S TRADE OR BUSINESS.

A. Employment of Casual Nature.

See Workmen's Compensation Act, 1925 (c. 84), s. 3 (2).

2185. Interpretation of "casual"—Not a term of precision.]—KNIGHT *v.* BUCKNILL, No. 2187, *post*.

2186. —— ——.]—A woman engaged as a "temporary cook," in the place of a regular cook away on a holiday, for a period of fourteen days with an option to extend it, at a weekly wage & provided with board & lodging, met with injury by accident in the course of her employment. The county ct. judge found that she was not a "workman" within Workmen's Compensation Act, 1906 (c. 58), as being in "employment of a

Sect. 3.—*Persons not entitled to compensation: Subsect.* 2, *A. & B.*]

casual nature" :—*Held:* (1) there was evidence to support the finding & no misdirection; the word "casual" as used in Workmen's Compensation Act, 1906 (c. 58), is not a term of precision, & is incapable of being exactly defined; (2) where the question, whether the employment is or is not of a casual nature, is reasonably debatable, it must be for the county ct. judge to decide finally as a question of fact.—STOKER *v.* WORTHAM, [1919] 1 K. B. 499; 88 L. J. K. B. 457; 120 L. T. 426; 35 T. L. R. 225; 63 Sol. Jo. 245; 12 B. W. C. C. 34, C. A.

Annotations:—*As to* (2) **Consd.** Williams *v.* Haigh (1925), 134 L. T. 238. **Reld.** Hughes *v.* Walker (1926), 19 B. W. C. C. 79.

2187. What amounts to casual labour—Question of fact.]—A jobbing gardener was employed to cut & lop some trees, on the terms that he should be paid 3*s.* 6*d.* a day. He did the work, & was then kept on to level the lawn, & that being done he was told to cut & lop some other trees. He had been working daily in this way for the same employer for five weeks; his wages were paid to him weekly. He was injured by a fall from one of the trees. The county ct. judge found that the employment was of a casual nature: —*Held:* there was evidence to support the finding.

Casual is here used not as a term of precision, but as a colloquial term . . . when the question is reasonably debatable it must be for the county ct. judge to decide (HAMILTON, L.J.).—KNIGHT *v.* BUCKNILL (1913), 57 Sol. Jo. 245; 6 B. W. C. C. 160, C. A.

Annotations:—**Distd.** Smith *v.* Buxton (1915), 84 L. J. K. B. 697. **Consd.** Stoker *v.* Wortham, [1919] 1 K. B. 499; Williams *v.* Haigh (1925), 134 L. T. 238; Hughes *v.* Walker (1926), 19 B. W. C. C. 79.

2188. —— —— .]—STOKER *v.* WORTHAM, No. 2186, *ante*.

2189. —— ——.]—A workman was employed to build a wall round the garden of a house which his employer had bought as a speculation. He claimed compensation for injury by an accident suffered in the course of his employment, & the county ct. judge held that the employment was not of a casual nature:—*Held:* it was a question of fact as to which there was evidence to support the finding, & no misdirection.—HUGHES *v.* WALKER (1926), 19 B. W. C. C. 79, C. A.

2190. —— **Regular employment—On specific work—At specific intervals.**]—A washerwoman & charwoman was engaged in washing clothes at the private house of a man & his wife, when she met with an accident to her left hand & was permanently incapacitated. For about eighteen months prior to the accident, which happened on a Tuesday, she had been in the habit of going to the house every Friday & on alternate Tuesdays, for the purpose of washing, & on other days of the week she washed & cleaned for different persons, & also did washing at her own home. She made a claim under Workmen's Compensation Act, 1906 (c. 58), & the county ct. judge found that she was not in the casual but in the regular employment of the man & his wife, & he made an award in her favour based on her aggregate earnings in the different employments:—*Held:* there was ample evidence to justify the finding; consequently applt. was a "workman" engaged under "a contract of service" within sect. 13 of the Act, under which the employment was not "of a casual nature," but was periodical & regular; & with regard to the measure of compensation the case was within Workmen's Compensation Act, 1906 (c. 58), Sched. I., 1 (2) (*b*).—DEWHURST *v.* MATHER, [1908] 2 K. B. 754; 77 L. J. K. B. 1077; 99 L. T. 568; 24 T. L. R. 819; 52 Sol. Jo. 681; 1 B. W. C. C. 328, C. A.

Annotations:—**Reld.** Knight *v.* Bucknill (1913), 6 B. W. C. C. 160; Smith *v.* Buxton (1915), 112 L. T. 893; Stoker *v.* Wortham (1919), 88 L. J. K. B. 457. **Mentd.** Simmons *v.* Heath Laundry Co., [1910] 1 K. B. 543.

2191. —— —— —— ——.]—A labourer who had been regularly employed every year for many years to work in the woods on a gentleman's estate during the season for this work, which lasted some two months, for the season, at a weekly wage, was injured by accident in this employment:—*Held:* the employment was not of a casual nature, & the man was a "workman" within Workmen's Compensation Act, 1906 (c. 58), s. 13, & was entitled to compensation under the Act.—SMITH *v.* BUXTON (1915), 84 L. J. K. B. 697; 112 L. T. 893; 8 B. W. C. C. 196, C. A.

Annotations:—**Consd.** Williams *v.* Haigh (1925), 134 L. T. 238. **Reld.** Stoker *v.* Wortham, [1919] 1 K. B. 499.

2192. —— **Irregular employment—Arrangement for work not made in advance.**]—A man who earned his living by doing odd jobs was employed by the occupier of a private house to clean his windows. He had been so employed at irregular intervals of about six weeks during a period of two years. He was usually sent for when the windows required cleaning, & when he came was paid 6*s.* 6*d.* a day for his work. There was no agreement between the parties for either permanent or periodic employment. While so employed the man met with his death through an accident:—*Held:* the employment was "of a casual nature"; deceased was therefore not a "workman" within Workmen's Compensation Act, 1906 (c. 58), s. 13; & consequently the employer was not liable to pay compensation under the Act.—HILL *v.* BEGG, [1908] 2 K. B. 802; 77 L. J. K. B. 1074; 99 L. T. 104; 24 T. L. R. 711; 52 Sol. Jo. 581; 1 B. W. C. C. 320, C. A.

Annotations:—**Distd.** Dewhurst *v.* Mather, [1908] 2 K. B. 754. **Expld.** Knight *v.* Bucknill (1913), 6 B. W. C. C. 160. **Consd.** Smith *v.* Buxton (1915), 84 L. J. K. B. 697. **Expld.** Hughes *v.* Walker (1926), 19 B. W. C. C. 79. **Reld.** Bennie *v.* Reid (1908), 1 B. W. C. C. 324; Blyth *v.* Sewell (1909), 2 B. W. C. C. 476; Gane *v.* Norton Hill Colliery Co. (1909), 100 L. T. 979. **Mentd.** Simmons *v.* Heath Laundry Co. (1910), 79 L. J. K. B. 395.

2193. —— —— ——.]—BOSWELL *v.* GILBERT (1909), 2 B. W. C. C. 251, C. A.

2194. —— —— ——.]—A window cleaner cleaned the windows of a private house for the same employer once a month for four years, when he fell & was killed. No arrangements as to the work were made in advance. The county ct. judge found the employment was of a casual nature:—*Held:* there was evidence to support the finding.—RITCHINGS *v.* BRYANT (1913), 6 B. W. C. C. 183, C. A.

PART XIV. SECT. 3, SUB-SECT. 2.—A.

2190 i. *What amounts to casual labour—Regular employment—On specific work—At specific intervals.*]—M'CARTHY *v.* NORCOTT (1908), 43 I. L. T. 17; 2 B. W. C. C. 279.—IR.

2190 ii. —— —— —— ——.]—Deceased, employed by deft. as cook for a gang, was paid an hourly rate for a certain number of hours per day, with overtime. Deceased perished in a natural disturbance:—*Held:* as deceased's employment was not continuous there was nothing to show that he was in deft.'s employ at the time of the accident, & therefore deft. entitled to judgment.—YOUNG *v.* N. Z. SULPHUR CO., LTD., [1917] N. Z. L. R. 189.—N.Z.

2192 i. —— *Irregular employment—Arrangement for work not made in advance.*]—RENNIE *v.* REID, [1908] S. C. 1051.—SCOT.

t. —— *Temporary postman.*]—BOLDEN *v.* CHASE (1919), 46 N. B. R. 147.—CAN.

2195. —— —— Miscellaneous nature of work.]—KNIGHT *v.* BUCKNILL, No. 2187, *ante*.

2196. —— —— Temporary cook.]—STOKER *v.* WORTHAM, No. 2186, *ante*.

2197. —— Engagement for specific work—To be completed within stated time.]—The workman was employed to lop the trees of applt. overhanging a road, pursuant to a notice to abate the nuisance caused thereby served on applt. by the local council. The agreement come to was that the workman should receive a wage of 12*s.* a day, the job to be done in three or four weeks. The workman worked for a week, then took a day off to attend to some home affairs, & on resuming next day fell from a bough on to the road & was instantaneously killed. On a claim for compensation by his dependants the county ct. judge held that deceased was a workman within the definition contained in Workmen's Compensation Act, 1906 (c. 58), s. 13, & that his employment was not of a casual nature:—*Held:* it was a question of fact as to which there was evidence to support the findings, & there was no misdirection.—WILLIAMS *v.* HAIGH (1925), 134 L. T. 238; 18 B. W. C. C. 549, C. A.

2198. Casual nature admitted by applicant.]—D., living in the country as a private gentleman, owned property in Kensington. He contracted with S., whose workshop was in Kensington, to collect rents & do repairs. On the occasion in question, it was necessary to carry out painting work on this property. S., without extra pay, & unknown to D., engaged a man for a short time to help. This man fell from a ladder & was killed. The widow claimed against D. In her evidence she admitted that deceased was only casually employed. The county ct. judge found that deceased was employed by D. through S., who was his agent, but that the employment was casual, & that as D. carried on no trade or business applt. could not recover compensation. Further, he held that if S. were a contractor the case could not come within Workmen's Compensation Act, 1906 (c. 58), s. 4, because D., the principal, as said, carried on no trade or business. It was argued, on appeal, that the judge should not have decided the case on the ground that the employment was casual, as this point was not raised in resp.'s answer:—*Held:* the widow's own evidence had put her out of ct., before resps. were called upon, & the judge had no other course except to dismiss the application.—MILES *v.* DAWE (1915), 8 B. W. C. C. 225, C. A.

B. Employment Otherwise than for Employer's Trade or Business.

See Workmen's Compensation Act, 1925 (c. 84), s. 3 (2).

2199. What amounts to employment for employer's trade or business—Question of fact.]—The question whether a casual labourer is employed "for the purposes of the employer's trade or business" so as to bring himself within the definition of "workman" in Workmen's Compensation Act, 1906 (c. 58), s. 13, depends upon the facts of each particular case, & does not turn on the question whether the premises in respect of which the work is done are used solely for business purposes or are used for domestic purposes also.

A farmer, who lived in a small farmhouse on the farm, employed a casual labourer to thatch the roof of the farmhouse. The man fell off the roof & sustained injuries which caused his death. It was a common practice for farmers in the district to do their own thatching. Upon a claim for compensation by the dependants:—*Held:* there was evidence upon which the county ct. judge could find that the deceased man was employed for the purposes of the farmer's trade or business.

(2) It is absolutely clear that the right of the dependants is not in any way directly derived from the man whose death has been occasioned by an accident in the course of his employment: they recover compensation for loss of the benefit which they would have derived from the continuance of his life, & there could be no estoppel by reason of the agreement made between the employer & employee (LORD FINLAY).—MANTON *v.* CANTWELL, [1920] A. C. 781; 89 L. J. P. C. 73; 123 L. T. 433; 36 T. L. R. 534; 64 Sol. Jo. 477; 13 B. W. C. C. 55, H. L.

Annotation:—*As to* (2) **Reid.** Harper *v.* Dick, Kerr (1920), 90 L. J. K. B. 1313.

2200. —— Trade or business—Management of own property.]—Deft. owned several houses & was co-owner of three others, which were let to weekly tenants. She collected the rents & generally managed the property, accounting to the other co-owners for rent received on their behalf, but they paid her nothing for so doing:—*Held:* she was not carrying on the business of an estate agent within Workmen's Compensation Act, 1906 (c. 58), so as to be liable to compensate a workman whose employment was of a casual nature, & who met with an accident while engaged in doing some repairs to the houses.—BARGEWELL *v.* DANIEL (1907), 98 L. T. 257, C. A.; *revsg.*, 9 W. C. C. 142.

2201. —— Employment of neighbour by farmer—To cut boundary hedge.]—The garden of a labourer was separated from the adjoining land of a farmer by a hedge on the land of the farmer, & the labourer complained of the height of the hedge. The farmer agreed with the labourer that the latter should cut the hedge & he would pay him 10*s.* for doing it, the farmer to have the poles from the hedge to use in his hop field. While cutting the hedge the labourer met with an accident:—*Held:* the employment, though of a casual nature, was for the purposes of the farmer's trade or business, & the labourer was a "workman" within Workmen's Compensation Act, 1906 (c. 58).—TOMBS *v.* BOMFORD (1912), 106 L. T. 823; 5 B. W. C. C. 338, C. A.

Annotation:—**Consd.** Alderman *v.* Warren (1916), 85 L. J. K. B. 1442.

2202. —— Repairing or improving business premises.]—Appct. was a rag & bone dealer, who had on certain occasions used his donkey & cart, with which he was accustomed to go about his work, for payment for the purpose of fetching beer for a publican. He did other odd jobs besides his ordinary occupation, & one day he was invited to come into the public-house & take down a stove that was in the bar thereof, which had got out of order, & the chimney of which was smoking. In doing that work he sustained injury by accident, in respect of which he claimed compensation from the publican under Workmen's

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PART XIV. SECT. 3, SUB-SECT. 2.—B.

2202 i. *What amounts to employment for employer's trade or business—Repairing or improving business premises.*]—NEWMAN *v.* MELLICK, [1908] S. R. Q. 1.—**AUS.**

2202 ii. —— ——.]—Where a casual workman was employed to assist a slater in repairing the roof of a house used solely for the purpose of business, & was killed by falling from the roof:—*Held:* his dependants were entitled to compensation, inasmuch as the work he was engaged to assist in doing was, though of a casual nature, for the purposes of the employers' trade or business.—JOHNSTON *v.* MONASTEREVAN GENERAL STORE CO. (1908), 42 I. L. T. 268; 2 B. W. C. C. 183.—**IR.**

2202 iii. —— ——.]—A retired doctor

Sect. 3.—Persons not entitled to compensation: Sub-sect. 2, B.; sub-sects. 3, 4 & 5.]

Compensation Act, 1906 (c. 58), s. 1, which was followed in due course by a request for arbitration. It was decided by the county ct. judge that, although appct.'s employment by resp. was admittedly of a "casual nature" within the meaning of sect. 13 of the Act of 1906, yet he came within the definition in that Act of a "workman" because that employment was "for the purpose of the employer's trade or business"; & that therefore appct. was entitled to compensation at the rate of half his "average weekly earnings" of 25*s.* per week, being the amount which he obtained from his business of a rag & bone dealer. Resp. appealed:—*Held:* (1) what appct. was employed to do for resp. was not "for the purposes of the employer's trade or business," for although it might be advantageous thereto that the smoking of the chimney should be prevented & that certain necessary repairs to the stove should be executed, yet it would be an extension of the statutory words to treat them as applicable to such a case as the present; (2) in any event the "average weekly earnings" of appct. in his own business of a rag & bone dealer could not be regarded in ascertaining the compensation payable to him, but only the amount that he realised from odd jobs which he occasionally did under a "contract of service."—ALDERMAN *v.* WARREN (1916), 85 L. J. K. B. 1442; 115 L. T. 363; 32 T. L. R. 665; 9 B. W. C. C. 507, C. A.

Annotations:—As to (1) **Distd.** Boothby *v.* Patrick (1918), 88 L. J. K. B. 190. **Consd.** Manton *v.* Cantwell, [1920] A. C. 781.

2203. —— ——.]—A man whose ordinary work was that of a grain porter was temporarily employed by a firm of saw millers, timber merchants & contractors for wood work to assist their own workmen in removing a crane to a mill of the employers, to be used there for lifting timber. While so working the man was injured by accident:—*Held:* he was employed "for the purposes of the employers' trade or business," & he was therefore a "workman" within Workmen's Compensation Act, 1906 (c. 58), s. 13, & was entitled to compensation.—BOOTHBY *v.* PATRICK (PETER) & SON (1918), 88 L. J. K. B. 190; 120 L. T. 7; 35 T. L. R. 48; 11 B. W. C. C. 201, C. A.

Annotation:—**Consd.** Manton *v.* Cantwell, [1920] A. C. 781.

2204. —— ——.]—MANTON *v.* CANTWELL, No. 2199, *ante*.

SUB-SECT. 3.—EMPLOYMENT ILLEGAL.

See Workmen's Compensation Act, 1925 (c. 84), s. 3 (3).

2205. General rule.]—If the contract under which a workman is employed is illegal, it is not a contract for service within Workmen's Compensation Act, 1906 (c. 58), s. 13.

A child between thirteen & fourteen years of age was employed to work as "odd boy" with a barge. He was to be paid according to the work he did, & to have his meals when out with the barge. On Sept. 8, 1916, the day of the accident, he started work at 3.30 a.m. He was ordered to drive the horse towing the barge, & was kicked by the horse, & he was severely injured. The county ct. judge found that any contract of service under which the child was working was rendered void by the hours at which he was sometimes required to begin his day's work, as contravening Employment of Children Act, 1903 (c. 45). Such a contract of service could not support a claim for compensation, & he gave his award, therefore, in favour of resps.:—*Held:* there was evidence to support the finding, & no misdirection.—POUNTENEY *v.* TURTON (1917), 34 T. L. R. 103; 62 Sol. Jo. 159; 10 B. W. C. C. 601, C. A.

Annotation:—**Refd.** M'Lelland *v.* Hutchison (1918), 12 B. W. C. C. 428.

2206. Offence against Truck Acts.]—KEMP *v.* LEWIS, No. 2052, *ante*.

2207. Illegal employment of children.]—POUNTENEY *v.* TURTON, No. 2205, *ante*.

SUB-SECT. 4.—EMPLOYMENT ABROAD.

See Workmen's Compensation Act, 1925 (c. 84), ss. 35–37.

2208. British employers.]—Workmen's Compensation Act, 1906 (c. 58), has no application outside the territorial limits of the United Kingdom, except in the case of seamen & apprentices as provided by sect. 7.

Where an English workman in the employment of English contractors was sent out by them to Malta to work for them there, & met with a fatal accident:—*Held:* his widow was not entitled to compensation under the Workmen's Compensation Act, 1906 (c. 58).—TOMALIN *v.* PEARSON (S.) & SON, LTD., [1909] 2 K. B. 61; 78 L. J. K. B. 863; 100 L. T. 685; 25 T. L. R. 477; 2 B. W. C. C. 1, C. A.

Annotations:—**Apprvd. & Distd.** Kruse *v.* Crow's Nest Pass Coal Co., [1912] A. C. 590. **Foll.** Schwartz *v.* India Rubber, Gutta Percha & Telegraph Works Co., [1912] 2 K. B. 299.

2209. —— **Accident on voyage to place of employment.**]—A workman employed by defts. was directed to proceed at their expense, in a British ship, to Teneriffe to do work upon electric cables there. The ship foundered in the Bay of Biscay & the workman & all on board were lost. His dependants applied for compensation:—*Held:* Workmen's Compensation Act, 1906 (c. 58), had no application to British ships on the high seas except in the case of seamen & apprentices within sect. 7.—SCHWARTZ *v.* INDIA RUBBER, GUTTA PERCHA & TELEGRAPH WORKS CO., LTD., [1912] 2 K. B. 299; 81 L. J. K. B. 780; 106 L. T. 706; 28 T. L. R. 331; 5 B. W. C. C. 390, C. A.

Seamen.]—*See* Sect. 2, sub-sect. 1, E., *ante*.

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farmed some 215 acres for profit. The swaying of some trees shook the roots, & thereby injured the wall of his haggard. He employed a man casually to lop the trees:—*Held:* the employment was for the purposes of the employer's trade or business.—COTTER *v.* JOHNSON (1911), 45 I. L. T. 259; 5 B. W. C. C. 568.—**IR.**

2202 iv. —— ——.]—M'CANN *v.* M'DONNELL (1913), 47 I. L. T. 229.—**IR.**

2202 v. —— ——.]—A casual labourer engaged by a shopkeeper to repair houses disconnected from the shop & occupied by tenants is not employed for the purposes of the trade or business of the employer.—KELLY *v.* BUCHANAN (1913), 47 I. L. T. 228.—**IR.**

a. —— *Cleaning ship's boiler.*]—SPIERS *v.* ELDERSLIE S.S. CO., LTD., [1909] S. C. 1259; 46 Sc. L. R. 893; [1909] 2 S. L. T. 107.—**SCOT.**

PART XIV. SECT. 3, SUB-SECT. 3.

b. Employment of deserter from army—Employers without knowledge—Contract only voidable.]—A deserter from the army was employed by shipowners, who did not know that he was a deserter, as a marine fireman or trimmer. He was drowned by the loss at sea of the vessel on which he was employed:—*Held:* his widow was entitled to recover compensation in respect that the contract of employment with her deceased husband was not void but voidable, & had not been avoided at the date of the accident.—M'LELLAND *v.* HUTCHISON (1919), 12 B. W. C. C. 428.—**SCOT.**

SUB-SECT. 5.—INDEPENDENT CONTRACTORS.

2210. Whether workman or independent contractor—Payment by tonnage—Applicant engaging workmen—Employer supplying tools.]—A quarryman was employed under a written agreement that he should be paid a certain sum per ton of material worked, his employers supplying the necessary tools. He engaged & discharged men to work under him. He determined his employment, but resumed it again upon his employers assuring him that he should be compensated in case he was injured by accident:—*Held:* there was evidence that he was a workman within Workmen's Compensation Act, 1897 (c. 37), & not an independent contractor.—EVANS *v.* PENWYLLT DINAS SILICA BRICK CO. (1901), 18 T. L. R. 58; 4 W. C. C. 101, C. A.

Annotations:—**Consd.** Vamplew *v.* Parkgate Iron & Steel Co., [1903] 1 K. B. 851; Jones *v.* Penwyllt Dinas Silica Brick Co. (1913), 6 B. W. C. C. 491. **Refd.** Bagnall *v.* Levinstein (1906), 76 L. J. K. B. 234.

2211. —— —— ——.]—In an arbitration under Workmen's Compensation Act, 1897 (c. 37), upon a claim by the dependants of a man who was killed by an accident while at work upon the premises of resps., the evidence was that the deceased man worked for resps. at breaking steel & clearing cinders, that he was paid by tonnage, & that he had five or six working under him whom he employed & paid on his own account:—*Held:* the county ct. judge was justified in finding that the deceased man was not a "workman" in the employment of resps. within the meaning of the Act.—VAMPLEW *v.* PARKGATE IRON & STEEL CO., [1903] 1 K. B. 851; 72 L. J. K. B. 575; 88 L. T. 756; 67 J. P. 417; 51 W. R. 691; 19 T. L. R. 421; 47 Sol. Jo. 469; 5 W. C. C. 114, C. A.

Annotation:—**Refd.** Jones *v.* Penwyllt Dinas Silica Brick Co. (1913), 6 B. W. C. C. 491.

2212. —— —— —— **Under orders of works manager.**]—A quarryman, with a partner & six men who worked with him & under him, was employed to obtain stone from a quarry & was killed at work. He received 1*s.* 2*d.* per ton for ordinary stone & a higher payment for building stone. The quarry manager ordered the kind of stone he wished to be obtained, & would have given deceased notice to determine the contract had he been disobeyed. Deceased could work when & where he pleased provided he obtained the necessary stone. All tools belonged to the quarry owners. The horse used also belonged to them, but deceased had to keep & feed it. Deceased had to obey the manager as to where the refuse was put. The county ct. judge found that deceased was a workman under a contract of service with the quarry owners:—*Held:* there was evidence to support the finding.—JONES *v.* PENWYLLT DINAS SILICA BRICK CO. (1913), 6 B. W. C. C. 491, C. A.

2213. —— **Contract for work at fixed price—Applicant supplying labour & tools.**]—Appct. contracted with resp. to supply labour & tools for the purpose of carrying out the bricklaying work on a certain building for the sum of £160. As the work proceeded payments on account were made of about 75 per cent. of the value of the work done. Appct. while working upon the building as a foreman bricklayer was injured by accident:—*Held:* appct. was a sub-contractor & not a "workman" within the meaning of Workmen's Compensation Act, 1897 (c. 37), & therefore not entitled to compensation under the Act.—SIMMONS *v.* FAULDS (1901), 65 J. P. 371; 17 T. L. R. 352; 3 W. C. C. 169, C. A.

Annotation:—**Refd.** Vamplew *v.* Parkgate Iron & Steel Co., [1903] 1 K. B. 851.

2214. —— **Foreman of work gang—Lump sum payment to gang—Engaged & directed by employer.**]—A tree feller, C., was engaged by a bailiff to cut down certain trees. He asked that his son might help him, & also recommended another man. These men, with a further man, were all engaged by the bailiff, & the whole gang worked under the directions of C. The tree fellers were paid a lump sum for the job, which sum was distributed among the gang by arrangement among themselves. The men found some of the tools, the bailiff supplied others. On one occasion the bailiff instructed the men which way to let a tree fall, & after the accident he engaged two new men to take the place of C. The county ct. judge found that C. was not a workman:—*Held:* there was evidence to support the finding.—CURTIS *v.* PLUMPTRE (1913), 6 B. W. C. C. 87, C. A.

Annotations:—**Refd.** Hughes *v.* Quinn (1917), 11 B. W. C. C. 420; Bray *v.* Kirkpatrick (1919), 12 B. W. C. C. 493.

2215. —— **Liberty as to hours of work.**]—A decorator agreed with a builder to paper a house, being erected by the latter. The decorator was to have complete liberty as to hours of work. He made out a bill for the work done by him on the payment of which he gave a receipt. On a claim for compensation for injury by accident, the county ct. judge found that the decorator was under a contract of service with the builder:—*Held:* there was evidence to support the finding.—LEWIS *v.* STANBRIDGE (1913), 6 B. W. C. C. 568, C. A.

2216. —— —— **Delegation of work not possible.**]—A workman was engaged by a firm to break up old metal by means of blasting. He had no regular hours of work; his time of arrival depended on the kind of morning & the work to be done; he could leave when he liked; he pleased himself & did not go to work every day as there was not always work. Having suffered an injury while

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PART XIV. SECT. 3, SUB-SECT. 5.

2213 i. *Whether workman or independent contractor—Contract for work at fixed price—Applicant supplying labour & tools.*]—RAILWAYS COMR. *v.* RICHARDS, [1911] S. R. Q. 51.—**AUS.**

2213 ii. —— —— ——.]—POZZI *v.* AYLEN (1918), 20 W. A. L. R. 104.—**AUS.**

2213 iii. ——————.]—HUGHES *v.* QUINN (1917), 52 I. L. T. 21; 11 B. W. C. C. 420.—**IR.**

c. —— ——.]—A rabbit trapper, having agreed in writing with an employer to do the trapping of rabbits on certain lands for a season, at a fixed payment per couple, the employer supplying the gear & the use of a cottage while so engaged, was injured in the course of his employment:—*Held:* on the agreement, appct. was an independent contractor.—M'CONNELL *v.* GALBRAITH (1913), 7 B. W. C. C. 968.—**IR.**

2215 i. —— *Liberty as to hours of work.*]—BYRNE *v.* BALTINGLASS RURAL DISTRICT COUNCIL & KELLY (1911), 45 I. L. T. 206; 5 B. W. C. C. 566.—**IR.**

2215 ii. —— ——.]—RYAN *v.* TIPPERARY NORTH RIDING COUNTY COUNCIL (1914), 8 B. W. C. C. 415.—**IR.**

2215 iii. ——————.]—BRAY *v.* KIRKPATRICK & SONS (1919), 12 B. W. C. C. 493.—**IR.**

2215 iv. —— ——.]—CROWLEY *v.* LIMERICK COUNTY COUNCIL, [1923] 2 I. R. 178.—**IR.**

2215 v. ——————.]—HAYDEN *v.* DICK (1902), 5 F. (Ct. of Sess.) 150.—**SCOT**

2215 vi. —— ——.]—CHISHOLM *v.* WALKER & CO., [1908] S. C. 31; 46 Sc. L. R. 24; 16 S. L. T. 395; 2 B. W. C. C. 261.—**SCOT.**

2215 vii. ——————.]—EDWARDS & CO. *v.* LLOYD, [1919] T. P. D. 291.—**S. AF.**

2216 i. —— —— *Delegation of work not possible.*]—*Held:* the nurse was employed under a contract for professional services & not under a contract of service, &, accordingly, was not a workman within Workmen's Compensation Acts.—DOW *v.* M'NEILL, [1925] S. C. 50.—**SCOT.**

d. —— *Necessity for wages.*]—A worker, in order to be entitled to the benefits of Workers' Compensation Act, 1902, must, at the time of the accident in respect of which he claims, have

Sect. 3.—Persons not entitled to compensation: Subsects. 5, 6, 7, 8 & 9. Sect. 4: Sub-sect. 1.]

at work, which resulted in total incapacity, he made an application for compensation, & the county ct. judge found that he was a "workman" within the meaning of Workmen's Compensation Act, 1906 (c. 58), on the ground that as the contract was one in which it was impossible for him to delegate the work, it was a contract of service:—*Held:* whether there was power to delegate the work or not was not the correct test; the case must go back for a rehearing for the county ct. judge to consider more fully the question of "control" of the work & workman by the alleged employers.—UNDERWOOD *v.* PERRY & SON, LTD. (1922), 15 B. W. C. C. 131, C. A.

2217. —— Accident during work done in spare time—Work obtained through assistance of employer.]—A workman was engaged by the lessee of a theatre to do work which occupied him part of the morning & the whole of each evening. For this he was paid a weekly wage, & given early information as to the movements of theatrical performers, so as to enable him to contract with them for the moving of their luggage to & from the railway station at the beginning & end of each week. While removing luggage in the performance of one of these contracts he met with injury by accident:—*Held:* he was not under the control of the lessee at the time, or temporarily lent to another, person, but an independent contractor, & therefore, the accident did not arise out of or in the course of his employment.—HUSCROFT *v.* BENNETT (1914), 110 L. T. 494; 58 Sol. Jo. 284; 7 B. W. C. C. 41, C. A.

2218. —— Assistance given by workman's family—& by hired assistance.]—A workman was employed as a dairyman on the terms of a written agreement which described the parties to it as employer & employee, provided that the latter should (*inter alia*) manage a herd of forty-five cows, & that several things should be done according to the instructions or desire or directions of the employer. The employer was to give 45*s.* a week with house & garden & certain extras. The employee kept a boy at 3*s.* 6*d.* a week to assist him in the work, & his own two sisters lived with him & helped in the dairy. He paid the boy's wages & boarded him & also paid allowances to, & the board of, his sisters. In proceedings by him for compensation under Workmen's Compensation Act, 1906 (c. 58):—*Held:* on the construction of the agreement, appct. was a "workman" within the Act & not an independent contractor; & expenses of help given by younger members of the family who lived with the workman ought not to be deducted from his wages in the absence of an express contract or proof that he could not earn his wages without their assistance.—ROPER *v.* HUSSEY-FREKE, [1915] 3 K. B. 222; 113 L. T. 635; *sub nom.* ROPER *v.* FREKE, 84 L. J. K. B. 1351; 31 T. L. R. 507; 59 Sol. Jo. 596; 8 B. W. C. C. 604, C. A.

Annotation:—**Consd.** Jones *v.* International Anthracite Collieries Co., [1919] 1 K. B. 156.

2219. —— Description in contract of service—Employer & employee.]—ROPER *v.* HUSSEY-FREKE, No. 2218, *ante.*

2220. —— Engagement at weekly wages—Subject to week's notice—Salvage contractor.]—Appct., a man with long experience as a diver & highly skilled in salvage operations, was engaged, under a contract in writing with harbour comrs., "to superintend the work of dispersing" a barge sunk in the harbour, at a salary of £10 a week, the engagement to be determinable by either party giving the other a week's notice, & the comrs. supplying a diver & assistants, boat, diving gear, explosives & all necessary plant. In the course of the operations he fell & injured his back, & was thereby totally incapacitated from work, & claimed compensation:—*Held:* on the true construction of the contract, appct. was not an independent contractor, but was a "workman" who had entered into a "contract of service" with his employers within Workmen's Compensation Act, 1906 (c. 58), s. 13.—BINDING *v.* GREAT YARMOUTH PORT & HAVEN COMRS. (1923), 92 L. J. K. B. 377; 128 L. T. 743; 16 B. W. C. C. 28, C. A.

SUB-SECT. 6.—MEMBER OF POLICE FORCE.

See Workmen's Compensation Act, 1925 (c. 84), s. 3 (2).

2221. Police constable acting as fireman—In pursuance of duty—Not within compensation provisions.]—Part of the duty of a police constable was to act as a fireman. He was injured while so acting:—*Held:* when a police constable in pursuance of any duty under an Act of Parliament acts as a fireman, he is acting as a member of a police force, & is not a "workman" within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 13.—SUDELL *v.* BLACKBURN CORPN. (1910), 3 B. W. C. C. 227, C. A.

SUB-SECT. 7.—MEMBER OF ROYAL FORCES.

See Workmen's Compensation Act, 1925 (c. 84), s. 33.

Reservist in Royal Forces—In civil employment.]—*See* No. 2078, *ante.*

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been engaged under a contract of service with his employer at a remuneration which can be properly described as wages.—CORCORAN *v.* GREAT FINGALL G. M. CO., LTD. (1907), 9 W. A. L. R. 192.—**AUS.**

e. —— *Housepainter.*]—Painter employed to paint a homestead is precluded by Workmen's Compensation Act, s. 10, from recovering compensation for injuries sustained at that work.—SMID *v.* TOWNSEND (1915), 8 W. W. R. 474.—**CAN.**

f. —— *No exclusive employment.*]—A man who had a carting business used to cart stones for a county council. He did the work as & when he liked, being uncontrolled by the council, except that their surveyor told him where the stones were to be placed. He did not work continuously, doing other work when he wished:—*Held:* he was not a workman within the Act.—RYAN *v.* TIPPERARY (S. R.) COUNTY COUNCIL (1912), 48 I. L. T. 69; 5 B. W. C. C. 578.—**IR.**

g. —— ——.]—A man was employed by the road overseer of the county council to draw stones from a quarry, & used for the purpose a horse & cart belonging to his father. There was evidence that he was to get work now & again when there would be work to do, but there was no objection to his working for some one else when he was not wanted badly by the county council:—*Held:* the man was employed under a contract of service & was a workman with the Act.—O'DONNELL *v.* CLARE COUNTY COUNCIL (1912), 47 I. L. T. 41; 6 B. W. C. C. 457.—**IR.**

h. —— ——.]—TAYLOR *v.* BURNHAM & Co., [1910] S. C. 705.—**SCOT.**

k. —— *Directions as to work given.*]—A plumber, called in to execute repairs, was paid by time, the owner of the house supplying the materials. The owner of the house indicated where the defect was, gave some directions to the plumber as to what he was to do, & from time to time during the course of the work visited the place to see what progress was being made. The plumber met with an accident:—*Held:* the plumber was a servant, & not an independent contractor.—MCNALLY *v.* FITZGERALD (1913), 7 B. W. C. C. 966.—**IR.**

l. —— *Contract to supply ship & crew.*]—A man, who had contracted with harbour comrs. to supply a yawl & a crew of four men for pilotage purposes, was drowned whilst putting a pilot on board a vessel:—*Held:* he was an independent contractor, & his dependants were not entitled to compensation.—WALSH *v.* WATERFORD HARBOUR COMRS. (1913), 7 B. W. C. C. 960.—**IR.**

m. —— *Workgang supervised by foreman.*]—M'CREADY *v.* DUNLOP &

SUB-SECT. 8.—MEMBER OF EMPLOYER'S FAMILY DWELLING IN HIS HOUSE.

See Workmen's Compensation Act, 1925 (c. 84), s. 3 (2).

2222. Employment by parent—Effect of claim being barred—On claim against principal of parent.]—Resp. a timber merchant, having purchased certain trees in the course of his business, contracted with M. to fell same. M. employed appct., his son, to help him in carrying out his contract with resp., & appct. suffered personal injury in so doing. In proceedings by the son to recover compensation from resp. as principal under Workmen's Compensation Act, 1906 (c. 58), s. 4, it being admitted that the son had no claim against his father by reason of his being a "member of his employer's family dwelling in his house" within the definition of "workman" in sect. 13 of the Act:—*Held:* inasmuch as the liability under sect. 4 is a liability on the part of the principal to pay compensation to the "workman employed," & as the son was not a "workman" within the meaning of the Act as between himself & his employer, his father, resp. was not liable as a principal under sect. 4.—MARKS *v.* CARNE, [1909] 2 K. B. 516; 78 L. J. K. B. 853; 100 L. T. 950; 25 T. L. R. 620; 53 Sol. Jo. 561; 2 B. W. C. C. 186, C. A.

Annotation:—**Consd.** Wood *v.* Wood (1923), 93 L. J. K. B. 538.

2223. Employment by family partnership—One partner resident elsewhere.]—WOOD *v.* WOOD, No. 2231, *post*.

SUB-SECT. 9.—PARTNERS.

2224. No claim between partners—Or by widow of deceased partner.]—A member of a partnership formed for the purpose of working a mine, by arrangement with his co-partners, worked in the mine as a working foreman, & received weekly wages out of the profits of the business. While working in the mine, he met with an accident which caused his death, & his widow thereupon claimed compensation under Workmen's Compensation Act, 1897 (c. 37), from the surviving partners:—*Held:* the case contemplated by the Workmen's Compensation Act, 1897 (c. 37), was that of a workman employed by some other person or persons; deceased having been himself one of the partners in the firm for which he was working, he could not be said to have been employed by them; & therefore the case was not within the Act, & appct. was not entitled to compensation.—ELLIS *v.* ELLIS (JOSEPH) & Co., [1905] 1 K. B. 324; 74 L. J. K. B. 229; 92 L. T. 718; 53 W. R. 311; 21 T. L. R. 182; 7 W. C. C. 97, C. A.

Annotation:—**Apld.** Whelan *v.* Great Northern Steam Fishing Co. (1909), 100 L. T. 913.

SECT. 4.—PERSONS LIABLE TO PAY COMPENSATION.

SUB-SECT. 1.—IN GENERAL.

See Workmen's Compensation Act, 1925 (c. 84), ss. 5, 48 (2).

2225. Who is an employer—Question of fact.]—Resps. were owners of a threshing machine which they let out on hire to farmers. They were bound by statute to have three men to attend the machine, two to look after the engine & a third as a "road man." At farms the road man acted as assistant in the threshing, being paid for this by the farmer & not by resps. While engaged in the threshing appct., the "road man," was injured, & claimed compensation from resps., who denied liability, stating the farmer was employer. The county ct. judge held resps. were the employers:—*Held:* the county ct. judge had decided a question of fact, & there was evidence to support his decision.—REED *v.* SMITH, WILKINSON & Co. (1910), 3 B. W. C. C. 223, C. A.

2226. —— ——.]—A workman was drowned while mooring a ship of resps.; he was paid by a stevedore who worked for resps. & other firms. Resps. contended that he was employed by the stevedore & not by them. The stevedore gave evidence that the money was paid through him merely for the convenience of the resps.:—The county ct. judge held that the man was employed directly by resps. & not by the stevedore:—*Held:* it was a question of fact, & the ct. could not interfere, as there was some evidence to support the decision.—POLLARD *v.* GOOLE & HULL STEAM TOWING CO., LTD. (1910), 3 B. W. C. C. 360, C. A.

2227. —— ——.]—Appct. was a pupil at a sea training school learning the work of a stoker. By arrangement with a gas co. the pupils visited the gas works for the purpose of learning trimming & stoking coal, as part of their training, for which they received no remuneration. Subsequently the gas co. having difficulty in obtaining labour, made an arrangement with the school whereby the work required was done by the pupils. Boys were selected by the school authorities, & marched to the work, supervised & marched back by the school instructor. The gas co. paid each boy 6*d.* an hour. During this employment appct. was injured & claimed compensation. He said that he thought this employment was part of his training. The county ct. judge found that this was not so, but that appct. was in the employment, at the time of the accident, & under the control of the gas co. Upon this he made an award in favour of appct. against the gas co.:—*Held:* it was a question of fact upon which there was evidence to support the finding, & there was no misdirection.—BAGLEY *v.* GRAVESEND GAS CO. (1923), 16 B. W. C. C. 19, C. A.

Co. (1900), 2 F. (Ct. of Sess.) 1027.—**SCOT.**

PART XIV. SECT. 3, SUB-SECT. 8.

n. *Employment by parent.*]—A son, employed by his father, lived with him, & paid him board & lodging. He was injured while absent for several weeks on his father's business:—*Held:* he was a "member" of his employer's family, "dwelling in his house," & was therefore not a workman within the Act.—M'DOUGALL *v.* M'DOUGALL, [1911] S. C. 426; 48 Sc. L. R. 315; [1911] 1 S. L. T. 96; 4 B. W. C. C. 373.—**SCOT.**

PART XIV. SECT. 3, SUB-SECT. 9.

o. *Partnership must be proved.*]—A person who owned ten sixty-fourth shares of a trading schooner was employed as master by the managing owner, & met his death while in the course of his employment:—*Held:* in the absence of any proof of partnership or joint-adventure in a course of trading, the master was a workman & his dependants were entitled to recover compensation from the managing owner.—CARSWELL *v.* SHARPE, [1910] S. C. 391; 47 Sc. L. R. 335; [1910] 1 S. L. T. 80; 3 B. W. C. C. 552.—**SCOT.**

PART XIV. SECT. 4, SUB-SECT. 1.

p. *Who is an employer.*]—The words "an employer" in Workmen's Compensation Act, R. S. B. C., 1924, c. 278, s. 12 (3), include any employer who falls within the purview of the Act & is deft. to a workman's action for injuries even though he was not the employer of said workman.—PETER *v.* YORKSHIRE ESTATE CO., LTD., [1926] 2 D. L. R. 641; [1926] A. C. 513; [1926] 2 W. W. R. 545; *affg.*, [1925] 3 D. L. R. 1193; 36 B. C. R. 71; *revsg.*, [1925] 2 D. L. R. 1213; [1925] 2 W. W. R. 78; 35 B. C. R. 431.—**CAN.**

q. —— "*Undertaker.*"] — MURRAY *v.* NORTH BRITISH RY. CO. (1904), 6 F. (Ct. of Sess.) 540; 41 Sc. L. R. 383; 11 S. L. T. 746.—**SCOT.**

r. *Landlord of farm let for share of produce—No relation of employer to*

Sect. 4.—Persons liable to pay compensation: Sub-sect. 3, B., C. & D.; sub-sect. 4.]

of the roof was no part of the business of the builder, the last clause of Workmen's Compensation Act, 1897 (c. 37), s. 4 applied, & the builder was not liable to pay compensation.—BUSH *v.* HAWES, [1902] 1 K. B. 216; 71 L. J. K. B. 68; 85 L. T. 507; 66 J. P. 260; 50 W. R. 311; 4 W. C. C. 33, C. A.

Annotation:—**Apld.** Hockley *v.* West London Timber & Joinery Co. (1914), 112 L. T. 1.

2246. —— Liability only within provision.]—SKATES *v.* JONES & CO., No. 2239, *ante*.

2247. —— Erection of station for railway company.]—The erection of a railway station is work "which is merely ancillary or incidental to, & is no part of, or process in, the trade or business" of a railway co. within the meaning of Workmen's Compensation Act, 1897 (c. 37), s. 4; & therefore the railway co. are not liable to pay compensation under that Act to the workman of a contractor, who has contracted with them to do such work, in respect of an injury occasioned to the workman in the execution of it.—PEARCE *v.* LONDON & SOUTH WESTERN RY. CO., [1900] 2 Q. B. 100; 69 L. J. Q. B. 683; 82 L. T. 487; 48 W. R. 599; 16 T. L. R. 336; 2 W. C. C. 47, C. A.

Annotations:—**Refd.** Knight *v.* Cubitt (1901), 3 W. C. C. 71; Wrigley *v.* Bagley & Wright, [1901] 1 K. B. 780.

2248. —— Erection of iron roof for builder.]—BUSH *v.* HAWES, No. 2245, *ante*.

2249. —— Fixing wheel to steam engine of factory.]—A firm of engineers contracted with the owners of a cotton spinning factory to put a new driving wheel into the steam engine belonging to the factory. While engaged in the work of fixing the new wheel a workman employed by the engineers met with an accident which caused his death:—*Held:* the work being merely ancillary or incidental to & no part of or process in the business of the owners of the cotton spinning factory the case did not come within Workmen's Compensation Act, 1897 (c. 37), s. 4, & therefore a dependant of the deceased workman was not entitled to compensation under the Act against the owners of the cotton spinning factory.—WRIGLEY *v.* BAGLEY & WRIGHT, [1901] 1 K. B. 780; 70 L. J. K. B. 538; 84 L. T. 415; 65 J. P. 372; 49 W. R. 472; 3 W. C. C. 61, C. A.; *on appeal, sub nom.* WRIGLEY *v.* WHITTAKER & SONS, [1902] A. C. 299, H. L.

Annotations:—**Refd.** Willmott *v.* Paton, [1902] 1 K. B. 237; Pattison *v.* White (1904), 20 T. L. R. 775; Houlder Line *v.* Griffin, [1905] A. C. 220; Back *v.* Dick Kerr, [1906] A. C. 325; Spencer *v.* Harrison (1908), 1 B. W. C. C. 76.

2250. —— Demolition of building for builder.]—A firm of builders entered into a contract with the owner of two adjoining houses in a street, numbered respectively 16 & 17, for the demolition of No. 17 & the erection of a new building on the site of it, & for alterations & repairs to No. 16. The firm habitually entered into contracts for the demolition of buildings & the erection of new buildings on their sites. It was, however, their practice not to execute the work of demolition themselves, but to sub-contract for that work with another person, which they accordingly did with regard to the house No. 17. The two houses respectively, & the party wall common to both, were of a height exceeding thirty feet. An accident happened to a workman employed by the sub-contractor in the demolition of No. 17 in the course of his employment, which caused his death. At the time of the accident No. 17 had been reduced to a height of about eleven feet, excepting the party wall, which was not to be pulled down, & remained standing. On a claim by the workman's widow for compensation for herself & children as dependants on deceased under Workmen's Compensation Act, 1897 (c. 37), the county ct. judge found that the workman was employed in the demolition of a building which at the time of the accident exceeded thirty feet in height, & that the builders were liable to make compensation to his dependants under s. 4 of the Act:—*Held:* there was evidence to support the county ct. judge's finding as above mentioned; work of demolition was not merely ancillary to their business; & therefore they were liable under Workmen's Compensation Act, 1897 (c. 37), s. 4.—KNIGHT *v.* CUBITT & CO., [1902] 1 K. B. 31; 71 L. J. K. B. 65; 85 L. T. 526; 66 J. P. 52; 50 W. R. 113; 18 T. L. R. 26; 46 Sol. Jo. 49; 4 W. C. C. 42, C. A.

Annotations:—**Distd.** Bush *v.* Hawes, [1902] 1 K. B. 216. **Refd.** Wagstaff *v.* Perks (1902), 87 L. T. 558; Hartley *v.* Quick, [1905] 1 K. B. 359.

2251. —— Navigation to destination of lighter—For coal merchants.]—A limited co. carried on the business of coal merchants in various parts of the world, including Cape Verd, &, as incidental to that business, the business of lightermen, & they purchased in England a lighter for use in their business at Cape Verd. By an agreement entered into between the co. & G., G. agreed for a lump sum to navigate the lighter from England to Cape Verd & deliver her into the co.'s hands there, & to provide & pay for the crew, & the co. agreed to pay all demands for insurance, also clearances at the port of departure. B., who was appointed by G. to take command of the lighter, engaged the crew. The boatswain, who was incapacitated by an accident on the voyage, applied against the co. for compensation under Workmen's Compensation Act, 1906 (c. 58):—*Held:* the co. in the course or for the purposes of their business had contracted with G. for the execution by or under G. of part of the work undertaken by them & were liable as principals under Workmen's Compensation Act, 1906 (c. 58), s. 4 (1).—DITTMAR *v.* SHIP V 593 (OWNERS), [1909] 1 K. B. 389; 78 L. J. K. B. 523; *sub nom.* DITTMAR *v.* WILSON, SONS & CO., 100 L. T. 212; 25 T. L. R. 188; 2 B. W. C. C. 178, C. A.

Annotations:—**Distd.** Hockley *v.* West London Timber & Joinery Co. (1914), 112 L. T. 1. **Refd.** Skates *v.* Jones, [1910] 2 K. B. 903.

2252. —— Services of lecturer at exhibition—Engaged by licencee of exhibition authorities.]—WAITES *v.* FRANCO-BRITISH EXHIBITION, No. 2044, *ante*.

2253. —— Repair of own house for surveyor.]—A surveyor contracted to have his house repaired, & agreed to supervise the work himself:—*Held:* this was not a contract in the course of or for the purposes of the surveyor's trade or business.—BRINE *v.* MAY, ELLIS, GRACE & CO. (1912), 6 B. W. C. C. 134, C. A.

2254. —— Scaling of ship's boiler—For ship owners.]—Where the owners of a steamship entered

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factory.]—BEE *v.* OVENS (1900), 2 F. (Ct. of Sess.) 439.—**SCOT.**

h. —— *Erection of signals for railway company.*]—BURNS *v.* NORTH BRITISH RY. (1900), 2 F. (Ct. of Sess.) 629.—**SCOT.**

k. —— *Collection & delivery of goods for railway company.*]—GREENHILL *v.* CALEDONIAN RY. (1900), 2 F. (Ct. of Sess.) 736.—**SCOT.**

l. —— *Erection of stone wall in cutting for railway company.*]—DUNDEE & ARBROATH JOINT RY. *v.* CARLIN (1901), 3 F. (Ct. of Sess.) 843.—**SCOT.**

m. —— *Cleaning windows of workshop for firm of tailors.*]—DEMPSTER *v.* HUNTER (1902), 4 F. (Ct. of Sess.) 580.—**SCOT.**

n. —— *Tarring chambers of chemical works.*]—ZUGG *v.* CUNNINGHAM (J. & J.), LTD., [1908] S. C. 827;

into a contract with a contractor to scale the boilers of the vessel, & he engaged certain workmen to do the work, the principals not exercising any control over the workmen, it not being their practice to undertake the scaling of the boilers of their steamships themselves, they always employing an independent contractor to do it, the operation that the contractor had contracted to perform for the principals was held not to be work executed " in the course of or for the purposes of " the principal's " trade or business " within Workmen's Compensation Act, 1906 (c. 58), s. 4 (1), so that the principals were not liable to pay compensation to one of the workmen who was injured by " accident arising out of & in the course of " his employment.—LUCKWILL *v.* AUCHEN S.S. CO., LTD. (1913), 108 L. T. 52 ; 6 B. W. C. C. 51 ; 12 Asp. M. L. C. 286, C. A.

Annotation :—**Apld.** Hockley *v.* West London Timber & Joinery Co. (1914), 112 L. T. 1.

C. Indemnity.

See Workmen's Compensation Rules, 1926, rr. 20–24.

2255. Right of principal to indemnity—On compensation paid to workman—Award of compensation declaring no right to indemnity.]—The contractor for the building of a house sub-let the plastering work to F., who agreed to supply & control the labour for it, the contractor to find the materials & plant for such work. One of F.'s workmen, while engaged in the plastering work, met with an accident, & recovered compensation under Workmen's Compensation Act, 1897 (c. 37), from the contractor. The contractor appealed from that part of the award so far as it declared that he was not entitled to an indemnity from F. : —*Held :* allowing the appeal, F. had agreed to execute a substantial part of the work of construction, although only supplying & controlling the labour therefor ; he was consequently an " undertaker " in regard to that part, & he was bound to indemnify the contractor.—WAGSTAFF *v.* PERKS & SON (1902), 87 L. T. 558 ; 51 W. R. 210 ; 19 T. L. R. 112 ; 47 Sol. Jo. 145 ; 5 W. C. C. 110, C. A.

2256. —— ——.]—Applts. undertook to build a house, & agreed with a sub-contractor that he should slate the roof. A workman employed by the sub-contractor was killed in the course of his employment, & his widow was awarded compensation against applts. as undertakers under Workmen's Compensation Act, 1897 (c. 37) :—*Held :* the sub-contractor would have been liable as an undertaker, & applts. were entitled to be indemnified by him against the amount of compensation awarded.—COOPER & CRANE *v.* WRIGHT, [1902] A. C. 302 ; 71 L. J. K. B. 642 ; 86 L. T. 776 ; 51 W. R. 12 ; 18 T. L. R. 622 ; 4 W. C. C. 75, H. L.

Annotations :—**Folld.** Wagstaff *v.* Perks (1902), 87 L. T. 558 ; McCabe *v.* Jopling & Palmer's Travelling Cradle, [1904] 1 K. B. 222. **Refd.** Evans *v.* Cook, [1905] 1 K. B. 53.

2257. —— ——.]—The contractor for the repair of a building exceeding thirty feet in height agreed with a sub-contractor that the latter should supply, fix, & remove four travelling cradles which were used as a scaffolding in the process of repairing the building. During the process of removing the cradles, which the arbitrator found to be a substantial part of the process of repairing the building, one of the sub-contractor's workmen was fatally injured :—*Held :* the sub-contractor was liable to indemnify the contractor, who had been held liable to pay compensation to the deceased workman's dependants.—MCCABE *v.* JOPLING & PALMER'S TRAVELLING CRADLE, LTD., [1904] 1 K. B. 222 ; 73 L. J. K. B. 129 ; 89 L. T. 624 ; 68 J. P. 121 ; 52 W. R. 358 ; 20 T. L. R. 119 ; 6 W. C. C. 100, C. A.

Annotation :—**Refd.** Plant *v.* Wright, [1905] 1 K. B. 353.

2258. Mode of recovery—Whether limited to arbitration—High Court action.]—A workman in the employment of a sub-contractor sustained a personal injury by accident under circumstances that entitled him to compensation under Workmen's Compensation Act, 1897 (c. 37). The undertaker who had contracted to do the whole of the work agreed to pay to the workman during incapacity one-half of his average weekly earnings, & made payments accordingly. In an action brought by the undertaker to recover from the sub-contractor the amount so paid :—*Held :* there was nothing in the Act which affected the right of pltf. to bring the action in the High Ct.—EVANS *v.* COOK, [1905] 1 K. B. 53 ; 74 L. J. K. B. 95 ; 92 L. T. 43 ; 53 W. R. 81 ; 21 T. L. R. 42 ; 49 Sol. Jo. 53 ; 7 W. C. C. 41, C. A.

D. Exceptions to Liability.

See Workmen's Compensation Act, 1925 (c. 84), s. 6.

2259. Accident occurring elsewhere than in, on, or about premises—Meaning of " about "—Proximity to premises—Accident in public street two miles distant.]—A workman who was employed in connection with certain paving operations by a sub-contractor, his duties being to cart materials for the work, & remove rubbish, while so engaged was accidentally killed in the public street at a distance of two miles from the site of the work :—*Held :* the accident had not occurred " on, or in, or about premises " on which the principal contractor had undertaken to execute the work, or which were " otherwise under his control or management " within Workmen's Compensation Act, 1906 (c. 58), s. 4 (4), & consequently the principal was not liable to pay compensation under the Act.—ANDREWS *v.* ANDREWS & MEARS, [1908] 2 K. B. 567 ; 77 L. J. K. B. 974 ; 99 L. T. 214 ; 24 T. L. R. 709 ; 1 B. W. C. C. 264, C. A.

Annotation :—**Refd.** Dittmar *v.* Ship V 593, [1909] 1 K. B. 389.

2260. No claim maintainable against contractor—Principal not liable.]—MARKS *v.* CARNE, No. 2222, *ante*.

SUB-SECT. 4.—INSURANCE AGAINST LIABILITY.

See INSURANCE, Vol. XXIX., pp. 404–406, 443, Nos. 3195–3203, 3416.

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45 Sc. L. R. 670 ; 16 S. L. T. 51 ; 1 B. W. C. C. 257.—**SCOT.**

o. —— *Boiler-scaling for shipowner.*]—SPIERS *v.* ELDERSLIE S.S. CO., LTD., [1909] S. C. 1259 ; 46 Sc. L. R. 893 ; [1909] 2 S. L. T. 107 ; 2 B. W. C. C. 205.—**SCOT.**

PART XIV. SECT. 4, SUB-SECT. 3.—C.

2256 i. *Right of principal to indemnity—On compensation paid to workman.*]—TOPPING *v.* RHIND (1904), 6 F. (Ct. of Sess.) 666.—**SCOT.**

p. *Liability alternative—Not joint or joint & several.*]—The statutory liability of the employer & that of the principal are alternative & neither joint nor joint & several.—HEATH *v.* OLIVER (1914), 27 W. L. R. 597 ; 6 W. W. R. 305.—**CAN.**

q. —— ——.]—MEIER *v.* DUBLIN CORPN. (1912), 46 I. L. T. 236 ; 6 B. W. C. C. 441.—**IR.**

r. —— ——.]—HERD *v.* SUMMERS (1905), 7 F. (Ct. of Sess.) 870.—**SCOT.**

PART XIV. SECT. 4, SUB-SECT. 3.—D.

t. *Accident occurring elsewhere than in, on, or about premises—Meaning of " about "—At or near.*]—MONAGHAN *v.* UNITED COLLIERIES (1900), 3 F. (Ct. of Sess.) 149.—**SCOT.**

SECT. 5.—RIGHT TO COMPENSATION.

SUB-SECT. 1.—PERSONAL INJURY BY ACCIDENT.

A. In General.

See Workmen's Compensation Act, 1925 (c. 84), s. 1.

2261. Meaning of "accident"—Something fortuitous & unexpected.]—The word "accident" in Workmen's Compensation Act, 1897 (c. 37), s. 1, involves the idea of something fortuitous & unexpected.—HENSEY *v.* WHITE, [1900] 1 Q. B. 481; 69 L. J. Q. B. 188; 81 L. T. 767; 63 J. P. 804; 48 W. R. 257; 16 T. L. R. 64; 2 W. C. C. 1, C. A.

Annotations:—**Apld.** Timmins *v.* Leeds Forge Co. (1900), 83 L. T. 120. **Distd.** Walker *v.* Lilleshall Coal Co., [1900] 1 Q. B. 481, 488. **Overd.** Fenton *v.* Thorley, [1903] A. C. 443. **Consd.** Higgins *v.* Campbell & Harrison, Turvey *v.* Brintons, [1904] 1 K. B. 328. **Reld.** Roper *v.* Greenwood (1900), 83 L. T. 471; Boardman *v.* Scott & Whitworth, [1902] 1 K. B. 43; Clover, Clayton *v.* Hughes, [1910] A. C. 242.

2262. —— ——.]—A workman, having a blistered finger, was handling oil & red lead in the ordinary course of his employment, &, in so doing, failed to keep the red lead from the blistered finger, which accordingly became inflamed & was seriously injured:—*Held:* he had not suffered any injury by "accident" within the rule laid down in *Hensey* v. *White*, No. 2261, *ante*.—WALKER *v.* LILLESHALL COAL CO., [1900] 1 Q. B. 481, 488; 69 L. J. Q. B. 192; 81 L. T. 769; 64 J. P. 85; 16 T. L. R. 108; 44 Sol. Jo. 117; 2 W. C. C. 7, C. A.

Annotations:—**Consd.** Roper *v.* Greenwood (1900), 83 L. T. 471. **Apld.** Timmins *v.* Leeds Forge Co. (1900), 83 L. T. 120. **Reld.** Boardman *v.* Scott & Whitworth, [1902] 1 K. B. 43; Higgins *v.* Campbell & Harrison, Turvey *v.* Brintons, [1904] 1 K. B. 328.

2263. —— ——.]—TIMMINS *v.* LEEDS FORGE CO., LTD., No. 2291, *post*.

2264. —— **An untoward event not expected or designed.**]—In Workmen's Compensation Act, 1897 (c. 37), the word "accident" is used in the popular & ordinary sense, & means a mishap or untoward event not expected or designed.

A workman employed to turn the wheel of a machine, by an act of over-exertion ruptured himself:—*Held:* he suffered an "injury by accident" within the meaning of the Act & was entitled to compensation.

Hensey v. *White*, No. 2261, *ante*, overruled.

When personal injury & its cause or causes have been ascertained the question whether such cause on causes amount to an accident within the meaning of the Act is a question of law on which the decision of the county ct. judge is not final; & is not a question of fact on which his decision is not open to appeal (LORD LINDLEY).—FENTON *v.* THORLEY & CO., LTD., [1903] A. C. 443; 72 L. J. K. B. 787; 89 L. T. 314; 52 W. R. 81; 19 T. L. R. 684; 5 W. C. C. 1, H. L.

Annotations:—**Consd.** Higgins *v.* Campbell & Harrison, Turvey *v.* Brintons, [1904] 1 K. B. 328. **Folld.** Brintons *v.* Turvey, [1905] A. C. 230. **Consd.** Steel *v.* Cammell, Laird, [1905] 2 K. B. 232; Wicks *v.* Dowell, [1905] 2 K. B. 225; Ismay, Imrie *v.* Williamson, [1908] A. C. 437; Clover, Clayton *v.* Hughes, [1910] A. C. 242; Kelly *v.* Auchenlea Coal Co. (1911), 4 B. W. C. C. 417; Murray *v.* Denholm (1911), 5 B. W. C. C. 496; Alloa Coal Co. *v.* Drylie (1913), 6 B. W. C. C. 398; Paton *v.* Dixon (1913), 6 B. W. C. C. 882; Finlay *v.* Tullamore Union Grdns. (1914), 7 B. W. C. C. 973. **Expld.** Trim Joint District School, Board of Management *v.* Kelly, [1914] A. C. 667. **Apld.** Glasgow Coal Co. *v.* Welsh, [1916] 2 A. C. 1. **Consd.** Innes (or Grant) *v.* Kynoch, [1919] A. C. 765; Denholme *v.* Shipping Controller (1920), 124 L. T. 378. **Reld.** Marshall *v.* East Holywell Coal Co., Gorley *v.* Backworth Collieries (1905), 93 L. T. 360; Broderick *v.* L. C. C., [1908] 2 K. B. 807; Fitzgerald *v.* Clarke, [1908] 2 K. B. 796; Coe *v.* Fife Coal Co. (1909), 2 B. W. C. C. 8; *Re* Etherington & Lancashire & Yorkshire Accident Insce., [1909] 1 K. B. 591; Anderson *v.* Balfour (1910), 3 B. W. C. C. 588; Nisbet *v.* Rayne & Burn (1910), 80 L. J. K. B. 84; Warner *v.* Conchman (1910), 103 L. T. 693; Borland *v.* Watson, Gow (1911), 5 B. W. C. C. 514; Euman *v.* Dalziel (1912), 6 B. W. C. C. 900; M'Ardle *v.* Swansea Harbour Trust (1915), 85 L. J. K. B. 733; Scott *v.* Pearson, [1916] 2 K. B. 61; Leyland Shipping Co. *v.* Norwich Union Fire Insce. Soc., [1917] 1 K. B. 873; Carr *v.* Port Glasgow Burgh (1923), 16 B. W. C. C. 331. **Mentd.** Sherwood *v.* Johnson (1912), 5 B. W. C. C. 686; Vacher *v.* London Soc. of Compositors, [1912] 3 K. B. 547; *Re* Boaler, [1915] 1 K. B. 21.

2265. ——.]—A workman employed in unloading coal from a ship, who was required in the course of his duty to stand by the open hatchway through which the coal was being brought up from the hold, was seized with an epileptic fit while at work, & fell into the hold & was seriously injured:—*Held:* regard must be had to the proximate cause of the accident resulting in the injury, which was to be found in the necessary proximity of the workman to the hatchway; the accident therefore arose "out of" as well as "in the course of" his employment, & he was entitled to compensation under Workmen's Compensation Act, 1897 (c. 37).

It is said that these decisions on the meaning of the word "accident" in insurance policies have no application to the word as used in Workmen's Compensation Act, 1897 (c. 37), & reliance is placed on some observations made in *Fenton* v. *Thorley & Co., Ltd.*, No. 2264, *ante*, in the House of Lords. But when those observations are carefully looked at, I think that they do not affect the authority of the insurance cases on the question before us. The point that was there being insisted on was that the remedies under Workmen's Compensation Act, 1897 (c. 37), were not to be limited by special contracts of insurance, & it was not suggested that what would have been an accident but for such limitations was not an accident under Workmen's Compensation Act, 1897 (c. 37); in other words, compensation for an accident might be recoverable under that Act, although an action might not lie under the same circumstances upon an accident insurance policy. If injury is caused by an accident under the narrow standard of construction applied to insurance policies, *a fortiori*, it is so caused within the meaning of Workmen's Compensation Act, 1897 (c. 37) (COLLINS, M.R.).—WICKS *v.* DOWELL & CO., LTD., [1905] 2 K. B. 225; *sub nom.* WILKES *v.* DOWELL & CO., 74 L. J. K. B. 572; 92 L. T. 677; 53 W. R. 515; 21 T. L. R. 487; 49 Sol. Jo. 480; 7 W. C. C. 14, C. A.

Annotations:—**Consd.** Rodger *v.* Paisley School Board (1912), 5 B. W. C. C. 547; Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127; Wright & Greig *v.* M'Kendry (1918), 12 B. W. C. C. 410. **Reld.** Hughes *v.* Clover, Clayton, [1909] 2 K. B. 798; Fennah *v.* Mid. & G. W. Ry. of Ireland (1911), 4 B. W. C. C. 440; Coyle (or Brown) *v.* Watson, [1915] A. C. 1; White *v.* Avery (1915), 9 B. W. C. C. 663. **Mentd.** Williams *v.* Llandudno Coaching & Carriage Co. (1915), 112 L. T. 848.

2266. Meaning of injury.]—WOODCOCK *v.* LONDON & NORTH WESTERN RY. CO., No. 4085, *post*.

B. Questions of Law and Fact.

2267. Question of law—Whether facts found constitute an accident.]—FENTON *v.* THORLEY & CO., LTD., No. 2264, *ante*.

2268. —— **Inference to be drawn from facts found.**]—GANE *v.* NORTON HILL COLLIERY CO., No. 2559, *post*.

2269. —— ——.]—READ *v.* BAKER, No. 2632, *post*.

2270. Question of fact—Whether accident in fact happened.]—On July 31, 1923, a workman was carrying bags of cement upstairs, when, according to his evidence, a bag seemed to twist round his back. He went home & was confined to the house for three months. The county ct. judge, after

hearing conflicting medical evidence as to whether the man's condition was due to the accident or not, found that no accident had in fact happened to the workman on July 31, or on any other day :—*Held :* it was a question of fact upon which there was evidence to support the finding, & there was no misdirection.—BAFFA *v.* MONGIAT (1924), 17 B. W. C. C. 163, C. A.

2271. —— Whether accident occurred in course of employment.]—JOHNSON *v.* TORRINGTON (OWNERS), No. 2277, *post.*

C. What are Personal Injuries by Accident.

(a) In General.

See Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).

2272. Epileptic fit.]—WICKS *v.* DOWELL & Co., LTD., No. 2265, *ante.*

2273. Intrusion of foreign body into eye.]—Whilst a dock labourer was unloading a cargo of bran, some of the bran blew into his eye. There was grit in the bran, & this, by his constantly rubbing his eye, produced an abrasion of the cornea. In the end, his eye had to be removed. The county ct. judge found that the injury was due to an accident within Workmen's Compensation Act, 1906 (c. 58) :—*Held :* there was evidence to support the finding.—ADAMS *v.* THOMPSON (1911), 5 B. W. C. C. 19, C. A.

Annotation :—**Consd.** Bellamy *v.* Humphries (1913), 6 B. W. C. C. 53.

2274. ——.]—Appct. was a youth about nineteen years of age, in the employment of resps. as an apprentice turner. On Sept. 11, 1918, he was engaged in turning a steel piston when a piece of steel flew off & entered his eye. He went to an eye hospital, & it was found that a piece of steel had lodged under his eyelid, & it was removed. He was prescribed for at the hospital & received from the dispensary some drops & a lotion. Appct. attended as an out patient at the hospital for a considerable time, using the drops & the lotion. On Oct. 19, 1918, when appct.'s eye was very much inflamed, he was seen by a doctor, & again on Nov. 1. The doctor had therefore not seen appct. until considerably more than a month after the accident happened to him. Ultimately the eye had to be removed, which took place on Nov. 5. The doctor's view was that, as he could find no mark of any actual injury to appct.'s eye, he was driven to the conclusion that the inflammation must be attributed, not to the foreign body which had undoubtedly been in the eye, but to tuberculosis. The doctor gave evidence however on cross-examination to the effect that he was quite aware that inflammation would follow the presence in the eye of such a foreign body as a piece of steel, but that as he could not find any abrasion on the eye he thought that there was some other cause, such as tuberculosis, for the inflammation.

It was decided by the county ct. judge that the injury to appct.'s eye had resulted in its removal & that it was "personal injury by accident arising out of & in the course of" appct.'s employment within Workmen's Compensation Act, 1906 (c. 58), s. 1. Resps. appealed :—*Held :* there was evidence upon which the county ct. judge could come to the conclusion at which he did in favour of appct., the doctor's evidence as to the cause of the inflammation being merely conjectural.—STANSBY *v.* AYRTON & Co. (1919), 122 L. T. 149 ; 12 B. W. C. C. 301, C. A.

(b) Nervous Shock.

2275. May amount to accident.]—Nervous shock causing incapacity to work is as much "personal injury by accident" as a broken limb or other physical injury.

A nervous shock caused by the excitement & alarm resulting from a fatal accident to a fellow workman while engaged in the employment :—*Held :* to be a case of "personal injury by accident arising out of & in the course of the employment" within Workmen's Compensation Act, 1906 (c. 58).—YATES *v.* SOUTH KIRKBY, ETC. COLLIERIES, LTD., [1910] 2 K. B. 538 ; 79 L. J. K. B. 1035 ; 103 L. T. 170 ; 26 T. L. R. 596 ; 3 B. W. C. C. 418, C. A.

(c) Exposure to Heat, Cold, etc.

2276. Exposure to heat—Furnace.]—A workman, in a weak & emaciated condition, while raking out ashes from under the boiler in the stokehole of a steamship received a heat stroke from the effect of which he died :—*Held :* this was a case of death by accident within Workmen's Compensation Act, 1906 (c. 58).—ISMAY, IMRIE & Co. *v.* WILLIAMSON, [1908] A. C. 437 ; 77 L. J. P. C. 107 ; 99 L. T. 595 ; 24 T. L. R. 881 ; 52 Sol. Jo. 713 ; 1 B. W. C. C. 232, H. L.

Annotations :—**Apld.** Morgan *v.* S.S. Zenaida (1909), 25 T. L. R. 446 ; Dotzauer *v.* Strand Palace Hotel (1910), 3 B. W. C. C. 387. **Consd.** Clover, Clayton *v.* Hughes, [1910] A. C. 242 ; Eke *v.* Hart-Dyke, [1910] 2 K. B. 677 ; Warner *v.* Couchman (1910), 103 L. T. 693. **Distd.** Karemaker *v.* S.S. Corsican (1911), 4 B. W. C. C. 295. **Consd.** Kelly *v.* Auchenlea Coal Co. (1911), 4 B. W. C. C. 417 ; Trim Joint District School, Board of Management *v.* Kelly, [1914] A. C. 667. **Folld.** Maskery *v.* Lancashire Shipping Co. (1914), 7 B. W. C. C. 428. **Apld.** Glasgow Coal Co. *v.* Welsh (1915), 8 B. W. C. C. 635. **Consd.** M'Ardle *v.* Swansea Harbour Trust (1915), 85 L. J. K. B. 733. **Distd.** Pyper *v.* Manchester Liners, [1916] 2 K. B. 691 ; Dennis *v.* Mid. Ry. (1921), 90 L. J. P. C. 144. **Apld.** Harris *v.* Thomas (1921), 14 B. W. C. C. 105. **Reid.** Fennah *v.* Mid. & G. W. Ry. of Ireland (1911), 4 B. W. C. C. 440 ; Lee *v.* Stag Line (1912), 107 L. T. 509 ; Wright & Greig *v.* M'Kendry (1918), 12 B. W. C. C. 410.

2277. —— ——.]—A fireman on board ship was seen frequently drinking water while in the stokehole. Soon after he was found to be very ill ; he next became unconscious & died. No post mortem was held, & the medical evidence as to the cause of death was conflicting. The judge came to the conclusion, there being medical evidence to that effect, that the cause of death was cerebral hæmorrhage, caused by the heat & the drinking of excessive quantities of water :—*Held :* the question as to whether or not the workman did in fact sustain a personal injury by accident arising out of & in the course of the employment was one of fact for the judge, & there had not been any misdirection.—JOHNSON *v.* TORRINGTON (OWNERS) (1909), 3 B. W. C. C. 68, C. A.

2278. —— ——.]—An engineer, aged nineteen, employed in the engine-room on a steamship, sailing in the tropics, collapsed from heat stroke, & subsequently died. The temperature of the

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PART XIV. SECT. 5, SUB-SECT. 1.—C. (a).

2273 i. *Intrusion of foreign body into eye.*]—While engaged in chipping the burs from a steel plate with a cold-chisel, pltf. was injured by a piece of the steel so chipped off, striking him in the eye & destroying its sight :—*Held :* the injury was an accident within the meaning of Workmen's Compensation Act, 1902.—NEVILLE *v.* KELLY BROTHERS & MITCHELL, LTD. (1907), 5 W. L. R. 427 ; 13 B. C. R. 125.—CAN.

a. *Poisoned blisters caused by using pick.*]—CARR *v.* PORT-GLASGOW BURGH, [1923] S. C. 844.—SCOT.

PART XIV. SECT. 5, SUB-SECT. 1.—C. (c).

b. *Exposure to heat—Workman running upstairs.*]—A canvasser & collector, who to get his work done in time had to hurry up many flights of stairs, became overheated & took a chill, which developed into pleurisy, & incapacitated him from work :—

Sect. 5.—Right to compensation: Sub-sect. 1, C. (c) & (d).]

engine room was 114 degrees Fahrenheit. There was evidence that deceased was physically unsuited to withstand the normal heat of a tropical climate:—*Held:* the death resulted from an accident arising out of his employment.—MASKERY *v.* LANCASHIRE SHIPPING CO., LTD. (1914), 7 B. W. C. C. 428.

Annotations:—**Distd.** Pyper *v.* Manchester Liners, [1916] 2 K. B. 691. **Refd.** Harris *v.* Thomas (1921), 14 B. W. C. C. 105.

2279. —— **Sunstroke.**]—Appct., an ordinary seaman, while engaged in painting the vessel when she was lying at a port on the coast of Mexico was incapacitated by sunstroke. The medical evidence was to the effect that a seaman painting the outside of a ship is running a greater risk of sunstroke than when employed on deck, because he not only gets the direct rays of the sun, but he also gets the reflected rays from the ship's side:—*Held:* his injury arose by accident within Workmen's Compensation Act, 1906 (c. 58), & he was entitled to compensation.—MORGAN *v.* ZENAIDA (OWNERS) (1909), 25 T. L. R. 446; 2 B. W. C. C. 19, C. A.

Annotations:—**Consd.** Warner *v.* Couchman, [1911] 1 K. B. 351. **Distd.** Karemaker *v.* S.S. Corsican (1911), 4 B. W. C. C. 295; Pyper *v.* Manchester Liners, [1916] 2 K. B. 691. **Consd.** Harris *v.* Thomas (1921), 14 B. W. C. C. 107. **Refd.** Davies *v.* Gillespie (1911), 105 L. T. 494; Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127; Wales *v.* Lambton & Hetton Colliery Co. (1917), 117 L. T. 454.

2280. —— ——.]—Appct., while engaged for several hours in superintending the loading the cargo posted on the unsheltered deck of resp.'s vessel at a port in the West Indies, had an attack of sunstroke, which resulted in his being incapacitated for work:—*Held:* appct. was entitled to compensation under Workmen's Compensation Act, 1906 (c. 58), he having by reason of the nature of his occupation been exposed to a greater risk of sunstroke than other persons.—DAVIES *v.* GILLESPIE (1911), 105 L. T. 494; 28 T. L. R. 6; 56 Sol. Jo. 11; 5 B. W. C. C. 64, C. A.

Annotation:—**Refd.** Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127.

2281. —— ——.]—A seaman employed as a stoker on board a ship died from heatstroke while going through the Red Sea. For four or five days before his death he had complained of the heat, which was admittedly excessive, & although he felt ill he continued working, being persuaded to do so in order to lessen the strain upon his fellow-workers. On the fifth day he collapsed while at work in the stokehold, & was taken up on deck, where he died. Upon an application by his widow against the owners of the ship for compensation under Workmen's Compensation Act, 1906 (c. 58):—*Held:* his death was not the result of an "injury by accident" within the meaning of the Act, & no compensation was payable.—PYPER *v.* MANCHESTER LINERS, LTD., [1916] 2 K. B. 691; 85 L. J. K. B. 1459; 115 L. T. 406; 32 T. L. R. 723; 60 Sol. Jo. 706; 9 B. W. C. C. 580, C. A.

Annotation:—**Consd.** Harris *v.* Thomas (1921), 14 B. W. C. C. 105.

2282. Exposure to cold & damp.]—WARNER *v.* COUCHMAN, No. 2604, *post.*

2283. ——.]—KAREMAKER *v.* CORSICAN (OWNERS), No. 2609, *post.*

2284. ——.]—Upon an application for compensation by the widow of a miner the arbitrator found that, owing to a wreck in the shaft of No. 2 pit where deceased was working, deceased & his fellow workers were ordered to ascend to the surface by the shaft of No. 1 pit, this being the downcast shaft for the air current which ventilated the mine; that they were kept waiting at a mid-landing for an hour & a half until the men who usually ascended by this shaft had been raised, & were exposed to a cold down draft; that as the result of this exposure the deceased caught a chill which brought on pneumonia from which he died:—*Held:* the death resulted from the exposure consequent on the wreck in shaft No. 2 & there was evidence to support the finding of the arbitrator that deceased sustained an injury by accident arising out of & in the course of his employment.—COYLE (OR BROWN) *v.* WATSON (JOHN), LTD., [1915] A. C. 1; 83 L. J. P. C. 307; 111 L. T. 347; 30 T. L. R. 501; 58 Sol. Jo. 533; 7 B. W. C. C. 259, H. L.

Annotations:—**Consd.** Barbeary *v.* Chugg (1914), 84 L. J. K. B. 504; Glasgow Coal Co. *v.* Welsh, [1916] 2 A. C. 1; Innes (or Grant) *v.* Kynoch, [1919] A. C. 765. **Refd.** Aitken *v.* Finlayson, Bousfield & Co., (1914), 7 B. W. C. C. 918; Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127. **Mentd.** Fidelity & Casualty Co. of New York *v.* Mitchell, [1917] A. C. 592; Janvier *v.* Sweeney, [1919] 2 K. B. 316; Hambrook *v.* Stokes, [1925] 1 K. B. 141.

2285. ——.]—A man was employed as a pilot to take a ketch out of harbour. Having piloted her out, he attempted to get into his own boat, towing astern of the ketch, in order to go ashore. He jumped in, alighting somewhere near the bows of the boat, with the result that they went under water, & he was wetted to the thighs. He was pulled aboard the ketch again. He ultimately got ashore in the boat. Subsequently he suffered from sciatica in consequence of this wetting:—*Held:* he was suffering from injury by "accident" & the accident arose "out of & in the course of" his employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—BARBEARY *v.* CHUGG (1915), 84 L. J. K. B. 504; 112 L. T. 797; 31 T. L. R. 153; 8 B. W. C. C. 37, C. A.

2286. ——.]—A man employed as a brusher in a mine was directed by the mine owners to bale out a large quantity of water which had accumulated at the pit's bottom owing to the breakdown of a pump which had occurred five days earlier. He was engaged in this work, which necessitated

Held: there was no accident.—M'MILLAN *v.* SINGER SEWING MACHINE CO., LTD., [1913] S. C. 346; 50 Sc. L. R. 220; [1912] 2 S. L. T. 484; 6 B. W. C. C. 345.—**SCOT.**

2282 i. *Exposure to cold & damp.*]—An attack of rheumatism, contracted by a workman in the course of his employment, is not an injury by "accident" within the meaning of Workers' Compensation Act, 1902.—SYLLELEDIS *v.* ARAPAKIS (1909), 11 W. A. L. R. 50.—**AUS.**

2282 ii. ——.]—A workman was employed in a millrace, where he had to work for a fortnight up to his knees in water. As a result he contracted inflammation of the kidneys & died:—*Held:* this was a personal injury by accident.—SHEERAN *v.* CLAYTON (F. & J.) & CO., LTD. (1909), 44 I. L. T. 52; 3 B. W. C. C. 583.—**IR.**

2282 iii. ——.]—A pump in a wet pit having been stopped in order that a defect might be repaired, water accumulated in the pit bottom & rose to the knees of certain miners, who, in consequence of the rising water, had left their work & were waiting for the cage to take them to the pit-head. One of the miners, in consequence of this immersion, contracted a chill, upon which, after he had done some work on three subsequent days, pneumonia ensued, from which he ultimately died:—*Held:* this was an accident.—ALLOA COAL CO., LTD. *v.* DRYLIE (1913), 6 B. W. C. C. 398.—**SCOT.**

2282 iv. ——.]—A miner, in order that he might be among the first to ascend the shaft, stood in an accumulation of water at the pit bottom for some thirty minutes instead of waiting on dry ground till his turn to ascend came. Had he waited he might have reached the cage comparatively dry. He had recently often been wetted due to the continual breakdown of pumps. He contracted a chill. Deafness followed as the result & rendered him totally unfit for work:—*Held:* the incapacity was not due to an injury by "accident."—M'LUCKIE *v.* WATSON (JOHN), LTD., [1913] S. C. 975; 50 Sc. L. R. 770; [1913] 2 S. L. T. 61; 6 B. W. C. C. 850.—**SCOT.**

c. —— *Twenty-four hour shift—Usual in the employment.*]—MAGUIRE

his standing up to his chest in water, for eight hours, with the result that he contracted subacute rheumatism. Upon a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), the arbitrator found that the rheumatism was caused by the extreme & exceptional exposure to cold & damp to which the man was subjected on the occasion in question & awarded him compensation :—*Held :* the injury was sustained by accident within the Act.—GLASGOW COAL CO., LTD. *v.* WELSH, [1916] 2 A. C. 1 ; 85 L. J. P. C. 130 ; 114 L. T. 809 ; 32 T. L. R. 359 ; 60 Sol. Jo. 336 ; 9 B. W. C. C. 371, H. L.

Annotations :—**Apld.** Scott *v.* Pearson, [1916] 2 K. B. 61. **Consd.** Innes (or Grant) *v.* Kynoch, [1919] A. C. 765. **Refd.** Lyons *v.* Woodilee Coal & Coke Co. (1916), 9 B. W. C. C. 655 ; Pyper *v.* Manchester Liners, [1916] 2 K. B. 691 ; Fenton *v.* Kelvin (Owners), [1925] 2 K. B. 473.

2287. ——.]—A brusher, having finished his night's work, went to the bottom of the pit shaft to be taken to the surface just at a time when the daily statutory inspection of the shaft was beginning. The inspection, which generally took half an hour going down, that morning took an hour owing to the breakdown of the bell wire. During that time the workman was standing about in a strong current of cold air. He contracted a chill & pneumonia intervened, from which he died. The arbitrator found that although the cause of the man's death arose out of & in the course of his employment, nevertheless it was not due to an "accident." He had chosen to break off work so as to bring himself to the bottom of the shaft just at the time that he knew the daily inspection took place, & breakdown of the bell wire was too remote a cause of delay to fill up the chain of causation. He made his award, therefore, in favour of resps. : —*Held :* it was competent on the evidence for the arbitrator to find that deceased was not injured by accident arising out of & in the course of his employment.—LYONS *v.* WOODILEE COAL & COKE CO., LTD. (1917), 86 L. J. P. C. 137 ; 117 L. T. 65 ; 61 Sol. Jo. 490 ; 10 B. W. C. C. 416, H. L.

Annotation :—**Expld.** Innes (or Grant) *v.* Kynoch, [1919] A. C. 765.

2288. ——.]—An engine driver, who had to take out an early train on a bitterly cold morning in Mar., was called late by a fellow workman, employed on night work, who habitually knocked him up on his way home. This was an arrangement between themselves, with which the co. had nothing to do. He had only time to put on his clothes hurriedly, & did not stop to get his overcoat or anything to eat. Insufficiently clad, & without his usual food, he drove his engine, with the result that he contracted a chill, & pneumonia followed from which he died :—*Held :* there was no accident, & therefore no injury by accident within Workmen's Compensation Act, 1906 (c. 58). —DENNIS *v.* MIDLAND RY. CO. (1921), 90 L. J. P. C. 144 ; 125 L. T. 545 ; 37 T. L. R. 623 ; 65 Sol. Jo. 511 ; 14 B. W. C. C. 71, H. L.

Annotation :—**Refd.** Hanniffin *v.* Fitzmaurice (1920), 14 B. W. C. C. 320.

2289. ——.]—A miner, who habitually worked underground, was employed to shovel snow during a blizzard at the top of the colliery tip which was high up on the side of the mountain. After working for about an hour & a half he went into a fireman's hut to warm himself. He & the other workmen were allowed to do this. After leaving the hut, he collapsed & died almost immediately. In arbitration proceedings the county ct. judge found that the death of the man was caused by an accident arising out of & in the course of his employment. From this decision the employers appealed on the ground that there was no evidence to support the finding of the judge, that the death was due to doing the heavy work in very severe weather, & that it was not work arising out of the employment. It was contended on behalf of the employers that the man, in doing the work, was doing nothing which would bring a greater risk on him than the risk which the ordinary public would experience :—*Held :* it was extraordinary to suggest that a man who was by reason of his employment instructed to do the heavy work of shovelling snow on a tip in a blizzard was undergoing exactly the same risk as that of the general public ; the accident arose out of & in the course of the employment, & the appeal must be dismissed. —HEWITT *v.* PARTRIDGE JONES & PATON (JOHN), LTD. (1922), 128 L. T. 238 ; 15 B. W. C. C. 239.

2290. —— **Shipwreck.**]—FENTON *v.* KELVIN (OWNERS), No. 2939, *post.*

(*d*) *Strain.*

2291. Rupture.]—A workman was employed by defts. in the work of lifting & removing planks from a stack of timber ; one night there was rain & frost, & the planks became frozen together, the planks lower in the stack being more firmly frozen together than those above ; on the next day the workman began to work in the morning, & lifted & removed planks all day ; about 4 p.m., while trying to lift a plank, he ruptured himself.

The workman claimed compensation under Workmen's Compensation Act, 1897 (c. 37), & the county ct. judge found that the injury was caused by the lifting of the plank, & was an injury by "accident" within the meaning of the Act :—*Held :* there was evidence of something fortuitous & unexpected upon which the county ct. judge might properly find that the injury was caused by "accident" within the meaning of Workmen's Compensation Act, 1897 (c. 37).—TIMMINS *v.* LEEDS FORGE CO., LTD. (1900), 83 L. T. 120 ; 16 T. L. R. 521 ; 2 W. C. C. 10, C. A.

Annotations : **Refd.** Roper *v.* Greenwood (1900), 83 L. T. 471 ; Boardman *v.* Scott & Whitworth (1901), 85 L. T. 502 ; Perry *v.* Baker (1901), 3 W. C. C. 29.

2292. — —.]—FENTON *v.* THORLEY & CO., LTD., No. 2264, *ante.*

2293. Strain caused by lifting weight.]—A woman who was employed as a box maker, was ordered to work upon boxes which were larger & heavier than those upon which she had previously worked. When she had finished some of the boxes & was working upon another, she suffered internal injury from the strain of the unusual exertion. The county ct. judge found that the injury did not arise from an "accident" within Workmen's Compensation Act, 1897 (c. 37), s. 1 (1) :—*Held :* the judge had properly found that the injury did not arise from an "accident" within the Act.—

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v. UNION S.S. CO. OF NEW ZEALAND, [1920] 27 C. L. R. 570.—**AUS.**

d. —— *Engine driver insufficiently clad on snowy morning.*]—*Re* WORKMEN'S COMPENSATION ACT, 1906, DENNIS *v.* MIDLAND RY. CO., [1920] 2 I. R. 154.—**IR.**

PART XIV. SECT. 5, SUB-SECT. 1.—C. (d).

2293 i. *Strain caused by lifting weight.*] —A workman who merely by an effort in lifting suffers an injury which disables him from working has suffered an injury due to an accident within the meaning of Workmen's Compensation Act, R. S. S., 1920.—HEWITSON *v.* ROBIN HOOD MILLS, LTD., [1924] 1 D. L. R. 206 ; [1924] 1 W. W. R. 143 ; 18 Sask. L. R. 9.—**CAN.**

2293 ii. ——.]—LOGAN *v.* JOHNS (1915), 34 N. Z. L. R. 881.—**N.Z.**

Sect. 5.—Right to compensation: Sub-sect. 1, C. (d), (e) & (f) i.]

ROPER *v.* GREENWOOD & SONS (1900), 83 L. T. 471; 3 W. C. C. 23, C. A.

Annotations :—**Distd.** Boardman *v.* Scott & Whitworth, [1902] 1 K. B. 43. **Dbtd.** Fenton *v.* Thorley, [1903] A. C. 443.

2294. ——.]—It was the duty of a workman employed in a factory to remove the empty yard beams from looms. He had, in the ordinary course of duty, removed such a beam, weighing about 100 lbs., from a loom, & was in the act of lifting it on to his shoulder, when, finding that it was unevenly balanced, he gave it an extra lift up to get it on his shoulder. The sudden strain so caused had the effect of lacerating the muscles on the right side of his back. Before this occurrence he was in good health, & had not found anything wrong with his back. Upon a claim made by him for compensation under Workmen's Compensation Act, 1897 (c. 37), the county ct. judge found that he had been injured by an "accident":—*Held:* the decision of the county ct. judge was correct.—BOARDMAN *v.* SCOTT & WHITWORTH, [1902] 1 K. B. 43; 71 L. J. K. B. 3; 85 L. T. 502; 66 J. P. 260; 50 W. R. 184; 18 T. L. R. 57; 4 W. C. C. 1, C. A.

Annotation :—**Refd.** Neville *v.* Kelly & Mitchell (1907), 1 B. W. C. C. 432.

Disease aggravated by accident.]—*See* Sub-sect. 1, C. (*f*) iii., *post*.

(*e*) *Crimes of Violence.*

2295. Assault—Stones thrown at engine.]—CHALLIS *v.* LONDON & SOUTH WESTERN RY. CO., No. 2585, *post*.

2296. —— **By employer.**]—BLAKE *v.* HEAD, No. 2591, *post*.

2297. —— **By fellow employee.**]—The workman, while employed as a stoker by resp. co. on board their ship, was assaulted without provocation by an African stoker, who was also employed on the ship, while they were both engaged in wheeling barrows of hot ashes, & he claimed compensation for the incapacity resulting from his injuries. The county ct. judge found as a fact that although the assault was an intentioned act on the part of the aggressor, a risk of assault was inherent in the employment, as appct.'s work brought him into contact with this undisciplined African, & made an award in favour of appct.:—*Held:* it was a question of fact as to which there was evidence to justify the finding, & there was no misdirection.—PARKER *v.* FEDERAL STEAM NAVIGATION CO., LTD. (1925), 95 L. J. K. B. 664; 134 L. T. 137; 18 B. W. C. C. 469, C. A.

2298. Murder or manslaughter—Of bank cashier.]—A cashier, while travelling in a railway carriage to a colliery with a large sum of money for the payment of his employers' workmen, was robbed & murdered. On an application by his widow for compensation:—*Held:* the murder was an "accident" from the standpoint of the person who suffered from it, & it arose "out of" an employment which involved more than the ordinary risk, & consequently the widow was entitled to compensation under Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—NISBET *v.* RAYNE & BURN, [1910] 2 K. B. 689; 80 L. J. K. B. 84; 103 L. T. 178; 26 T. L. R. 632; 54 Sol. Jo. 719; 3 B. W. C. C. 507, C. A.

Annotations :—**Consd.** Murray *v.* Denholm (1911), 5 B. W. C. C. 496. **Apld.** Mitchinson *v.* Day, [1913] 1 K. B. 603. **Consd.** Trim Joint District School, Board of Management *v.* Kelly, [1914] A. C. 667. **Refd.** Weekes *v.* Stead (1914), 83 L. J. K. B. 1542.

2299. —— **By drunken man.**]—A carman was in charge of a horse & van which were standing in the street. A man in an intoxicated state approached the van & either touched or was apparently about to touch the horse when the carman warned him that the horse might hurt him. The drunken man then struck the carman a heavy blow, & before he could protect himself a second blow followed which felled him to the ground & caused his death. The assault was entirely unprovoked, & the assailant was subsequently tried & found guilty of manslaughter:—*Held:* the carman had suffered "injury by accident" within Workmen's Compensation Act, 1906 (c. 58), s. 1.—MITCHINSON *v.* DAY BROTHERS, [1913] 1 K. B. 603; 82 L. J. K. B. 421; 108 L. T. 193; 29 T. L. R. 267; 57 Sol. Jo. 300; 6 B. W. C. C. 190, C. A.

Annotations :—**Consd.** Shaw (Glasgow) *v.* Macfarlane (1914), 8 B. W. C. C. 382; Sheldon *v.* Needham (1914), 111 L. T. 729; Weekes *v.* Stead (1914), 83 L. J. K. B. 1542; Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127. **Refd.** Nash *v.* S.S. Rangatira (1914), 7 B. W. C. C. 590; Cooper *v.* N. E. Ry. (1915), 85 L. J. K. B. 187. Dennis *v.* White, [1917] A. C. 479; Upton *v.* G. C. Ry. (1923), 130 L. T. 577; Parker *v.* Federal Steam Navigation Co. (1925), 134 L. T. 137.

2300. —— **Of schoolmaster by pupils.**]—An assistant master at an industrial school, whilst engaged in the performance of his duties, was assaulted by two of the pupils in pursuance of a preconcerted plan of attack & killed. A dependant of deceased claimed compensation from the managers of the school. The county ct. judge found that some of the boys were unruly & badly disposed & that deceased met his death by accident arising out of & in the course of his employment:—*Held:* (1) the death was caused by accident; (2) there was evidence to support the finding of the arbitrator that the accident arose out of the employment.

(3) Construction of the Acts (*see* No. 2040, *ante*).—TRIM JOINT DISTRICT SCHOOL BOARD OF MANAGEMENT *v.* KELLY, [1914] A. C. 667; 83 L. J. P. C. 220; 111 L. T. 305; 30 T. L. R. 452; 58 Sol. Jo. 493; 7 B. W. C. C. 274, H. L.; *affg.* S. C. *sub nom.* KELLY *v.* TRIM JOINT DISTRICT SCHOOL BOARD OF MANAGEMENT, 6 B. W. C. C. 921, C. A.

Annotations :—*As to* (1) **Expld.** Weekes *v.* Stead (1914), 83 L. J. K. B. 1542. **Consd.** Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127; Reid *v.* British & Irish Steam Packet Co., [1921] 2 K. B. 319; Parker *v.* Federal Steam Navigation Co. (1925), 95 L. J. K. B. 664. **Refd.** Shaw (Glasgow) *v.* Macfarlane (1914), 8 B. W. C. C. 382; Clayton *v.* Hardwick Colliery Co. (1915), 85 L. J. K. B. 292; Leyland Shipping Co. *v.* Norwich Union Fire Insco. Soc., [1917] 1 K. B. 873; Selvage *v.* Burrell, [1921] 1 K. B. 355; Samuel *v.* Dumas, [1924] A. C. 431. *As to* (2) **Consd.** Reid *v.* British & Irish Steam Packet Co., [1921] 2 K. B.

2293 iii. ——.]—A workman while engaged in the course of his employment in replacing a derailed coal hutch on the rails severely strained his back:—*Held:* an injury by accident.—STEWART *v.* WILSON & CLYDE COAL CO. (1902), 5 F. (Ct. of Sess.) 120.—**SCOT.**

e. Cerebral hæmorrhage.]—A workman, in the course of his ordinary & usual employment, over-exerted himself & eventually brought on an attack of cerebral hæmorrhage:—*Held:* an accident within Workmen's Compensation Act, 1906, s. 1 (1).—M'INNES *v.* DUNSMUIR & JACKSON, LTD., [1908] S. C. 1021; 45 Sc. L. R. 804; 16 S. L. T. 214; 1 B. W. C. C. 226.—**SCOT.**

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f. Assault—Gamekeeper injured by poachers.]—A gamekeeper, while in the discharge of his duties, was attacked by poachers & injured:—*Held:* a personal injury by accident.—ANDERSON *v.* BALFOUR (1910), 44 I. L. T. 168; 3 B. W. C. C. 588.—**IR.**

g. Murder or manslaughter—By rioters.]—Where a carter was shot dead at his work on his lorry in a street in a disturbed locality:—*Held:* death was due to personal injury by accident

319. **Refd.** Clayton *v.* Hardwick Colliery Co. (1915), 85 L. J. K. B. 292; Slade *v.* Taylor (1915), 8 B. W. C. C. 65; Glasgow Coal Co. *v.* Welsh, [1916] 2 A. C. 1; Dennis *v.* White, [1917] A. C. 479; Allcock *v.* Rogers (1918), 118 L. T. 386; Wright & Greig *v.* M'Kendry (1918), 12 B. W. C. C. 410.

2301. —— By applicant for employment.]—W., was employed as foreman of the yard of a firm who carried on the business of furniture removers. Among his duties was that of deciding daily & weekly between competing persons for odd jobs. There was evidence that these appcts. for odd jobs contained among them men of a particularly rough class who, if disappointed of work, were likely to express resentment by rough language & rough acts towards the man who refused them. There was also evidence that W. had been assaulted by men to whom he had refused work, & similar evidence of assaults made on them was given by foremen of other yards in the same town. W.'s duty was also to let out vans to persons applying for them; but there was no evidence that he had ever been exposed to assault in connection with the letting out of vans. Among those who applied for odd jobs was S., who came to W. late at night & applied for a van for the next day. S. said that he was coming for the van at 6 a.m., but he did not come till 8.30 a.m., & by that time all the vans had gone out. At 3.30 p.m. S. came to the yard & assaulted W. by striking him on the mouth. They were separated but an hour later S. came back, & when W. had his back turned to him S. hit him twice on the side of the head, & then, as he was falling, struck him again so fiercely that W. died in the hospital two or three days afterwards:—*Held:* there was evidence to justify the finding that the accident to deceased workman arose "out of" as well as "in the course of" his employment, because there was a special risk of assault upon him which was incidental to that employment; &, therefore, the dependants of the deceased workman were entitled to compensation.—WEEKES *v.* STEAD (WILLIAM), LTD. (1914), 83 L. J. K. B. 1542; 111 L. T. 693; 30 T. L. R. 586; 58 Sol. Jo. 633; 7 B. W. C. C. 398, C. A.

Annotations:—**Expld.** Sheldon *v.* Needham (1914), 111 L. T. 729. **Refd.** Dennis *v.* White, [1917] A. C. 479; Upton *v.* G. C. Ry. (1923), 130 L. T. 577.

(*f*) *Disease.*

i. *Time and Place of Contraction.*

Industrial diseases, *see* Sect. 22, *post.*

2302. Necessity for proof of—Lead poisoning.]—A workman, whose employment necessitated the handling of white & red lead, gradually accumulated lead in his system, with the ultimate result that he suffered from lead poisoning, which produced partial paralysis & incapacity for work. On appeal from an award of compensation under the Workmen's Compensation Act, 1897 (c. 37):—*Held:* to bring a case within the Act there must be, by reason of sect. 2 (1), an injury by an accident of which notice can be given, & that, since it was not possible to indicate a time at which there was an accident which caused the injury to the workman, he was not entitled to an award under the Act.—STEEL *v.* CAMMELL, LAIRD & Co., LTD., [1905] 2 K. B. 232; 74 L. J. K. B. 610; 93 L. T. 357; 53 W. R. 612; 21 T. L. R. 490; 7 W. C. C. 9, C. A.

Annotations:—**Apld.** Marshall *v.* East Holywell Coal Co., Gorley *v.* Backworth Collieries (1905), 93 L. T. 360. **Consd.** Broderick *v.* L. C. C., [1908] 2 K. B. 807. **Distd.** Kelly *v.* Auchenlea Coal Co. (1911), 4 B. W. C. C. 417; Glasgow Coal Co. *v.* Welsh, [1916] 2 A. C. 1. **Consd.** Innes (or Grant) *v.* Kynoch, [1919] A. C. 765. **Folld.** Williams *v.* Guest, Keen & Nettlefolds, [1926] 1 K. B. 497. **Refd.** Eke *v.* Hart-Dyke, [1910] 2 K. B. 677; Alloa Coal Co. *v.* Drylie (1913), 6 B. W. C. C. 398.

2303. —— "Beat hand"—"Beat knee."]—One coal miner was incapacitated for work by "beat hand" & another by "beat knee." "Beat hand" is an injury caused by an abscess gradually produced by the jar, friction or pressure to the hand caused by using the pick & "beat knee" is an injury caused by an abscess in the knee gradually developed by long continued kneeling whilst at work. Both are common injuries in the ordinary course of work in a coal mine:—*Held:* the injuries were not caused by "accident" within the meaning of Workmen's Compensation Act, 1897 (c. 37), s. 1 (1).

To be an accident it must be something which is capable of being described as having occurred on a particular date (COLLINS, M.R.).—MARSHALL *v.* EAST HOLYWELL COAL CO., GORLEY *v.* BACKWORTH COLLIERIES (1905), 93 L. T. 360; 21 T. L. R. 494; 7 W. C. C. 19, C. A.

Annotation:—**Refd.** Innes (or Grant) *v.* Kynoch, [1919] A. C. 765.

See, now, Workmen's Compensation Act, 1925 (c. 84), ss. 43–47.

2304. —— Sewer gas poisoning.]—Except in the case of the industrial diseases scheduled in Workmen's Compensation Act, 1906 (c. 58), to which, by sect. 8 the provisions of the Act are to apply, unless appct. can indicate the time, the day, & circumstance & place in which the accident has occurred by means of some definite event, a disease cannot be treated as a personal "injury by accident" within sect. 1, sub-sect. 1, of the Act, & appct. is not entitled to compensation.

In July, 1909, a gardener & labourer & caretaker was ordered by his employer to open certain cesspools for the purpose of inspection, & was engaged in such work on four or five different days. Early in Aug. he became unwell, & on Aug. 23 saw a doctor, who thought he was suffering from the smell of paint. In Sept. another doctor saw him, & considered that he was affected with sewer gas poisoning. He died on Oct. 30, 1909, but no notice was given to his employer until Dec. 30. His widow took proceedings for compensation. The application for arbitration gave no date as to when the alleged accident occurred. It was admitted that the man's disease was obscure. The county ct. judge found that it was not possible to give any particular day as the date of the accident, but he decided that the man died from poisoning contracted whilst working on the cesspools, & that the employer was not prejudiced in his defence by want of notice; & he awarded compensation:—*Held:* (1) the second limb of proviso (*a*) in sect. 2 (1) of the Act had nothing to do with the prejudice caused to the employer by the want of notice, which was dealt with in the first limb, but said that the want of notice should not be a bar to proceedings for compensation if

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arising out of his employment.—NOBLE, LTD. *v.* CARRAGHER (1923), 57 I. L. T. 137.—IR.

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h. Necessity for proof of—Fever contracted from handling sewage.]—A workman, in the employment of a board of guardians, as a machinery attendant, contracted typhoid fever from the handling of sewage from time to time. He died shortly after contracting the disease, & his widow claimed compensation from the guardians:—*Held:* as it was not possible to indicate a time & place at which there was an "accident" which caused the injury to the workman, he was not entitled to an award under Workmen's Compensation Act, 1906 s. 1 (1).—FINLAY *v.* TULLAMORE UNION GUARDIANS (1911), 7 B. W. C. C. 973.—IR.

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such want was occasioned by a reasonable cause; & under the circumstances there was "reasonable cause" for not giving the notice; (2) there had not been an accident within the meaning of the Act, the county ct. judge's finding was not sufficient to support his decision, & consequently no compensation was payable.—EKE *v.* HART-DYKE, [1910] 2 K. B. 677; 80 L. J. K. B. 90; 103 L. T. 174; 26 T. L. R. 613; 3 B. W. C. C. 482, C. A.

Annotations:—As to (2) **Apld.** Martin *v.* Manchester Corpn. (1912), 106 L. T. 741. **Distd.** Glasgow Coal Co. *v.* Welsh, [1916] 2 A. C. 1. **Consd.** Innes (or Grant) *v.* Kynoch, [1919] A. C. 765. **Refd.** Warner *v.* Couchman, [1911] 1 K. B. 351; M'Millan *v.* Singer Sewing Machine Co. (1912), 6 B. W. C. C. 345; Sherwood *v.* Johnson (1912), 5 B. W. C. C. 686; Alloa Coal Co. *v.* Drylie (1913), 6 B. W. C. C. 398; M'Luckie *v.* Watson (1913), 6 B. W. C. C. 850; Pyper *v.* Manchester Liners, [1916] 2 K. B. 691; Scott *v.* Pearson, [1916] 2 K. B. 61; Williams *v.* Guest, Keen & Nettlefolds (1925), 134 L. T. 459.

2305. —— Fever contracted by hospital attendant.]—A porter in a scarlet fever hospital had an attack of influenza & returned to his work on Mar. 22. On Apr. 1 he was in the course of his duty in the scarlet fever wards, & he also cleaned the mortuary for the first time after his return. About three or four hours afterwards he was sick, & for the next three days he was very unwell. On Apr. 5, he was found to be suffering from scarlet fever. As a result of his illness his heart was affected & he suffered from nephritis, & at the date of the application he was totally incapacitated from work. He could not say that there had been in the mortuary shortly before the day he cleaned it any bodies of persons who had died from scarlet fever, but he said that it was very likely there had been:—*Held:* every hospital nurse or attendant who contracted scarlet fever did not suffer an injury by accident arising out of & in the course of the employment, & as appct. had not satisfied the ct. that there was a particular time, place, & circumstance by means of which the "injury by accident" happened he was not entitled to an award.—MARTIN *v.* MANCHESTER CORPN. (1912), 106 L. T. 741; 76 J. P. 251; 28 T. L. R. 344; 10 L. G. R. 996; 5 B. W. C. C. 259, C. A.

*Annotations:—***Consd.** Innes (or Grant) *v.* Kynoch, [1919] A. C. 765. **Refd.** Scott *v.* Pearson, [1916] 2 K. B. 61.

2306. —— Dermatitis contracted by hairdresser.]—PETSCHETT *v.* PREIS, No. 2854, *post.*

2307. —— Blood poisoning.]—Where a workman claims that he has sustained "personal injury by accident arising out of & in the course of his employment" within Workmen's Compensation Act, 1906 (c. 58), s. 1, it is not necessary to establish that his total or partial incapacity for work has resulted from the injury in the sense that it was the natural & probable consequence of the injury. It is enough that it resulted from the injury although it was not the sole & unassisted consequence thereof. For, if the injury to some extent caused the incapacity, it is immaterial that some other cause has supervened & increased the incapacity by acting on the incapacity caused by the injury.

Where therefore appct., who was a furnace labourer in the employment of resps., & whose duty it was to fork & screen heaps of iron ore which had been calcined, came to his work on Feb. 18, 1917, with one of his hands cracked by frosty weather & at about 8 p.m. the previously existing cracks became an open wound & bled, & between that hour & 4 a.m. the following morning when appct. ceased work, septic poisoning was set up:—*Held:* the cause of appct.'s incapacity for work was septic poisoning due to microbes entering the frost cracked hand some time after 8 p.m. on Feb. 18, 1917, & 4 p.m. on Feb. 19, & appct. had accordingly sustained "personal injury by accident arising out of & in the course of" his employment.—SADDINGTON *v.* INSLIP IRON CO., LTD. (1917), 87 L. J. K. B. 184; 118 L. T. 138; 62 Sol. Jo. 120; 10 B. W. C. C. 624, C. A.

*Annotations:—***Folld.** Carr *v.* Port Glasgow Burgh (1923), 16 B. W. C. C. 331. **Consd.** Hutchinson *v.* Kiveton Park Colliery Co., [1926] 1 K. B. 279. **Refd.** Doolan *v.* Hope (1918), 119 L. T. 14; Comery *v.* New Hucknall Colliery Co. (1919), 88 L. J. K. B. 462; Williams *v.* Graigola Merthyr Co. (1924), 132 L. T. 227.

2308. —— —— Date fixed within reasonable limits.]—A workman employed in handling artificial manure, consisting mainly of bone dust, died from blood poisoning caused by his becoming infected through an abrasion on his leg by certain noxious bacilli, which were present in large numbers in bone dust, but were also found in the air & in other substances, though in a much lesser degree. It did not appear when or how he received the abrasion, & it was impossible to say with certainty when the infection occurred. The arbitrator found, as the result of the medical evidence, that the infection which caused the illness was derived from the poisonous germs contained in the bone dust which deceased handled in the course of his employment, & awarded compensation under the Workmen's Compensation Act, 1906 (c. 58):—*Held:* (1) the fortuitous alighting of the bacilli upon the abraded spot constituted an accident within the Act; (2) there was evidence upon which the arbitrator was entitled to find that the injury arose out of & in the course of deceased's employment; (3) the provisions of the Act as to fixing the date of the accident were satisfied if, having regard to the nature of the particular injury alleged, the date of the occurrence of the accident was reasonably fixed, so as to connect the injury with the accident.—INNES (OR GRANT) *v.* KYNOCH, [1919] A. C. 765; 88 L. J. P. C. 85; 121 L. T. 39; 35 T. L. R. 392; 63 Sol. Jo. 444; 12 B. W. C. C. 78, H. L.

Annotations:—As to (1) **Distd.** Dennis *v.* Mid. Ry. (1920), 13 B. W. C. C. 542. **Consd.** Burrell *v.* Selvage (1921), 90 L. J. K. B. 1340; Carr *v.* Port Glasgow Burgh (1923), 16 B. W. C. C. 331; Hutchinson *v.* Kiveton Park Colliery Co., [1926] 1 K. B. 279; Williams *v.* Guest, Keen & Nettlefolds, [1926] 1 K. B. 497. *As to* (2) **Consd.** Walker *v.* Wynn, Timmins & Co. (1922), 15 B. W. C. C. 122.

2309. —— —— —— ——.]—Where a workgirl has received a series of scratches & cuts on her hands during her work, extending over a period of some months, the combined effect of which is to produce a septic condition incapacitating her from work, it is an injury "by accident" for which she is entitled to compensation under Workmen's Compensation Act, 1906 (c. 58), although the times & places of the several scratches or cuts cannot be fixed & her condition cannot be attributed to any one particular injury.—BURRELL (CHARLES) & SONS, LTD. *v.* SELVAGE (1921), 90 L. J. K. B. 1340; 126 L. T. 49; 65 Sol. Jo. 734; 14 B. W. C. C. 158, H. L.; *affg.* S. C. *sub nom.* SELVAGE *v.* BURRELL (CHARLES) & SONS, LTD., [1921] 1 K. B. 355, C. A.

*Annotation:—***Distd.** Williams *v.* Guest, Keen & Nettlefolds, [1926] 1 K. B. 497.

2310. —— Silicosis.]—The workman, a coalminer, had been employed since 1914 in boring rock. In Jan. 1922, he had to give up work on account of breathing trouble. He resumed work on two occasions, but had not been able to work since Apr. 1925. He was found to be suffering from silicosis due to breathing in particles of dust from the silica contained in the rock. Compensation for disablement from silicosis is provided for

by the Silicosis Acts, 1918 & 1924, but these Acts admittedly did not apply to the circumstances of this case. The workman sought to recover compensation by contending that his incapacity had resulted from a series of minute accidents the accumulated effect of which had caused disablement from silicosis:—*Held:* the workman had not been injured by accident within Workmen's Compensation Act, 1906 (c. 58), s. 1, & was not entitled to compensation.—WILLIAMS *v.* GUEST, KEEN & NETTLEFOLDS, [1926] 1 K. B. 497; 95 L. J. K. B. 676; 134 L. T. 459; 18 B. W. C. C. 535, C. A.

ii. *Diseases of Gradual Onset.*

2311. Paralysis of leg.]—A workman gradually acquired paralysis of his right leg through the strain of riding a heavy carrier tricycle for his employers. At the end of five years the condition incapacitated him from work:—*Held:* the paralysis was not a personal injury by accident.—WALKER *v.* HOCKNEY BROTHERS (1909), 2 B. W. C. C. 20, C. A.

Annotation:—**Refd.** Innes (or Grant) *v.* Kynoch, [1919] A. C. 765.

2312. Blood poisoning caused by continuous pressure of boot.]—The workman claimed compensation for incapacity due to blood-poisoning following a sore foot. His particulars of claim stated "wound on the third toe of left foot, caused by rubbing of boot which had previously become permeated by some bone manure used by resp. on his land." At the hearing of the arbitration, the case he set up differed, & was that he had knocked his toe against a seed drilling machine, & that the wound subsequently became poisoned by the manure which had saturated & dried into his boots some time before. The judge found that the injury sustained by appct. was caused by the pressure of a boot which had become too tight for him, & that this was not an accident, neither did it arise "out of" his employment, & so made an award in favour of resp.:—*Held:* the award of the county ct. judge was correct.—WHITE *v.* SHEEPWASH (1910), 3 B. W. C. C. 382, C. A.

2313. Eczema caused by chemicals.]—A workman was employed to dip rings into a basin of carbon bisulphide with his fingers. He was affected with eczema, caused gradually by the exposure to fumes or splashes from the chemical. The county ct. judge found that this was not an accident within Workmen's Compensation Act, 1906 (c. 58), s. 1:—*Held:* there was evidence to support the finding.—EVANS *v.* DODD (1912), 5 B. W. C. C. 305, C. A.

2314. Heart failure caused by continuous work.]—An officer was superintending loading a ship for several days. The work was practically continuous day & night & very hard. Six days after the ship left port the officer died of heart failure. There was medical evidence that the death was due to heart failure caused by the continuous strain of work. The county ct. judge found that there was no evidence of accident:—*Held:* there was no misdirection.—BLACK *v.* NEW ZEALAND SHIPPING CO., LTD. (1913), 6 B. W. C. C. 720, C. A.

iii. *Disease Aggravated or Accelerated by Accident.*

2315. General rule.]—A workman, employed as a smith at the engineering works of applts., was holding a flatter on an anvil for a fellow workman to strike the flat end of the flatter. The fellow workman made a bad stroke & struck the rod or round part of the flatter & jarred the workman's hand, causing it to swell & bringing on gout in the hand. The workman had previously been attended for gout in the hand & elbow by a doctor, who was of opinion that the swollen hand was caused by gout brought on by the jar, & who also certified that the workman was suffering from a weak hand caused partially by the injury:—*Held:* the injury to the workman was caused by an "accident," & the provisions of Workmen's Compensation Act, 1897 (c. 37), s. 1, applied so as to entitle the workman to recover compensation under the Act.—LLOYD *v.* SUGG & CO., [1900] 1 Q. B. 481, 486; 69 L. J. Q. B. 190; 81 L. T. 768; 16 T. L. R. 65; 2 W. C. C. 5, C. A.

Annotations:—**Consd.** Walker *v.* Lilleshall Coal Co., [1900] 1 Q. B. 481, 488. **Refd.** Roper *v.* Greenwood (1900), 83 L. T. 471; Timmins *v.* Leeds Forge Co. (1900), 83 L. T. 120; Boardman *v.* Scott & Whitworth, [1902] 1 K. B. 43; Higgins *v.* Campbell & Harrison, Turvey *v.* Brintons, [1904] 1 K. B. 328.

2316. Workman with aneurism—Rupture due to strain.]—A workman suffering from serious aneurism was employed in tightening a nut by a spanner when he suddenly fell down dead from rupture of the aneurism. The county ct. judge found upon conflicting evidence that death was caused by a strain arising out of the ordinary work of deceased operating upon a condition of body which was such as to render the strain fatal:—*Held:* there was evidence to support the finding, & it was a case of "personal injury by accident arising out of & in the course of the employment" within Workmen's Compensation Act, 1906 (c. 58).—CLOVER, CLAYTON & CO., LTD. *v.* HUGHES, [1910] A. C. 242; 79 L. J. K. B. 470; 102 L. T. 340; 26 T. L. R. 359; 3 B. W. C. C. 275; *sub nom.* HUGHES *v.* CLOVER, CLAYTON & CO., 54 Sol. Jo. 374, H. L.

Annotations:—**Consd.** Fennah *v.* Mid. & G. W. Ry. of Ireland (1911), 4 B. W. C. C. 440; Hawkins *v.* Powells Tillery Steam Coal Co., [1911] 1 K. B. 988. **Apld.** Trodden *v.* McLennard (1911), 4 B. W. C. C. 190. **Distd.** Spence *v.* Baird (1912), 5 B. W. C. C. 542. **Folld.** M'Ardle *v.* Swansea Harbour Trust (1915), 85 L. J. K. B. 733. **Consd.** Maxwell *v.* Ruabon Coal & Coke Co. (1916), 86 L. J. K. B. 428. **Refd.** Barnabas *v.* Bersham Colliery Co. (1910), 102 L. T. 621; Yates *v.* South Kirby, etc. Collieries, [1910] 2 K. B. 538; Groves *v.* Burroughes & Watts (1911), 4 B. W. C. C. 185; Beaumont *v.* Underground Elec. Rys. of London (1912), 5 B. W. C. C. 247; Euman *v.* Dalziel (1912), 6 B. W. C. C. 900; Noden *v.* Galloways, [1912] 1 K. B. 46; Alloa Coal Co. *v.* Drylie (1913), 6 B. W. C. C. 398; Broforst *v.* S.S. Blomfield (1913), 6 B. W. C. C. 613; Doughton *v.* Hickman (1913), 6 B. W. C. C. 77; Mitchinson *v.* Day (1913), 82 L. J. K. B. 421; Aitken *v.* Finlayson, Bousfield (1914), 7 B. W. C. C. 918; Trim Joint District School, Board of Management *v.* Kelly, [1914] A. C. 667; Kerr (or Lendrum) *v.* Ayr Steam Shipping Co., [1915] A. C. 217; Woods *v.* Wilson (1915), 84 L. J. K. B. 1067; Glasgow Coal Co. *v.* Welsh, [1916] 2 A. C. 1; Wright & Greig *v.* M'Kendry (1918), 12 B. W. C. C. 410; Innes (or Grant) *v.* Kynoch, [1919] A. C. 765; Treasure *v.* Cardiff Collieries (1920), 13 B. W. C. C. 28; Clark *v.* Lord Advocate (1922), 15 B. W. C. C. 320; Carr *v.* Port Glasgow Burgh (1923), 16 B. W. C. C. 331.

2317. ——— ———.]—A workman, who was fifty years of age, had been employed at resps.' tin sheds for ten years. On Oct. 5, 1914, while shifting tinplates from a pile to a trolly, he stood on the trolly & was pulling a box weighing 2 cwt. towards him with a tool when his hands let go & he fell backwards dead off the trolly on to the floor. His death was discovered by a post-mortem examination to have been caused by rupture of an aneurism of the aorta. Sticking the tool into & drawing the box forward was the easiest part of the work; the

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heaviest was lifting the boxes when the shed heap had got lower than the heap on the trolly. The medical evidence was to the effect that it was the continued strain of ten years' work & the walls of the arteries gradually getting weaker accounted for the condition of the workman; that the strain in pulling the box forward was quite sufficient to cause the rupture of the aneurism, that being the culminating point; & that the cause of his death was the natural & inevitable termination of his disease, the final burst being practically instantaneous:—*Held:* there was clearly an "accident" within the meaning of the statutory provision as construed by the House of Lords in *Fenton* v. *Thorley & Co., Ltd.*, No. 2264, *ante*, & the facts of the present case were practically indistinguishable from those of *Clover, Clayton & Co., Ltd. v. Hughes*, No. 2316, *ante*.—M'ARDLE *v.* SWANSEA HARBOUR TRUST (1915), 85 L. J. K. B. 733; 113 L. T. 677; 8 B. W. C. C. 489, C. A.

Annotation:—**Refd.** Andrews v. Highley Mining Co. (1922), 15 B. W. C. C. 192.

Meaning of "accident."]—*See* Sect. 5, sub-sect. 1, A., *ante*.

2318. —— No evidence that aneurism caused or accelerated by accident.]—A workman with degenerate arteries, whose work was very heavy, fell out of a railway truck on to his head on the line. He resumed work in three weeks, but shortly afterwards became incapacitated again, & was found to be suffering from an aneurism. He claimed compensation on the ground that the accident had caused or accelerated the aneurism. The judge found that the accident had accelerated the aneurism, basing his finding on the fact, as he said, that a swelling, a symptom of the aneurism, had appeared within four weeks of the accident. In truth, the only evidence as to the swelling was that it appeared seven weeks after the accident, & there was no evidence that the aneurism had been in existence at the time of the accident:—*Held:* the judge had misdirected himself, & the case must be reheard.—TAYLOR *v.* BOLCKOW, VAUGHAN & CO., LTD. (1911), 5 B. W. C. C. 130, C. A.

2319. Abnormally sensitive skin—Injury caused by washing with caustic soda.]—A scullion at an hotel was the subject of a disease, erythro-melalgia, affecting his skin, & making it abnormally sensitive. On the day he commenced work he washed up crockery for a number of hours in a tank containing hot water, soft soap, & caustic soda. His hands became greatly inflamed, his nails came off, & he was disabled for four & a half months:—*Held:* it was an accident; "the mere circumstance that a perfectly healthy man would not have met with it is no answer at all."—DOTZAUER *v.* STRAND PALACE HOTEL, LTD. (1910), 3 B. W. C. C. 387, C. A.

2320. Rupture—Aggravated by strain.]—A workman wearing a truss, sufficient to keep an existing hernia up under ordinary circumstances, was employed to attend to a furnace. His duties involved the heavy work of raking, poking, & coaling the fire. He went home to dinner as usual, & appeared to be quite well, but shortly after he returned to work he was found in great pain. He died soon afterwards & medical evidence showed that his death was due to strangulated hernia. The county ct. judge drew the inference that the injury was caused by an accident arising out of the employment:—*Held:* there was evidence to support the inference.—SCALES *v.* WEST NORFOLK FARMERS' MANURE & CHEMICAL CO., LTD. (1913), 6 B. W. C. C. 188, C. A.

2321. —— ——.]—A brewer's assistant was lifting a heavy cask standing on a shelf five feet from the ground, when he felt a severe internal strain & became faint & sick. He afterwards found that he had ruptured himself. Twenty-two years before he had had a rupture in the same place, for which he wore a truss for many years, but during the last five or six years he had left it off, as he found he could do his work without it. The county ct. judge held that, although there was injury by accident, it did not arise out of the employment, as it was the result of a gradual weakening, & not of any unusual strain:—*Held:* there was misdirection. "Accident" having been found, the evidence proved that it arose out of the employment.—BROWN *v.* KEMP (1913), 6 B. W. C. C. 725, C. A.

Annotation:—**Refd.** Carr v. Port Glasgow Burgh (1923), 16 B. W. C. C. 331.

2322. Diseased arteries—Apoplexy caused by exertion.]—A fireman, after having been for some time at work shovelling coal & raking fires in the stokehole of a steam ship, had an apoplectic stroke. The medical evidence went to prove that the man was in a diseased condition, & that such a stroke would be likely to be brought on by such exertion. The cy. ct. judge drew the inference that the injury was caused by accident within Workmen's Compensation Act, 1906 (c. 58):—*Held:* there was evidence to support the inference.—BROFORST *v.* BLOMFIELD (OWNERS) (1913), 6 B. W. C. C. 613, C. A.

2323. Appendicitis—Death by peritonitis following blow.]—When an arbitrator is sitting with a medical assessor he has a right to act upon the advice of the assessor on matters of medical opinion & medical inference, even if there is no corresponding opinion on the part of the medical witnesses.

A workman was engaged in a lighter in coaling a ship. He was in the act of filling a basket held between his body & a heap of coal when a rush of coal came which either hit him in the stomach or knocked the basket against his stomach, & he was unable to go on with his work. He sat down in great pain, & shortly afterwards went home. He was attended for four days by his own doctor, & was then sent to the infirmary, where an operation was performed, & a perforation of the bowel was discovered. At the same time it was ascertained by the operating surgeons that he had been suffering from chronic appendicitis. Three days afterwards he died from peritonitis, & during a post mortem examination another perforation of the bowel was discovered. The county ct. judge found that the accident caused acute injury to the weakened bowel, & that the injury so caused graudually produced perforation & so accelerated his death. He accordingly made an award in favour of the workman's widow:—*Held:* there was evidence on which it was competent for the judge to make the award.—WOODS *v.* WILSON, SONS & CO., LTD. (1915), 84 L. J. K. B. 1067; 113 L. T. 243; 31 T. L. R. 273; 59 Sol. Jo. 348; 8 B. W. C. C. 288, H. L.

2324. Latent tuberculosis—Made acute by accident.]—(1) A workman while in his master's employment, suffered in July a serious accident which affected his brain & general health, & he died in the following Dec. A post mortem examination showed that he died from acute tuberculosis which had been latent for some time, but there was medical evidence that the tuberculosis might have been accelerated or aggravated by his lowered

state of vitality due to the accident :—*Held :* there was evidence on which the county ct. judge could properly find that the death resulted from the accident which set up the disease from which the workman died.

(2) Deceased's wife said that deceased returned home on Oct. 14, & he stated that he had been out that evening & collapsed while out & got wet through :—*Held :* this statement was not admissible in evidence, & was properly rejected by the county ct. judge.—BEARE *v.* GARROD (1915), 85 L. J. K. B. 717 ; 113 L. T. 673 ; 8 B. W. C. C. 474, C. A.

Annotation :—As to (2) **Consd.** Sharp *v.* Loddington Ironstone Co. (1924), 132 L. T. 229.

iv. *Particular Diseases.*

Industrial diseases, *see* Sect. 22, *post.*

Diseases of gradual onset, *see* Sect. 5, sub-sect. 1, C. (*f*) ii., *ante.*

2325. Blood poisoning.]—A miner was employed in hewing coal, & while so employed a piece of coal worked itself into his knee, with the result that blood poisoning set in & the workman died :—*Held :* his death was the result of an "injury by accident" within Workmen's Compensation Act, 1897 (c. 37), s. 1.—THOMPSON *v.* ASHINGTON COAL CO., LTD. (1901), 84 L. T. 412 ; 65 J. P. 356 ; 17 T. L. R. 345 ; 3 W. C. C. 21, C. A.

See, also, Nos. 2307-2309, *ante.*

2326. Anthrax.]—BRINTONS, LTD. *v.* TURVEY, No. 3799, *post.*

2327. Enteritis.]—(1) A workman contracted enteritis from inhaling sewer gas in the course of his employment :—*Held :* this was not a case of "injury by accident" within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1) ; (2) the decision in *Brintons, Ltd.* v. *Turvey*, No. 3799, *post*, is not to be taken as involving the doctrine that all diseases contracted by a workman in the course of his employment are to be regarded as accidents within Workmen's Compensation Acts.—BRODERICK *v.* LONDON COUNTY COUNCIL, [1908] 2 K. B. 807 ; 77 L. J. K. B. 1127 ; 99 L. T. 569 ; 24 T. L. R. 822 ; 1 B. W. C. C. 219, C. A.

Annotations :—As to (1) **Apld.** Eke *v.* Hart-Dyke, [1910] 2 K. B. 677. **Consd.** Kelly *v.* Auchenlea Coal Co. (1911), 4 B. W. C. C. 417. **Apld.** Martin *v.* Manchester Corpn. (1912), 106 L. T. 741 ; Finlay *v.* Tullamore Union Grdns. (1914), 7 B. W. C. C. 973. **Consd.** Innes (or Grant) *v.* Kynoch, [1919] A. C. 765. **Refd.** Sherwood *v.* Johnson (1912), 5 B. W. C. C. 686 ; Alloa Coal Co. *v.* Drylie (1913), 6 B. W. C. C. 398 ; Scott *v.* Pearson, [1916] 2 K. B. 61.

2328. Cattle ringworm.]—A woman employed as a farm servant to tend & feed calves contracted cattle ringworm, a contagious disease with which the calves were infected, & was thereby incapacitated for work. She claimed compensation under Workmen's Compensation Act, 1906 (c. 58), on the ground that she had sustained an "injury by accident." It was admitted that the calves were infected with the disease, which was not an industrial disease within the Act. At the suggestion of the county ct. judge the cross-examination of appct. & her witnesses was reserved. The judge thereupon awarded in favour of the employer on the ground that no injury by accident had been proved :—*Held :* on appeal, the disease might have been caused by an accident or series of accidents as in *Brintons Ltd.* v. *Turvey*, No. 3799, *post*, & the facts had not been sufficiently ascertained for the determination of the question. If a definite time, place, & occasion could be assigned for the contracting of the disease, & if the occasion were a part, but an unusual part, of the employment, an illness so produced might be deemed an "injury by accident." The case must be remitted to the county ct. for further trial.—SCOTT *v.* PEARSON, [1916] 2 K. B. 61 ; 85 L. J. K. B. 825 ; 114 L. T. 833 ; 32 T. L. R. 412 ; 60 Sol. Jo. 428 ; 9 B. W. C. C. 229, C. A.

2329. Poisoning from noxious fumes.]—Men were employed by applts. to ladle molten metal into moulds. The shift usually worked for some quarter of an hour & then had to go into the fresh air in order to avoid being poisoned by the noxious fumes that they came into contact with in the course of their work. On Feb. 20, 1920, the fumes were very bad indeed, & one of the workmen complained of feeling ill from that cause. Three days later his doctor certified that he was suffering from lead poisoning, & the man claimed compensation under Workmen's Compensation Act, 1906 (c. 58), s. 8, but subsequently abandoned the claim as his incapacity was not in fact due to lead poisoning or to any industrial disease within that sect. He then, on Aug. 6, gave notice of accident & made a claim for incapacity as the result of an accident on Feb. 20. The county ct. judge found that the great accumulation of gas on Feb. 20 was accidental & that the incapacity from bronchial asthma was the result. He therefore awarded compensation. Upon the point of delay in giving notice he found that on the whole evidence the employers had not been prejudiced. Upon this point there was evidence that the employers knew the full circumstances from the beginning :—*Held :* there was evidence to support the findings on both the question of accident & notice & no misdirection.—HARRIS *v.* THOMAS & CO. (1921), 11 B. W. C. C. 107, C. A.

(*g*) *Effect of Previous Injury.*

2330. Previous accident—Contributing cause to subsequent accident.]—NODEN *v.* GALLOWAYS, LTD., No. 2797, *post.*

2331. —— ——.]—Appct., a collier, had his leg fractured by accident underground on May 6, 1919. He was paid compensation for a time & then returned to work for over a year. On Oct. 13, 1920, he was walking across a common not in the course of his employment, when he trod on a stone & fell, breaking his leg again in the same place. He claimed compensation on the ground that the second accident would not have happened but for the first. The county ct. judge came to the conclusion that long before the second accident, appct. had recovered full capacity, but that there was some weakness remaining after the first accident which contributed to the second accident. He could not, however, find as a fact that the second accidental injury would not have happened but for such weakness, though that was possible. He held that appct.'s incapacity was attributable to the

PART XIV. SECT. 5, SUB-SECT. 1.—C. (I) iv.

k. *Poisoning from noxious fumes — Bad ventilation.*]—SCOTLAND *v.* CANADIAN CARTRIDGE CO. (1919), 45 O. L. R. 586 ; 48 D. L. R. 655 ; 16 O. W. N. 255.—CAN.

l. —— *Unexplained presence of fumes—Presumption in favour of workman.*]—KELLY *v.* AUCHENLEA COAL CO., LTD., [1911] S. C. 864.—SCOT.

m. *Tetanus—From wound in foot of gardener—Foot pierced by nail through boot.*]—WALKER *v.* MULLINS (1908), 42 I. L. T. 168 ; 1 B. W. C. C. 211.—IR.

PART XIV. SECT. 5, SUB-SECT. 1.—C. (g).

n. *Previous accident — Hernia — Subsequent strangulation.*]—WALKER *v.* MURRAYS, [1911] S. C. 825 ; 48 Sc. L. R. 741 ; [1911] 1 S. L. T. 448 ; 4 B. W. C. C. 409.—SCOT.

o. —— *Wrenched knee — Subsequent broken cartilage.*]—A workman, rising from a kneeling position, in which he had been at work, felt a pain in his knee. The cartilage was found to be ruptured. He had wrenched his knee three years before, & been incapacitated for a time, but had thereafter worked without difficulty

Sect. 5.—Right to compensation: Sub-sect. 1, C. (g); sub-sect. 2, A. & B. (a) i.]

second accident & not to the accident of May, 1919, & that the fact that the first accident may have contributed to the second accident did not in law render resps. liable to compensate appct. on account of his present incapacity. He accordingly made an award in favour of the employers:—*Held:* there was evidence to support & no misdirection.—ROBERTS *v.* BROUGHTON & PLAS POWER COLLIERY CO., LTD. (1921), 14 B. W. C. C. 186, C. A.

Annotation:—**Folld.** Hutchinson *v.* Kiveton Park Colliery Co., [1926] 1 K. B. 279.

SUB-SECT. 2.—ARISING OUT OF, OR IN THE COURSE OF THE EMPLOYMENT.

A. In General.

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).

2332. "Out of the employment."]—A workman was injured by a practical joke of his fellow workmen, who placed the hook of a crane in his necktie & lifted him from the ground. The necktie broke & he fell to the ground, receiving serious injuries:—*Held:* he was not entitled to compensation from his employers under Workmen's Compensation Act, 1906 (c. 58), as the accident did not arise "out of & in the course of the employment."

The words "out of & in the course of the employment" are used conjunctively, not disjunctively. . . . The words "out of" point, I think, to the origin or cause of the accident; the words "in the course of" to the time, place, & circumstances under which the accident takes place. . . . It must be an accident resulting from a risk reasonably incident to the employment (BUCKLEY, L.J.).—FITZGERALD *v.* CLARKE (W. G.) & SON, [1908] 2 K. B. 796; 77 L. J. K. B. 1018; 99 L. T. 101; 1 B. W. C. C. 197, C. A.

Annotations:—**Consd.** Craske *v.* Wigan, [1909] 2 K. B. 635. **Refd.** Murray *v.* Denholm (1911), 5 B. W. C. C. 496; Rodger *v.* Paisley School Board (1912), 5 B. W. C. C. 547; Frazer *v.* Riddell (1913), 7 B. W. C. C. 841; Mitchinson *v.* Day, [1913] 1 K. B. 603; Trim Joint District School Board of Management *v.* Kelly, [1914] A. C. 667; White *v.* Avery (1915), 9 B. W. C. C. 663; Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127. **Mentd.** Newson *v.* Burstall & Farrow (1915), 112 L. T. 792.

2333. ——.]—PLUMB *v.* COBDEN FLOUR MILLS CO., LTD., No. 2415, *post.*

2334. ——.]—THOM (OR SIMPSON) *v.* SINCLAIR, No. 2619, *post.*

2335. ——.]—DAVIDSON (CHARLES R.) & CO. *v.* M'ROBB OR OFFICER, No. 2339, *post.*

2336. ——.]—A workman was employed to proceed by train from A. station to B. station, thence to walk in a public road to a water main, repair the main, & return via B. to A. On the return journey he waited on B. platform for the train. It was a wet & windy morning. The train came in; he went hurriedly across the platform to get into the carriage, slipped, fell, injured his knee, & subsequently died as the result. The platform was an ordinary one & was not specially slippery. In proceedings by the dependant in the county ct. it was admitted that the accident arose in the course of the employment. The county ct. judge held that there being no particular peril upon the platform which could be said to have caused the accident, the accident did not arise out of the employment. This decision was affirmed by the Ct. of Appeal, & a further appeal was made to the House of Lords:—*Held:* there was a causal relation between the accident & the workman's employment, & therefore the accident, which admittedly happened in the course of the employment, also arose out of the employment.

"Arising out of" no doubt imports some kind of causal relation with the employment; but it does not logically necessitate direct or physical causation. . . . That the accident should have arisen out of his fulfilment of these conditions [of employment] seems to be all that is required to establish the only kind of causation that is demanded. . . . If in the course of his employment a workman meets with injury by an accident which has arisen directly out of circumstances encountered because to encounter them fell within the scope of the employment, compensation may be claimed (LORD HALDANE).—UPTON *v.* GREAT CENTRAL RY. CO., [1924] A. C. 302; 93 L. J. K. B. 224; 130 L. T. 577; 40 T. L. R. 204; 68 Sol. Jo. 251; 16 B. W. C. C. 269, H. L.

2337. "In the course of the employment."]—FITZGERALD *v.* CLARKE (W. G.) & SON, No. 2332, *ante.*

2338. ——.]—MOORE *v.* MANCHESTER LINERS, LTD., No. 2547, *post.*

2339. ——.]—(1) The chief engineer of a ship lying in a part of a public harbour which had been taken over temporarily by the Admlty. & was closed to the public, & to which access was granted only by an Admlty. pass, went ashore on leave for purposes of his own. On returning to the ship after dark he fell from the quay & was drowned:—*Held:* the control of the Admlty. did not make the quay the provided access to the ship & the accident was not shown to have arisen out of the employment.

"Arising out of the employment" obviously means arising out of the work which the man is employed to do & what is incident to it, in other words, out of his service (LORD FINLAY, C.).

(2) *Semble:* "In the course of the employment" does not mean during the currency of the engagement, but means in the course of the work which the workman is employed to do & what is incident to it; & absence on leave for the workman's own purposes is an interruption of the employment.

"In the course of the employment" must mean similarly in the course of the work which the man is employed to do, & what is incident to it, in other words, in the course of his service (LORD FINLAY, C.).—DAVIDSON (CHARLES R.) & CO. *v.*

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until this occasion, although he at times felt pain when getting up from kneeling:—*Held:* the workman had suffered injury by accident.—BORLAND *v.* WATSON, GOW & CO., LTD., [1912] S. C. 15; 49 Sc. L. R. 10; [1911] 2 S. L. T. 327; 5 B. W. C. C. 514.—**SCOT.**

PART XIV. SECT. 5, SUB-SECT. 2.—A.

2332 i. *"Out of the employment."*]—In order for an accident to have been one "arising out of" a workman's employment within the meaning of Workmen's Compensation Act, 1908, it must have been an accident arising out of the nature of the work itself.—MARTINEAU *v.* GRAND TRUNK PACIFIC RY., [1926] 2 D. L. R. 858; [1926] 2 W. W. R. 113; 22 Alta. L. R. 142.—**CAN.**

p. —— *Wrong & dangerous method of doing work.*]—An accident to a workman may be attributable to his adopting a wrong & dangerous method of doing work which could be done safely, & at the same time may be an "accident arising out of & in the course of the employment" in the sense of Workmen's Compensation Act, 1897, s. 1.—DURHAM *v.* BROWN BROTHERS & CO., LTD. (1898), 1 F. (Ct. of Sess.) 279; 36 Sc. L. R. 190; 6 S. L. T. 239.—**SCOT.**

q. *Accident occurring elsewhere than in, on or about the work.*]—To found a claim under Workmen's Compensation Act, Sask., claimant must show, & this is a question of fact, that he suffered the accident while employed "on, in or about" the "work," & the "work" means something having geographical boundaries.—PATTERSON *v.* ROURKE, [1923] 2 D. L. R. 328;

M'ROBB OR OFFICER, [1918] A. C. 304; 87 L. J. P. C. 58; 118 L. T. 451; 34 T. L. R. 213; 62 Sol. Jo. 347; 10 B. W. C. C. 673, H. L.; *revsg.* S. C. *sub nom.* OFFICER *v.* DAVIDSON (CHARLES R.) & Co. (1917), 10 B. W. C. C. 480.

Annotations:—*As to* (1) **Consd.** Philbin *v.* Hayes (1918), 87 L. J. K. B. 779; Armstrong, Whitworth *v.* Redford, [1920] A. C. 757; Hewitson *v.* St. Helens Colliery Co. (1923), 16 B. W. C. C. 230; Upton *v.* G. C. Ry., [1924] A. C. 302; Wilson *v.* Lyle (1925), 18 B. W. C. C. 731. **Refd.** Heffernan *v.* Secretary of State for War (1918), 11 B. W. C. C. 424; Stevens *v.* L. & S. W. Ry. (1918), 87 L. J. K. B. 756; Wilson *v.* L. & N. W. Ry. (1918), 11 B. W. C. C. 19; Matthews *v.* Pomeroy (1919), 12 B. W. C. C. 136. *As to* (2) **Consd.** Hewitson *v.* St. Helens Colliery Co. (1923), 16 B. W. C. C. 230; Wilson *v.* Lyle (1925), 18 B. W. C. C. 731. **Refd.** Heffernan *v.* Secretary of State for War (1918), 11 B. W. C. C. 424; Bell *v.* Armstrong, Whitworth (1919), 88 L. J. K. B. 844; Clark *v.* Lord Advocate (1922), 15 B. W. C. C. 320. *Generally*, **Mentd.** Wild *v.* Brown, [1919] 1 K. B. 134.

2340. ——.]—ST. HELENS COLLIERY CO., LTD. *v.* HEWITSON, No. 2364, *post.*

B. Commencement and Termination of Course of Employment.

(a) Where no Means of Conveyance provided by Employer.

i. *In General.*

2341. Accident on way to or from work—Crossing railway lines—Deviation by workman for own purpose.]—BENSON *v.* LANCASHIRE & YORKSHIRE RY. Co., No. 2379, *post.*

2342. —— —— **User with knowledge of employer.**]—A workman employed as a fitter's labourer had the choice of three ways to his employers' works, the shortest way & one most frequently used by the workmen being along a railway track. The employers knew of the use of this way by their workmen, & did not forbid it. The workman, while going to work by this way, was injured by a passing locomotive engine:—*Held:* the accident arose "out of & in the course of the employment," & although the way taken was dangerous, it was recognised by the employers, & was not a peril added to the employment by the workmen so as to disentitle him to compensation.—FOX *v.* REES & KIRBY, LTD. (1916), 86 L. J. K. B. 43; 115 L. T. 358; 9 B. W. C. C. 459, C. A.

Annotation:—**Consd.** Howells *v.* Powell Duffryn Steam Coal Co., [1926] 1 K. B. 472.

2343. —— —— **User by permission of railway company.**]—A colliery workman at the end of his day's work left the colliery & went to catch a train at a railway station about 700 yards away. He left the colliery by a road, & about half way to the station got on to the railway line, & was continuing his way along the line when he was caught by a train & killed. He could have gone all the way to the station by the road, which was a very slightly longer route. The colliery men generally made use of the line in going to & from their work. They used it by permission of the railway co., but this permission was not given at the request of the employers or by arrangement with them:—*Held:* the accident did not arise either "out of" or "in the course of" the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—WHITTALL *v.* STAVELEY IRON & COAL CO., LTD. (1917), 86 L. J. K. B. 985; 117 L. T. 130; 61 Sol. Jo. 523; 10 B. W. C. C. 298, C. A.

Annotations:—**Expld. & Distd.** Morgan *v.* Guest, Keen & Nettlefold (1922), 92 L. J. K. B. 192. **Refd.** Wales *v.* Lambton & Hetton Colliery Co. (1917), 117 L. T. 454.

2344. —— **Customary way across employers' property.**]—A workman who was proceeding to his employers' works took a route, that he had been the habit of using for many years, along a footpath which ran across a vacant piece of land & then on to a railway line & so on to the works. The property in the vacant piece of land was vested in the employers. While on this footpath, at a distance of little short of a quarter of a mile from the place where the workman was to go, he slipped on some ice & injured his ankle:—*Held:* the workman had no right to go, & his employers could not confer upon him any right to go, along the railway line; another route existed by which he had ready access to his work; & therefore the accident could not be deemed to have arisen "in the course of" his employment.—GILMOUR *v.* DORMAN, LONG & Co., LTD. (1911), 105 L. T. 54; 4 B. W. C. C. 279, C. A.

Annotations:—**Consd.** Stewart (1912), Ltd. *v.* Longhurst, [1917] A. C. 249. **Distd.** Redford *v.* Armstrong, Whitworth (1919), 88 L. J. K. B. 850. **Refd.** Graham *v.* Barr & Thornton (1913), 6 B. W. C. C. 412; Davidson *v.* M'Robb (or Officer), [1918] A. C. 304.

2345. —— ——.]—A miner, proceeding to his work along a footpath prepared by the employers for the workmen's convenience, slipped on some steps at a point about a mile away from the place of employment. There was evidence that the employers knew the steps were not safe:—*Held:* the accident did not arise in the course of the employment.—WALTERS *v.* STAVELEY COAL & IRON CO. (1911), 105 L. T. 119; 55 Sol. Jo. 579; 4 B. W. C. C. 303, H. L.

Annotations:—**Consd.** Fox *v.* Rees & Kirby (1916), 86 L. J. K. B. 43. **Distd.** Redford *v.* Armstrong, Whitworth (1919), 88 L. J. K. B. 850.

2346. —— ——.]—The circumstance that the soil of a footpath which a workman used as a member of the public was vested in his employer was held not to render an injury that he sustained through slipping & falling while passing along the footpath on his way to his employment an "injury by accident arising out of & in the course of" his employment within Workmen's Compensation Act, 1906 (c. 53), s. 1, so as to entitle him to compensation under that Act.—WILLIAMS *v.* ASSHETON SMITH (1913), 108 L. T. 200; 6 B. W. C. C. 102, C. A.

2347. —— ——.]—The workman, a collier, was walking from his work at the pit & had crossed a bridge over a railway siding of the colliery co., & continued along a footpath over a brickyard which belonged to the employers, when he caught his foot on some obstacle, fell down, & fractured a thigh. The county ct. judge said that the brickyard was not necessarily part of the colliery premises, & the workman had left the admitted place of employment & was walking along the footpath just as any member of the public might walk

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[1923] 1 W. W. R. 1128; 16 Sask. L. R. 341.—**CAN.**

r. —— *In or about an engineering work.*]—CORNEA *v.* NATIONAL PAVING & CONTRACTING CO. (1916), 33 W. L. R. 462; 9 W. W. R. 1059.—**CAN.**

PART XIV. SECT. 5, SUB-SECT. 2.—B. (a) i.

2341 i. *Accident on way to or from work—Crossing railway lines—Deviation by workman for own purpose.*]—HALEY *v.* UNITED COLLIERIES, [1907] S. C. 214.—**SCOT.**

t. —— ——.]—A workman who was employed as haulage man in a coal mine, & whose duties were entirely underground, had finished his work for the day, & was returning homewards by a track at the side of a branch railway belonging to the colliery, when, at a place about 400 yards from the shaft mouth & 280 yards from the colliery office, he was knocked down & killed by a passing engine:—*Held* the accident did not arise out of & in the course of his employment.—GRAHAM *v.* BARR & THORNTON, [1913] S. C. 513; 50 Sc. L. R. 391; [1913] 1 S. L. T. 180; 6 B. W. C. C. 412.—**SCOT.**

a. —— *Travelling pay allowed—Deviation for own purpose.*]—MULLIONS *v.* ELTHAM, [1921] N. Z. L. R. 697.—**N.Z.**

b. —— —— *Injury on public road.*]

Sect. 5.—Right to compensation: Sub-sect. 2, B. (a) i & ii., & (b).]

along it, & therefore the employers were not liable as the accident did not arise in the course of the employment:—*Held:* the case must go back for re-trial, as it was not possible to apply the law to it until the questions whether the brickfields were part of the colliery premises & whether the foot-path over them was a public right of way, &, if it was, under what circumstances was the workman using it, had been answered by the county ct. judge.—HARVEY *v.* WEST CANNOCK COLLIERY CO., LTD. (1925), 18 B. W. C. C. 556, C. A.

2348. —— Postman on way to first pillar box.]—A postman, whose first duty was to collect letters from a certain pillar box at 4 p.m., was on Sept. 6, 1923, riding a bicycle, as he was permitted to do, to the pillar box from his home which was three miles away from that pillar box. He was wearing his uniform & was carrying his keys & postman's bag. He habitually signed on as at 4 p.m., & therefore his week of 40 hours was calculated as from that time. From the time when he left the office at night until he reached the pillar box he was not under any control. At 3.40 p.m., before he reached the pillar box, he met with a street accident which resulted in his death. In arbitration proceedings by the widow the county ct. judge found on the facts that there was no implied contract that the employment should begin when the postman left his house & that in fact it began at 4 p.m. when he reached the pillar box, & that the accident did not arise in the course of the employment. Appct. appealed:—*Held:* it was a question of fact upon which there was evidence to support the finding, & there was no misdirection.—EVANS *v.* POSTMASTER-GENERAL (1924), 132 L. T. 137; 40 T. L. R. 856; 69 Sol. Jo. 9; 17 B. W. C. C. 151, C. A.

2349. Commercial traveller—Accident on way home after canvassing.]—DICKINSON *v.* BARMAK, LTD. (1908), 124 L. T. Jo. 403, C. A.

Annotation:—**Refd.** Gilmour *v.* Dorman, Long (1911), 105 L. T. 54.

ii. *Reasonable Interval of Time and Space.*

2350. General rule.]—Applt., a workman, while working in resps.' colliery was, for disobedience of orders, suspended from work, pending an inquiry into the matter by the under-manager of the colliery. It appeared that men were not allowed to remain in the workings of the colliery when not at work; & the practice was for a workman who was suspended while at work to go to the pit bottom, *i.e.*, the bottom of the shaft in which the cage worked, by which access to or egress from the mine was obtained. Applt., when he was suspended, went into a place called a "pass-by," at the side of the tramway leading to the pit bottom. While sitting there he was ordered by the deputy to go to the pit bottom. He remained however in the pass-by, where, about two hours later, a fall from the roof took place, by which he was injured. If applt. had gone to the pit bottom as directed, he could not have got out of the mine till the cage went up in the ordinary course, which was later than the time at which the accident happened. Upon a claim by applt. for compensation under Workmen's Compensation Act, 1897 (c. 37), the county ct. judge found that the accident did not arise out of & in the course of applt.'s employment:—*Held:* there was evidence upon which he was entitled so to find.

While the workman is leaving the place where he is employed, I think that, for the purposes of this Act, his employment would still continue. But though his employment may continue for an interval after he has actually ceased working, yet there must come a time when he can no longer be said to be engaged in his employment in such a way that an accident happening to him can be said to have arisen out of & in the course of his employment (COLLINS, M.R.).—SMITH *v.* SOUTH NORMANTON COLLIERY CO., [1903] 1 K. B. 204; 72 L. J. K. B. 76; 88 L. T. 5; 67 J. P. 381; 51 W. R. 209; 19 T. L. R. 128; 5 W. C. C. 14, C. A.

Annotation:—**Mentd.** Johnson *v.* Marshall, [1906] A. C. 409.

2351. ——]—GANE *v.* NORTON HILL COLLIERY CO., No. 2559, *post*.

2352. Coming to work—Workman crossing railway siding.]—A workman who is injured in a place not under his employer's control while going to or returning from his work is not within the provisions of the Workmen's Compensation Act, 1897 (c. 37).

A firm of contractors, under a contract with a railway co. for the widening of their line, were ballasting a siding which was separated from the main line by several lines of rail. The siding could only be reached by walking for a considerable distance through the premises of the railway co., & the workmen were advised by the contractors, with the authority of the railway co., to enter the premises by a gate, from which a path led by the side of the railway to the siding which was being ballasted; it was not necessary, while following this route, to go upon the main line. On a foggy morning, seven minutes before the hour for the commencement of the day's work, a workman in the employ of the contractors, while on his way to his work at the siding, was run over & killed on the main line about 150 yards from the locality of his work:—*Held:* it was no part of the contract of employment that the employment should include the time taken in getting to & from the work, under the circumstances the contractors owed no duty to the workman while proceeding to his work, & therefore the accident did not arise out of & in the course of the employment of the workman within Workmen's Compensation Act, 1897 (c. 37), s. 1 (1).—HOLNESS *v.* MACKAY & DAVIS, [1899] 2 Q. B. 319; 68 L. J. Q. B. 724; 80 L. T. 831; 47 W. R. 531; 15 T. L. R. 351; 43 Sol. Jo. 476; 1 W. C. C. 13, C. A.

Annotations:—**Dbtd. & N.F.** Stewart (1912), Ltd. *v.* Longhurst, [1917] A. C. 249. **Consd.** Howells *v.* Powell Duffryn Steam Coal Co., [1926] 1 K. B. 472. **Refd.** Coldrick *v.* Partridge, Jones, [1909] 1 K. B. 530; Riley *v.* Holland, [1911] 1 K. B. 1029; Fox *v.* Rees & Kirby (1916), 9 B. W. C. C. 459; Whittall *v.* Staveley Iron & Coal Co. (1917), 86 L. J. K. B. 985; Evans *v.* Postmaster-General (1924), 132 L. T. 137.

2353. —— Collier crossing foot bridge erected by employers.]—This bridge is one of the expedients for shortening the way of the workmen to their

—BROWN *v.* UNION S.S. CO., [1925] N. Z. L. R. 246.—**N.Z.**

c. —— Climbing spiked railings to reach his work when gate locked.]—GIBSON *v.* WILSON (1901), 3 F. (Ct. of Sess.) 661.—**SCOT.**

PART XIV. SECT. 5, SUB-SECT. 2.—B. (a) ii.

2350 i. *General rule.*]—The course of a workman's employment embraces all the time occupied in coming, going, & stopping for any purpose ancillary to his work.—EVANS *v.* BRITISH COLUMBIA ELECTRIC RY. CO. (1914), 29 W. L. R. 435; 7 W. W. R. 121.—**CAN.**

d. Coming to work—Miner crossing rails belonging to employer.]—MACKENZIE *v.* COLTNESS IRON CO., LTD. (1903), 6 F. (Ct. of Sess.) 8; 41 Sc. L. R. 6; 11 S. L. T. 350.—**SCOT.**

e. —— Workman using path provided by employer.]—NICOL *v.* YOUNG'S PARAFFIN LIGHT & MINERAL OIL CO., LTD., [1915] S. C. 439; 52 Sc. L. R. 354; [1915] 1 S. L. T. 159; 8 B. W. C. C. 395.—**SCOT.**

f. Leaving work—Workman crossing railway line of employers.]—A workman, employed at a coal mine,

work. Apparently, according to the finding of the county ct. judge, this man had got to one of the erections, put up for the express purpose of enabling the workmen to get to the premises. The man was on his way to the premises. I do not agree that his employment only begins at the moment he strikes the coal with his pick. I think the man was really in the employment at the moment he reached the bridge, he was doing something on his masters' behalf, that is to say he was on his way to the colliery for the purpose of working; he was going to get his lamp (LORD HALSBURY, C.). —CROSS, TETLEY & CO., LTD. *v.* CATTERALL (1905), [1926] 1 K. B. 488, n.; 134 L. T. 135, n.; 18 B. W. C. C. 445, n., H. L.

Annotations :—**Expld.** Sharp *v.* Johnson, [1905] 2 K. B. 139; Hoskins *v.* Lancaster (1910), 3 B. W. C. C. 476; Stewart (1912), Ltd. *v.* Longhurst, [1917] A. C. 249. **Consd.** Davidson *v.* Officer (1918), 87 L. J. P. C. 58; Harvey *v.* West Cannock Colliery Co. (1925), 18 B. W. C. C. 556; Howells *v.* Powell Duffryn Steam Coal Co., [1926] 1 K. B. 472. **Refd.** Nicol *v.* Young's Paraffin Light & Mineral Oil Co. (1915), 8 B. W. C. C. 395.

2354. —— Collier passing through iron gate on employers' premises.]—Each case must depend upon its own facts as to the reasonable interval of time & space during which a workman's employment lasts. It must not be taken that the protection of Workmen's Compensation Act, 1906 (c. 58), extends to workmen on any part of the employers' property.

Appct., a collier, who was employed at resps.' colliery, in order to get to his work had to pass through an iron gate which was on resps.' premises, & which was 100 yards from the lamp room where appct. had first to go. While appct. was passing through the iron gate it slammed & caught & injured him :—*Held :* the accident arose out of & in the course of appct.'s employment, & he was entitled to compensation under Workmen's Compensation Act, 1906 (c. 58).—HOSKINS *v.* LANCASTER (1910), 26 T. L. R. 612; 3 B. W. C. C. 476, C. A.

Annotation :—**Consd.** Williams *v.* Assheton Smith (1913), 108 L. T. 200.

2355. Leaving work—Leaving ship for dock side.]—A seaman discharged at the end of a voyage, had for the purpose of going ashore to descend by a ladder fixed to his employers' ship berthed at a floating stage, known as a dolphin, in the river Thames in order to step on the dolphin. It was moored in the river quite close to the ship & at a distance of 33½ feet from the quay, with which it was connected by a permanent bridge. In so doing the seaman fell from the dolphin into the river & was drowned :—*Held :* the dolphin was a structure forming part of the dock premises, & the seaman had "landed" from the ship; & that being so the accident did not arise "in the course of" the seamen's employment, within Workmen's Compensation Act, 1906 (c. 58), s. 1, & therefore his dependant was not entitled to recover compensation under that Act.—COOK *v.* MONTREAL (OWNERS) (1913), 108 L. T. 164; 29 T. L. R. 233; 57 Sol. Jo. 282; 6 B. W. C. C. 220, C. A.

Annotations :—**Distd.** Webber *v.* Wansborough Paper Co., [1915] A. C. 51; Stewart (1912), Ltd. *v.* Longhurst, [1917] A. C. 249. **Consd.** Davidson *v.* M'Robb (or Officer), [1918] A. C. 304. **Refd.** Harvey *v.* West Cannock Colliery Co. (1925), 18 B. W. C. C. 556.

2356. —— ——.]—A seaman on board a ketch, which was lying in W. harbour, was employed in unloading the cargo. When the ketch was at W. he slept on shore. After his work for the day was finished he left the ketch by a plank, one end of which rested on the ketch & the other on a rung of an iron ladder permanently fixed to the quay & belonging to the harbour authorities. Whilst ascending the ladder he slipped & fell into the harbour & injured his foot. The county ct. judge found that the ladder was the proper means of access to the ketch & that the accident arose out of & in course of the employment :—*Held :* there was evidence to support this finding.—WEBBER *v.* WANSBOROUGH PAPER CO., LTD., [1915] A. C. 51; 84 L. J. K. B. 127; 111 L. T. 658; 30 T. L. R. 615; 58 Sol. Jo. 685; 7 B. W. C. C. 795, H. L.

Annotations :—**Consd.** Davidson *v.* M'Robb (or Officer), [1918] A. C. 304; Harvey *v.* West Cannock Colliery Co. (1925), 18 B. W. C. C. 556. **Refd.** Barbeary *v.* Chugg (1915), 112 L. T. 797; M'Lean *v.* Macbrayne (1916), 9 B. W. C. C. 687; Stewart (1912), Ltd. *v.* Longhurst, [1917] A. C. 249.

2357. —— ——.]—A carpenter, who was employed in repairing a barge lying in dock, after finishing his day's work started on a dark night to walk along the quay to the dock gates, but fell off the quay & was drowned. The dock was private property & was not open to the public, but the man's employers & their workmen had leave to pass through the dock on their way to & from the barge. A claim for compensation by the widow was disallowed by the county ct. judge on the ground that at the time of the accident the relationship of master & servant had ceased :—*Held :* inasmuch as the man was on the dock premises solely by virtue of his contract of service, the accident arose out of & in the course of his employment.—STEWART (JOHN) & SON (1912), LTD. *v.* LONGHURST, [1917] A. C. 249; 86 L. J. K. B. 729; 116 L. T. 763; 33 T. L. R. 285; 61 Sol. Jo. 414; 10 B. W. C. C. 266, H. L.; *affg.* S. C. *sub nom.* LONGHURST *v.* STEWART (JOHN) & SON (1912), LTD., [1916] 2 K. B. 803, C. A.

Annotations :—**Distd.** Spencer *v.* Liberty (Owners) (1917), 86 L. J. K. B. 1381. **Consd.** Blake *v.* Ramsay (1917), 10 B. W. C. C. 500; Whittall *v.* Staveley Iron & Coal Co. (1917), 86 L. J. K. B. 985. **Distd.** Davidson *v.* M'Robb (or Officer), [1918] A. C. 304. **Consd.** Harvey *v.* West Cannock Colliery Co. (1925), 18 B. W. C. C. 556; Howells *v.* Powell Duffryn Steam Coal Co., [1926] 1 K. B. 472. **Refd.** Bell *v.* Armstrong, Whitworth (1919), 121 L. T. 258; Simpson *v.* Bolsover Colliery Co. (1920), 13 B. W. C. C. 173; St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59; Upton *v.* G. C. Ry., [1924] A. C. 302; Wilson *v.* Lyle (1925), 18 B. W. C. C. 731. **Mentd.** Armstrong, Whitworth *v.* Redford (1920), 89 L. J. K. B. 495.

(*b*) *Where Means of Conveyance provided by Employer.*

2358. Railway owned by employer—Use optional.]—DAVIES *v.* RHYMNEY IRON CO., LTD. (1900), 16 T. L. R. 329; 2 W. C. C. 22, C. A.

Annotations :—**Folld.** Walters *v.* Staveley Coal & Iron Co. (1910), 4 B. W. C. C. 89. **Apprvd.** St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59. **Refd** Coldrick *v.* Partridge, Jones, [1910] A. C. 77; Parker *v.* Pout (1911), 105 L. T. 493; Newton *v.* Guest, Keen & Nettlefolds (1925), 133 L. T. 26.

2359. —— Used by direction of employer.]—An engine cleaner, who had been employed by a railway co. at their station at K., was directed by his employers to work in a new engine shed at H., about four miles distant. The workman, who lived near K., was conveyed by the railway co.

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had finished his day's work, & was proceeding home along a private line of railway occupied by the colliery, when he was run over & killed at a point 230 yards distant from the place where he worked :—*Held :* the accident did not arise out of & in the course of the employment of the workman within Workmen's Compensation Act, 1897, s. 1 (1).—CATON *v.* SUMMERLEE & MOSSEND IRON CO. (1902), 4 F. (Ct. of Sess.) 989.—**SCOT.**

g. —— *By an unusual way.*]—The mere fact that a workman at the time the accident occurs is leaving his employer's works by a way other than that usually used, does not preclude an arbitrator from finding that the accident arose out of & in the course of the employment within Workmen's Compensation Act, 1906, s. 1 (1).—M'KEE *v.* GREAT NORTHERN RY. CO. (1908), 42 I. L. T. 132; 1 B. W. C. C. 165.—**IR.**

Sect. 5.—Right to compensation: Sub-sect. 2, B. (b).]

free of charge in one of their trains to their station at H., reaching there a short time before the hour for commencing work in the shed, & was taken back free of charge at the end of his day's work. While crossing the line at the station at H. in order to get to his work in the engine shed, & shortly before the hour at which work began, he was killed by a passing train:—*Held:* the employment of the workman commenced when he got into the train to be conveyed to his work, & not on his arrival at the engine shed, & the accident arose out of & in the course of his employment within Workmen's Compensation Act, 1897 (c. 37), s. 1 (1).—HOLMES *v.* GREAT NORTHERN RY. CO., [1900] 2 Q. B. 409; 69 L. J. Q. B. 854; 83 L. T. 44; 64 J. P. 532; 48 W. R. 681; 16 T. L. R. 412; 2 W. C. C. 19, C. A.

Annotations:—**Distd.** St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59. **Consd.** Taylor *v.* MacAlpine & Southern Ry. (1924), 130 L. T. 793. **Apprvd.** Upton *v.* G. C. Ry., [1924] A. C. 302. **Refd.** Gane *v.* Norton Hill Colliery Co., [1909] 2 K. B. 539.

2360. ——.]—Where a workman is injured by an accident while being conveyed to his work in a train which is actually the property of his employers, & in which he has no right to be except by virtue of his employment, the employment may be deemed to have commenced & the workman be entitled to compensation, notwithstanding that the use of the train by the workman was not obligatory.—HOWELLS *v.* POWELL DUFFRYN STEAM COAL CO., [1926] 1 K. B. 472; 95 L. J. K. B. 654; 134 L. T. 129; 70 Sol. Jo. 184; 18 B. W. C. C. 427, C. A.

Annotation:—**Refd.** Harvey *v.* West Cannock Colliery Co. (1925), 18 B. W. C. C. 556.

2361. Train provided by agreement with railway company—As implied term of contract of service.]—Where a claim for compensation is made under Workmen's Compensation Act, 1906 (c. 58), s. 1, it is still as necessary as before to establish that the accident arose not only out of but "in the course of" the employment.

A number of colliers lived about six miles from the colliery in which they were employed. A train, composed of carriages belonging to the employers, but driven by a railway co.'s men, conveyed free of charge the colliers from their home to a platform erected by the employers on land belonging to the railway co., & took them back again. The platform was under the control of the employers & was used exclusively by the colliers, who walked from there along a high road to the colliery, which was about a quarter of a mile away. A collier, whilst waiting on the platform for the return train, was knocked down in a rush for seats, & was killed by the train:—*Held:* it was an implied term of the contract of service that the trains should be provided by the employers, & that the colliers should have the right, if not the obligation, to travel to & fro without charge; & therefore the employment began when the colliers entered the train in the morning & ceased when they left the train in the evening, & the employers were liable; but it did not follow that every workman was entitled to the protection of the Act whenever an accident happened to him on his way from his home to his employer's place of business.—CREMINS *v.* GUEST, KEEN & NETTLEFOLDS, LTD., [1908] 1 K. B. 469; 77 L. J. K. B. 326; 98 L. T. 335; 24 T. L. R. 189; 52 Sol. Jo. 146; 1 B. W. C. C. 160, C. A.

Annotations:—**Apld.** Gilbert *v.* Nizam (Owners), [1910] 2 K. B. 555. **Distd.** Edwards *v.* Wingham Agricultural Implement Co., [1913] 3 K. B. 596. **Folld.** Walton *v.* Tredegar Iron & Coal Co. (1913), 6 B. W. C. C. 592. **Consd.** Morgan *v.* Guest, Keen & Nettlefold (1922), 92 L. J. K. B. 192. **Overd.** St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59. **Consd.** Howells *v.* Powell Duffryn Steam Coal Co., [1926] 1 K. B. 472. **Refd.** Gane *v.* Norton Hill Colliery Co., [1909] 2 K. B. 539; Parker *v.* Pout (1911), 105 L. T. 493; Williams *v.* Assheton Smith (1913), 108 L. T. 200; Whitfield *v.* Lambert (1915), 112 L. T. 803; Longhurst *v.* Stewart (1912), Ltd., [1916] 2 K. B. 803; Whittall *v.* Staveley Coal & Iron Co. (1917), 117 L. T. 130; Taylor *v.* McAlpine & Southern Ry. (1924), 130 L. T. 793; Newton *v.* Guest, Keen & Nettlefolds (1925), 133 L. T. 26; Williams *v.* Guest, Keen & Nettlefolds (1925), 133 L. T. 111.

2362. —— ——.]—A collier, living six miles from the pit where he worked, travelled free of charge to & from his work on a train provided by a railway co. at the instance of the employers. By an agreement the collier indemnified the employers against loss from accident on the journey, & agreed to desist from exercising the privilege of travelling by the train whenever his employers required him to do so. In getting into this train for the journey home the collier was killed by an accident:—*Held:* the accident arose out of & in the course of the employment.—WALTON *v.* TREDEGAR IRON & COAL CO. (1913), 6 B. W. C. C. 592, C. A.

Annotations:—**Refd.** Price *v.* Tredegar Iron & Coal Co. (1914), 111 L. T. 688; St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59; Newton *v.* Guest, Keen & Nettlefolds (1925), 133 L. T. 26.

2363. —— —— **Accident after leaving train & proceeding to work.**]—A collier travelled from home to his work by a special train provided by the railway co. at the cost of the employers, & from the point where he left the train he had to walk some distance to the colliery level. He went by a route which took him across a farmyard, by permission of the farmer, & while crossing the yard on a dark & frosty morning slipped on some ice & fell injuring his right leg:—*Held:* the employment having begun, according to the decision in *Cremins* v. *Guest, Keen & Nettlefold, Ltd.*, No. 2361, *ante*, when the workman entered the train, there was no break in it between the time of leaving the train & reaching the pit, as there was no deviation from a usual & recognised route, & therefore the accident arose out of & in the course of the employment, within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—MORGAN *v.* GUEST, KEEN & NETTLEFOLD, LTD. (1922), 92 L. J. K. B. 192; 128 L. T. 239; 15 B. W. C. C. 245, C. A.

2364. —— —— **No obligation on servant to use train.**]—A workman employed at a colliery was injured in a railway accident while travelling in a special colliers' train from his work to his home at M. By an agreement between the colliery co. & the railway co. the railway co. agreed to provide special trains for the conveyance of the colliery co.'s workmen to & from the colliery & M., & the colliery co. agreed to indemnify the railway co. against claims by the workmen in respect of accident, injury or loss while using the trains. Any workman who desired to travel by these trains signed an agreement with the railway co. releasing them from all claims in case of accident, & the colliery co. then provided him with a pass & charged him a sum representing less than the full amount of the agreed fare, & this sum was deducted week by week from his wages:—*Held:* there being no obligation on the workman to use the trains, the injury did not arise in the course of the employment within Workmen's Compensation Act, 1906 (c. 58).

A workman is acting in the course of his employment when he is engaged "in doing something he was employed to do." Or what is, in other & I think better words, in effect the same thing, namely, when he is doing something in discharge

of *a* duty to his employer, directly or indirectly, imposed upon him by his contract of service. The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment but it is to be borne in mind that the word "employment" as here used covers & includes things belonging to or arising out of it (LORD ATKINSON).

The man is not in the course of his employment unless the facts are such that it is in the course of his employment, & in performance of a duty under his contract of service that he is found in the place where the accident occurs. If there is only a right & there is no obligation binding on the man in the matter of his employment there is no liability (LORD WRENBURY).—ST. HELENS COLLIERY CO., LTD. *v.* HEWITSON, [1924] A. C. 59; 93 L. J. K. B. 177; 130 L. T. 291; 40 T. L. R. 125; 68 Sol. Jo. 163; *sub nom.* HEWITSON *v.* ST. HELENS COLLIERY CO., LTD., 16 B. W. C. C. 230, H. L.

Annotations:—**Folld.** Taylor *v.* McAlpine & Southern Ry. (1924), 130 L. T. 793. **Consd.** Williams *v.* Guest, Keen & Nettlefolds (1925), 133 L. T. 111. **Distd.** Howells *v.* Powell Duffryn Steam Coal Co., [1926] 1 K. B. 472. **Folld.** Newton *v.* Guest Keen & Nettlefolds (1926), 135 L. T. 386. **Refd.** Clark *v.* Southwark Corpn. (1925), 133 L. T. 753.

2365. ——— ——— ———.]—The construction of a road from D. to S. was undertaken by the Minister of Transport with a view to affording work for the unemployed in the London area. By an agreement between the Minister of Transport & applts., Sir R. M. & co., the construction of the section of the road S. to the east was placed with Sir R. M. & co. on condition that they should employ only men from the London area. It was agreed that the Minister of Transport should pay the travelling expenses of the men employed & provide the travelling facilities, but Sir R. M. & co. were to give the men at the end of each day's employment a voucher in return for which they would be able to receive a return railway ticket. The Minister of Transport then entered into an agreement with the other applts., the Southern Railway co., to provide trains to carry the men to S., the payment of the fares to be made by the Minister of Transport. The Southern Railway issued workmen's return tickets, printed on the back of which was a condition that the liability of the railway in case of personal injury should be restricted to the sum of £100. The trains by which the employed men travelled could be used by any one who purchased a ticket though he had no voucher. Resp. to this appeal was employed by Sir R. M. & co., & received on Aug. 21, 1922, a workmen's return ticket from London Bridge to S. in exchange for a voucher given to him by Sir R. M. & co. He alighted at M. & some of his fellow workmen were killed, & others injured while attempting to cross the line, & he assisted the railway staff in succouring them, but whilst so engaged they were run into by a train & he received very severe injuries. He applied in Feb. 1923, for compensation, & made the Southern Railway co. third parties to his claim under Workmen's Compensation Act, 1906 (c. 56), s. 6 (2). The county ct. judge decided that under that sect. & sub-sect. the railway co. were liable to pay to Sir R. M. & co. the whole amount of any compensation awarded against them, notwithstanding the restriction of their liability to £100 as that sub-sect. provided for indemnity; on the claim he awarded compensation of £1 per week with war additions on the ground that the accident arose out of & in the course of the employment. Sir R. M. & co. & the third parties both appealed against the decision that the accident arose out of & in the course of the employment & the award made:—*Held:* there being no evidence of contractual obligation on the part of Sir R. M. & co. to provide facilities for the workmen to get to & from the work or on the part of the workmen to make use of the facilities which were provided, & as it had very recently been laid down by the House of Lords that where there was no duty on the part of workmen to use the facilities provided, the employers could not be charged with responsibility during the use of those facilities, this accident did not arise in the course of the employment, there being no contract of employment at all until the workman reached S.—TAYLOR *v.* MCALPINE & SONS & SOUTHERN RY. CO. (1924), 130 L. T. 793; 17 B. W. C. C. 26, C. A.

2366. ——— ——— ———.]—A colliery labourer was employed by resps. at their colliery. He lived three & a quarter miles from the colliery, which was on a high hill, the road from his house to the colliery being an open mountain road with ponds & bogs along the route. In winter thick fogs hung over the mountain. Resps., over thirty years ago, to enable them to form a shift as early as 7 a.m., provided trains by which the miners could travel to the colliery. These trains were run by the Great Western Railway Co., under an agreement between them & resps. The colliery agent, in evidence, said that the men were expected to travel by these trains. The coaches & platform were owned by resps. On Oct. 18, 1923, the workman, whilst crossing the line about 5.35 a.m. to join one of these trains to travel to the colliery, was knocked down by a light engine, & as a result of the injuries he received, his left leg had to be amputated. The county ct. judge found that the only practicable & reasonable means of access to the colliery for appct. was the train provided by resps., & held that it was therefore the man's duty to travel by this train & consequently that the accident arose out of & in the course of his employment:—*Held:* there was no evidence on which it could be found that it was part of the workman's duty to use the train whenever he went to & from the mine, & therefore it formed no part of his contract of employment; the accident consequently did not arise in the course of his employment.

There is no doubt that the test of duty . . . is the accepted basis on which these questions ought to be dealt with (LORD CAVE, C.).—NEWTON *v.* GUEST, KEEN & NETTLEFOLDS, LTD. (1926), 135 L. T. 386; 70 Sol. Jo. 689; 19 B. W. C. C. 119, H. L.

Annotation: **Distd.** Howells *v.* Powell Duffryn Steam Coal Co., [1926] 1 K. B. 472.

2367. Ticket provided by employers—No obligation on servant to use train.]—The employers, ship scalers, gave a workman a return ticket to the dock railway station, telling him to report himself on board a ship at 7 a.m. in the morning. The workman made use of the ticket. On arriving at the dock he mistook the position of the gangway, & falling between the dock wall & the ship was injured. His day's pay would have begun from the time he reported himself on board the ship. Neither dock, ship, nor gangway were under the control of his employer. The county ct. judge

2367 i. *Ticket provided by employers—No obligation on servant to use train.*]—M'PHERSON *v.* REID, M'FARLANE & CO., LTD., [1926] S. C. 359.—SCOT.

Sect. 5.—Right to compensation: Sub sect. 2, B. (b), (c) & (d), & C.]

on an arbitration between the workman & the employers under Workmen's Compensation Act, 1906 (c. 58), found that the giving of the return railway ticket was merely a gratuitous concession by the employers, & that it was in no way obligatory on the workman to go or to return from his work by train:—*Held:* the accident did not arise out of & in the course of his employment.—NOLAN *v.* PORTER & SONS (1909), 2 B. W. C. C. 106, C. A.

Annotations:—**Consd.** Edwards *v.* Wingham Agricultural Implement Co., [1913] 3 K. B. 596. **Apprvd.** St. Helens Colliery Co. *v.* Howitson, [1924] A. C. 59. **Reld.** Newton *v.* Guest, Keen & Nettlefolds (1925), 133 L. T. 26.

2368. Conveyance provided by farmer—To convey newly engaged workman.]—A shepherd newly engaged by a farmer was killed by falling from a waggon which had been sent by the farmer to the shepherd's home, situate several miles from the farm, for the purpose of conveying him with his family & furniture to the cottage that he was to occupy during his employment:—*Held:* although there was a contract of service between the farmer & the shepherd, the employment of the latter did not commence when he left his home in the waggon belonging to the farmer, but would have commenced at the earliest period of time when he would have entered on his duties as a shepherd if he had not met with the accident which caused his death; therefore, the accident did not arise "out of & in the course of the employment" of deceased. —WHITBREAD *v.* ARNOLD (1908), 99 L. T. 103; 1 B. W. C. C. 317, C. A.

Annotation:—**Reld.** Whitfield *v.* Lambert (1915), 112 L. T. 803.

2369. Boat provided by employer—Only means of transit.]—A workman, whose only method of getting to & from work was by means of a boat supplied by his employer, was drowned by falling from the boat as he was returning at the usual hour:—*Held:* the accident arose out of & in the course of the employment.—MOLE *v.* WADWORTH (1913), 6 B. W. C. C. 129, C. A.

Annotation:—**Distd.** Edwards *v.* Wingham Agricultural Implement Co., [1913] 3 K. B. 596.

2370. —— ——.]—A workman was employed on an island at yearly wages & board & lodging, & it was part of his contract of service that he should be allowed at reasonable times to cross to the mainland to visit his wife, & be taken across in his employer's boat for that purpose. He met with an accident whilst in the boat on his way home, from the effects of which he died:—*Held:* the accident arose "out of" as well as "in the course of" the employment, & his widow was entitled to compensation under Workmen's Compensation Act, 1906 (c. 58).—RICHARDS *v.* MORRIS, [1915] 1 K. B. 221; 84 L. J. K. B. 621; 110 L. T. 496; 7 B. W. C. C. 130, C. A.

Annotations:—**Consd.** Newton *v.* Guest, Keen & Nettlefolds (1925), 133 L. T. 26. **Reld.** St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59.

2371. Bicycle provided by employer—Use by employee not obligatory.]—In a claim under Workmen's Compensation Act, 1906 (c. 58), by the dependants of a deceased workman, it appeared that he was employed as an engine driver & was paid by the hour, his work consisting in going round from farm to farm with an engine & threshing machine belonging to his employers, to do the threshing, to look after the interests of his employers, & solicit orders from farmers. For these purposes he was supplied by his employers with a bicycle to use in travelling between his work & his home & between the farms in his district. He also had to make up a daily sheet giving the name of the farmer using the machine, & the number of hours worked, lost time, moves, & flagmen. He was not bound to use the bicycle, but the evidence showed that the use of a bicycle was part of the arrangement & a term of the contract of engagement. On Sept. 25, 1912, his work having ended at 6 p.m., he proceeded to go home on his bicycle. On the way home he came into collision with a motor lorry & sustained injuries from which he died the next day:—*Held:* the employment ended at 6 o'clock & it was not part of his duty to ride home on the bicycle, therefore the accident did not arise in the course of the employment.—EDWARDS *v.* WINGHAM AGRICULTURAL IMPLEMENT CO., LTD., [1913] 3 K. B. 596; 82 L. J. K. B. 998; 109 L. T. 50; 57 Sol. Jo. 701; 6 B. W. C. C. 511, C. A.

Annotation:—**Reld.** Philbin *v.* Hayes (1918), 11 B. W. C. C. 85.

(c) *Arrival on Premises before Time of Employment.*

2372. General rule.]—A number of the workmen employed on certain building work in the county had to come down from London each day by a train which brought them to the place of employment about twenty minutes before the time fixed for commencing work in the morning. The workmen employed on the works were paid by the hour, & each of them had, within three minutes after the time fixed for commencing work for the day, to deposit a ticket at a ticket office at the entrance of the works. It was to the knowledge of the employers the practice of the men coming from London, on their arrival by the train, to come to the works about twenty minutes before the time fixed for commencing work, &, after depositing their tickets at the ticket office, to go for refreshment to a mess cabin provided by the employers on the works for the supply of necessary refreshment to the workmen employed. One of these workmen, who had come from London one morning, while proceeding to deposit his ticket at the ticket office about twenty minutes before the time fixed for commencing work, sustained injuries through accidentally falling into an excavation on the works near the ticket office:—*Held:* the accident arose out of & in the course of his employment within Workmen's Compensation Act, 1897 (c. 37), s. 1.

A reasonable margin must be allowed to the workman for the purpose of getting to the part of the premises where his actual work is to be carried on; & if during that interval he is engaged in doing something which is for the benefit of his employer . . . he is just as much engaged in his employment as if he were engaged in the actual work which he has to do. . . . The moment at which the actual work of the workman begins cannot be taken as the true moment of the commencement of his employment for the purposes of the Act (COLLINS, M.R.).—SHARP *v.* JOHNSON & CO., LTD., [1905] 2 K. B. 139; 74 L. J. K. B.

PART XIV. SECT. 5, SUB-SECT. 2.—B. (c).

h. *Arrival on premises but not at point of work.*]—A miner was injured on his way to work. He was on his employers' land but had not reached the point at which his duties commenced, & the accident occurred twenty minutes before the hour at which work started:—*Held:* the accident did not arise out of & in the course of the employment.—ANDERSON *v.* FIFE COAL CO., LTD., [1910] S. C. 8; 47 Sc. L. R. 3; [1909] 2 S. L. T. 260; 3 B. W. C. C. 539.—SCOT.

506; 92 L. T. 675; 53 W. R. 597; 21 T. L. R. 482; 7 W. C. C. 28, C. A.

Annotations:—**Consd.** Hoskins *v.* Lancaster (1910), 26 T. L. R. 612. **Reld.** Gane *v.* Norton Hill Colliery Co. (1909), 100 L. T. 979; Nicol *v.* Young's Paraffin Light & Mineral Oil Co. (1915), 8 B. W. C. C. 395; Bell *v.* Armstrong, Whitworth (1919), 88 L. J. K. B. 844.

2373. Miner waiting at pit head.]—A miner's employment has commenced when he has obtained his pit-lamp & his "tallies," & is waiting at the pit brow to descend.—FITZPATRICK *v.* HINDLEY FIELD COLLIERY CO. (1901), 4 W. C. C. 7, C. A.

2374. Lighterman employed to pump barge—Arrival at wharf before tide sufficiently low.]—Appct., who was employed as a lighterman by resp., received instructions from him to take on the early morning flood tide a barge which was lying in the river Thames to the south of midstream off a wharf to a certain place. While waiting until the tide had ebbed sufficiently for him to reach the barge appct. stepped into a boat that was lying on the mud to rest himself. In so doing he slipped with his foot caught under the thwart of the boat, & sustained injuries:—*Held:* the evidence was sufficient to support the finding that appct. in going to rest in the boat was acting reasonably & within the ambit of his employment; & therefore the accident which befell him arose "out of & in the course of" his employment, within Workmen's Compensation Act, 1906 (c. 58), s. 1, entitling him to compensation.—MAY *v.* ISON (1914), 110 L. T. 525; 7 B. W. C. C. 148, C. A.

(d) Return to Premises for Legitimate Purpose.

2375. After termination of service—Return to obtain tools.]—A workman a few days after leaving his work, obtained leave to go down into the mine to bring up his tools, & while there for that purpose met with an accident. The county ct. judge, in a considered judgment, found that the accident "arose out of & in the course of" the man's employment with the colliery owners, & awarded him compensation. The colliery owners appealed on the ground that the judge had misconceived the facts. Although his finding of fact was that the man was ordered by the manager to fetch his tools, the judge ought to have found on the evidence that he had ceased to be their servant, & had met with the accident while in the mine on his own business. They asked that the case should be remitted:—*Held:* the employers' request must be refused, as this ct. had no jurisdiction to interfere with the finding of fact.—MOLLOY *v.* SOUTH WALES ANTHRACITE COLLIERY CO. (1910), 4 B. W. C. C. 65, C. A.

Annotation:—**Reld.** Riley *v.* Holland, [1911] 1 K. B. 1029.

2376. —— Return to receive wages.]—Appct., who was employed at resps.' mill, was discharged on a Wednesday. By the usage of the mill the wages were made up to Wednesday & were payable at the mill on Friday. Appct. went to the mill on the Friday for her wages, which were paid her, &, on going down the stairs of the mill, slipped & was injured:—*Held:* the accident arose out of & in the course of her employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—RILEY *v.* HOLLAND (WILLIAM) & SONS, LTD., [1911] 1 K. B. 1029; 80 L. J. K. B. 814; 104 L. T. 371; 27 T. L. R. 327; 4 B. W. C. C. 155, C. A.

Annotations:—**Apld.** Baird *v.* M'Graw (1919), 13 B. W. C. C. 394. **Reld.** Cook *v.* Ship Montreal (1913), 108 L. T. 164.

2377. Return to receive wages.]—Applt. was employed as a collier by resps., & it was part of his contract of employment that the employers should pay him his wages at their pay office. Applt. left work on Saturday at 5 a.m. At 12.30 p.m. he was going for his wages along a path which had been made by resps. for their workmen, & while going along a railway co.'s line which ran through resp.'s premises he was knocked down by an engine & injured:—*Held:* he was injured "in the course of the employment" within Workmen's Compensation Act, 1897 (c. 37), s. 1 (1), & was entitled to compensation.—LOWRY *v.* SHEFFIELD COAL CO., LTD. (1907), 24 T. L. R. 142; 1 B. W. C. C. 1, C. A.

Annotations:—**Folld.** Riley *v.* Holland, [1911] 1 K. B. 1029. **Apld.** Baird *v.* M'Graw (1919), 13 B. W. C. C. 394. **Reld.** Dothie *v.* MacAndrew (1908), 98 L. T. 495; Phillips *v.* Williams (1911), 4 B. W. C. C. 143.

2378. Return to settle dispute with employer—No intention to return to work unless dispute settled.]—A collier received his paynote on a Saturday. Being dissatisfied with the amount, he spoke to the manager, who referred him to the under-manager. The latter could not be seen till Monday. The collier came on Monday at mid-day, not intending to resume work unless the dispute was settled in his favour, & saw the under-manager, who did not give in. The collier then proceeded to leave, but was knocked down by a coal waggon & killed:—*Held:* the accident arose neither out of nor in the course of the employment.—PHILLIPS *v.* WILLIAMS (1911), 4 B. W. C. C. 143, C. A.

C. Interruption of Course of Employment.

Risks incidental to employment.]—*See* Sub-sect. 3, H., *post.*

2379. General rule.]—An engine driver in the employ of a railway co. had, in order to commence his day's work, to go in the morning to the co.'s engine shed. His proper route to the engine shed was through a gate opening from the public road on to the railway, & thence by a pathway which did not cross the rails. One morning, on getting through the gate, instead of going along the pathway towards the engine shed, he went in the opposite direction along the railway to a signal box, which stood in the middle of the line with rails on both sides of it, in order to get some information from the signalman for his own purposes. After obtaining the information which he required, he proceeded from the signal box towards the engine shed along the railway. Some time afterwards he was found lying on the line seriously injured, having presumably been run down by an engine, & he subsequently died of his injuries. On a claim for compensation by his dependants against the co. under the Workmen's Compensation Act, 1897 (c. 37):—*Held:* the accident could not be said to have arisen out of & in the course of deceased's employment, & therefore the claim for compensation must fail.

I do not think that the protection given by the

PART XIV. SECT. 5, SUB-SECT. 2.—B. (d).

2376 i. *After termination of service—Return to receive wages.*]—LASTUKA *v.* GRAND TRUNK PACIFIC RY. CO. (1913), 24 W. L. R. 137; 4 W. W. R. 569; 11 D. L. R. 375; 6 Alta. L. R. 59.—CAN.

k. *Return to work after receiving wages from pay depôt—Travelling time paid for.*]—NELSON *v.* BELFAST CORPN. (1908), 42 I. L. T. 223; 1 B. W. C. C. 158.—IR.

l. *Return to inspect machinery—Voluntary inspection by superintendent outside regular hours.*]—PUBLIC TRUSTEE *v.* CHRISTCHURCH CORPN., [1919] N. Z. L. R. 257.—N.Z.

PART XIV. SECT. 5, SUB-SECT. 2.—C.

m. *Miner leaving work to get a drink of water.*]—A miner who had left the pithead, where he was working, to get a drink of water, was killed by a runaway hutch when he was returning:—*Held:* he was killed in the course of his employment within Workmen's Compensation Act, 1897, s. 1 (1).—

Sect. 5.—Right to compensation: Sub-sect. 2, C. & D. (a) & (b) i.

Act can be confined to the time during which a workman is actually engaged in manual labour, & that he would not be protected during the intervals of leisure which may occur in the course of his daily employment. A workman is not a machine, & must be treated as likely to act as workmen ordinarily would during such intervals: &, as regards any reasonable use which, while on the employer's premises, he may make of moments when he is not actually working, I must not be supposed to say that he would be thereby deprived of the protection of the Act (MATHEW, L.J.).—BENSON *v.* LANCASHIRE & YORKSHIRE RY. CO., [1904] 1 K. B. 242; 73 L. J. K. B. 122; 89 L. T. 715; 68 J. P. 149; 52 W. R. 243; 20 T. L. R. 139; 6 W. C. C. 20, C. A.

Annotations:—**Distd.** Robertson *v.* Allan (Liverpool & London), S.S. Corsican (1908), 98 L. T. 821. **Consd.** Harding *v.* Brynddu Colliery Co. (1911), 105 L. T. 55. **Refd.** Dothie *v.* McAndrew (1908), 98 L. T. 495.

2380. Accident occurring out of working hours.]—A labourer employed upon some works by a contractor while asleep in a hut on the works belonging to the contractor was injured by the hut being blown down by a strong wind. He was engaged upon the terms that he was to be provided with a hut to live in at 2*d.* a day, but he was not by the terms of his service obliged to sleep in the hut:—*Held:* the accident did not arise "in the course of the employment" within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—PHILBIN *v.* HAYES (1918), 87 L. J. K. B. 779; 119 L. T. 133; 34 T. L. R. 403; 62 Sol. Jo. 519; 11 B. W. C. C. 85, C. A.

Annotations:—**Apld.** Armstrong, Whitworth *v.* Redford, [1920] A. C. 757. **Refd.** St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59.

2381. Accident occurring in meal time.]—A workman was paid by the hour for the number of hours per week that he was actually engaged on his work, not including the midday dinner hour. During that hour he was at liberty to stay & take his meal on the premises, or to go elsewhere. He stayed on the premises, & sat down to eat his dinner, & while so doing a wall fell upon him, & he was injured. On appeal from the refusal of an application for an award of compensation under Workmen's Compensation Act, 1897 (c. 37):—*Held:* during the dinner hour there had been no break in the employment of the workman, & he was entitled to claim compensation.—BLOVELT *v.* SAWYER, [1904] 1 K. B. 271; 73 L. J. K. B. 155; 89 L. T. 658; 68 J. P. 110; 52 W. R. 503; 20 T. L. R. 105; 48 Sol. Jo. 115; 6 W. C. C. 16, C. A.

Annotations:—**Expld.** Brice *v.* Lloyd, [1909] 2 K. B. 804. **Consd.** Pope *v.* Hill's Plymouth Co. (1910), 102 L. T. 632. **Apld.** Alderidge *v.* Merry (1912), 6 B. W. C. C. 450; Highley *v.* L. & Y. Ry. (1916), 85 L. J. K. B. 1513. **Distd.** Bell *v.* Armstrong, Whitworth (1919), 88 L. J. K. B. 844. **Consd.** Armstrong, Whitworth *v.* Redford, [1920] A. C. 757.

2382. ——.]—MORRIS *v.* LAMBETH CORPN., No. 2621, *post*.

2383. ——.]—ROWLAND *v.* WRIGHT, No. 2596, *post*.

2384. ——.]—MARTIN *v.* LOVIBOND (J.) & SONS, LTD., No. 2635, *post*.

2385. Accident occurring between two employments.]—A workman was engaged to load a van, & was promised employment in unloading it at another place if he would be there by the time the van arrived. He agreed to be there, & started on his bicycle, but on the way met with an accident. The judge held that the employment was continuous, & awarded compensation:—*Held:* there were two separate & distinct employments; one had ended & the other had not begun. The accident therefore did not arise out of & in the course of his employment.—PERRY *v.* ANGLO-AMERICAN DECORATING CO. (1910), 3 B. W. C. C. 310, C. A.

2386. Absence with leave—Seaman—Whether employment interrupted.]—DAVIDSON (CHARLES R.) & CO. *v.* M'ROBB OR OFFICER, No. 2339, *ante*.

2387. —— —— ——.]—KITCHENHAM *v.* JOHANNESBURG (OWNERS), No. 2548, *post*.

2388. Absence without leave.]—WARREN *v.* HEDLEY'S COLLIERY CO., LTD., No. 2460, *post*.

D. Scope of Employment.

(a) Prohibited Acts.

See Sub-sect. 2, E., *post*.

(b) Added Perils.

i. Necessary or Reasonable Acts.

2389. Workman engaged to load ship—Fixing cross-bars over hatchways after loading completed.]—LYSONS *v.* KNOWLES (ANDREW) & SONS, LTD., STUART *v.* NIXON & BRUCE, No. 3433, *post*.

2390. Leaving ship by means of rope.]—The workman, a riveter working on a ship in dock, was about to go ashore for his breakfast. When he came on deck he found the vessel was being removed to a dry dock, & was already a short distance from the quay. The gangway had been removed, & there was no other means of getting ashore than by slipping down a rope which still held the vessel to the quay. By means of this rope a fellow workman got ashore safely, & appct. attempted to follow him. The rope gave way, & he was thrown against the quay wall & injured:—*Held:* there was evidence to support the finding of the county ct. judge that the accident "arose out of & in the course of" the man's employment.—KEYSER *v.* BURDICK & CO. (1910), 4 B. W. C. C. 87, C. A.

2391. Lighting temporary stove in cabin during intense cold.]—While resps.' steamship was lying in port in the Black Sea in Feb. 1911, the second engineer, on account of the intensity of the cold, rigged up a stove in his cabin. He had been allowed by the chief engineer to use the stove during the day time, but was forbidden to use it at night, as it was dangerous. On Feb. 9 there was no fire in the stove at 11 p.m.; but apparently the second engineer lit the fire at some period of the night, & he was found dead the next morning, having been asphyxiated by the fumes of the fire. On an application by his dependants for compensation under Workmen's Compensation Act, 1906 (c. 58), the county ct. judge held that the accident arose out of & in the course of deceased's employment; he accordingly made an award of compensation:—*Held:* there was evidence upon which the county ct. judge could find as he did.—EDMUNDS *v.* PETERSTON (OWNERS) (1911), 28 T. L. R. 18; 5 B. W. C. C. 157, C. A.

Annotation:—**Mentd.** Taylor *v.* Cripps, [1914] 3 K. B. 989.

KEENAN *v.* FLEMINGTON COAL CO. (1902), 5 F. (Ct. of Sess.) 164.—**SCOT.**

PART XIV. SECT. 5, SUB-SECT. 2.—D. (b) i.

n. Workman easing girders outside lift—Crushed by counterweight.]—YOUNG *v.* STUART (1915), 15 S. R. N. S. W. 435; 32 N. S. W. W. N. 144.—**AUS.**

o. Boy using machine not forbidden to touch.]—TOBIN *v.* HEARN, [1910] 2 I. R. 639.—**IR.**

p. Workman jumping from vehicle in motion—To recover pipe.]—M'LAUCHLAN *v.* ANDERSON, [1911] S. C. 529; 48 Sc. L. R. 349; [1911] 1 S. L. T. 127; 4 B. W. C. C. 376.—**SCOT.**

q. —— *To recover coat.*]—STRONG

2392. Sailor washing clothes in dark alley way.]—A sailor, washing his clothes in a dark alley way, fell down a half-open hatchway & was injured. The county ct. judge found that it was necessary to wash his clothes, & that he was doing it in a reasonable place & manner:—*Held:* the accident arose out of the employment.—COKOLON *v.* KENTRA (OWNERS) (1912), 5 B. W. C. C. 658, C. A.

2393. Sailor discharging cargo on gangway—Alteration of position of gangway—Swinging from stern of another vessel to lighten gangway.]—A seaman employed on board a fishing vessel was engaged in discharging fish from it across a gangway resting on a floating pontoon. While he was standing in the middle of the gangway it became necessary to lower the end of it that rested on the pontoon. Instead of walking off the gangway the seaman caught hold of the stem of another vessel which was moored alongside, & swung himself therefrom. While doing so he slipped & fell into the water sustaining such serious injuries that he died:—*Held:* the accident arose "out of" as well as "in the course of" the seaman's employment.—GALLANT *v.* GABIR (OWNERS) (1913), 108 L. T. 50; 29 T. L. R. 198; 57 Sol. Jo. 225; 6 B. W. C. C. 9; 12 Asp. M. L. C. 284, C. A.

2394. Window cleaner—Climbing from one sill to another.]—A man employed (*inter alia*) as a window cleaner at a hotel was cleaning a second floor window on the outside. There was another window 2 feet 2 inches away, which was joined to the first window by a common ledge 9 inches wide. After cleaning the first window the man climbed along the ledge to get to the next window. His fingers slipped, & he fell & was killed. There was no reason why he should not have gone back into the room to get to the other window. He was a competent workman, who had been employed similarly for four years:—*Held:* the accident arose out of the employment.—BULLWORTHY *v.* GLANFIELD (1914), 7 B. W. C. C. 191, C. A.

Annotation:—**Distd.** Palmer v. Harrods (1916), 85 L. J. K. B. 1659.

2395. Farm bailiff going round farm buildings at night—Climbing through window to obtain key.]—A farm bailiff, whose practice it was to go round the farm buildings every evening at about 8 o'clock when his day's work was finished in order to see that all was secure, on one occasion after doing so, as usual, went to a neighbouring town for the purpose of shopping, & returned to his home at about 11 o'clock, when he again went round the premises. Being desirous of obtaining the key of one of the buildings, which he had earlier left inside a cowshed, he remembered that the key of the cowshed was in his own house, which was distant about three minutes walk. In order to avoid the walk he vaulted on to the window sill of the cowshed &, leaning through the window, endeavoured to reach the key which he required. In so doing he overbalanced himself & fell upon the floor of the shed, sustaining injuries from which he died:—*Held:* the accident arose out of & in the course of deceased's employment. The obtaining of the key was part of his duty, & the fact that he endeavoured to discharge that duty by imprudently taking a short cut did not deprive his dependants of the right to compensation under Workmen's Compensation Act, 1906 (c. 58).—PEPPER *v.* SAYER, [1914] 3 K. B. 994; 83 L. J. K. B. 1756; 111 L. T. 708; 30 T. L. R. 621; 58 Sol. Jo. 669; 7 B. W. C. C. 616, C. A.

Annotations:—**Refd.** Wardle *v.* Enthoven (1916), 86 L. J. K. B. 309; Guest *v.* Gaston (1926), 95 L. J. K. B. 759.

2396. Driver of motor van—Removal of floor boards to improve working of clutch.]—A workman was employed as a motor van driver. The clutch of his motor was so worn that it was impossible to change the speeds without considerable noise & injury to the gear. He complained of this once or twice, & something had been done to remedy it, but without effect. In order to work the clutch more efficiently & without noise, he removed two boards from the floor of the van. This would have enabled him to press the clutch further down. As he was adjusting his rug, preparatory to moving off, one end of the rug fell through the gap left by the boards which had been removed, & got caught in the shaft, with the result that the man was drawn down & his leg broken. The county ct. judge found that the man had not been guilty of serious & wilful misconduct in removing the boards, & that the accident arose out of & in the course of the employment:—*Held:* there was evidence to support the finding, & no misdirection.—PARTRIDGE *v.* WHITELEY (WM.), LTD. (1915), 8 B. W. C. C. 53, C. A.

2397. Workman carrying heavy burden—Obtaining lift in passing cart.]—A builder's handyman was sent to remove a window & to put another in its place at a farm about two miles distant from his employer's yard. He was told to take the window frame there the best way he could. His employer had no horse & trap available to convey the window frame to the farm. The workman started to carry it on his shoulder. On the way he came up with a pony & cart going past his destination. With the driver's permission, he placed the window frame in the cart, & started to climb up himself. The pony bolted & he fell out & was injured. The county ct. judge found that the man was acting reasonably in carrying out his duties, & held the accident arose out of the employment:—*Held:* there was evidence to support the finding & no misdirection.—MULLINGER *v.* BIDEWELL (1916), 10 B. W. C. C. 104, C. A.

2398. Workman waiting for pay—Resting on machinery.]—A workman, who was employed at a rubber machine, knocked off work at about 5.15, as it was too late to finish another batch of rubber before 5.30, when the day's work ended. It was a Friday, & he & the other men had to wait in the works until 5.30 to be paid. He intended to lean or sit upon the stationary part of the machine, but as he was going there, his foot slipped. He threw out his arm to save himself, and it was caught in the revolving rollers of the machine & so badly crushed that it had to be amputated above the elbow. The county ct. judge found that it was the usual thing for men, waiting about such as this, to lean against or sit on this part of the machine, & that the employers knew of it, & never objected; &, further, that it was not an obviously dangerous thing to do. He therefore found that the accident arose out of & in the course of the employment, & made an award accordingly:—*Held:* there was evidence to support the findings & no misdirection.—MAYOR *v.* LEYLAND (BIRMINGHAM) RUBBER CO. (1920), 13 B. W. C. C. 115, C. A.

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v. WRIGHT & CO., [1922] S. C. 515.—SCOT.

r. *Cleaner of machinery—Cleaning parts outside her duty.*]—A woman, part of whose work was to clean certain machinery in a factory, finding the guard removed from another part of the machinery which it was not her duty to touch, proceeded to clean that. While she was cleaning it the machinery started, & she was injured:—*Held:*

Sect. 5.—Right to compensation: Sub-sect. 2, D. (b) i. & ii.]

2399. Workmen travelling on employer's cart—Instead of van sent for purpose.]—Resp., a farmer, told appct. to go, on the following day, by tramcar to a certain place where she & some other women would be met by his man with a four-wheeled van in which they would be driven to the field where they were to pick up potatoes. At the appointed place on the following day the women found the van waiting for them. There was also a two-wheeled farm cart, in charge of one of resp.'s men at the same place. This farm cart was also going to the field. One of the women said she would ride to the field in the cart, & the other women all got in after her. The man in charge of the van expostulated with the women, but made no attempt to stop them riding in the cart. He then drove off & the cart followed. Going round a corner the cart upset & appct. was injured. The county ct. judge took the view that the women got into the cart to please themselves & that the accident did not arise out of the employment. He consequently made an award for resp.: *Held:* upon the admitted facts, the question was one of law. The accident arose out of & in the course of appcts.' employment.—BIRD *v.* PRICE (1920), 13 B. W. C. C. 143, C. A.

2400. Seaman going ashore for own & employer's benefit.]—(1) A seaman, employed on a steam trawler, had been assisting in coaling the vessel in port when, by reason of the condition of the tide, no more work could be done for some hours. The captain ordered a plank to be placed from the ship to the quay so that the hands could go ashore. There was no other means of access to the quay. The seaman fell from the plank to the vessel & died as the result. His object for going ashore was to collect certain money that had been realised, on a previous occasion when the ship was in that port, by the sale of old rope. The crew were entitled to the proceeds of such sale, but the owners had a right to deduct from it the value of any broken crockery. On the occasion in question there was nothing to deduct:—*Held:* the accident arose out of & in the course of the man's employment.

(2) The seaman in the above circumstances was paid 6*s.* a day & "trip money," commonly called a bonus which was fixed at 6*s.* to be paid whenever the catch for seven days amounted in value to £100:—*Held:* the "trip money" or "bonus" was really an extra wage paid upon the happening of certain events & was not a share in the profits or gross earnings of the vessel.—DUCK *v.* NORTH SEA STEAM TRAWLING CO., LTD. (1915), 9 B. W. C. C. 83, C. A.

2401. Workman resting during interval for meal—Accident while fetching cap of fellow-workman.]—A workman was ordinarily employed as a gas stoker. On the night of the accident he was engaged with others in removing crown bricks which had fallen into a furnace from the roof. Two men at a time went into the furnace, & after being there about five minutes, came out to cool & rest, their places being taken by two others. During this work an interval, though at no stated time, was allowed for food. About 2 a.m. the workman & his mate had come from the furnace for a rest & were told to get their meal, & then come back. They brought their food with them, but before the man went to get his food from the place where he had left it in his coat, his mate asked him if he knew where his cap was. He replied that he thought it was where they had previously been sitting & he would get it for him. While in the act of fetching the cap he fell into an unfenced & unlighted hole & was seriously injured. The county ct. judge found that at the time of the accident the man was acting reasonably within the scope of his employment, & held that the accident arose out of & in the course of his employment:—*Held:* the decision was one of fact; there was evidence to support the finding, & no misdirection.—BRATTON *v.* JONAS & COLVER, LTD. (1920), 13 B. W. C. C. 305, C. A.

2402. Man employed to load cart—Injury while moving cart to suitable position.]—It was a workman's duty to count bags of sawdust delivered for his employer. He was injured while helping to move the cart containing the sawdust. The cart belonged to the person bringing the sawdust, whose duty it was to put the sawdust in a certain shed. The county ct. judge found that the accident arose out of & in the course of the man's employment & made an award in his favour:—*Held:* there was evidence to support the finding & no misdirection.—EASTWOOD *v.* BRUNT (1921), 14 B. W. C. C. 48, C. A.

2403. Cleaner employed on sweeping—Injury by picking up & cleaning detonator.]—A man was employed to sweep up & clean an engine house. In the course of this work he swept up a small metal tube. He knew it to be a detonator & that it should not have been in the house, for these detonators were only given out to the shot firers in the mine, one at a time, & were supposed to be used by the shot firer at once. Thinking that it was an empty detonator case, covered with dust, he tapped it on the table to remove the dust, & it exploded, severely injuring his hand. The county ct. judge held that the accident did not "arise out of" the man's employment, & refused to award compensation:—*Held:* in picking up the detonator the man was acting within his employment, & as it was a perfectly natural thing to do to tap it to remove the dust, this was no evidence that the man was acting outside the sphere of his employment. The accident must be held to have arisen out of & in the course of the employment.—JONES *v.* YNYSARWED COLLIERY CO. (1921), 14 B. W. C. C. 111, C. A.

2404. Workman taking meal in shed—Injury from boiling water used for meal.]—Men employed at an oil wharf were allowed to take their meals in a shed close to the engine room. The co. provided a fire & a table & some seats for the men, but no utensils for cooking anything. A workman went to take his tea in the shed &, there being no kettle, he used a large oil can to boil the water for the tea. As he was sitting in front of the fire waiting for the water to boil, the coal in the grate fell in & the can tipped over, & he was scalded by the water that was splashed over his feet & legs. The employers admitted that the accident arose in the course of the man's employment, but they contended that it did not arise out of the employment. The county ct. judge decided against that contention & awarded compensation:—*Held:* there was evidence to support the finding, & no misdirection.

Of course, if the risk from which he suffered was

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the accident arose out of the employment.—GREER *v.* LINDSAY THOMPSON, LTD. (1912), 46 I. L. T. 89; 5 B. W. C. C. 586.—IR.

t. Factory hand making necessary adjustment to machine—After removal from machine.]—BEATTIE *v.* TOUGH & SONS, [1917] S. C. 199; 54 Sc. L. R. 127; [1917] 1 S. L. T. 27.—SCOT.

a mere risk that any one incurs from taking tea, that is to say that he might drink his tea too hot, or that he might choke himself with too large a piece of bread & butter, or that he might injure himself by cutting himself with a knife in spreading his butter or otherwise using it, I think a difference might very well arise, but taking the facts as agreed in this case, it appears to me that this was a risk incidental to the employment (ATKIN, L.J.).—SMIDMORE *v.* LONDON & THAMES HAVEN OIL WHARVES, LTD. (1921), 14 B. W. C. C. 114, C. A.

2405. Workman returning to post by improper route—Accident after arrival at proper post.]—A dock labourer, engaged in unloading mutton from a ship, returned to his work by an improper route. After arriving at a point at which he would have had to arrive at had he gone by the proper route he alighted, as was his duty, from a sling of frozen mutton on to a defective hatch cover. The hatch cover broke, & the man fell through & was injured:—*Held:* (1) as he was obliged to approach the hatch cover by way of the sling of mutton, it was immaterial that he did not come by the proper route to the sling of mutton; (2) as at the time of the accident he was doing what it was his duty to do & acting as he was bound to do, the accident arose out of & in the course of his employment.—READ *v.* PACIFIC STEAM NAVIGATION CO. (1922), 15 B. W. C. C. 39, C. A.

2406. Workman crossing elevator to return to duty.]—A workman was employed to handle empty wagons after they had been brought to a high level on a moving elevator. While waiting between the arrival of successive batches of wagons he was entitled to, & did, shelter in a cabin near the bottom of the elevator, from where he had to return to his post beyond the top of the elevator upon the arrival of a wagon. While so returning he crossed the elevator, which was not a necessary act, & slipped & was injured, with the result that a leg had to be amputated. The county ct. judge held that the accident arose out of & in the course of the employment, inasmuch as he found that the crossing of the elevator was merely a negligent way of returning to his post, & was not an act altogether outside the scope of the man's employment. The employers appealed on the ground that it was no part of the workman's duty to cross the elevator:—*Held:* it was a question of fact, upon which there was evidence to support the finding, & there was no misdirection.—EDWARDS *v.* OCEAN COAL CO., LTD. (1924), 131 L. T. 7; 17 B. W. C. C. 7, C. A.

2407. Workman mounting cart by hanging ladder.]—Applt. claimed as sole dependant of the deceased workman who had been employed for some years by resp. corpn. as one of their dust collectors & had for some time suffered from hernia, but with some assistance from his mates was able to do the work. When the round was finished & the steam lorry was full the gang employed would ride back in the lorry to the depot to there shoot the rubbish & clean the lorry. The habit of the men was to stop on the way back to the depot some distance from it at a coffee shop, but deceased always then walked on to the depot. The lorry was taken to the depot & emptied & on the way from there to the garage where it had to be cleaned to be used that day for other purposes, came on deceased who endeavoured to clamber on to it by means of one of two swinging ladders used for the purpose, but fell back & was fatally injured. At the time the lorry was only going two & a half miles an hour. Part of the duty of deceased was to help clean the lorry, & if he had not attempted to get into the lorry he would have been late for the job. The county ct. judge found that it was no part of the duty of deceased to hazard that which caused the injury; & the man had left his employment at the time of the accident since he ought to have gone straight to the depot, therefore the accident did not arise out of & in the course of the employment:—*Held:* the accident arose out of & in the course of the employment as the workman had not at the time left his employment as he was employed to go to the garage to help clean the lorry & his attempt to get into the lorry was not of a nature so dangerous as to add a peril not incident or necessary to the employment.—CLARK *v.* SOUTHWARK CORPN. (1925), 133 L. T. 753; 18 B. W. C. C. 367, C. A.

Annotation:—**Consd.** Guest *v.* Gaston (1926), 95 L. J. K. B. 759.

ii. *Unnecessary or Unreasonable Acts.*

2408. Mines—Labourer acting as collier.]—An accident occurring to a labourer in a mine while he is, without instructions, acting as a collier is not one arising out of & in the course of his employment.—EDWARDS *v.* INTERNATIONAL COAL CO. (1899), 5 W. C. C. 21, C. A.

2409. —— Passing between trucks unsecured.]—The workmen employed in a colliery were in the habit of going to & from their work across a "jig brow," where tubs were run up & down an inclined plane by means of an endless rope. At the times when the men were expected to cross nothing was done with the tubs, no machinery was in use, a "stop block" was let down to keep the tubs in place, & there was no traffic & no danger. A workman had permission to leave work two hours before the usual time. He came to the "jig brow" & attempted to cross between two tubs before the stop block was down, & in pushing them apart set them in motion, whereby he sustained fatal injuries. There was evidence that if he had waited a minute the stop block would have been put down, or he could have walked round the end of the tubs instead of trying to pass between them. In a proceeding by his widow for compensation:—*Held:* there was evidence upon which the county ct. judge could find that the accident did not arise out of the employment but from an added peril due to the conduct of the servant himself.—BAKER *v.* BRADFORD (EARL) (1916), 85 L. J. K. B. 1031; 114 L. T. 1144; 60 Sol. Jo. 493; 9 B. W. C. C. 436, H. L.

Annotations:—**Apld.** Senior *v.* Brodsworth Main Colliery Co. (1917), 86 L. J. K. B. 1387. **Reld.** L. & Y. Ry. *v.* Highley, [1917] A. C. 352; Armitstead *v.* Humber Graving Dock & Engineering Co. (1918), 88 L. J. K. B. 140; Whiddett *v.* Chislet Colliery Co. (1920), 89 L. J. K. B. 1209.

2410. —— Workman leaving work to relieve nature—Latrine provided by employer.]—Appct. was in the employment of resps. in the fitting shop on the surface of their colliery. On Sept. 29, 1916, while crossing a railway line, he was run over by a train which so injured his right foot that it

PART XIV. SECT. 5, SUB-SECT. 2.—D. (b) ii.

a. *Mines—Workman leaving work to relieve nature—In unauthorised place.*]—THOMSON *v.* FLEMINGTON COAL CO., LTD., [1911] S. C. 823.—**SCOT.**

b. —— *Miner getting out at wrong level—Taking circuitous route to work.*]—SNEDDON *v.* GREENFIELD COAL & BRICK CO., LTD., [1910] S. C. 362; 47 Sc. L. R. 337; [1910] 1 S. L. T. 145; 3 B. W. C. C. 557.—**SCOT.**

c. —— *Ignorant workman using machinery forbidden to use.*]—BURNS *v.* SUMMERLEE IRON CO., LTD., [1913] S. C. 227; 50 Sc. L. R. 164; [1912] 2 S. L. T. 469; 6 B. W. C. C. 320.—**SCOT.**

d. —— *Workman sitting on pulley cover.*]—FRASER *v.* LOCHGELLY IRON

Sect. 5.—Right to compensation: Sub-sect. 2, D. (b) ii.]

had to be amputated. It appeared that on the day when the accident happened appct. was suffering from diarrhoea, & had occasion to evacuate his bowels several times in the course of the day. At about 4.30 p.m. appct. was desirous of again performing that function. There was a set of privies which was provided by resps. specially for the use of the fitters, which was situated suitably close to the fitting shop where appct. habitually worked. But, instead of going to that sanitary convenience or to any other of the sets of privies provided, appct. went to a place in the open to which it was forbidden for him to go, which was distant about 200 to 300 yards away from the fitting shop, & to arrive at which it was necessary for him to cross many dangerous sidings & lines of railways. That proceeding was directly contrary to the general regulations made by the Home Secretary under Coal Mines Act, 1911 (c. 50), regulation 111 of which provides as follows: "No person shall relieve his bowels on the surface except in one of the conveniences provided in accordance with the foregoing regulations." Where appct. went there was a tip & on the slopes of that there were trees & bushes growing, which would screen appct. from observation:—*Held:* the added peril to which appct. exposed himself was not incidental to his employment nor due to the nature thereof: he was consequently acting outside the sphere of his employment; & he was not entitled, & therefore he was not employed, to do things which were unreasonable or which were expressly forbidden.—SENIOR *v.* BRODSWORTH MAIN COLLIERY CO., LTD. (1917), 86 L. J. K. B. 1387; 117 L. T. 496; 61 Sol. Jo. 676; 10 B. W. C. C. 577, C. A.

2411. —— Workman taking short cut on railway line.]—Appct., a labourer employed by a colliery co., was injured by accident while going to his employer's office, where he had to report before beginning his day's work in the early morning before daylight on Dec. 17, 1920. To get to the office from his home he had to cross a line of railway. His proper route lay along a private road, but for eight months he had been in the habit of taking a short cut by going along a private railway line running into the colliery. He was walking between the rails in the dark when he stumbled on a projecting rail & fell, breaking his leg. There was no evidence of any existing express prohibition by the employers against walking along the railway track, but the use by appct. of the railway track as a road to the office was without the knowledge or consent of the employers. The county ct. judge found that at the time of the accident appct. was in a place where his duties did not require him to be, & was running a risk which was not one of the ordinary risks of the employment. He therefore held that the accident did not arise out of the employment, & made an award in favour of the employers:—*Held:* there was evidence to support the finding, & no misdirection.—JOHNSON *v.* BELL BROTHERS, LTD. (1921), 14 B. W. C. C. 181, C. A.

2412. Machinery—Unskilled labourer starting machinery.]—A girl, eighteen years of age, acting as she thought in her master's interest, left her work to start an engine, which was in charge of a person who was not present. As she went towards it several of her companions told her she ought not to touch it:—*Held:* there was evidence that an accident that occurred at the machine did not arise out of & in the course of the employment.—LOSH *v.* EVANS (RICHARD) & CO., LTD. (1902), 51 W. R. 243; 19 T. L. R. 142; 47 Sol. Jo. 158; 5 W. C. C. 17, C. A.

2413. —— Unskilled labourer cleaning machinery.]—A boy, employed to piece broken ends of yarn in a spinning mill, injured himself while cleaning machinery in motion. The judge found as a fact that he was not employed to clean the machinery:—*Held:* the accident did not arise out of the employment.—NAYLOR *v.* MUSGRAVE SPINNING CO., LTD. (1911), 4 B. W. C. C. 286, C. A.

2414. —— Workman employed solely on one machine—Injured on another.]—A workman, employed solely to work one machine, scratched her hand on a machine of another sort. It was not explained how she came to be at the other machine. Blood poisoning followed, & she died:—*Held:* the county ct. judge was not justified in inferring that the accident arose out of the employment.—O'RONIN *v.* SILVER (1911), 4 B. W. C. C. 221, C. A.

2415. —— Workman using shafting improperly.]—A workman, who was employed at a flour mill to stack sacks by manual labour, made an improper use with that object of the revolving shafting of certain machinery which was erected in the mill. He was caught by the shafting & severely injured. The county ct. judge found that what the workman had done was unwise & dangerous & unknown to his employers, & if known would have been forbidden; & that he did not do the act for his own benefit, but in the interests of his employers, as the sacks were thereby raised more expeditiously, & that the employers were liable to pay compensation:—*Held:* the workman was not entitled to compensation, not because he was acting outside the sphere of his employment, nor because by his conduct he brought on himself a new & added peril, but because he failed to show any circumstance which would justify a finding that the accident arose "out of his employment."

There are prohibitions which limit the sphere of employment & prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was & consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere (LORD DUNEDIN).—PLUMB *v.* COBDEN FLOUR MILLS CO., LTD., [1914] A. C. 62; 83 L. J. K. B. 197; 109 L. T. 759; 30 T. L. R. 174; 58 Sol. Jo. 184; 7 B. W. C. C. 1, H. L.

Annotations:—**Consd.** Carinduff *v.* Gilmore (1914), 7 B. W. C. C. 981; M'William *v.* G. N. of Scotland Ry. (1914), 7 B. W. C. C. 875. **Distd.** Chilton *v.* Blair (1914), 111 L. T. 782. **Apld.** Price *v.* Tredegar Iron & Coal Co. (1914), 111 L. T. 688; Pritchard *v.* Torkington (1914), 111 L. T. 917; Corbett *v.* Pitt (1915), 8 B. W. C. C. 466. **Consd.** White *v.* Avery (1915), 9 B. W. C. C. 663. **Apld.** Baker *v.* Bradford (1916), 85 L. J. K. B. 1031; Dennis *v.* White, [1916] 2 K. B. 1; Herbert *v.* Fox, [1916] 1 A. C. 405; Gaunt *v.* Babcock & Wilcox (1917), 10 B. W. C. C. 733; L. & Y. Ry. *v.* Highley, [1917] A. C. 352; Maydew *v.* Chatterley-Whitfield Collieries, [1917] 2 K. B. 742 (*see* 119 L. T. 362); Senior *v.* Brodsworth Main Colliery Co. (1917), 86 L. J. K. B. 1387. **Consd.** Thom (or Simpson) *v.* & COAL CO. (1920), 57 Sc. L. R. 589. —**SCOT.**

e. Machinery — Moulder removing loose sand by hand & not by scraper.]—GAUNT *v.* BABCOCK & WILCOX, LTD. (1917), 10 B. W. C. C. 733.—**SCOT.**

f. —— Boy employed as assistant attendant on saw—Injured in saw pit while recovering can of fellow employee.]—A boy, while employed as an assistant attendant at a circular saw, went into the saw pit to recover a can belonging to another employee, & while doing so was injured by the saw. In the

Sinclair, [1917] A. C. 127. **Apld.** Wilson *v.* L. & N. W. Ry. (1918), 87 L. J. K. B. 843; Matthews *v.* McClure (1920), 90 L. J. K. B. 510; Brown *v.* Baton Colliery Co. (1921), 14 B. W. C. C. 265. **Folld.** Moore *v.* Donnelly, Fife Coal Co. *v.* Sharp, Same Co. *v.* Fyfe, [1921] 1 A. C. 329. **Apld.** Estler *v.* Phillips (1922), 91 L. J. K. B. 470; Finn *v.* Shelton Iron, Steel & Coal Co. (1923), 131 L. T. 213; Davies *v.* Gwauncaegurwen Colliery Co., [1924] 2 K. B. 651; Fife Coal Co. *v.* Braid (or Laurence, or Wilson, or Murray) (1924), 93 L. J. P. C. 225. **Consd.** Leivers *v.* Barber, Walker (1924), 93 L. J. K. B. 933; Borley *v.* Ockenden, [1925] 2 K. B. 325. **Apld.** Jones *v.* Tarr, [1926] 1 K. B. 25. **Reld.** Keen *v.* St. Clement's Press (1914), 7 B. W. C. C. 542; Pepper *v.* Sayer, [1914] 3 K. B. 994; Smith *v.* Fife Coal Co., [1914] A. C. 723; Trim Joint District School Board of Management *v.* Kelly, [1914] A. C. 667; Blair *v.* Chilton (1915), 113 L. T. 514; Cooper *v.* N. E. Ry. (1915), 85 L. J. K. B. 187; Newson *v.* Burstall & Farrow (1915), 112 L. T. 792; Thorn *v.* Humm (1915), 84 L. J. K. B. 1459; Griffiths *v.* Robins (1916), 10 B. W. C. C. 90; Kettle *v.* McKay & Ryland (1916), 85 L. J. K. B. 1490; M'Lean *v.* Macbrayne (1916), 9 B. W. C. C. 687; Palmer *v.* Harrods (1916), 114 L. T. 869; Wales *v.* Lambton & Hetton Collieries (1917), 86 L. J. K. B. 1346; Stevens *v.* L. & S. W. Ry. (1918), 87 L. J. K. B. 756; Bourton *v.* Beauchamp, [1920] A. C. 1001; Whiddett *v.* Chislet Colliery (1920), 89 L. J. K. B. 1209; Smith *v.* Russell (1921), 14 B. W. C. C. 278; Costello *v.* Addie's Collieries, [1922] 1 A. C. 164; Rodger *v.* Fife Coal Co. (1923), 16 B. W. C. C. 299; Upton *v.* G. C. Ry. (1923), 130 L. T. 577; Edwards *v.* Ocean Coal Co. (1924), 131 L. T. 7; Garrallan Coal Co. *v.* Anderson (or Devlin) (1926), 19 B. W. C. C. 356; Wilsons & Clyde Coal Co. *v.* McFerrin, Kerr *v.* Dunlop, [1926] A. C. 377.

2416. —— Soap stamper assisting fellow workman with machine.]—A lad, a soap stamper, was supposed to make himself "handy about the place" after he had finished stamping soap. He went to help a fellow workman remove a piece of soap which had jambed in a soap-compressing machine, with the result that his hand & arm were caught & injured in the revolving knives of the machine. He said that he had been ordered to go to the machine, but this was denied by the employers. The county ct. judge disbelieved the boy, & found that he had no right to touch the machines, & consequently found that the accident did not arise out of & in the course of the employment:—*Held:* there was evidence to support the finding.—DAVIES *v.* CROWN PERFUMERY CO. (1913), 6 B. W. C. C. 649, C. A.

2417. —— Workman employed to adjust belting—Not using ladder provided.]—A workman employed in a room with machinery driven by belting from revolving shafts in the ceiling, had, as part of his duties, to replace this belting on the pullies attached to the shafting. Ladders were provided for this purpose. Deceased worked with a mate at a machine near a window recess, & on the occasion of the accident tried to replace a shifted belt by climbing on to the sloping window ledge with the help of his mate, though at the time one of the ladders was only 12 feet away. Somehow, not seen by any one, deceased fell from this position fatally injured. The judge visited the place & came to the conclusion that the man did an unsafe thing, & incurred a risk which was not incidental to his employment, & therefore found that he was not injured by accident arising out of his employment:—*Held:* there was evidence to support the finding & no misdirection.—RUSSELL *v.* MURRAY (A. G.), LTD. (1915), 9 B. W. C. C. 81, C. A.

Annotations:—**Consd.** Wardle *v.* Enthoven (1916), 86 L. J. K. B. 309. **Reld.** Borley *v.* Ockenden, [1925] 2 K. B. 325; Guest *v.* Gaston (1926), 95 L. J. K. B. 759.

2418. —— Joiner using planing machine.]—A joiner, engaged in fitting spokes in gun wheels, endeavoured to facilitate his work by obtaining a suitable block of wood on which to rest the wheel. Having found a block he inserted it into a planing-machine at the time unattended, in order to shape it for the purpose for which he wanted it, & in working the machine his hand was seriously injured. The county ct. judge found that, at the employer's works machine men were specially employed, & were the only men allowed to work the machines, & that joiners & others did not in fact do so, & therefore the accident was not caused by a peril incidental to the man's employment, & did not therefore arise out of the employment:—*Held:* there was evidence to support the finding & no misdirection.—ANDERSON *v.* ARMSTRONG, WHITWORTH & CO., LTD. (1916), 10 B. W. C. C. 67, C. A.

2419. —— Workman employed at hand press—Assisting at power press.]—A girl was employed to make metal squares by means of a hand press. She was working on the top floor of a factory &, having finished the work she was then engaged upon, went down to the second floor to see the foreman about more work. On the second floor other girls were at somewhat similar work, only using more dangerous machines driven by power. The foreman was not at his usual place at the time & the girl went over & helped another girl who was doing piece work on one of the power presses. She had never used one of these machines before, & somehow injured her hand. The foreman admitted that he had known such help given before & if the girl had finished her own work said he raised no objection. On the other hand, one of the girls called said that whenever anything of the kind was done they took good care the foreman was not about. The county ct. judge, without finding whether the girl had taken on an added risk not within her employment, dealt with the case chiefly on the basis as to whether or not the work done was in the interests of the employer, & then found that the girl was injured when doing work which she was not employed to do & which it was no part of her duty to perform:—*Held:* apart from the reasons given by the learned county ct. judge there was ample & self-apparent evidence to support the award.

I think we ought to support the award . . . if there are facts which are self-apparent, although county ct. judge has not based his decision upon them (LORD COZENS-HARDY, M.R.).—BRINCKMAN *v.* HARRIS (1916), 9 B. W. C. C. 200, C. A.

2420. —— Girl employed on twine spinning machine—Injury while recovering comb.]—A girl, whose duty it was to put bobbins on a twine spinning machine, took her hair down just before the dinner hour & began to comb out the fluff & dust. It was customary for girls to do this & was well known to the employers. While she was thus engaged she accidentally dropped her comb between two of the machines near the driving belt which was running at the time. In stooping to try & recover the comb she caught her hair in the machinery & was very severely injured. On a claim for compensation being heard, the county ct. judge found that when she "put her head into the machine" to get the comb she was not doing anything which arose out of her employment, & awarded for resps.:—*Held:* the question was really one of fact, & there was evidence to support the finding & no misdirection.—HEATHCOTE *v.* GRIMSBY CORDAGE CO., LTD. (1920), 13 B. W. C. C. 1, C. A.

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ordinary performance of his duties he was not required to enter the saw pit:—*Held:* the accident did not arise out of & in the course of his employment.—ESPIE *v.* BRITISH BASKET CO., LTD. (1920), 13 B. W. C. C. 492. —**SCOT.**

g. *Railway—Engine driver returning home along line after warning of danger.*]—TODD *v.* CALEDONIAN RY. CO. (1899), 1 F. (Ct. of Sess.) 1047; 36 Sc. L. R. 784; 7 S. L. T. 85.—**SCOT.**

Sect. 5.—Right to compensation: Sub-sect. 2, D. (b) ii.]

2421. —— Girl employed on screw turner—Injured while recovering screw from beneath machine—Not using means provided.]—A girl was employed as a screw-turner at a lathe which was worked by means of a shaft beneath it. There was a sufficient guard protecting the shaft down to 12 inches from the ground, & rakes were provided for the recovery of any screws which rolled beneath the machinery. On the occasion in question a screw rolled under the machinery, & the girl placed her head between the foot of the guard & the floor in order to reach the screw more easily. The machine was in operation at the time & her hair was caught in the shaft, with the result that she was scalped & totally incapacitated. In proceedings commenced by her in the county ct. the judge, in the course of his judgment, said: "The question in law that I must ask myself is 'was it part of appt.'s employment to hazard, to suffer, or to do that which caused her injury?' The answer must be in the negative. I hold that the accident did not arise out of the employment. Award for resps." Appt. appealed:—*Held:* it being obvious that the guard was there for the express purpose of protecting workmen from risk, & as rakes were provided for the purpose of recovering screws from beneath the machinery, the girl had, in acting as she did, gone clearly beyond the scope of her employment; the evidence was such as to entitle the county ct. judge to find as he did & the appeal must be dismissed.—FAIRHURST *v.* HOLLINWOOD SCREW & RIVET CO., LTD. (1923), 129 L. T. 683; 16 B. W. C. C. 168, C. A.

2422. Railway—Stoker attempting to board engine in motion.]—A stoker on a locomotive engine was paid by mistake the wages of another man X. He left his engine & went over to an engine which X. was working in order to give him these wages. This engine was travelling at about five miles an hour. The workman attempted to board the engine by grasping the rails at the side of the doorway, missed the step & sustained personal injuries by the wheels of the engine passing over his foot:—*Held:* the attempt to board the engine whilst in motion was obviously dangerous & wholly unnecessary, & the accident did not arise out of & in the course of the employment.—WILLIAMS *v.* WIGAN COAL & IRON CO., LTD. (1909), 3 B. W. C. C. 65, C. A.

Annotation:—**Reld.** Clark *v.* Southwark Corpn. (1925), 133 L. T. 753.

2423. —— Workman crossing line—Footbridge provided.]—A deceased workman was employed by a builder. It was part of his duties to go to P. daily to supervise erection of houses there by his employer, who supplied him with a season ticket for the purpose. There were notices at P. station that passengers must cross the line by the footbridge only, but it was proved that large numbers of people crossed over the metals at a point where there was boarding for crossing luggage, & that the railway co. did not object. On the day of the accident, the train by which deceased had come was standing in the station & blocking the ordinary crossing point over the metals. Deceased went to the end of the platform & crossed in front of the standing engine, which concealed from him what was coming on the other side. He was knocked down by an incoming express & killed:—*Held:* the workman had exposed himself to an added risk which was not incidental to the employment; the accident did not arise out of his employment.—PRITCHARD *v.* TORKINGTON (1914), 111 L. T. 917; 58 Sol. Jo. 739; 7 B. W. C. C. 719, C. A.

Annotation:—**Reld.** Jibb *v.* Chadwick, [1915] 2 K. B. 94.

2424. —— ——.]—A carter, employed by a firm of contractors, who were engaged upon building operations at several railway stations, was told to go from one station to another to fetch some mortar from the mortar mill there. He was told at the mortar mill that he could not take the mortar without a permit from the foreman. His duty was to remain with his horse & cart, but, instead, he backed them against the railway embankment, left them, & went on the line to see if he could find the foreman. He was then killed by a passing train:—*Held:* the accident did not arise out of the employment.—MORRIS *v.* ROWBOTHAM (1915), 8 B. W. C. C. 157, C. A.

2425. —— —— Crossing under stationary trucks.]—The widow of a workman employed on a railway claimed compensation for the death of her husband. On the day of his death deceased, with other workmen, was under orders to travel by train to a place further down the line to work there. The men arrived at a station where they had to change, &, having some time to wait for the next train, they started to cross the lines to a mess room on the opposite side of the station where they could get hot water for their breakfast, which they had brought with them. On his way to the mess room deceased attempted to pass under the trucks of a standing goods train. The train moved & he was killed. The mess room could have been reached without crossing the lines, but this way took longer, & the men for their own convenience habitually used the way across the lines. The county ct. judge found that the accident did not arise out of or in the course of the employment:—*Held:* deceased, in attempting to pass under the trucks, was exposing himself to an added peril & was not acting within the sphere of his employment.—LANCASHIRE & YORKSHIRE RY. CO. *v.* HIGHLEY, [1917] A. C. 352; 86 L. J. K. B. 715; 116 L. T. 767; 33 T. L. R. 286; 61 Sol. Jo. 397; 10 B. W. C. C. 241; *revsg.* S. C. *sub nom.* HIGHLEY *v.* LANCASHIRE & YORKSHIRE RY. CO. (1916), 85 L. J. K. B. 1513, C. A.

Annotations:—**Apld.** Senior *v.* Brodsworth Main Colliery Co. (1917), 86 L. J. K. B. 1387; Armitstead *v.* Humber Graving Dock & Engineering Co. (1918), 88 L. J. K. B. 140. **Consd.** Stevens *v.* L. & S. W. Ry. (1918), 87 L. J. K. B. 756; Wilson *v.* L. & N. W. Ry. (1918), 87 L. J. K. B. 843; Woodlee Coal & Coke Co. *v.* Robertson (1919), 12 B. W. C. C. 463. **Apld.** Bourton *v.* Beauchamp, [1920] A. C. 1001; Matthews *v.* McClure (1920), 90 L. J. K. B. 510. **Distd.** Rossiter *v.* Waterford Port Comrs. (1920), 13 B. W. C. C. 550. **Apld.** Brown *v.* Baton Colliery Co. (1921), 14 B. W. C. C. 205; Smidmore *v.* London & Thames Haven Oil Wharves (1921), 14 B. W. C. C. 114. **Consd.** Davies *v.* Gwauncaegurwen Colliery, [1924] 2 K. B. 651; Leivers *v.* Barber, Walker (1924), 93 L. J. K. B. 933; Borley *v.* Ockendon, [1925] 2 K. B. 325. **Reld.** Byrne *v.* Larrinaga S.S. Co. (1918), 88 L. J. K. B. 1255; Gibbins *v.* British Dyes (1918), 88 L. J. K. B. 716; Bell *v.* Armstrong, Whitworth (1919), 88 L. J. K. B. 844; Horner *v.* Wandsworth, Wimbledon & Epsom Gas Co. (1919), 88 L. J. K. B. 355; Bird *v.* Price (1920), 13 B. W. C. C. 143; Braine *v.* Port of London Authority (1920), 13 B. W. C. C. 342; Bratton *v.* Jonas & Colver (1920), 13 B. W. C. C. 305; Cook *v.* L. & S. W. Ry. (1921), 14 B. W. C. C. 100; Moore *v.* Donnelly, Fife Coal Co. *v.* Sharp, Same Co. *v.* Fyfe, [1921] 1 A. C. 329; Read *v.* Pacific Steam Navigation Co. (1922), 15 B. W. C. C. 39; Edwards *v.* Ocean Coal Co. (1924), 131 L. T. 7; Fife Coal Co. *v.* Braid (or Lawrence, or Wilson, or Murray) (1924), 93 L. J. P. C. 225; St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59; Clark *v.* Southwark Corpn. (1925), 133 L. T. 753.

2426. —— Entering train in motion.]—A foreman joiner was in the employment of applts., who were builders carrying on business at Rotherham, a short distance from Sheffield, where they had contracts for work. The foreman lived at

Rotherham, & applts. provided him with a railway season ticket between the two places. It was his duty to return each evening at a specified time in order to report upon his work. One evening he arrived at Sheffield Station just as the train, by which it was necessary for him to travel in order to keep his appointment at Rotherham, had started. He endeavoured to get into it whilst in motion, fell between the train & the platform, & was killed. Upon a claim by his dependants for compensation under Workmen's Compensation Act, 1906 (c. 58) :—*Held :* the risk attaching to the attempt to enter a train in motion was not a risk reasonably incidental to deceased's employment ; he had exposed himself to an added risk by doing an unauthorised & illegal act, & the accident did not, therefore, arise out of the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—JIBB *v.* CHADWICK, [1915] 2 K. B. 94 ; 84 L. J. K. B. 1241 ; 112 L. T. 878 ; 31 T. L. R. 185 ; 8 B. W. C. C. 152, C. A.

Annotations :—**Consd.** Byrne *v.* Larrinaga S.S. Co. (1918), 88 L. J. K. B. 1255. **Distd.** Upton *v.* G. C. Ry., [1924] A. C. 302.

2427. —— Driver using rail to trim shovel.]—In order to trim the shovel which was used for stoking a railway engine, & which had become ragged at the edge, the driver & the fireman alighted from the engine as it was standing on a siding waiting to be called on for shunting duty. The fireman held the shovel to one of the rails of a siding adjoining the siding on which the engine was standing as if the rail had been an anvil, while the driver used a hammer & chisel to trim the shovel. While they were thus engaged another engine came along without them seeing or hearing it, which knocked them both down inflicting injuries upon the driver from which he shortly afterwards died. It was not disputed that the position in which the driver so placed himself was extremely dangerous, the rail which was so used as an anvil being one over which engines & vehicles frequently passed. It was no part of the duty of the driver & fireman to trim the shovel. They did it voluntarily. If a shovel was in want of repair, the proper course for the engine drivers & firemen was to return it to the store & either obtain a new one or have the old one made serviceable. But when all that was required was trimming, it had for a considerable time been the usual if not the invariable practice for the drivers & firemen to do the trimming themselves. The dependant of the driver having made a claim for compensation against his employers, it was followed in due course by a request for arbn. under Workmen's Compensation Act, 1906 (c. 58) : —*Held :* deceased incurred, not a risk incidental to his employment, but a new & added peril by using the running rail as an anvil, it not being a peril which his contract of service either involved or at all obliged him to encounter. Award for resps.—STEVENS *v.* LONDON & SOUTH WESTERN RY. CO. (1918), 87 L. J. K. B. 756 ; 118 L. T. 792 ; 11 B. W. C. C. 7, C. A.

2428. Surgeon—Voluntary submission to experiment.]—An infirmary received a present of X-ray apparatus. Nobody knew the time for necessary exposure for treatment of ringworm, but a house-surgeon volunteered to have an experimental exposure on his own arm. The result of this was a serious burn :—*Held :* the accident did not arise out of the employment.—CURTIS *v.* TALBOT & KIDDERMINSTER INFIRMARY COMMITTEE (1911), 5 B. W. C. C. 41, C. A.

2429. Farm labourer returning to farm for pay—Injury while mounting empty cart.]—Appct. was employed on different farms belonging to resp. Having finished his work at one farm, appct. was proceeding to another, about two miles distant by road, for the purpose of receiving his day's pay & to inquire about the work for the next day. Finding an empty cart belonging to resp. returning to the same farm, appct. attempted to get into it, & while so doing an accident occurred to him. Resp.'s workmen not unfrequently returned in such an empty cart, & this fact was known to him :—*Held :* it was no part of appct.'s contract of service that he should travel to his employer's farm by a cart, whereby he added unnecessarily to the risk of his employer ; & therefore he was not entitled to compensation under Workmen's Compensation Act, 1906 (c. 58).—PARKER *v.* POUT (1911), 105 L. T. 493 ; 5 B. W. C. C. 45, C. A.

2430. Workman returning to work—Loitering in dangerous area.]—Repair work was being done to a ship in dock, &, in consequence, part of the quay was roped off as dangerous, notices being put up to that effect. Men going to the ship to work often went under the ropes & across the dangerous area, as it was the quickest way. Deceased was employed on the ship as a boiler scaler, but had nothing to do with the repair work. After his dinner hour, having signed on at the tally house, he returned by way of this dangerous area. He stood for some minutes within the area watching the repair work, & was killed by a rope, attached to the ship, snapping & hitting him :—*Held :* the accident did not arise out of the employment.—MURRAY *v.* ALLAN BROTHERS & CO. (U. K.), LTD. (1913), 6 B. W. C. C. 215, C. A.

2431. Assistant porter at hospital—Dusting lift.]—An assistant porter at a hospital, whilst ascending in a lift to do cleaning work on the top floor, went up some steps which he had placed in the lift, & sat on the top step for the purpose of dusting the top of the lift. He was crushed between the top step, which projected above the top of the lift, & a beam at the top of the lift shaft. He had never been told to dust the lift. He had helped to grease it before, but only in the presence & under the orders of the head porter, when the lift was at rest :—*Held :* the accident did not arise out of & in the course of the employment.—WHITEMAN *v.* CLIFDEN (VISCOUNT) (1913), 6 B. W. C. C. 49, C. A.

2432. Man employed to walk beside traction engine—Injured while attending to lamps.]—A man was employed to walk beside a traction engine to help if necessary, persons in vehicles on the road wishing to pass the engine. He had nothing to do with the engine itself. If the lamps wanted attending to, it was his duty to call the attention of the engine driver to them. One night one of the lamps burnt dimly & the man, by walking sideways when the traction engine was moving, attempted to put it right. He slipped & was fatally injured. The county ct. judge found that it was no part of his duty to touch the lamps & awarded for the employers, on the ground that the accident did not arise out of the employment : —*Held :* there was evidence to support the finding & no misdirection.—PAYNE *v.* CURTIS & SON (1915), 9 B. W. C. C. 29, C. A.

2433. Porter sent to deliver parcels—No person at place of delivery—Accident while asleep.]—A porter, a man twenty-six years of age & in good health, was sent with a parcel weighing 17 lbs. a distance of some three miles on a very hot day. When he arrived at the house to which he was sent he knocked at the door ; but no one was in, & he

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sat down on a coping at the top of some steps leading to the door. About half an hour later, he fell off the coping into the area below, & received injuries from which he died a few days later:—*Held:* the accident did not arise "out of" the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—KETTLE *v.* MCKAY & RYLAND (1916), 85 L. J. K. B. 1490; 115 L. T. 397; 9 B. W. C. C. 544, C. A.

2434. Workman travelling by goods lift.]—A workman employed in packing parcels, & in the course of his work required to go from the second floor of the establishment to the ground floor, made use of a lift only intended for carrying parcels from one floor to another, & quite unsuitable for use by a man, in order to descend to the ground floor & return to the second floor. In so doing his head was crushed, & he met his death:—*Held:* the use of the lift was an added risk & not within the scope of the workman's employment, & his dependant could not recover compensation, as the accident did not arise out of the employment.—PALMER *v.* HARRODS, LTD. (1916), 85 L. J. K. B. 1659; 114 L. T. 869; 32 T. L. R. 382; 9 B. W. C. C. 291, C. A.

Annotation:—**Refd.** Warden *v.* Enthoven (1916), 116 L. T. 103.

2435. Workman killed by poisonous fumes—Coke fire lit for own convenience.]—A coppersmith was engaged in doing work upon a warship in dry dock. The men worked in shifts of twenty-four hours, with intervals for meals, one of which was between 3.30 a.m. & 4 a.m. The workman & a companion were found dead at 8 a.m. in a confined space on the vessel, death having been caused by asphyxiation from carbon fumes given off by a coke fire the men had lit in a bucket for their own comfort, the weather being very cold at the time:—*Held:* the death being caused by a peril imported by the workman for his own convenience, & unnecessary for his employment, did not result from injury by any accident arising out of the employment.—ARMITSTEAD *v.* HUMBER GRAVING DOCK & ENGINEERING CO., LTD. (1918), 88 L. J. K. B. 140; 120 L. T. 161; 63 Sol. Jo. 114; 11 B. W. C. C. 269, C. A.

2436. Attempt to board tramcar in motion.]—A chief steward of a steamship went ashore to make some purchases for the use of the steamship, & on his way back at night attempted to board a tramcar in motion, but slipped & fell & was severely injured. In his evidence he stated that he believed it was the last car that evening, & that he considered it to be his duty to get on to it if possible, so as to get to the steamship that night:—*Held:* he had taken upon himself an added risk or peril which was not incidental to his employment, & consequently the accident did not arise out of & in the course of the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—BYRNE *v.* LARRINAGA S.S. CO., LTD. (1918), 88 L. J. K. B. 1255; 120 L. T. 163; 63 Sol. Jo. 114; 11 B. W. C. C. 260, C. A.

2437. ——.]—Applt.'s husband was employed by resps. to supervise the weighing of cotton at their various warehouses in Liverpool. He was allowed by his employers to use the tramcars to get from their head office to a warehouse, from warehouse to warehouse & back to the head office. One day, having concluded his work at a warehouse, he was returning to the head office. In attempting to get on a tramcar which had just started to move from a stopping place he fell & was killed. The regulations of the tramway authority forbade passengers attempting to get on or alight from tramcars in motion. The county ct. judge held that the accident did not arise out of deceased's employment because the act of deceased in attempting to board the tramcar when in motion was an act which he did at his own risk, & his employers were not liable:—*Held:* the judge had misdirected himself. It being within the scope of the workman's employment to use the tramcar to get from the office to a warehouse & from warehouse to warehouse & back to the office, the mere fact of his trying to get on a tramcar which had just started to move from a stopping place, was not sufficient to support a finding that the accident did not arise out of & in the course of his employment. The case must go back to the judge to find whether on the facts the act of the workman was an act of negligence in doing something which was within the scope of his employment, or an act which in its nature was such as to take the case outside Workmen's Compensation Acts altogether.—GUEST *v.* GASTON & CO., [1927] 1 K. B. 1; 95 L. J. K. B. 759; 135 L. T. 400; 42 T. L. R. 547; 70 Sol. Jo. 667; 19 B. W. C. C. 237, C. A.

2438. Workman using unlighted path—Lavatory provided by employers.]—A workman employed at works close to the river Thames being desirous while at work at night, of relieving himself, did so in a pail, & went to throw the contents of the pail into the river. The way to the river was dark, &, in doing this, he fell over the quayside & struck his shoulder against a barge lying at the quay, & was incapacitated. There were lavatories provided by the employers some 250 yards from where the man was working, & the way to the

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2436 i. *Attempt to board tramcar in motion.*]—A message-clerk who was sent a message by his employers, & had been provided with money to pay his tramway fare, was injured while attempting to board, a short distance from its stopping-place, a car which was moving at the rate of five miles an hour. He acted without invitation & contrary to a notice on the car, of which he was aware:—*Held:* the accident did not arise out of & in the course of the employment.—WEMYSS COAL CO., LTD. *v.* SYMON, [1912] S. C. 1239; 49 Sc. L. R. 921; [1912] 2 S. L. T. 127; 6 B. W. C. C. 298.—**SCOT.**

h. *Workman taking circuitous route on ship—Route unlighted & dangerous.*]—PASH *v.* VICTORIAN STEVEDORING & GENERAL CONTRACTING CO. PTY., LTD., [1920] V. L. R. 35.—**AUS.**

k. ——.]—A mate employed on a dredger elected to cross the vessel by an obviously dangerous, but not prohibited, route, although an alternative & comparatively safe way was available. He was caught between the platform & the mast, & sustained injuries which resulted in his death:—*Held:* the accident arose out of the employment.—ROSSITER *v.* PORT OF WATERFORD COMRS. (1920), 13 B. W. C. C. 550.—**IR.**

l. —— *Increased rather than added risk.*]—READFORD *v.* NEW ZEALAND SHIPPING CO., [1921] N. Z. L. R. 40.—**N.Z.**

m. *Manual labourer — Assisting fellow workman outside his ordinary work & without authority.*]—FERGUSON *v.* BRICK & SUPPLIES, LTD. (1914), 27 W. L. R. 70; 5 W. W. R. 1227; 16 D. L. R. 67; 7 Alta. L. R. 337.—**CAN.**

n. *Deliberate adoption of dangerous method of work.*]—A workman who, with full knowledge of the risk he is taking, deliberately adopts a dangerous method of doing his work, where there is open to him another method of doing it which is free from risk, cannot impose liability upon his employer for personal injuries resulting entirely from his adoption of the unsafe course.—POWELL *v.* THOMAS, JAMIESON & MACKENZIE, LTD. (Alta.), [1918] 3 W. W. R. 901.—**CAN.**

o. —— *Application of principle.*]—The application of the principle that a worker who, in carrying out his employment, selects a course of action fraught with obvious & unnecessary danger, goes outside of the course of his employment depends not on any previously definable state of facts, but on the circumstances of the particular case under consideration.—TAKLE, ETC. *v.* BRYANT & SHIEL BROTHERS, [1919] V. L. R. 656.—**AUS.**

p. *Workman collecting coal for van after working hours—When forbidden*

lavatories was lighted. It was proved that there was a practice among the workmen of relieving themselves in this manner, but it was not established that the practice was known to the employers:—*Held:* the accident was due to an added risk incurred by the workman & did not arise out of his employment, &, therefore, he was not entitled to compensation under Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—HORNER *v.* WANDSWORTH, WIMBLEDON & EPSOM GAS CO. (1919), 88 L. J. K. B. 355; 120 L. T. 463; 12 B. W. C. C. 21, C. A.

2439. Carter interfering with crane.]—The workman while employed as a carter by resps., who carried on the business of builders, was using a horse & cart in the builder's yard. There was in the yard a large hand crane which was not intended to be used, as at the time it was not sufficiently connected at the base, & a tub of bricks was attached to the arm to prevent it swaying. The workman, having had trouble with his horse when he had to take it near the crane, to prevent further inconvenience attempted to shift the tub on the crane, but in doing so the crane not being steady owing to its base, tilted over, & he was struck on the head, receiving serious injuries, causing total incapacity. The county court judge held that the act of interfering with the crane was outside the scope of the employment, & therefore not within Workmen's Compensation Act, 1906 (c. 58), s. 1, & consequently could not come under Workmen's Compensation Act, 1923 (c. 42), s. 7:—*Held:* whether the act was within Workmen's Compensation Act, 1906 (c. 58), s. 1, was in the circumstances a question of fact, & there was evidence to support the finding, & no misdirection, & therefore Workmen's Compensation Act, 1923 (c. 42), s. 7, did not apply.—HAWKINS *v.* KENDRICK (W.) & SON (1926), 19 B. W. C. C. 325, C. A.

(c) *Acting in Emergency.*

2440. General rule.]—An accident happening to a workman who, while in his master's employment & on his master's work, does upon an emergency an act in the interests of his master outside the scope of what he was employed to do, & suffers injury while doing the act, is within Workmen's Compensation Act, 1897 (c. 37).

A fireman employed in a coal-mine was in the course of his duty carrying a report of the state of the mine from the pit's mouth to the office; the horse drawing the tramway truck in which he was riding ran away, & in endeavouring to stop it he fell & was killed:—*Held:* the accident arose out of or in the course of the workman's employment within Workmen's Compensation Act, 1897 (c. 37), s. 1 (1).—REES *v.* THOMAS, [1899] 1 Q. B. 1015; 68 L. J. Q. B. 539; 80 L. T. 578; 47 W. R. 504; 15 T. L. R. 301; 43 Sol. Jo. 397; 1 W. C. C. 9, C. A.

Annotations:—**Refd.** Mitchinson *v.* Day, [1913] 1 K. B. 603; Jones *v.* Tarr, [1926] 1 K. B. 25.

2441. Stopping employer's horse.]—REES *v.* THOMAS, No. 2440, *ante*.

2442. Altering points to avoid collision.]—Appct., a boy, was employed to grease the wheels of railway trucks. Having greased all that were ready & while waiting for more to come up, he went & sat on a point lever in front of a fire which was a short distance away. Seeing an engine coming up, & thinking that the points were in a wrong position, the boy pulled the lever, but the engine forced the points open, with the result that he was thrown against the engine by the lever & injured:—*Held:* the county ct. judge was right in finding that the accident arose "out of & in the course of the employment," & the boy had not been guilty of serious & wilful misconduct.—HARRISON *v.* WHITAKER BROTHERS, LTD. (1899), 64 J. P. 54; 16 T. L. R. 108; 2 W. C. C. 12, C. A.

2443. Endeavouring to drive lion back into cage.]—HAPELMAN *v.* POOLE, No. 2595, *post*.

2444. Enemy bombardment—Risk run common to every one.]—COOPER *v.* NORTH-EASTERN RY. CO., No. 2581, *post*.

2445. Seaman employed on liner—Protection of passengers from insult.]—Appct. was employed as third baker on board the *Ormonde*. While the steamer was at Port Said, during an interval in his work of baking, appct. went on deck for fresh air, as he was permitted to do. As he was proceeding up the companion way he heard an Egyptian using very foul language to two English lady passengers who had accidentally brushed against the Egyptian in passing him. The baker told the Egyptian to stop, & threatened to have him turned off the steamer if he did not stop. The Egyptian thereupon drew out a knife & attacked him, & appct. in self-defence used his fists & struck the Egyptian a severe blow in the face. The Egyptian was subsequently turned off the steamer by the master-at-arms. Appct., in striking the Egyptian, cut his knuckles against the Egyptian's teeth. In consequence of this, blood poisoning set in which resulted in total incapacity. On a claim for compensation the judge at the City of London Ct. found that appct.'s incapacity was caused by an accident arising out of & in the course of his employment & made an award in his favour:—*Held:* in protecting a lady passenger committed to his employers' care, from insult, although not doing something which was part of his specific duties, appct. was discharging in this emergency an implied duty upon him as a member of the crew. There was therefore evidence to support the award & no misdirection.—CULPECK *v.* ORIENT STEAM NAVIGATION CO., LTD. (1922), 15 B. W. C. C. 187, C. A.

2446. Act done in aid of workman not fellow employee.]—J., together with G. & S., was employed upon brickwork in a pit belonging to resp., who supplied all the tools. J. was in charge of the job, & being in need of a bricking hammer, sent G. & S. to a neighbouring pit, belonging to H., to fetch a hammer belonging to J.'s brother. S. let G. down H.'s pit. G. found the hammer, but when S. was winding up the bucket, G. was overcome by noxious gas & fell out of it. S. immediately fetched J., who went down H.'s pit to rescue G., but he, too, was overcome by the

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by foreman.]—LAJOIE *v.* R. (1921), 20 Exch. C. R. 473; 69 D. L. R. 147.—**CAN.**

q. *Workman in front instead of in rear of vehicle—Traction engine.*]—M'KEOWN *v.* M'MURRAY (1911), 45 I. L. T. 190.—**IR.**

r. —— *Lorry.*]—REVIE *v.* CUMMING, [1911] S. C. 1032.—**SCOT.**

t. *Workman swimming river instead of using boat provided.*]—GUILFOYLE *v.* FENNESSY (1912), 47 I. L. T. 19; 6 B. W. C. C. 453.—**IR.**

a. *Canal overseer on railway line—Unnecessarily & without authority.*]—M'LAREN *v.* CALEDONIAN RY. CO., [1911] S. C. 1075.—**SCOT.**

b. *Electrician cleaning apparatus—Without switching off current.*]—BROWN *v.* BATON COLLIERY CO., [1921] S. C. 323.—**SCOT.**

PART XIV. SECT. 5, SUB-SECT. 2.—D. (c).

c. *Adjusting machinery of fellow workman—Though not in charge of machinery.*]—M'QUIBBAN *v.* MENZIES (1900), 2 F. (Ct. of Sess.) 732; 37 Sc. L. R. 526; 7 S. L. T. 432.—**SCOT.**

d. *Rescue of fellow workman in*

Sect. 5.—*Right to compensation: Sub-sect.* 2, *D.* (c) & (d).]

gas, & both he & G. lost their lives. J.'s daughter claimed compensation, & the county ct. judge awarded her damages:—*Held:* (1) in giving the order to G. & S., & in acting as he did, J. had himself stepped outside the sphere of his employment; he exposed himself to risk unconnected with his employment & to which he was not employed to expose himself; G. being at the moment a stranger to the common employer, it was not a case of emergency to a fellow workman so as to render the act of J. an act in the course of his employment; & appct. was not entitled to recover compensation, inasmuch as the accident did not arise out of & in the course of J.'s employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1), & was therefore one to which Workmen's Compensation Act, 1923 (c. 42), s. 7, did not apply; (2) Workmen's Compensation Act, 1923 (c. 42), s. 7, did not enlarge the scope of Workmen's Compensation Act, 1906 (c. 58), s. 1.—JONES *v.* TARR, [1926] 1 K. B. 25; 95 L. J. K. B. 203; 133 L. T. 783; 41 T. L. R. 642; 69 Sol. Jo. 763; 18 B. W. C. C. 386, C. A.

Annotation:—*As to* (2) **Refd.** Hawkins *v.* Kendrick (1926), 19 B. W. C. C. 325.

(*d*) *Workman Acting for Own Purpose.*

2447. Railway—Employee standing on footboard of moving train—To talk to friend.]—The Ct. of Appeal has jurisdiction under Workmen's Compensation Act, 1897 (c. 37), to entertain an appeal upon questions of law only. A workman in the employment of a railway co. as a platelayer was occasionally engaged in the duty of collecting tickets, & on one occasion, after having completed the collection of tickets, got on to the footboard of a carriage to speak to a passenger. It was found as a fact that he got on to the footboard not for any object of his employers, but only for his own pleasure. In getting off the train after it had started he fell between the platform & the train, & was killed:—*Held:* the accident did not arise out of his employment within Workmen's Compensation Act, 1897 (c. 37), s. 1 (1); to render an employer liable to pay compensation the accident must arise not only "out of," but also "in the course of" the employment, & consequently the railway co. were not liable.—SMITH *v.* LANCASHIRE & YORKSHIRE RY. Co., [1899] 1 Q. B. 141; 68 L. J. Q. B. 51; 79 L. T. 633; 47 W. R. 146; 15 T. L. R. 64; 43 Sol. Jo. 75; 1 W. C. C. 1, C. A.

Annotations:—**Distd.** McNicholas *v.* Dawson, [1899] 1 Q. B. 773. **Refd.** Pomfret *v.* L. & Y. Ry., [1903] 2 K. B. 718; Dothie *v.* MacAndrew (1908), 98 L. T. 495; Robertson *v.* Allan (Liverpool & London), The Corsican (Owners) (1908), 98 L. T. 821; Low & Jackson *v.* General Steam Fishing Co., [1909] A. C. 523.

2448. —— —— ——.]—A railway porter closed the handle of a carriage door just as the train was starting, & in some manner slipped & fell between the train & the platform & was seriously injured. No one on the platform actually witnessed the accident, but the stationmaster two days afterwards obtained written statements from two passengers to whom the porter had been talking just before the train started. At the arbn. they gave evidence in favour of the workman, inconsistent with those statements, which were in fact put to them in cross-examination. The county ct. judge disbelieved the evidence of appct.'s witnesses, & found that appct. had not discharged the *onus* of proof which was upon him & that the accident happened by reason of the workman doing something entirely for his own pleasure, & therefore the accident did not arise out of his employment. On appeal it was argued that the facts contained in the statements had influenced the judge's mind:—*Held:* apart from such statements, which though inadmissible as direct evidence were properly admitted to discredit the witnesses, there was evidence to support the county ct. judge's finding & no misdirection.—PARSONS *v.* SOMERSET JOINT COMMITTEE OF SOUTH WESTERN & MIDLAND RY. COS. (1916), 9 B. W. C. C. 532, C. A.

2449. —— **Engine driver crossing line to speak with friend.**]—An engine driver in charge of his engine left it, &, for a purpose of his own & not in the execution of his duty or in the interest of his employers, crossed a siding. On returning to his engine he was killed by a waggon which was being shunted:—*Held:* the accident did not arise out of & in the course of his employment within Workmen's Compensation Act, 1897 (c. 37), s. 1.

I agree that in all these cases it is incumbent upon the claimant to make out that the accident in respect of which compensation is claimed arose out of & in the course of the injured man's employment, not upon the employers to prove the contrary (LORD MACNAUGHTEN).

It is not that he thereby violated a rule, but that the accident did not arise out of or take place in the course of the employment at all. It took place while for the moment he quitted his employment (LORD LOREBURN, C.).—REED *v.* GREAT WESTERN RY. Co., [1909] A. C. 31; 78 L. J. K. B. 31; 99 L. T. 781; 25 T. L. R. 36; 53 Sol. Jo. 31; 2 B. W. C. C. 109, H. L.

Annotations:—**Distd.** Low (or Jackson) *v.* General Steam Fishing Co., [1909] A. C. 523; Corlett *v.* L. & Y. Ry. (1918), 120 L. T. 236. **Refd.** Mackinnon *v.* Miller (1909), 2 B. W. C. C. 64; Williams *v.* Wigan Coal & Iron Co. (1909), 3 B. W. C. C. 65; Evans *v.* Astley (1911), 4 B. W. C. C. 319; Williams *v.* Llandudno Coaching & Carriage Co. (1915), 112 L. T. 848; L. & Y. Ry. *v.* Highley, [1917] A. C. 352; Tinker *v.* Hulse (1918), 11 B. W. C. C. 28; Bratton *v.* Jonas & Colver (1920), 13 B. W. C. C. 305.

2450. —— **Workman travelling on train provided by employer—Leaving train in motion for own purpose.**]—A collier who was riding in a railway train that was provided by his employers for the use of the colliers, under an arrangement with the railway co., attempted to leave it while it was in motion, in violation of the regulations of the railway co., at a distance of about one hundred yards from the colliers' platform, entirely for a purpose of his own, that is to say, to shorten the way to his home. He suffered such injuries as to

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danger.]—LONDON & EDINBURGH SHIPPING Co. *v.* BROWN (1905), 7 F. (Ct. of Sess.) 488.—**SCOT.**

e. ——.]—MULLEN *v.* STEWART & Co., LTD., [1908] S. C. 991; 45 Sc. L. R. 729; 16 S. L. T. 172; 1 B. W. C. C. 204.—**SCOT.**

PART XIV. SECT. 5, SUB-SECT. 2.—D. (d).

f. *General rule.*]—An accident occurring to a workman while doing something purely for his personal convenience, & foreign to his duty, is not an accident arising out of & in the course of his employment.—SCALZO *v.* COLUMBIA MACCARONI FACTORY (1912), 17 B. C. R. 201.—**CAN.**

g. *Own purpose—What amounts to.*]—In determining whether an accident arose out of & in the course of the employment within Workers' Compensation Act, 1916, s. 5, where a worker is injured while doing something on his employers' premises for his own immediate purpose & benefit, though still under his contract of service, the ct. will consider whether or not he was in the circumstances making a reasonable use of the facilities afforded him for so doing.—CAMPBELL *v.* NORTHCOTE BRICK Co., LTD., [1921] V. L. R. 133.—**AUS.**

2449 i. *Railway—Engine driver crossing line to speak with friend.*]—GOODLET *v.* CALEDONIAN RY. Co. (1902), 4 F. (Ct. of Sess.) 986; 39 Sc. L. R. 759; 10 S. L. T. 203.—**SCOT.**

h. —— *Workman climbing on wagon when returning home.*]—MORRISON *v.* CLYDE NAVIGATION TRUSTEES, [1909]

cause " serious & permanent disablement " within Workmen's Compensation Act, 1906 (c. 58), s. 1 (2) (*c*):—*Held:* the contract between the employers & the workman was not to take him from any part of the colliery to any part of the railway line where he might be minded to alight; & the accident to the workman at the place where & at the time when it happened was not an " accident arising out of & in the course of the employment," it being caused by an added peril for his own personal convenience & for nothing else.—PRICE *v.* TREDEGAR IRON & COAL CO., LTD. (1914), 111 L. T. 688; 30 T. L. R. 583; 58 Sol. Jo. 632; 7 B. W. C. C. 387, C. A.

Annotation:—**Refd.** Jibb *v.* Chadwicke (1915), 84 L. J. K. B. 1241.

2451. —— —— ——.]—A railway servant who, against the rules of the co., & for his own convenience, jumps out of a train in motion is deliberately taking an added peril which is not within the scope of his employment; & consequently his dependants, in the event of his being fatally injured, are not entitled to compensation under Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—WILSON *v.* LONDON & NORTH-WESTERN RY. CO. (1918), 87 L. J. K. B. 843; 118 L. T. 796; 11 B. W. C. C. 19, C. A.

Annotation:—**Distd.** Clark *v.* Southwark Corpn. (1925), 133 L. T. 753.

2452. —— Deviation in returning from latrine.]—Appct., a youth in the employment of resps. on their railway as a crane driver, had the necessity to visit the W.C. On returning therefrom he proceeded along the railway line on the 10 foot way & he stepped across it to the 4 foot way to ask a boy the time. A bale of cotton which was being rolled from a cart on the road with the object of being ultimately loaded on a railway waggon fell & struck appct. while he was standing between the rails. If he had continued on the 10 foot way the accident would not have happened to him:—*Held:* the terms of appct.'s employment required him to run a risk in passing from the crane to the W.C. & back over a perilous route; the mere fact of his asking the boy the time was not such a departure from the sphere of his employment as to show that he was running a risk that was not part of his employment; & therefore the accident arose " out of " as well as " in the course of " his employment, entitling him to compensation from his employers.—CORLETT *v.* LANCASHIRE & YORKSHIRE RY. CO. (1918), 120 L. T. 236; 63 Sol. Jo. 115; *sub nom.* CORBETT *v.* LANCASHIRE & YORKSHIRE RY. CO., 11 B. W. C. C. 293, C. A.

Annotation:—**Refd.** Bratton *v.* Jonas & Colver (1920), 13 B. W. C. C. 305.

2453. Seaman—Going ashore for meal.]—Applt.'s husband was employed by resps. to watch trawlers as they lay in Granton Harbour. He was on duty for twenty-five hours, during which time he had to provide his own food; & in connection with his duties it was occasionally necessary for him to be on the quay. In the course of his watch he left the trawlers & went to an hotel which was a short distance away from the harbour, where he got half a glass of whisky & a glass of beer. He was absent a very short time, & on his return to the quay, while descending a fixed ladder attached to the quay to go on board one of the trawlers, he fell into the water & was drowned:—*Held:* the accident arose " out of & in the course of " the employment of deceased within Workmen's Compensation Act, 1906 (c. 58), for when the accident occurred he had returned to the quay which was the scene or sphere of his duty.—LOW (OR JACKSON) *v.* GENERAL STEAM FISHING CO., LTD., [1909] A. C. 523; 78 L. J. P. C. 148; 101 L. T. 401; 25 T. L. R. 787; 53 Sol. Jo. 763; 2 B. W. C. C. 56.

Annotations:—**Apld.** Webber *v.* Wansborough Paper Co., [1913] 3 K. B. 615. **Refd.** Hewitt *v.* Ship Duchess, [1910] 1 K. B. 772; Moore *v.* Manchester Liners, [1910] A. C. 498; Kitchenham *v.* S.S. Johannesburg, Leach *v.* Oakley Street, [1911] 1 K. B. 523; Warren *v.* Hedley's Colliery Co. (1913), 6 B. W. C. C. 136; Trim Joint District School Board of Management *v.* Kelly, [1914] A. C. 667; Braine *v.* Port of London Authority (1920), 13 B. W. C. C. 342.

2454. —— ——.]—An engineer on a ship which was lying in dry dock, after completing his morning's work of getting stores on board, went home to his dinner, & on his return fell into the dry dock, where his dead body was found:—*Held:* there was no evidence that the accident arose out of & in the course of his employment within Workmen's Compensation Act, 1906 (c. 58), & his dependants were not entitled to compensation.—GILBERT *v.* NIZAM (OWNERS), [1910] 2 K. B. 555; 79 L. J. K. B. 1172; 103 L. T. 163; 26 T. L. R. 604; 3 B. W. C. C. 455, C. A.

Annotations:—**Distd.** Parker *v.* Black Rock (Owners) (1914), 110 L. T. 520. **Refd.** Armstrong, Whitworth *v.* Redford, [1920] A. C. 757.

2455. —— ——.]—One of the duties of a ship's steward was to victual the ship when in port, at a certain store some three hundred yards away from the quay. The store was within the dock gates. When he went to the store he was permitted to visit his home, which was one & a half miles in a different direction. One morning he left the ship with a list of stores required, went home & breakfasted, & in returning to the stores was killed by a dock engine soon after he had entered the dock gates & when he was about four hundred yards from the store. The accident happened between his home & the store & not between the store & the quay. He had the list of required stores in his hand when knocked down:—*Held:* the accident did not arise out of or in the course of his employment.—LEE *v.* ST. GEORGE (OWNERS) (1914), 7 B. W. C. C. 85, C. A.

2456. —— Going ashore for provisions.]—A fireman on board a steamship went ashore, with leave, to buy provisions for himself. When he endeavoured to return to the ship the night was rough & dark, & he fell off the pier where the ship was supposed to be, though in fact she had been moved, & was drowned. In his contract of service, which was contained in a printed document issued by the Board of Trade, the Board of Trade scale of provisions was struck out & the words " Crew to provide their own provisions " were substituted:—*Held:* the deceased owed no duty to his employer to go ashore to buy provisions & his death was not caused by accident arising out of his employment.—PARKER *v.* BLACK ROCK (OWNERS), [1915] A. C. 725; 83 L. J. K. B. 1373; 113 L. T. 515; 31 T. L. R. 432; 59 Sol. Jo. 475; 8 B. W. C. C. 327; 13 Asp. M. L. C. 137, H. L.

Annotations:—**Consd.** White *v.* Avery (1915), 9 B. W. C. C. 663. **Apld.** Bell *v.* Armstrong, Whitworth (1919), 88 L. J. K. B. 844. **Consd.** Armstrong, Whitworth *v.* Redford,

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S. C. 59; 46 Sc. L. R. 40; 16 S. L. T. 454; 2 B. W. C. C. 99.—**SCOT.**

2456*l.* *Seaman—Going ashore for provisions.*]—MARTIN *v.* FULLERTON & CO., [1908] S. C. 1030; 45 Sc. L. R. 812; 16 S. L. T. 219; 1 B. W. C. C. 168.—**SCOT.**

k. —— *Going ashore on own business.*]—A sailor, returning on board his ship after a trip on shore unconnected with his employment, fell into the water from steps leading from the gangway, of which they formed part, & was drowned:—*Held:* this was not an accident arising out of & in the course of the employment.—HYNDMAN *v.* CRAIG & CO. (1910), 44 I. L. T. 11; 4 B. W. C. C. 438.—**IR.**

l. —— ——.]—M'LEAN *v.* MACBRAYNE (DAVID), LTD., [1916] S. C. 338; 53 Sc. L. R. 254; [1916] 1 S. L. T. 76.—**SCOT.**

Sect. 5.—*Right to compensation: Sub-sect.* 2, *D.* (*d*), (*e*), (*f*), (*g*) & (*h*), & *E.* (*a*).]

[1920] A. C. 757; St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59. **Refd.** Whitfield *v.* Lambert (1915), 112 L. T. 803; L. & Y. Ry. *v.* Highley, [1917] A. C. 352; Davidson *v.* M'Robb or Officer, [1918] A. C. 304; Newton *v.* Guest, Keen & Nettlefolds (1925), 133 L. T. 26.

2457. —— Going ashore to sleep.]—A ship's fireman left his ship lying in the Thames at Deptford on Sunday, & went to his son's house at Poplar, where he slept the night. Early next morning he made his way back towards his ship. On reaching the public quay, St. George's Steps, Deptford, he hailed a waterman, but on descending the steps slipped, fell, & was injured:—*Held:* the accident did not arise out of & in the course of his employment.—KELLY *v.* FOAM QUEEN (OWNERS) (1910), 3 B. W. C. C. 113, C. A.

Annotation:—**Folld.** Kitchenham *v.* S.S. Johannesburg, Leach *v.* Oakley Street, [1911] 1 K. B. 523.

2458. —— Finding ship moved—Accident while proceeding to new berth.]—A seaman went ashore with leave for his own purposes. When he returned late at night he found that the ship had meanwhile been moved to another part of the dock; he proceeded to make his way to the ship, along the dock-side, which had many railway lines upon it. He was injured by a train on the docks, about two hundred yards from his ship:—*Held:* the accident did not arise out of the employment.—BIGGART *v.* MINNESOTA (OWNERS) (1911), 5 B. W. C. C. 68, C. A.

2459. Carter—Deviation for refreshment.]—A carter was sent with a horse & cart to deliver a load of sand. Instead of returning to his employers' yard by the nearest & ordinary way, he, for his own purposes, went back by another road, which was only a little farther, & stopped at a public-house to drink. On resuming his journey back, the horse ran away & he was thrown out of the cart & killed:—*Held:* the accident did not arise out of & in the course of the man's employment.—EVERITT *v.* EASTAFF & Co. (1913), 6 B. W. C. C. 184, C. A.

Annotation:—**Refd.** Dennis *v.* Taylor (1919), 89 L. J. K. B. 158.

2460. Collier—Leaving work to inquire time.]—A collier was employed to work in a special stall in a mine. At regular intervals a haulier brought trucks to take the coal away. On the night in question the collier commenced work at 11 p.m., & would have had to leave the mine at 7 a.m. The haulier on one occasion seemed late in coming, & the collier walked some distance away to ascertain the time from two other colliers. The time was 4.20 a.m. On his return journey he was killed by a fall of the roof. The county ct. judge found the collier had not gone to see the time in the interests of his employers, & that there was a temporary interruption of the employment. He thereupon held that the accident did not arise out of or in the course of the employment:—*Held:* there was evidence to support the finding, & no misdirection.

I think if a man for his own purposes deliberately goes away from the place where he was employed, & meets with an accident on the way back before he reaches the point where he should be to do his duty, the judge is justified in finding, *primâ facie*, that the accident did not arise in the course of his employment (COZENS-HARDY, M.R.).—WARREN *v.* HEDLEY'S COLLIERY CO., LTD. (1913), 6 B. W. C. C. 136, C. A.

2461. Injury while hiding provisions on ledge under machine in motion.]—An apprentice, in charge of a printing machine, injured his hand while putting a tin of condensed milk on a ledge in the machine immediately below the running machinery. The practice of keeping things for tea in this place had existed for a long time, but was kept entirely a secret to prevent pilfering by other workmen:—*Held:* the accident did not arise out of the employment.—KEEN *v.* ST. CLEMENT'S PRESS, LTD. (1914), 7 B. W. C. C. 542, C. A.

2462. Injury while working for outside firm.]—OATES *v.* TURNER (THOMAS) & Co., No. 2236, *ante*.

2463. Injury while gossiping with fellow workman.]—Appct., a lad of fifteen, was employed by resps. as a lathe learner at their works. The foreman told him to ask H. for a screw cap required for his lathe. H. was engaged at a lathe close by. H. had not one, but said he thought M. had. M., in fact, had a spare cap, but refused to give it to appct., who then returned to H., & the two had a chat. While the lad was standing talking to H., the latter put a nut in a vice & began chipping it. This act was no part of H.'s employment. A chip of metal from this nut hit appct.'s eye, & the eye had to be removed. The county ct. judge found that the accident happened to appct. while idling away his time talking with another workman, & held that it did not arise out of or in the course of his employment:—*Held:* there was evidence to support the finding & no misdirection.—TINKER *v.* HULSE & Co., LTD. (1918), 11 B. W. C. C. 28, C. A.

(*e*) *Workman as mere Licencee.*

2464. Agreement that workman should have conveyance to convey luggage to house—Accident while in charge of horse & cart.]—Appct., who was a farm hand, was hired by resp., who was a farmer, to enter resp.'s employment on Nov. 13, 1913. It was a term of the employment that appct. could have a horse & cart to convey his box from the railway station to resp.'s farm. About 12.30 p.m. on the date fixed appct. arrived at the farm, having cycled over from his home, & his box was then at the railway station. Resp.'s wife, having given appct. his dinner, told her boy to show appct. which horse he had to take. The boy pointed out a horse. The appct. harnessed the horse to the cart & proceeded towards the railway station to procure his box. On the way the horse was frightened by a motor, & an accident happened whereby appct. was seriously injured:—*Held:* appct. in going with the horse & cart, for his box, was not fulfilling any contract by resp., to carry that box from the railway station to the farm; appct. was merely using resp.'s horse & cart with leave & licence as it was agreed that he should be at liberty to do; he was going on his own business & not on resp.'s business, &

2462 l. *Injury while working for outside firm.*]—CARLTON *v.* SINCLAIR, LTD., [1914] S. C. 871.—**SCOT.**

m. *Domestic servant drying hair in front of fire.*]—CLIFFORD *v.* JOY (1909), 43 I. L. T. 193; 2 B. W. C. C. 32.—**IR.**

n. *Roadman tending fire of steam roller—Private arrangement with driver.*]—M'ALLAN *v.* PERTHSHIRE C. C. WESTERN DISTRICT (1906), 8 F. (Ct. of Sess.) 783; 43 Sc. L. R. 592; 14 S. L. T. 36.—**SCOT.**

o. *Fish porter—Crossing railway line to make unnecessary inquiries.*]—HENDRY *v.* CALEDONIAN RY., [1907] S. C. 732.—**SCOT.**

p. *Boy ascending by crane—Not in pursuance of any duty.*]—RODGERS *v.* UNITED TURKEY RED CO., LTD., [1926] S. C. 906.—**SCOT.**

PART XIV. SECT. 5, SUB-SECT. 2.—D. (e).

q. *Employee on premises of employer during hours of employment but returning from his own business.*]—CONYEA *v.* CANADIAN NORTHERN RY.

therefore the accident did not arise "out of" appct.'s employment having regard to the evidence.—WHITFIELD *v.* LAMBERT (1915), 84 L. J. K. B. 1378; 112 L. T. 803; 8 B. W. C. C. 91, C. A.

(f) Workman "Larking."

2465. Boy throwing missile at another boy—Injuring different boy.]—Where an accident happened to a workman, while engaged at his work, through the tortious act of a fellow workman which had no relation whatever to their employment:—*Held:* the accident did not arise out of the employment within Workmen's Compensation Act, 1897 (c. 37), s. 1 (1).—ARMITAGE *v.* LANCASHIRE & YORKSHIRE RY. CO., [1902] 2 K. B. 178; 71 L. J. K. B. 778; 86 L. T. 883; 66 J. P. 613; 18 T. L. R. 648; 4 W. C. C. 5, C. A.

Annotations:—**Folld.** Fitzgerald *v.* Clarke, [1908] 2 K. B 796. **Consd.** Murray *v.* Denholm (1911), 5 B. W. C. C. 496. **Refd.** Pomfret *v.* L. & Y. Ry., [1903] 2 K. B. 718; Challis *v.* L. & S. W. Ry., [1905] 2 K. B. 154; Mitchinson *v.* Day, [1913] 1 K. B. 603; Trim Joint District School Board of Management *v.* Kelly, [1914] A. C. 667.

2466. ——.]—Applt., a boy, was employed at resp.'s colliery to pick stones out of coal. Another boy in the same employment threw a stone, as the arbitrator found mischievously & tortiously, which struck applt. in the left eye, & injured it, so that he lost the sight of that eye. There was evidence that the boys employed sometimes threw stones to attract the attention of others, & there was a notice up at the colliery prohibiting the practice. In a proceeding under Workmen's Compensation Act, 1906 (c. 58):—*Held:* there was evidence on which the arbitrator might find that the accident arose out of the employment within Workmen's Compensation Act, 1906 (c. 58).—CLAYTON *v.* HARDWICK COLLIERY CO., LTD. (1915), 85 L. J. K. B. 292; 114 L. T. 241; 32 T. L. R. 159; 60 Sol. Jo. 138; 9 B. W. C. C. 136, H. L.

Annotations:—**Refd.** Dennis *v.* White, [1916] 2 K. B. 1; Ince *v.* Reigate Education Committee, [1916] 2 K. B. 671; Read *v.* Baker, [1916] 1 K. B. 927.

2467. Practical joke by fellow workmen.]—FITZGERALD *v.* CLARKE (W. G.) & SON, No. 2332, *ante*.

2468. Boy playing with machine.]—A boy who had charge of the handle of a machine, lifted off the cover over some pinion wheels & played with them, with the result that his hand was caught in the wheels & the end of one of his fingers was torn off. He had orders not to lift the cover or touch the pinion wheels:—*Held:* the accident did not arise out of & in the course of his employment.—FURNISS *v.* GARTSIDE & CO., LTD. (1910), 3 B. W. C. C. 411, C. A.

Annotation:—**Folld.** Cole *v.* Evans, Lescher & Webb (1911), 4 B. W. C. C. 138.

2469. ——.]—A lad, set to clean a machine at rest, was larking with another lad, & accidentally started the machine, thereby injuring himself:—*Held:* the accident did not arise out of the employment.—COLE *v.* EVANS, SON, LESCHER & WEBB, LTD. (1911), 4 B. W. C. C. 138, C. A.

2470. Fall from a push.]—A workman went for some purpose to a fellow workman in a workshop; on parting he tapped his friend on the back with a rule & received a push in return, from which he fell & was injured. The county ct. judge found they were larking:—*Held:* the accident did not arise out of, & in the course of the employment.—WRIGLEY *v.* NASMYTH WILSON & CO., LTD. (1913), 6 B. W. C. C. 90, C. A.

(g) Acts Done under Order of Superior.

See Sub-sect. 2, F., *post*.

(h) Acts in Accordance with Custom or Practice.

See Sub-sect. 2, H., *post*.

E. Prohibited Acts.

(a) In General.

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 1 (2).

2471. Effect of Workmen's Compensation Act, 1925 (c. 84), s. 1 (2).]—WILSONS & CLYDE COAL CO. *v.* M'FERRIN, KERR *v.* DUNLOP (JAMES) & CO., No. 2499, *post*.

2472. Distinction between prohibitions defining what work to be done—& those defining how work to be done.]—The question whether a servant who violates his master's order is or is not acting in the course of his employment depends on whether the order is or is not one limiting or defining the scope of the servant's employment.

A workman was employed as a carpenter, & part of his duty was to sharpen his tools on a grindstone rotated by machinery. He had received orders not to touch the machinery. The band that rotated the grindstone having slipped he endeavoured to replace it, & in doing so was injured. On a claim for compensation under Workmen's Compensation Act, 1897 (c. 37), the county ct. judge found that the accident arose out of & in the course of the employment of the workman, & negatived serious & wilful misconduct on his part, & made an award in his favour:—*Held:* the disobedience of the master's order did not of itself prevent the act of the workman from being an act done in the course of his employment, & as it had not been shown that the replacing of the band was an act on the part of the workman so remote from his ordinary duties that it could not fairly be said to be one arising out of & in the course of his employment, the award must stand.—WHITEHEAD *v.* READER, [1901] 2 K. B. 48; 70 L. J. K. B. 546; 84 L. T.

Co. (1913), 26 W. L. R. 57; 5 W. W. R. 607; 14 D. L. R. 685; 6 Sask. L. R. 55.—**CAN.**

PART XIV. SECT. 5, SUB-SECT. 2.—D. (f).

2466 i. *Boy throwing missile at another boy.*]—BAIRD (WILLIAM) & CO., LTD. *v.* BURLEY (1908), 45 Sc. L. R. 416; 1 B. W. C. C. 7.—**SCOT.**

r. *Farm labourer pointing gun in fun at domestic servant—Gun carried with authority—Accidental discharge.*]—HILLIS *v.* SHAW (1913), 47 I. L. T. 221.—**IR.**

t. *Horse play.*]—A workman in the course of his employment met with an accident caused by his fellow workmen, who at the time were not engaged at their work, but were indulging in horse-play:—*Held:* the accident was not one arising "out of" the employment.—FALCONER *v.* LONDON & GLASGOW ENGINEERING, ETC. CO. (1901), 3 F. (Ct. of Sess.) 564.—**SCOT.**

a. *Fellow workman grabbing tool in anger from injured workman.*]—M'INTYRE *v.* RODGER & CO. (1903), 6 F. (Ct. of Sess.) 176; 41 Sc. L. R. 107; 11 S. L. T. 467.—**SCOT.**

b. *Ball thrown at nurse by fellow servant—Nurse playing with child at time of injury.*]—A domestic servant while engaged in the performance of her duties was struck on the eye by a child's ball playfully thrown at her by a fellow-servant, the child's nurse, with the result that she almost completely lost the sight of the eye:—*Held:* that the accident arose out of the employment within Workmen's Compensation Act, 1906, s. 1 (1).—WILSON *v.* LAING, [1909] S. C. 1230; 46 Sc. L. R. 843; [1909] 2 S. L. T. 18; 2 B. W. C. C. 118.—**SCOT.**

PART XIV. SECT. 5, SUB-SECT. 2.—E. (a).

c. *General rule.*]—An employee in doing an act which is unnecessary & which is to his knowledge expressly forbidden by his employer's rules is acting outside the scope of his employment & cannot recover for injuries received in doing it.—JACKSON *v.* CANADIAN PACIFIC RY. CO. (Sask.), [1919] 3 W. W. R. 706.—**CAN.**

d. *Distinction between prohibitions*

Sect. 5.—*Right to compensation: Sub-sect.* 2, *E.* (*a*) & (*b*) *i.* & *ii.*]

514; 65 J. P. 403; 49 W. R. 562; 17 T. L. R. 387; 3 W. C. C. 40, C. A.

Annotations:—**Consd.** Conway *v.* Pumpherston Oil Co. (1911), 4 B. W. C. C. 392; Harding *v.* Brynddu Colliery Co., [1911] 2 K. B. 747; Chilton *v.* Blair (1914), 111 L. T. 782; Plumb *v.* Cobden Flour Mills Co., [1914] A. C. 62; Gaunt *v.* Babcock & Wilcox (1917), 10 B. W. C. C. 733. **Apld.** Fife Coal Co. *v.* Braid (or Laurence or Wilson or Murray) (1924), 93 L. J. P. C. 225.

2473. —— ——.]—BARNES *v.* NUNNERY COLLIERY CO., LTD., No. 2489, *post*.

2474. —— ——.]—PLUMB *v.* COBDEN FLOUR MILLS CO., LTD., No. 2415, *ante*.

2475. Duty of arbitrator—To decide nature of prohibited act.]—A machine minder injured her hand while engaged in her employment, through having it drawn into the moving machinery. The evidence left it doubtful how the accident happened, but the county ct. judge held it did not arise out of the employment, on the ground that she was doing something at the time which was dangerous & was fully aware of her danger:—*Held*: there must be a new trial, on the ground that the judge had not decided whether there was misconduct within the sphere of the employment, or whether the accident was due to undertaking an added risk not incidental to the employment.—ROGERS *v.* GARSIDE (1915), 9 B. W. C. C. 91, C. A.

(*b*) *Prohibition Limiting Sphere of Work.*

i. *In General.*

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 1 (2).

2476. Manual labourer—Interfering with machinery.]—A boy was employed in a pottery; his duty was to make balls of clay & hand them to the woman working at a machine, & he was forbidden to interfere in any way with the machinery. He sustained an injury through attempting to clean the machine while the woman was temporarily absent:—*Held*: the accident did not arise out of or in the course of his employment, & therefore he was not entitled to compensation under the Workmen's Compensation Act, 1897 (c. 37).—LOWE *v.* PEARSON, [1899] 1 Q. B. 261; 68 L. J. Q. B. 122; 79 L. T. 654; 47 W. R. 193; 15 T. L. R. 124; 43 Sol. Jo. 139; 1 W. C. C. 5, C. A.

Annotations:—**Consd.** Rees *v.* Thomas, [1899] 1 Q. B. 1015. **Distd.** Whitehead *v.* Reader, [1901] 2 K. B. 48. **Apld.** Losh *v.* Evans (1902), 19 T. L. R. 142. **Reld.** Davies *v.* Gwaunceagurwen Colliery Co., [1921] 2 K. B. 651.

2477. —— ——.]—A baker in a steam bakery required to have an engine started, in order to mix the dough he had prepared. The man in charge of the engine being absent, he started the engine himself. He had often done so before, & had been forbidden to do so. The machinery caught him up & killed him. The county ct. judge found that he was not employed to touch the engine at all, & that the accident did not arise out of the employment:—*Held*: there was evidence to support the finding.—MARRIOTT *v.* BRETT & BENEY, LTD. (1911), 5 B. W. C. C. 145, C. A.

2478. —— ——.]—A boy was employed as a "box-minder" in woollen mills, & knew it was his duty, if the machine feeding the box was not working properly, to report the matter to the foreman, & not to touch it himself. A warp having slackened in passing over rollers, he endeavoured to tighten it himself with the result that his fingers were caught & crushed in the rollers:—*Held*: the accident did not arise out of the employment.—MCCABE *v.* NORTH (HENRY) & SONS, LTD. (1913), 109 L. T. 369; 6 B. W. C. C. 504, C. A.

Annotation:—**Distd.** Foulkes *v.* Roberts (1919), 122 L. T. 169.

2479. —— ——.]—A lad was employed to stand behind a machine & take skeins of wool as they came through some rollers & put them in a basket. On the day of the accident, contrary to express orders he went to the front of the machine & picked off the bits of fluff from the rollers. While doing this his hand was drawn in between the rollers & his arm so crushed that it had to be amputated. The county ct. judge found that picking fluff from the front of the rollers was an act outside the sphere of his employment & awarded the employers:—*Held*: it was a question of fact for the judge, & there was no misdirection.—HOPLEY *v.* POOL, LORRIMER & TABBERER (1915), 8 B. W. C. C. 512, C. A.

2480. Workman dusting switchboard.]—A workman in a power house dusted the switchboard. It was no part of his duty, & he was expressly forbidden to do so. In doing this he fell against the live gear, & sustained injuries:—*Held*: the accident did not arise out of the employment.—JENKINSON *v.* HARRISON, AINSLIE & CO., LTD. (1911), 4 B. W. C. C. 194, C. A.

2481. Alleged breach of rules as to shot firing—Accident occurring while loading.]—A quarryman was ramming a cartridge preparatory to blasting. The cartridge exploded prematurely & injured him. The employers alleged that the workman was acting outside the scope of his employment, in breach of certain special rules as to shot-firing. The rules, in fact, related only to the firing of shots, & not to loading. The explosion occurred whilst loading:—*Held*: the accident arose out of the employment.—JOYCE *v.* WELLINGBOROUGH IRON CO. (1911), 5 B. W. C. C. 126, C. A.

2482. Liftman cleaning & oiling lift.]—A liftman, forbidden to clean or oil the lift, was killed by the lift suddenly starting when he was cleaning & oiling it:—*Held*: the accident did not arise in the course of the employment.—DOUGAL *v.* WESTBROOK (1913), 6 B. W. C. C. 705, C. A.

2483. Shunter going between moving trucks.]—By a regulation made by a railway co. shunters were forbidden to go between two vehicles, for the purpose of coupling or uncoupling them, until the two had been brought to rest. In breach of this rule a shunter signalled the engine driver to "ease up" one of two corridor carriages for the purpose of coupling them together & got on the line standing by the carriage that was stationary, to await the shunting of the other carriage. He failed to allow for the projecting gangway, which struck him on the head & injured him fatally. The county ct. judge found that the risk he voluntarily ran was, by the regulation referred to, put outside the scope of his employment, & that the regulation had not been waived

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for safety of workmen—& those defining how work to be done.]—MORREAU *v.* GRAND TRUNK PACIFIC RY. CO., [1921] 3 W. W. R. 156; 59 D. L. R. 458.—CAN.

PART XIV. SECT. 5, SUB-SECT. 2.—E. (b) i.

e. Alleged breach of rules as to shot firing—Premature explosion.]—KERR *v.* BAIRD & CO., LTD., [1911] S. C. 701.—SCOT.

f. Driver of canal boat steering although forbidden to do so.]—A man employed by the owner of a canal boat as driver, who was forbidden by his employer to take part in the steering or management of the boat, was drowned whilst engaged in steering. A boatman who had been temporarily in charge of the horse had deserted a short time before the accident, & the other boatman, who was also the master of the boat, then decided to drive, telling the deceased at the same time to steer:—*Held*: deceased had, in taking part in the steering of the boat, violated the orders of his employer, & the accident did not arise

by any sanction or conduct of the employers, & that, therefore, the accident did not arise out of deceased's employment:—*Held:* there was evidence to support the findings & no misdirection. —COOK *v.* LONDON & SOUTH WESTERN RY. CO. (1921), 14 B. W. C. C. 100, C. A.

Annotation:—**Distd.** Mellor *v.* Ashton (1921), 14 B. W. C. C. 128.

2484. Controlling trucks down incline from in front.]—A miner, whose duty it was to take hutches down an incline in a mine, by guiding them down at the side or from behind, attempted to do so by placing himself on the rails in front of them. This was in direct violation of an express verbal prohibition by his employers. He was fatally injured by being crushed between the hutches coming down & some stationary ones lower on the line. The sheriff-substitute held that the breach of this prohibition took the act of the workman outside the scope of his employment & awarded for the employers:—*Held:* the prohibition was one limiting the sphere of the employment & not one dealing merely with the workman's conduct within the sphere of employment. The accident therefore did not arise out of & in the course of the employment.—FIFE COAL CO. *v.* BRAID (OR LAURENCE, OR WILSON, OR MURRAY) (1924), 93 L. J. P. C. 225; 131 L. T. 513; 40 T. L. R. 555; *sub nom.* FIFE COAL CO., LTD. *v.* MCLEAN BRAID (OR LAURENCE, OR WILSON, OR MURRAY), 17 B. W. C. C. 120, H. L.

2485. Bootmaker doing repairs at home & out of hours.]—BORLEY *v.* OCKENDEN, No. 2573, *post.*

2486. Miner entering prohibited workings.]—Deceased was a miner, & was asphyxiated in a chamber which he entered to obtain tools that he had left there six weeks before, when working there. The chamber had been marked as a prohibited area. He was at the time of his death working in another chamber with borrowed tools, & could have continued to work with them. The county ct. judge refused to admit evidence of statements of deceased tending to establish that the tools he went to fetch were his own:—*Held:* the accident did not arise out of & in the course of his employment, since deceased entered a prohibited area without leave, & even if the rejected evidence had proved that the tools belonged to deceased, the *onus* was not discharged of proving that the act of getting them was done for the purposes of & in connection with his employer's trade or business within the meaning of Workmen's Compensation Act, 1925 (c. 84), s. 1 (2).—THOMAS *v.* PENTREMAWR COLLIERY CO., LTD. (1926), 19 B. W. C. C. 331, C. A.

Acts done under orders of superior.]—*See* Sub-sect. 2, G., *post.*

Acts in accordance with custom & practice.]—*See* Sub-sect. 2, H., *post.*

ii. *Forbidden Mode of Transit.*

2487. Riding on couplings between trams.]—A collier going from one part of a mine to another rode on the coupling between two trams, in breach of the colliery rules. His head was knocked against the roof, & he died from the injuries so received:—*Held:* the accident did not arise out of the employment.—POWELL *v.* BRYNDU COLLIERY CO. (1911), 5 B. W. C. C. 124, C. A.

Annotation:—**Refd.** Price *v.* Tredegar Iron & Coal Co. (1914), 111 L. T. 688.

2488. Trying to board moving train.]—A workman on his way home by a route across his employer's property which he was allowed to take tried to get into one of a train of trucks which was moving up an incline, which was on his way home, & fell between the trucks & was killed. There was a regulation that no one, except the persons in charge of the train, should ride on any moving train on an incline without special leave:—*Held:* the accident did not arise "out of" or "in the course of" his employment, & his dependants were not entitled to compensation.—POPE *v.* HILL'S PLYMOUTH CO. (1911), 105 L. T. 678; 5 B. W. C. C. 175, H. L.

Annotation:—**Refd.** Harding *v.* Brynddu Colliery Co. (1911), 105 L. T. 55.

2489. Travelling in tubs in colliery.]—A boy employed at a colliery, noticing that an endless rope having a number of empty tubs attached to it was about to start for a level where his work was, jumped into the front tub with three other boys in order to ride to his work instead of walking as he ought to have done, & in the course of the journey his head came in contact with the roof of the mine & he was killed. It was a common practice for the boys to ride to their work in the tubs, but it was expressly forbidden & the prohibition was enforced as far as possible. Upon a claim by the father for compensation under Workmen's Compensation Act, 1906 (c. 55), the county ct. judge found that the accident arose out of deceased's employment:—*Held:* there was no evidence to justify this finding, & the death was caused by an added peril to which deceased by his own conduct exposed himself, & not by any peril involved by his contract of service.

Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do & also is put outside the range of his service by a genuine prohibition I should say that the accidental injury did not arise out of his employment (LORD LOREBURN, C.).—BARNES *v.* NUNNERY COLLIERY CO., LTD., [1912] A. C. 44; 81 L. J. K. B. 213; 105 L. T. 961; 28 T. L. R. 135; 56 Sol. Jo. 159; 5 B. W. C. C. 195, H. L.

Annotations:—**Folld.** Powell *v.* Bryndu Colliery Co. (1911), 5 B. W. C. C. 124; Watkins *v.* Guest, Keen & Nettlefolds (1912), 106 L. T. 818; Gallant *v.* Ship Gabir (1913), 108 L. T. 50; M'Diarmid *v.* Ogilvy (1913), 6 B. W. C. C. 878. **Distd.** Richardson *v.* Denton Colliery Co. (1913), 109 L. T. 370. **Folld.** Sanderson *v.* Wright (1914), 110 L. T. 517. **Apld.** Pepper *v.* Sayer, [1914] 3 K. B. 994; Plumb *v.* Cobden Flour Mills Co., [1914] A. C. 62; Herbert *v.* Fox, [1916] 1 A. C. 405; Palmer *v.* Harrods (1916), 85 L. J. K. B. 1659; Maydew *v.* Chattorley-Whitfield Colliers, [1917] 2 K. B. 742. **Folld.** Woodlice Coal & Coke Co. *v.* Robertson (1919), 12 B. W. C. C. 463. **Consd.** Bourton *v.* Beauchamp, [1920] A. C. 1001. **Apld.** Matthews *v.* M'Clure (1920), 90 L. J. K. B. 510. **Folld.** Whiddett *v.* Chislet Colliery (1920), 89 L. J. K. B. 1209; Brown *v.* Baton Colliery Co. (1921), 14 B. W. C. C. 265. **Apld.** Borley *v.* Ockenden, [1925] 2 K. B. 325; Jones *v.* Tarr, [1926] 1 K. B. 25; Wilsons & Clyde Coal Co. *v.* M'Ferrin, Kerr *v.* Dunlop, [1926] A. C. 377. **Refd.** Frith *v.* S.S. Louisianian, [1912] 2 K. B. 155; Bates *v.* Mirfield Coal Co. (1913), 6 B. W. C. C. 165; Mitchinson *v.* Day, [1913] 1 K. B. 603; Carinduff *v.* Gilmore (1914), 7 B. W. C. C. 981; Chilton *v.* Blair (1914), 111 L. T. 782; M'William *v.* G. N. of Scotland Ry. (1914), 7 B. W. C. C. 875; Smith *v.* Fife Coal Co., [1914] A. C. 723; Baker *v.* Bradford (1915), 85 L. J. K. B. 263; Newson *v.* Burstall & Farrow (1915), 112 L. T. 792; L. & Y. Ry. *v.* Highley, [1917] A. C. 352; Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127; Wales *v.* Lambton & Hetton Collieries (1917), 86 L. J. K. B. 1346; Stevens *v.* L. & S. W. Ry. (1918),

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out of & in the course of the employment.—WHELAN *v.* MOORE (1909), 43 I. L. T. 205; 2 B. W. C. C. 114.—IR.

g. Workman cleaning machinery in motion.]—M'DIARMID *v.* OGILVY BROTHERS, [1913] S. C. 1103; 50 Sc. L. R. 883; [1913] 2 S. L. T. 113; 6 B. W. C. C. 878.—SCOT.

PART XIV. SECT. 5, SUB-SECT. 2.—E. (b) ii.

h. Riding on hutches in colliery.]—A miner on leaving his work jumped on to a hutch for the purpose of getting a ride to the pit bottom, & was injured by reason of his doing so. By a special rule in force in the mine, of which the miner was aware, miners were for-

Sect. 5.—Right to compensation: Sub-sect. 2, E. (b) ii. & iii.]

87 L. J. K. B. 756; Upton *v.* G. C. Ry. (1923), 130 L. T. 577; Leivers *v.* Barber, Walker (1924), 93 L. J. K. B. 933. **Mentd.** Trim Joint District School Board of Management *v.* Kelly, [1914] A. C. 667; Braine *v.* Port of London Authority (1920), 13 B. W. C. C. 342.

2490. ——.]—Three miners, requiring to leave the mine, walked along the haulage road to get to the pit bottom. Two said they were going to wait for a tub to come along upon which to ride. The third hurried on saying he would wait for the others at the pit bottom. At that time the haulage rope was stationary, but it soon started, & a tub came along on to which the two miners jumped. They had not proceeded far when they heard a cry from the miner in front. They stopped the line of tubs & found the miner lying across the rails injured in such a way as could only reasonably have happened by his riding on a tub & striking his head against the roof which sloped down at that place. There was a tub eleven yards in front of where he had fallen, which had been moving in the same direction. It was against the rules of the colliery to ride on the tubs. From these facts the county ct. judge inferred that the accident was caused by the miner riding on a tub, & therefore held that the accident did not arise out of the employment:—*Held:* the facts supported the inference.—BATES *v.* MIRFIELD COAL CO. (1913), 6 B. W. C. C. 165, C. A.

2491. ——.]—MAYDEW *v.* CHATTERLEY-WHITFIELD COLLIERIES, LTD., [1917] 2 K. B. 742; 86 L. J. K. B. 1353; 117 L. T. 460; 10 B. W. C. C. 548, C. A.; *sub nom.* MEYDEW *v.* CHATTERLEY WHITFIELD COLLIERIES, 61 Sol. Jo. 645; *on appeal, sub nom.* MAYDEW *v.* CHATTERLEY-WHITFIELD COLLIERIES, LTD. (1918), 88 L. J. K. B. 360, H. L.

2492. ——.]—The injured workman was a miner in the employment of applts. He finished his shift at about 2 p.m. & hurried on his way to the pit bottom. He was found lying with his back injured between the up & down sets of hutch rails on an incline in the colliery, leading up from his working place to the pit bottom, by two fellow workmen who were also walking towards the pit bottom & were a little further up the incline & turned back on hearing him shout. No one saw him sustain the injury. Immediately before he was found a rake of loaded hutches had passed the spot where he was found. On the morning after the accident some of the stone dust on the timbers of the incline was found to be rubbed off in such a way as could have been done by a man riding on a loaded hutch. The arbiter found upon the facts that the workman was riding on one of the loaded hutches contrary to express regulations, & that the accident did not arise out of his employment. He stated that he was forced to the conclusion by the workman's evidence that he had committed deliberate perjury in denying that he had been riding on the hutch:—*Held:* it was a question of fact as to which there was evidence to support the finding & there was no misdirection.—WATSON (JOHN), LTD. *v.* BROWN (1925), 18 B. W. C. C. 419, H. L.

Annotation:—**Refd.** Garallan Coal Co. *v.* Anderson (or Devlin) (1926), 42 T. L. R. 747.

2493. Assistant at motor garage—Riding on motor cycle.]—A workman was engaged by a cycle maker to look after his shop & do small repairs on the premises. He was expressly forbidden to use machines out of the shop. He was insured as a cycle repairer & not as a driver, of which fact he was aware. He had some physical weakness in his legs. One day a customer brought a motor cycle to the shop to be repaired. The workman, having repaired it, took it out of the shop, & was riding it back to the customer's house when he was run into by a motor omnibus & killed. It was not a case of emergency:—*Held:* deceased was not acting within the scope of his employment, & the accident did not therefore arise "out of" the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—LEGGETT *v.* GIBBONS (1916), 85 L. J. K. B. 980; 114 L. T. 830; 9 B. W. C. C. 354, C. A.

2494. Shunter riding on buffers.]—(1) A workman employed as a shunter upon his employer's private railway was seriously & permanently injured by falling from the buffer of a waggon upon which he was improperly riding. His duty when waggons were being moved was to walk in front of them & keep a look out, & a notice to that effect was posted on the employer's engine shed. On the occasion of the accident, at the conclusion of some shunting operations, four waggons were being pushed by an engine towards the engine shed, when the workman instead of walking in front of the train, climbed upon the buffer of the leading waggon & sat there till he fell & was run over. Upon a claim for compensation under the Workmen's Compensation Act, 1906 (c. 58), the county ct. judge found that the accident arose in the course of & out of the employment:—*Held:* the man, in sitting on the buffer, was acting outside the sphere of his employment, & therefore the accident did not arise out of his employment.

(2) An arbitrator ought to distinguish clearly between his rulings on law & on fact, & cannot by finding in the words of the statute secure for a finding on a pure question of law, or on a question of mixed law & fact, that unassailability which belongs only to a finding on a question of pure fact.—HERBERT *v.* FOX (SAMUEL) & CO., LTD., [1916] 1 A. C. 405; 85 L. J. K. B. 441; 114 L. T. 426; 32 T. L. R. 261; 60 Sol. Jo. 237; 9 B. W. C. C. 164, H. L.

Annotations:—*As to* (1) **Apld.** Palmer *v.* Harrods (1916), 85 L. J. K. B. 1659. **Consd.** Wardle *v.* Enthoven (1916), 86 L. J. K. B. 309; L. & Y. Ry. *v.* Highley, [1917] A. C. 352. **Apld.** Maydew *v.* Chatterley-Whitfield Collieries, [1917] 2 K. B. 742. **Consd.** Fife Coal Co. *v.* Braid (or Laurence, or Wilson, or Murray) (1924), 93 L. J. P. C. 225. **Apld.** Wilsons & Clyde Coal Co. *v.* M'Ferrin, Kerr *v.* Dunlop, [1926] A. C. 377. **Refd.** Gibbins *v.* British Dyes (1918), 88 L. J. K. B. 716; Bourton *v.* Beauchamp, [1920] A. C. 1001; Moore *v.* Donnelly, Fife Coal Co. *v.* Sharp, Same *v.* Fyfe, [1921] 1 A. C. 329; Phillips *v.* Estler (1921), 14 B. W. C. C. 138. *As to* (2) **Consd.** King *v.* Port of London Authority, [1920] A. C. 1; Thomson *v.* Anderson (or Scrimgeour) (1921), 91 L. J. P. C. 87. **Refd.** Longhurst *v.* Stewart (1912), Ltd., [1916] 2 K. B. 803; Cole *v.* De Trafford, [1917] 1 K. B. 911; Slater *v.* Maconochie (1920), 89 L. J. K. B. 1238; Larrinaga *v.* Soc. Franco-Américaine des Phosphates de Medulla (1922), 27 Com. Cas. 160; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406; St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59. *Generally,* **Refd.** Ince *v.* Reigate Education Committee, [1916] 2 K. B. 671; Pyper *v.* Manchester Liners, [1916] 2 K. B. 691. **Mentd.** Sanatorium *v.* Marshall (1916), 32 T. L. R. 477.

2495. Colliers riding on trams—Employed in coupling & uncoupling.]—A lad of seventeen was employed underground in a colliery as a "shackler," his duties as such being to join trams together into a "journey" after they had been brought up from the coal face. Working in the same part of the colliery was a man employed as a

bidden to ride on hutches:—*Held:* the injury was not caused by an accident arising out of the employment.—KANE *v.* MERRY & CUNNINGHAME, LTD., [1911] S. C. 533.—**SCOT.**

k. ——.]—JARDINE *v.* STEEL CO. OF SCOTLAND, LTD., [1926] S. C. 913.—**SCOT.**

l. *Boy travelling by prohibited lift.*]—M'DAID *v.* STEEL, [1911] S. C. 859.—**SCOT.**

'rider," his duties being to go up & down with the trams from the coal face. Applt., at one time having nothing to do, left the place where his work was & where he was alone authorised to be, & went down to the coal face. He attempted to do the rider's work & bring up a loaded tram, but met with a severe accident. The county ct. judge found that he was acting outside the scope of his employment, & the accident therefore did not arise out of his employment:—*Held:* there was evidence to support the award, & no misdirection.—HOWELL *v.* BEDWAS NAVIGATION COLLIERY CO., LTD. (1921), 14 B. W. C. C. 10, C. A.

2496. —— ——.]—A miner, whose duty was to couple & uncouple trucks on a haulage road, was killed while riding on a truck. No statutory prohibition applied to his case, but the employers at a late stage of the proceedings alleged, & tendered evidence of, a verbal prohibition given by them against riding on trucks, & this evidence was admitted & accepted by the county ct. judge. An adjournment was offered but was refused by appt.'s advisers. The county ct. judge found that the prohibition limited the sphere of the man's employment, & therefore held that the accident did not arise out of the employment:—*Held:* (1) the Ct. of Appeal would not interfere with the discretion of the county ct. judge in admitting evidence of an allegation, although raised only at a late stage of the proceedings, where the discretion had been judicially exercised; (2) there was evidence to support the findings of fact, & no misdirection in law.—LEIVERS *v.* BARBER, WALKER & CO. (1924), 93 L. J. K. B. 933; 131 L. T. 12; 40 T. L. R. 361; 68 Sol. Jo. 457; 17 B. W. C. C. 38, C. A.

2497. —— **Employed in filling.**]—On Aug. 1, 1922, a workman, who was employed to fill trams with stones, at a tip, & for that purpose only, acted without instructions on a certain occasion as rider & proceeded with the journey of trams from the tip towards the level. He was last seen before the accident half seated upon the tram & half walking. It was contrary to the colliery instructions for men other than riders to sit upon the trams unless specially instructed to go with the trams in the absence of the rider. On the occasion in question the tram went off the lines & the workman was found dying alongside the tram, with his foot caught in the hitching rope, & he died soon afterwards. The dependant instituted proceedings for compensation in the county ct. & the county ct. judge found that deceased had exceeded his instructions & that the accident did not arise in the course of his employment. The dependant appealed:—*Held:* in view of the evidence adduced before the county ct. judge it was open to him to form the conclusion that the workman had taken it upon himself to accompany the tram & the ct. ought not to interfere with his finding; there appeared to be no evidence of any emergency justifying the man in going outside his duty & that point ought not to be raised as it had never been taken before the county ct. judge; & the appeal should be dismissed.—WATKINS *v.* CWMGWRACH & EMPIRE COLLIERY CO., LTD. (1923), 129 L. T. 602; 16 B. W. C. C. 67, C. A.

iii. *Breach of Regulations relating to Mines and Quarries.*

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 1 (2).

2498. Shot firing—Miner doing work of shot firer—Connecting cable with charge—Premature firing by shot firer.]—The use of explosives in a mine was regulated by statutory rules, which provided that every charge should be fired by a specially appointed shot firer, & that, where the firing was done by electricity, it was the duty of the shot firer himself to connect the cable, first, with the charge, &, thereafter, with the firing apparatus, after seeing that all persons in the vicinity had taken shelter. A duly appointed shot firer, in breach of these regulations handed the cable to a miner for the purpose of having it connected with the charge, &, without waiting until this had been done & without ascertaining that all persons in the vicinity had taken shelter, connected the cable with the firing apparatus. He then fired the shot, & the miner, who had connected the cable with the charge & had not had time to retire to a place of safety, was injured by the explosion:—*Held:* the essential cause of the accident was not the unauthorised assumption by the miner of the shot firer's duty, but the premature firing by the shot firer, & there was evidence to support the finding of the arbitrator that the injury to the miner arose out of & in the course of his employment.—SMITH *v.* FIFE COAL CO., LTD., [1914] A. C. 723; 83 L. J. P. C. 359; 111 L. T. 477; 30 T. L. R. 502; 58 Sol. Jo. 533; 7 B. W. C. C. 253, H. L.

Annotations:—**Consd.** Coltness Iron Co. *v.* Baillie (1921), 14 B. W. C. C. 295; Rodger *v.* Fife Coal Co. (1923), 16 B. W. C. C. 299.

2499. —— —— ——.]—(1) In M'Aulay's case a miner, who was engaged with a fireman & another miner in firing by electricity a series of shots in a mine, coupled the cable to the detonator of the next shot in breach of a statutory regulation, which provided that the coupling should be done by the person specially authorised in writing by the manager to fire the shot. The only person so authorised was the fireman, & the miner had no authority or duty to touch the cable. The result of his act was that the shot exploded & he was killed:—*Held:* the operation of coupling being the work of the skilled fireman, the unskilled man had no right to meddle with it, & if he meddled he was doing something which he was not engaged to do, & entirely outside the scope of his employment. The accident, therefore, did not arise out of his employment, & Workmen's Compensation Act, 1923 (c. 42), s. 7 [*see, now,* Workmen's Compensation Act, 1925 (c. 84), s. 1 (2)], had no application.

The result of this sect. is, in my opinion, not doubtful. It does not either repeal or amend the radical provisions of the principal Act, that the accident to entitle the workman to compensation

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PART XIV. SECT. 5, SUB-SECT. 2.—E. (b) iii.

2498 i. *Shot firing—Miner doing work of shot firer—Connecting cable with charge—Premature firing by shot firer.*]—RODGER *v.* FIFE COAL CO., LTD. (1923), 16 B. W. C. C. 299.—**SCOT.**

2498 ii. —— —— ——.]—M'AULAY *v.* DUNLOP (JAMES) & CO., LTD. (1925), 18 B. W. C. C. 680.—**SCOT.**

m. —— —— *Premature return to site.*]—WADDELL *v.* COLTNESS IRON CO., LTD. (1913), 50 Sc. L. R. 29.—**SCOT.**

n. —— —— ——.]—M'KENNA *v.* NIDDRIE & BENHAR COAL CO., LTD., [1916] S. C. 1; 53 Sc. L. R. 1; [1915] 2 S. L. T. 234; 9 B. W. C. C. 411.—**SCOT.**

o. —— —— ——.]—SMITH *v.* RUSSELL, LTD., [1921] S. C. 335.—**SCOT.**

p. —— —— ——.]—SLOAN *v.* SHOTTS IRON CO., LTD., [1922] S. C. 294; 59 Sc. L. R. 253; [1922] S. L. T. 270; 15 B. W. C. C. 300.—**SCOT.**

q. —— —— —— *Employer's regulation extending scope.*]—ARDEN COAL CO., LTD. *v.* M'INTOSH (1923), 16 B. W. C. C. 320.—**SCOT.**

r. —— —— —— *Prohibition restricted to actual firer.*]—Two miners applied lights to fuses & thereafter retired to places of safety. One shot

Sect. 5.—Right to compensation: Sub-sect. 2, E. (b) iii.]

must arise out of, & in the course of, his employment, but it does introduce a far-reaching, though artificial, consideration which prevents a certain class of evidence being available to show that the accident did not arise out of the employment being any longer in force (LORD DUNEDIN).

(2) In M'Ferrin's case a miner was seriously & permanently disabled as the result of returning to a shot hole from which he had fired a shot within the period during which persons were by statutory regulations prohibited from approaching the shot hole. The arbitrator came to the conclusion that the workman was entitled to the benefit of Workmen's Compensation Act, 1923 (c. 42), s. 7, in respect that he had returned to the shot hole for the purpose of his employer's business:—*Held:* the accident arose out of the employment & was by sect. 7 still deemed to have done so notwithstanding the fact that the workman when injured was acting in breach of the prohibition.—WILSONS & CLYDE COAL CO. *v.* M'FERRIN, KERR *v.* DUNLOP (JAMES) & CO., [1926] A. C. 377; 95 L. J. P. C. 130; 135 L. T. 164; 42 T. L. R. 397; 19 B. W. C. C. 1, H. L.; *affg.* S. C. *sub nom.* MCFERRIN *v.* WILSONS & CLYDE COAL CO., LTD., M'AULAY *v.* DUNLOP (JAMES) & CO., LTD., 18 B. W. C. C. 630, 680.

Annotations:—As to (1) **Apld.** Guest *v.* Gaston (1926), 95 L. J. K. B. 759; Hawkins *v.* Kendrick (1926), 19 B. W. C. C. 325. *As to* (2) **Consd.** Guest *v.* Gaston (1926), 95 L. J. K. B. 759. **Distd.** Hawkins *v.* Kendrick (1926), 19 B. W. C. C. 325.

2500. —— Shot missing fire—Premature return to site.]—By special rules made under Quarries Act, 1894 (c. 42), where a shot has apparently missed fire, no person is to go near the place until after the lapse of half an hour. A quarry foreman had successfully fired two charges, but the third missed fire. After waiting only a quarter of an hour he went up to the fuse, & was proceeding to recharge it, in breach of the regulations, when the delayed explosion took place & killed him. There was evidence that his act was not only an offence under Quarries Act, but a very dangerous thing to do:—*Held:* the county ct. judge was right in holding that the accident did not arise out of the employment. The risk was one prohibited by the employment.—MATTHEWS *v.* POMEROY (1919), 12 B. W. C. C. 134, C. A.

Annotations:—**Apld.** Whiddett *v.* Chislet Colliery (1920), 89 L. J. K. B. 1209. **Mentd.** Cook *v.* L. & S. W. Ry. (1921), 14 B. W. C. C. 100.

2501. —— —— ——.] — In considering the right to compensation under Workmen's Compensation Act, 1906 (c. 58), the question whether a prohibition limits the sphere of employment or deals only with conduct within the sphere of employment is not determined by the mere fact that the prohibition is statutory. A miner in the course of his employment fired a shot by means of a fuse & detonator & retired to a place of safety. The shot missed fire. In contravention of the Explosives in Coal Mines Order of Sept. 1, 1913, para. 3 (*a*), made under the Coal Mines Act, 1911 (c. 50), s. 61, he returned to the place of the shot in less than one hour, & the shot blew off in his face & permanently disabled him. A miner who was working in a certain level with another was sent by his colleague to get brattice nails. He went to a disused part of the mine which was fenced off by a railing containing the words "No road" & was killed by poison gas. Brattice nails were procurable in an easily accessible part of the mine. The General Regulations of July 10, 1913, made under Coal Mines Act, 1911 (c. 50), s. 86, provided, by clause 4, subject to certain qualifications & exceptions which did not apply, that no workman should go into any part of the mine other than that part in which he worked, &, by clause 9, that no person should without authority pass beyond any fence or danger signal:—*Held:* in each case the contravention of these mining regulations took the miner outside the sphere of his employment, & consequently the injury did not arise out of & in the course of his employment.

No distinction can logically be drawn between a prohibition founded on statute & one imposed by the employer to regulate the employment. It is no doubt true that a statutory prohibition would usually be more notorious & more authoritative. Nor can it be made the subject of waiver or of informal modification (LORD BIRKENHEAD, C.).—MOORE (A. G.) & CO. *v.* DONNELLY, FIFE COAL CO. *v.* SHARP, FIFE COAL CO. *v.* FYFE, [1921] 1 A. C. 329; 90 L. J. P. C. 49; 124 L. T. 578; 37 T. L. R. 198; 65 Sol. Jo. 219, 239; 13 B. W. C. C. 458, H. L.

Annotations:—**Apld.** Cook *v.* L. & S. W. Ry. (1921), 14 B. W. C. C. 100. **Consd.** Smith *v.* Russell (1921), 14 B. W. C. C. 278. **Distd.** Coltness Iron Co. *v.* Baillie, [1922] 1 A. C. 170. **Apld.** Costello *v.* Addie Collieries, [1922] 1 A. C. 164; Hawkridge *v.* Howden Clough Collieries (1923), 128 L. T. 786. **Consd.** Fife Coal Co. *v.* Braid (or Laurence, or Wilson, or Murray) (1924), 93 L. J. P. C. 225. **Distd.** Borley *v.* Ockenden, [1925] 2 K. B. 325. **Reld.** Whiddett *v.* Chislet Colliery (1920), 89 L. J. K. B. 1209; Sloan *v.* Shotts Iron Co. (1922), 15 B. W. C. C. 300; Rodger *v.* Fife Coal Co. (1923), 16 B. W. C. C. 299; Finn *v.* Shelton Iron, Steel & Coal Co. (1924), 131 L. T. 213; Guest *v.* Gaston (1926), 95 L. J. K. B. 759; Wilsons & Clyde Coal Co. *v.* M'Ferrin, Kerr *v.* Dunlop, [1926] A. C. 377.

2502. —— —— ——.]—A shot misses fire within the meaning of para. 3 (*a*) of the Explosives in Coal Mines Order of Sept. 1, 1923, if a naked light is applied to the fuse & the shot does not explode at the usual time, & the regulation applies where the man who applies the light to the fuse *bonâ fide* believes that he has not succeeded in igniting it. If therefore he approaches the shot-hole within the prohibited time, & the shot explodes & injures him, he commits a breach of the regulation the injury does not arise out of his employment.—COSTELLO *v.* ADDIE (R.) & SONS COLLIERIES, LTD., [1922] 1 A. C. 164; 91 L. J. P. C. 72; 126 L. T. 609; 38 T. L. R. 266; 66 Sol. Jo. 248; 15 B. W. C. C. 19, H. L.

Annotation:—**Reld.** Coltness Iron Co. *v.* Baillie (1921), 91 L. J. P. C. 75.

2503. —— —— ——.]—WILSONS & CLYDE COAL CO. *v.* M'FERRIN, KERR *v.* DUNLOP (JAMES) & CO., No. 2499, *ante*.

2504. —— —— —— Prohibition restricted to actual firer.]—Para. 3 (*a*) of the Explosives in Coal Mines Order of Sept. 1, 1913, which provides that "if a shot misses fire the person firing the

exploded, & one of the miners thereupon returned to the coal face & received injuries from the explosion of the second shot, which resulted in serious & permanent disablement. By so returning the workman was acting in contravention of certain statutory orders:—*Held:* the act of the miner in returning had been "for the purposes of his employers' trade or business," & although he had committed a breach of statutory orders, he was by virtue of Workmen's Compensation Act, 1923, s. 7, entitled to compensation.—M'FERRIN *v.* WILSONS & CLYDE COAL CO., LTD. (1926), 18 B. W. C. C. 630.—SCOT.

t. —— ——.] — KERR *v.* BAIRD & CO., LTD., [1911] S. C. 701; 48 Sc. L. R. 646; [1911] 1 S. L. T. 446; 4 B. W. C. C. 397.—SCOT.

a. —— *Workman ramming charge.*]—LYNCH *v.* BAIRD (1904), 6 F. (Ct. of Sess.) 271.—SCOT.

b. —— *Drilling into misfired hole.*]—VILLAGE DEEP, LTD. *v.* STANTON'S

shot shall not approach or allow any one to approach the shot hole " until after a given interval, applies only to the person who actually fires the shot.

Accordingly, where a father, who was engaged along with his two sons in a blasting operation, loaded & stemmed the shot hole & inserted the fuse, to which a light was applied by one of his sons, &, believing that the fuse had not been effectually lighted, approached the shot hole within the prohibited period for the purpose of lighting the fuse afresh, & the shot exploded & injured him :—*Held :* in approaching the shot hole he had not violated any statutory regulation & was not acting outside the scope of his employment, & he was therefore entitled to compensation.—COLTNESS IRON CO., LTD. *v.* BAILLIE, [1922] 1 A. C. 170 ; 91 L. J. P. C. 75 ; 126 L. T. 611 ; 38 T. L. R. 267 ; 66 Sol. Jo. 249 ; 15 B. W. C. C. 25, H. L.

Annotation :—**Consd.** Morgan *v.* Evans, [1926] 2 K. B. 74.

2505. —— —— —— Employer's regulation extending scope.]—By the Explosives in Coal Mines Order of Sept. 1, 1913, made under the Coal Mines Act, 1911 (c. 50), " If a shot misses fire . . . the person firing the shot shall not approach, or allow any one to approach the shot hole " until a specified interval of time has elapsed. By a notice put up in resps.' colliery the words were added " & no person shall in such circumstances, on any pretext, return to the place " before the expiration of the prescribed interval of time. Applt., who was employed in the mine, was aware of this notice, &, in breach of the prohibition, went to the place where an attempt had been made to fire a shot before the expiration of the prescribed time, & the shot exploded, & he was seriously injured :—*Held :* the employers might make a regulation of their own in addition to the statutory regulation, & it was binding upon their workmen, & therefore, applt. was acting outside the scope of his employment in going to the place, & was not entitled to compensation under Workmen's Compensation Act, 1906 (c. 58).—M'INTOSH *v.* ARDEN COAL CO. (1924), 93 L. J. P. C. 264 ; 131 L. T. 321, H. L. ; *affg.* S. C. *sub nom.* ARDEN COAL CO., LTD. *v.* M'INTOSH (1923), 16 B. W. C. C. 320.

2506. —— —— Attempt to drill out stemming.]—A miner employed to get coal by pick or shot firing, on arriving at the coal face, saw a hole already drilled & stopped with stemming & the charred remains of a fuse. He proceeded to remove the stemming with a view to laying a fresh shot in the same hole when an explosion occurred which caused his death. The hole had been charged two days before, but the shot had missed fire. The use of explosives at the mine was regulated by statutory regulations made under the Coal Mines Act, 1911 (c. 50), which provided that when a hole had been charged no part of the stemming should be removed, & that if a shot misfired a second charge should not be placed in the same hole. Upon a claim for compensation under the Workmen's Compensation Act, 1906 (c. 58), by the widow of deceased :—*Held :* deceased, in disobeying the statutory regulations, was acting outside the sphere of his employment, & consequently his death was not caused by accident arising out of & in the course of his employment.—BOURTON *v.* BEAUCHAMP, [1920] A. C. 1001 ; 89 L. J. K. B. 1205 ; 123 L. T. 606 ; 13 B. W. C. C. 90 ; *sub nom.* BURTON *v.* BEAUCHAMP & BEAUCHAMP, 64 Sol. Jo. 601, H. L.

Annotations :—**Expld.** Gordon *v.* Fife Coal Co. (1920), 13 B. W. C. C. 523. **Apld.** Whiddett *v.* Chislet Colliery Co. (1920), 124 L. T. 14 ; Cook *v.* L. & S. W. Ry. (1921), 14 B. W. C. C. 100 ; Smidmore *v.* London & Thames Haven Oil Wharves (1921), 14 B. W. C. C. 116. **Followed** Moore *v.* Donnelly, Fife Coal Co. *v.* Sharp, Fife Coal Co. *v.* Fyfe, [1921] 1 A. C. 329. **Consd.** Davies *v.* Gwauncaegurwen Colliery, [1924] 2 K. B. 651. **Distd.** Borley *v.* Ockenden, [1925] 2 K. B. 325. **Refd.** Wilsons & Clyde Coal Co. *v.* McFerrin, Kerr *v.* Dunlop, [1926] A. C. 377.

2507. —— Failure to retire to place of safety.]—A workman, P., was engaged with another man, J., in blasting in resps.' quarry. J. fired the fuse & then both men retired some distance off to await the explosion, but P. was killed by a fragment of rock caused by the explosion. The widow claimed as a total dependant. The employers contended that deceased had infringed a rule made by them under Metalliferous Mines Regulation Act, 1872 (c. 77), s. 24, by not taking himself to a place of safety, & so had placed himself outside the scope of the employment. The rule provided that " the persons firing the shots shall station themselves out of the way of danger." There was nothing in the rule to show what a place of safety was, nor the distance to which the men should retire. The county ct. judge held that the rule as it restricted the rights of workmen to compensation should be construed strictly, & it was J. & not deceased who fired the shot. He found that deceased was protecting himself against the effect of the firing & not firing the shot, & made an award in favour of the widow :—*Held :* this was not such a breach of the rule as to take the case outside the scope of the employment. There was therefore no misdirection, & evidence to support the finding.—PRITCHARD *v.* VOTTY & BOWYDD SLATE QUARRIES CO., LTD. (1921), 14 B. W. C. C. 209, C. A.

2508. Using naked light.]—A workman employed in resps.' colliery struck a match to light his pipe, after finishing a meal at the customary knock off in the middle of his shift, & an explosion of gas followed, by which he was killed. To have or strike a match in the mine was an offence under the Coal Mines Act, 1911 (c. 50), ss. 32, 35, & this was known to deceased man :—*Held :* his death was not caused by an accident arising out of & in the course of his employment within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—ROBERTSON (OR CAMPBELL) *v.* WOODILEE COAL & COKE CO., LTD. (1920), 89 L. J. P. C. 79 ; 123 L. T. 113 ; 64 Sol. Jo. 374 ; 13 B. W. C. C. 51, H. L. ; *affg.* S. C. *sub nom.* WOODILEE COAL & COKE CO., LTD. *v.* ROBERTSON (1919), 12 B. W. C. C. 463.

Annotations :—**Refd.** Bourton *v.* Beauchamp, [1920] A. C. 1001 ; Moore *v.* Donnelly (1920), 13 B. W. C. C. 424. **Mentd.** Gordon *v.* Fife Coal Co. (1920), 13 B. W. C. C. 523.

2509. Relighting safety lamp.]—MOORE (A. G.) & CO. *v.* BARKEY, No. 2651, *post.*

2510. Crossing uncovered space of shaft bottom.]—Where a workman meets with a fatal accident whilst doing something which the law prohibits him from doing, & prohibits his employer from ordering him to do, & which his employer has not

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EXECUTOR, [1910] T. P. D. 726.—S. AF.

c. *Using naked light — Near explosives.*]—DAILLY *v.* WATSON (1900), 2 F. (Ct. of Sess.) 1044.—SCOT.

d. —— ——.]—DONNACHIE *v.* UNITED COLLIERIES, LTD., [1910] S. C. 503.—SCOT.

e. *Breach of regulation — Accident not necessarily taken outside scope of employment.*]—AUSTIN *v.* COAL CLIFF COLLIERIES, LTD. (1919), 19 N. S. W. L. R. 186 ; 36 N. S. W. W. N. 74.—AUS.

f. —— ——.]—Where a workman, though in breach of a statutory regulation, is nevertheless acting within the sphere of his employment, the accident arises out of the employment. —GORDON *v.* FIFE COAL CO., LTD., [1920] S. C. 747 ; 57 Sc. L. R. 616. —SCOT.

g. *Holing — Failure to erect sprags.*]

Sect. 5.—Right to compensation: Sub-sect. 2, E. (b) iii. & iv.]

in fact ordered him to do, it is not an accident arising out of & in the course of the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).

W. was an onsetter engaged to attend to the gates at the bottom of a mining shaft. There was an east & a west gate, & usually an onsetter at each, but on the occasion in question W. was attending to both gates. The cage came down inside an enclosed space in the shaft, & onsetters wishing to pass to one or other gate could do so by going round outside the enclosed cage space, either to north or south. They were forbidden by No. 22 of the Regulations made under Coal Mines Act, 1911 (c. 50), to cross the uncovered space of the shaft bottom, under the cage, except for the purpose of working in the shaft bottom, or to work there unless the cages were stopped. W. crossed from the west to the east gate, & attempted to return across the forbidden shaft bottom. Noticing that a sumph board was loose, he took a mallet to knock it into its place, which it was part of his duty to do, &, while doing so, was killed by the descending cage. He had himself signalled for the cage to come down, but had apparently forgotten it:—*Held:* on the principle stated above, the accident was not one arising out of & in the course of the employment.—WHIDDERT *v.* CHISLET COLLIERY, LTD. (1920), 89 L. J. K. B. 1209; 124 L. T. 14; 13 B. W. C. C. 157, C. A.

Annotation:—**Refd.** Morgan *v.* Evans, [1926] 2 K. B. 74.

2511. ——.]—(1) By Reg. 22 of the General Regulations, dated July 10, 1913, made under Coal Mines Act, 1911 (c. 50): "No person shall attempt to go on or across the uncovered space of the shaft bottom, except for the purpose of working in the shaft bottom, & no person shall be allowed to work in such space unless the cages are stopped":—*Held:* "stopped" referred to such a stoppage as was necessary for the safety of the men, *i.e.*, a stoppage for the purposes of the work, & not to a casual stoppage in circumstances in which motion might be resumed at any moment & without notice.

(2) The *onus* is on the workman to prove he was acting for the purpose of his employer's trade or business.—GARRALLAN COAL CO. *v.* ANDERSON (OR DEVLIN), [1927] A. C. 59; 19 B. W. C. C. 356; *sub nom.* GARALLAN COAL CO., LTD. *v.* ANDERSON (OR DEVLIN), 42 T. L. R. 747, H. L.

2512. Riding on tubs.]—A miner, whose ordinary occupation was that of a repairer in the employment of a colliery co., was, on Dec. 1, 1922, working in the co.'s mine. An accident happened to him on that date while he was riding on one of the tubs which were used in the charcoal seam of the colliery in which he was working. At the time of the accident he was using his left arm to steady some pieces of timber which were on the top of the train, &, at a time when his arm was above the timber which was resting on the train, his arm came into contact with the roof of the seam with the result that it was injured & had to be amputated. In arbn. proceedings it was contended by resp. co. that when he met with this accident he was (*a*) acting in a manner prohibited by Coal Mines Act, 1911 (c. 50), s. 43, & (*b*) acting outside the scope of his employment, because he was disregarding a prohibition which limited the scope or sphere of his employment & which precluded him from benefiting under Workmen's Compensation Act, 1906 (c. 58). The deputy county ct. judge found appct. had not established that he was one of the class of persons who was entitled to ride on a train in the discharge of his duties; that his purpose in riding on the train was that of keeping timber on the train, & that resps. were entitled to an award in their favour. The workman appealed. Coal Mines Act, 1911 (c. 50), s. 43, exempts from the statutory prohibition from riding on tubs "(*a*) a person travelling on a set or train for the purpose of detaching or attaching tubs from or to the haulage rope, if that set or train is not proceeding at a higher speed than three miles an hour:—*Held:* (1) the man, who was travelling on the train with a view to executing repairs which had to be done in the course of his duty, was travelling on it for the purpose of getting to the point, with the timber, where the repairs had to be done, & he had the duty of attaching & detaching tubs, & was a person travelling on the journey in question, "for the purpose," & came within the exception; when the deputy county ct. judge was finding that the man was riding in order to secure the timber from falling, that finding was not sufficient, unless he found as a fact that that was the only purpose for which he was riding; the deputy county ct. judge, in coming to the conclusion that the man rode on the truck in order to secure the timber from falling because it was not adequately secured, was coming to a conclusion not of fact only, but of mixed law & fact; & he should have come to the conclusion that the workman was a person within the category & a person relieved or excepted from the statutory prohibition; (2) there was on the totality of evidence nothing upon which the deputy county ct. judge could have found that there was in fact such a definite enforcement of the supposed additional domestic prohibition as would have prevented the case from being in that respect governed by the case of *Richardson* v. *Denton Colliery Co., Ltd.*, No. 2560, *post*, & the appeal must be allowed.—WILLIAMS *v.* CLEEVES WESTERN VALLEYS ANTHRACITE COLLIERIES, LTD. (1924), 131 L. T. 231; 17 B. W. C. C. 97, C. A.

Annotation:—*As to* (1) **Refd.** Morgan *v.* Evans, [1926] 2 K. B. 74.

iv. *Being in Unauthorised Place.*

Wilful & serious misconduct, *see* Sub-sect. 5, *post*.

2513. Workman remaining on premises after order to leave.]—SMITH *v.* SOUTH NORMANTON COLLIERY CO., No. 2350, *ante*.

2514. Taking meals in prohibited spot.] — A workman employed at certain works climbed on to a hot water tank in the building to eat his supper. The tank was only partially covered in. On returning to his work the man fell into the tank & was scalded to death. The workmen were not allowed on the tank:—*Held:* the accident did not arise "out of the employment" within Workmen's Compensation Act, 1906 (c. 58), & compensation was not recoverable under that Act. —BRICE *v.* EDWARD LLOYD, LTD., [1909] 2 K. B. 804; 79 L. J. K. B. 37; 101 L. T. 472; 25

—O'HARA *v.* CADZOW COAL CO. (1903), 5 F. (Ct. of Sess.) 439.—**SCOT.**

h. Opening gate fencing — When cage not opposite gate.]—UNITED COLLIERIES *v.* M'GHIE (1904), 6 F. (Ct. of Sess.) 808.—**SCOT.**

k. —— ——.]—GEORGE *v.* GLASGOW COAL CO., LTD., [1909] S. C. (H. L.) 1.—**SCOT.**

l. Whether knowledge of rules material.]—DOBSON *v.* UNITED COLLIERIES, LTD. (1905), 8 F. (Ct. of Sess.) 241.—**SCOT.**

m. Breach prior to but not causing accident.]—PRATIES *v.* BROXBURN OIL CO., [1907] S. C. 581.—**SCOT.**

L. L. R. 759; 53 Sol. Jo. 744; 2 B. W. C. C. 26, C. A.

Annotations:—**Folld.** Pope *v.* Hill's Plymouth Co. (1910), 102 L. T. 632. **Distd.** Harding *v.* Brynddu Colliery Co., [1911] 2 K. B. 747. **Folld.** Barnes *v.* Nunnery Colliery Co., [1912] A. C. 44. **Distd.** Carinduff *v.* Gilmore (1914), 7 B. W. C. C. 981. **Consd.** L. & Y. Ry. *v.* Highley, [1917] A. C. 352; Senior *v.* Brodsworth Main Colliery Co. (1917), 86 L. J. K. B. 1387. **Distd.** Redford *v.* Armstrong, Whitworth (1919), 88 L. J. K. B. 850. **Apld.** Davies *v.* Gwauncaegurwen Colliery, [1924] 2 K. B. 651. **Reld.** Williams *v.* Wigan Coal & Iron Co. (1909), 3 B. W. C. C. 65; Revie *v.* Cumming (1911), 5 B. W. C. C. 483; Pritchard *v.* Torkington (1914), 111 L. T. 917; Sanderson *v.* Wright (1914), 7 B. W. C. C. 141; Sheldon *v.* Needham (1914), 111 L. T. 729.

2515. Workman sent to a specified place—Proceeding to another.]—A workman employed as a potman, whose duty it was, amongst other things, to run messages, was sent by his employer to Hatton Garden for a postal order. He failed to get one there & went on to the General Post Office, some half a mile further. Here he slipped on a banana skin & injured himself. The county ct. judge held that this was not an accident arising out of & in the course of the workman's employment, as he had exceeded his duty:—*Held:* there was evidence to support this finding.—SMITH *v.* MORRISON (1911), 5 B. W. C. C. 161, C. A.

2516. Miner entering prohibited area.]—H., a collier, was employed to drill a hole into a stall below to let out an accumulation of gas; the entrance to the stall from below had been blocked with cross boards to show that it was unsafe in accordance with Colliery Special Rules. In defiance of these rules & in breach of an express order by the overlooker, H. entered the stall from below to ascertain the direction of the drill, with the result that he was suffocated by the gas:—*Held:* the accident arose "out of" the employment, & H.'s dependants were entitled to compensation.—HARDING *v.* BRYNDDU COLLIERY CO., LTD., [1911] 2 K. B. 747; 80 L. J. K. B. 1052; 105 L. T. 55; 27 T. L. R. 500; 55 Sol. Jo. 599; 4 B. W. C. C. 269, C. A.

Annotations:—**Distd.** Parker *v.* Hambrook (1912), 107 L. T. 249. **Consd.** Jackson *v.* Denton Collieries Co. (1914), 110 L. T. 559. **Apld.** Foulkes *v.* Roberts (1919), 122 L. T. 169. **Reld.** Watkins *v.* Guest, Keen & Nettlefolds (1912), 106 L. T. 818; Plumb *v.* Cobden Flour Mills Co., [1914] A. C. 62; Sanderson *v.* Wright (1914), 110 L. T. 517; Wardle *v.* Enthoven (1916), 10 B. W. C. C. 79; Moore *v.* Donnelly, Fife Coal Co. *v.* Sharp, Fife Coal Co. *v.* Fyfe, [1921] 1 A. C. 329.

2517. ——.]—A collier ordered to cut a road in the colliery left his work & went to cut coal in a part of the mine where it was forbidden by special rule to cut any. He thereby undermined some props, & caused a fall, which killed him:—*Held:* the accident did not arise out of nor in the course of the employment.—WEIGHILL *v.* SOUTH HETTON COAL CO., LTD., [1911] 2 K. B. 757, n.; 4 B. W. C. C. 141, C. A.

Annotations:—**Consd.** Harding *v.* Brynddu Colliery Co., [1911] 2 K. B. 747. **Folld.** Parker *v.* Hambrook (1912), 107 L. T. 249. **Distd.** Jackson *v.* Denton Colliery Co. (1914), 7 B. W. C. C. 92. **Reld.** Watkins *v.* Guest, Keen & Nettlefolds (1912), 106 L. T. 818.

2518. ——.]—A collier went to get coal at a stall, in which the props had been removed, & where he had been expressly told by the foreman not to go. He was there killed by a fall of coal:—*Held:* (1) the accident did not arise out of & in the course of the employment.

(2) It is the bounden duty of a county ct. judge to take a sufficient note in workmen's compensation cases (COZENS-HARDY, M.R.).—TOMLINSON *v.* GARRATT'S, LTD. (1913), 6 B. W. C. C. 489, C. A.

2519. ——.]—A collier left his place of work to go & relieve nature in an untimbered "goaf." It was a practice of the colliers to go into the timbered goaf, but they were prohibited from going into the untimbered part. The man was found crushed by a fall of stone, his head being about 15 inches from the last prop & turned towards his working place. The judge found that the man had voluntarily taken upon himself the risk of doing what he was prohibited from doing, & that appct., dependant, had not discharged the *onus* of proving that the accident arose out of the employment:—*Held:* there was evidence to support the findings.—COOK *v.* MANVERS MAIN COLLIERIES, LTD. (1914), 7 B. W. C. C. 696, C. A.

2520. ——.]—A coal miner was at work in a mine hewing coal at a spot in a gallery known as the "horse level." The under manager, seeing there was danger there from a threatened fall of stone, directed the miner & others working with him to move from the horse level a few yards into an adjoining gallery running at right angles into the horse level & get the coal there. While the miner was working a stone fell on him, causing injuries resulting in permanent incapacity. It was proved that at the time of the accident the miner was not working where directed by the under manager, but in the horse level. On an application by the workman for compensation under Workmen's Compensation Act, 1906 (c. 58):—*Held:* the workman had been guilty of disobedience of orders in not working where directed; the orders went only as to the method in which the work was to be done & not to limit the sphere of the employment; & inasmuch as the workman was about the work he was employed to do, though in an improper manner, the accident was one arising "in the course of the employment" so as to entitle him to compensation.—JACKSON *v.* DENTON COLLIERIES CO., LTD. (1914), 110 L. T. 559; 7 B. W. C. C. 92, C. A.

Annotations:—**Reld.** Wardle *v.* Enthoven (1916), 10 B. W. C. C. 79.

2521. —— Coal Mines Act, 1911 (c. 50), s. 43 (1).]—A number of workmen employed at a colliery having knocked off work after completing a night shift, walked along the main haulage road & congregated together near the foot of an incline, the haulage cable being in motion all the time. Some loaded trucks which were being hauled up the incline broke loose & injured one man & killed another. The county ct. judge found that the men congregating there while the cable was still working was a practice which had been adopted for some time & was known to the pit officials. But it was a practice which the men knew to have been prohibited. There were notices warning the men against being on the haulage way contrary to the regulations made under above sect. The employers contended that the accident was not one arising out of the employment, on the ground that the men were on the haulage road in breach of a verbal prohibition by the management, & of the regulations made by above sub-sect. The county ct. judge found that the verbal prohibition had not been enforced, & held that the statutory prohibition did not refer to the particular part of the haulage road on which the men were at the

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PART XIV. SECT. 5, SUB-SECT. 2.—E. (b) iv.

2516*l*. *Miner entering prohibited area.*]—CONWAY *v.* PUMPHERSTON OIL CO., LTD., [1911] S. C. 660; 48 Sc. L. R. 632; [1911] 1 S. L. T. 440; 4 B. W. C. C. 392.—SCOT.

n. *Locomotive craneman in wrong crane bay.*]—MILLER *v.* NORTH BRITISH LOCOMOTIVE CO., LTD., [1909] S. C. 698; 46 Sc. L. R. 755; [1909] 1 S. L. T. 509; 2 B. W. C. C. 80.—SCOT.

Sect. 5.—Right to compensation: Sub-sect. 2, E. (b) iv., & (c).]

time, therefore the accident arose out of & in the course of the employment & he made an award in favour of appcts. :—*Held:* there was evidence to support the finding & no misdirection.—RUCK *v.* STOCKINGFORD COLLIERY CO., LTD., MOORE *v.* SAME (1922), 92 L. J. K. B. 221; 128 L. T. 353; 67 Sol. Jo. 96; 15 B. W. C. C. 219, C. A.

Annotation :—**Refd.** Hawkridge *v.* Howden Clough Collieries Co. (1923), 92 L. J. K. B. 642.

2522. —— ——.]—Appct., a boy of eighteen, was employed as a miner in resp.'s colliery. On Apr. 29, 1922, after working on a night shift, he was walking along a haulage road while the haulage rope was in motion. He slipped & fell, & his ankle was caught between the haulage rope & the wall, & he was injured. The employers denied liability on the ground that they had forbidden workmen to use that road, & that appct. had acted contrary to the provisions of above sub-sect., which prohibits workmen from walking along a haulage road while the haulage rope is in motion except "where there is provided on one side of the road a clear space of at least two feet in width between the tubs & that side of the road. . . ." The county ct. judge found that the employers had not enforced the prohibition, that there was not a clear space of two feet between the haulage rope & the side of the road along the whole length of the haulage road, though there was such a space where the accident occurred, that appct. must be deemed to know the law & had acted in breach of the statutory prohibition, & was not, therefore, entitled to compensation as the accident did not arise out of the employment :—*Held:* the requirement as to space applied to the whole length of the haulage road, the award must be upheld on the true construction of the statutory regulations, & there was no misdirection.—HAWKRIDGE *v.* HOWDEN CLOUGH COLLIERIES CO., LTD. (1923), 92 L. J. K. B. 642; 128 L. T. 786; 67 Sol. Jo. 401; 16 B. W. C. C. 55, C. A.

2523. Employment to get flints—Particular trench forbidden.]—A workman who was employed to dig up flints in a certain hollow or quarry for the purpose of road making was forbidden to do so in a deep trench in the quarry on account of the danger that there was of the earth falling in. Nevertheless he went into the trench to work because the flints were more abundant there & his rate of pay depended upon the quantity of flints that he dug up. While so engaged the earth fell in & smothered him :—*Held:* deceased workman was not merely doing what he was instructed to do in a forbidden manner, but was doing something outside the sphere of his employment & for his own benefit; & therefore the accident did not arise "out of & in the course of" his employment.—PARKER *v.* HAMBROOK (1912), 107 L. T. 249; 56 Sol. Jo. 750; 5 B. W. C. C. 608, C. A.

Annotation :—**Refd.** Clark *v.* Southwark Corpn. (1925), 133 L. T. 753.

2524. Intoxicated seaman ordered to his room—Accident in another part of ship.]—The second mate of a ship was ordered by the captain to go to his room, as he was intoxicated & not fit for work. Instead of doing so, he went aft in the opposite direction to speak to some one on a personal matter, & fell down an open hatchway :—*Held:* the accident did not arise out of the employment.—HORSFALL *v.* JURA (OWNERS) (1913), 6 B. W. C. C. 213, C. A.

Annotation :—**Refd.** Nash *v.* S.S. Rangatira (1914), 7 B. W. C. C. 590.

2525. Seaman returning to ship to sleep—Sleeping on board forbidden.]—A seaman, while returning to his ship at the quay side, met with an accident, which resulted in death. Seamen had been expressly forbidden to sleep on board when in port, other accommodation having been found for them. The accident happened at 11 p.m. :—*Held:* (1) the accident did not arise out of & in the course of the employment.

(2) County ct. judges ought to state the basis of their judgment (COZENS-HARDY, M.R.).

(3) Evidence of important facts omitted from the judge's notes should not be supplied by affidavit, but should be agreed between the parties (*per* CUR.).—GRIGGS *v.* GAMECOCK (OWNERS) (1913), 6 B. W. C. C. 15, C. A.

2526. Employee killed on railway line—No authority to cross.]—A messenger boy, employed at a goods station, crossed the lines at night for some unexplained reason, contrary to rules, & was killed. The county ct. judge found that the accident did not arise out of & in the course of the employment :—*Held:* there was evidence to support the finding.—MCGRATH *v.* LONDON & NORTH WESTERN RY. CO. (1913), 6 B. W. C. C. 251, C. A.

2527. Girl leaving machine to see fellow worker.]—A young girl working at a sweetmeat machine, believed that she heard a fellow worker at the next machine, a few feet off, call & ask her to come to her. She did so at once, without asking why she was wanted, & in some manner she could not explain, caught her hand in the cogs of the next machine, & severely injured it. She had no business as far as her work went, at the next machine :—*Held:* there was no emergency to take her from her proper work, & the accident did not arise out of the employment.—CHINNICK *v.* POTTER & CLARK, LTD. (1916), 9 B. W. C. C. 320, C. A.

2528. Workman leaving duty—For dangerous part of premises.]—A man was employed to fill skips with ore. When a skip was full it was his duty to call for a crane to lift it. If the call was not answered, it was his duty to find the crane boy. The crane travelled across a structure which was placed over a street in order to connect two parts of the employers' premises. This structure, although termed a "bridge," was only designed to carry the travelling crane. One dark evening the man called for the crane, got no reply, went up on to the "bridge" to find the crane boy, & fell through a trapdoor in the "bridge" to the street below & was injured. Workmen were forbidden to go on to the "bridge"; but the man was ignorant of this prohibition, & honestly believed that he ought to go on to the "bridge." It was obviously dangerous to go on the "bridge" at the time. The man ought to have hailed the crane boy from a safe position near the "bridge" :—*Held:* the accident did not arise "out of" the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).

If a risk is not in fact imposed by the employment, a workman's mistaken belief that it is imposed will not make it a risk of the employment.—WARDLE *v.* ENTHOVEN & SONS, LTD. (1916), 86 L. J. K. B. 309; 116 L. T. 103; 33 T. L. R. 123; 61 Sol. Jo. 170; 10 B. W. C. C. 79, C. A.

Annotations :—**Refd.** Finn *v.* Shelton Iron, Steel & Coal Co. (1924), 131 L. T. 213; Borley *v.* Ockenden (1925), 133 L. T. 72; Guest *v.* Gaston (1926), 95 L. J. K. B. 759.

2529. Messroom boy—Descending shaft without authority.]—A mess room boy, employed to run errands, take messages, wait on workmen, &

generally do anything the foreman told him to do, was ascending a ladder from the bottom of a deep shaft, when he slipped & fell, injuring himself. There was a conflict of evidence as to whether it was in any circumstances the boy's duty to descend the shaft. The county ct. judge said that he disbelieved the boy's statement, & believed the evidence of resps. that the boy had been warned & ordered not to descend the shaft. He therefore found that it was no part of the boy's duty to go down the shaft, & held that the accident did not arise out of the employment:—*Held:* there was evidence to support the finding, & no misdirection.—JEFFERY *v.* MOWLEM & Co. (1918), 11 B. W. C. C. 266, C. A.

2530. Taxi-cab driver—Plying for hire in prohibited area.]—A taxi-cab driver, during an afternoon upon which, by arrangement with her employer, she was off duty, drove some fares in her cab outside the area for which the cab was licensed, against the orders of her employer, & in breach of the statutory petrol regulations. When returning, she met with an accident & was severely injured, her right arm having to be amputated:—*Held:* the accident did not arise out of & in the course of the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—DENNIS *v.* TAYLOR (1919), 89 L. J. K. B. 158; 121 L. T. 296; 12 B. W. C. C. 171, C. A.

2531. Sweeper in goods yard—Working in prohibited area.]—A man was employed by a railway co. to sweep their yard & goods warehouse. Several lines of rails ran through the yard, & it was his duty to sweep between the lines, but to stand clear of them when trucks were being run over them. On June 10, 1918, a capstan man in the employ of defts. gave notice to the man that he was going to run trucks into the yard, which notice the man acknowledged. The first truck was sent in, & the capstan man stated that he saw the man apply the brake to it, which was not a part of his duty, & then leave the yard. A second truck was then sent down on another line, & shortly afterwards the man was found sitting on the ground, having sustained injuries from which he died. Upon a claim by his widow for compensation under Workmen's Compensation Act, 1906 (c. 58), the county ct. judge decided that, as soon as the workman received the warning from the capstan man, the line of rails to be used was put outside the sphere of deceased's employment, & that as the last act he was seen to do was to apply the brake to the first truck, which was not within the scope of his duties, the accident did not arise out of & in the course of his employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1). He accordingly made an award in favour of resps.:—*Held:* as deceased man had been seen to leave the yard after applying the brake to the first truck, the latter act was not the last act that he was seen to do; while it was improper for him to be on the line which was being used for shunting trucks, he might, in pursuance of his duties as sweeper, have intended to cross that line while the trucks were at rest in order to sweep in another place; the facts had not been fully ascertained, & there must be a new trial.—DAWSON *v.* GREAT CENTRAL RY. Co. (1919), 88 L. J. K. B. 1177; 121 L. T. 263; 12 B. W. C. C. 161, C. A.

2532. Entry into prohibited area.]—DAVIES *v.* GWAUNCAEGURWEN COLLIERY, No. 2572, *post.*

(c) Prohibitions limiting Mode of Work.

2533. Touching machinery in motion—Replacing band.]—WHITEHEAD *v.* READER, No. 2472, *ante.*

2534. —— Oiling.]—A workman was employed to oil machinery. He was strictly forbidden to oil it when it was in motion. He had been seen to do so, & warned against the practice. He did so again, & received severe injuries, from which he died:—*Held:* the accident arose out of & in the course of the employment.—MAWDSLEY *v.* WEST LEIGH COLLIERY CO., LTD. (1911), 5 B. W. C. C. 80, C. A.

Annotations:—**Apld.** Watkins *v.* Guest, Keen & Nettlefolds (1912), 106 L. T. 818. **Distd.** M'Diarmid *v.* Ogilvy (1913), 6 B. W. C. C. 878. **Apld.** Chilton *v.* Blair (1914), 111 L. T. 782; Sanderson *v.* Wright (1914), 7 B. W. C. C. 141. **Distd.** Herbert *v.* Fox, [1916] 1 A. C. 405. **Foll.** Phillips *v.* Estler (1921), 14 B. W. C. C. 138. **Reid.** Williams *v.* Llandudno Coaching & Carriage Co., [1915] 2 K. B. 101; Baker *v.* Bradford (1916), 85 L. J. K. B. 1031; Leivers *v.* Barber, Walker (1924), 131 L. T. 12; Upton *v.* G. C. Ry. [1924] A. C. 302.

2535. —— Cleaning.]—Resp. was employed by applts. to work at a machine, & it was part of his duty to clean the machine when necessary. Workmen were expressly forbidden to clean machines when in motion, & resp. was aware of this rule. He did clean his machine while it was in motion, & was seriously injured in consequence:—*Held:* he was acting within the scope of his employment although disobediently, & he was entitled to compensation under the Workmen's Compensation Act, 1906 (c. 58).—ESTLER BROTHERS *v.* PHILLIPS (1922), 91 L. J. K. B. 470; 127 L. T. 73; 15 B. W. C. C. 291, H. L.; *affg.* S. C. *sub nom.* PHILLIPS *v.* ESTLER BROTHERS (1921), 14 B. W. C. C. 138, C. A.

Annotations:—**Consd.** Leivers *v.* Barber, Walker (1924), 93 L. J. K. B. 933. **Reid.** Ardon Coal Co. *v.* M'Intosh (1923), 16 B. W. C. C. 320; Rodger *v.* Fife Coal Co. (1923), 16 B. W. C. C. 299; Fife Coal Co. *v.* Braid (or Laurence or Wilson or Murray) (1924), 93 L. J. P. C. 225; Finn *v.* Shelton Iron, Steel & Coal Co. (1924), 131 L. T. 213.

2536. ——.]—A boy employed by a builder & contractor in doing odd jobs had asked to be put on a machine & was instructed to feed a planing machine with planks, the thickness of which had to be reduced, & to take them out at the other end. He was warned not to touch the machine if anything went wrong with it, but to report the matter to the foreman. The machine having stuck the boy tried to get the plank out of it by a method he had seen other workmen use, but in so doing accidentally restarted it & seriously injured his fingers. The county ct. judge found that the accident was caused, not by the boy doing anything outside the scope of his employment, but by the disregard of a general prohibition in the course of doing work within the scope of the employment:—*Held:* there was evidence to support the finding & no misdirection.—FOULKES *v.* ROBERTS (1919), 122 L. T. 169; 12 B. W. C. C. 370, C. A.

2537. Collier entering dangerous seam.]—HARDING *v.* BRYNDDU COLLIERY CO., LTD., No. 2516, *ante.*

2538. Collier riding on footboard of train provided by employers.]—A collier on his way to the colliery in a train provided for the men by the employers, when near the station & before the

PART XIV. SECT. 5, SUB-SECT. 2.—E. (c).

o. Elevator operator—Starting elevator from outside.]—A workman employed to operate an elevator is acting within the scope of his employment when he starts it when on the outside, although expressly warned not to do it.—WESTERN TRUST CO. *v.* WILLOUGHBY & DUNCAN (1914), 29 W. L. R. 818; 7 W. W. R. 569.—CAN.

p. Brakeman passing between cars to couple.]—WRIGHT *v.* CANADIAN PACIFIC RY. Co., [1923] 1 D. L. R. 371; 16 Sask. L. R. 367; [1923] 1 W. W. R. 120.—CAN.

Sect. 5.—Right to compensation: Sub-sect. 2, E. (c) & (d), & F.]

train had stopped, got out of the carriage on to the footboard so as to be ready to jump off as soon as the train arrived at the stopping place. He fell off & lost both hands. The county ct. judge held that he was riding in the train in the course of his employment, & therefore, although he was guilty of wilful misconduct, the injury being permanent, he was entitled to compensation:—*Held:* this decision must be affirmed.—WATKINS *v.* GUEST, KEEN & NETTLEFOLDS, LTD. (1912), 106 L. T. 818; 5 B. W. C. C. 307, C. A.

Annotations:—**Folld.** Frazer *v.* Riddell (1913), 7 B. W. C. C. 841. **Distd.** Price *v.* Tredegar Iron & Coal Co. (1914), 111 L. T. 688. **Apld.** Sanderson *v.* Wright (1914), 110 L. T. 517. **Consd.** Pritchard *v.* Torkington (1915), 111 L. T. 917. **Refd.** Plumb *v.* Cobden Flour Mills Co., [1914] A. C. 62; Woodilee Coal & Coke Co. *v.* Robertson (1919), 12 B. W. C. C. 463.

2539. Servant riding instead of leading horse.]—A groom was thrown from a horse which he was exercising, & which, there was some evidence, he had been told to lead, but not to ride. The horse threw him, & he lost the sight of one eye & suffered other injuries. The county ct. judge found that the accident arose out of & in the course of the employment:—*Held:* there was evidence to support the finding.—WRIGHT *v.* SCOTT (1912), 5 B. W. C. C. 431, C. A.

2540. Employee crossing railway line—Though prohibited by railway company.]—Deceased was employed as a traveller by resps., who were dealers in scrap iron. It was his duty to go to various railway stations in different parts of the country to examine the scrap iron which was to be consigned to his employers, & to give directions as to what was to be done with the goods. In the course of his work he went, as he had gone on many previous occasions, to the goods yard at a certain station belonging to a railway co. At that station there were several lines, & the yard was so constructed as to admit of a man crossing from one side to the other, but he could go round by the end of the stop blocks & so avoid danger. It was contrary to the rules & regulations of the railway co. to cross the yard while shunting operations were going on. On the day of the accident complained of, the goods for resps. were on the other side of the yard, & deceased went round by the end of the stop blocks. On coming back from where he had seen the goods, he attempted to cross one of the railway lines & in doing so he was caught between the buffers of two waggons & killed:—*Held:* even although deceased might have been guilty of "serious & wilful misconduct" within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 1 (2) (*c*), yet that circumstance was immaterial inasmuch as the accident which occurred to him resulted in his death; & dependants of deceased were no less entitled to compensation than if he had been one of the servants of the railway co. who had in the course of his duty crossed the line while shunting operations were in progress & met with his death, the accident having been caused by a risk incident to the employment.—SANDERSON *v.* WRIGHT (HENRY), LTD. (1914), 110 L. T. 517; 30 T. L. R. 279; 7 B. W. C. C. 141, C. A.

2541. Sitting at work instead of standing.]—(1) If an accident occurs through a workman doing his work in a wrong way it may be an accident arising out of his employment within the meaning of Workmen's Compensation Act, 1906 (c. 58). Resp. was employed by applts. to attend to a rolling machine. It was his duty to stand at the machine, but he chose, in disobedience to the rules, to sit on the guard, & in consequence his foot was caught in the rollers & seriously injured. The accident would not have happened if he had remained standing:—*Held:* the accident arose out of his employment, & he was entitled to compensation.

(2) Construction of the Acts (*see* No. 2041, *ante*).—BLAIR & CO., LTD. *v.* CHILTON (1915), 84 L. J. K. B. 1147; 113 L. T. 514; 31 T. L. R. 437; 59 Sol. Jo. 474; 8 B. W. C. C. 324, H. L.; *affg.* S. C. *sub nom.* CHILTON *v.* BLAIR & CO., LTD. (1914), 111 L. T. 782, C. A.

Annotations:—*As to* (1) **Folld.** Partridge *v.* Whiteley (1915), 8 B. W. C. C. 53. **Distd.** Baker *v.* Bradford (1916), 85 L. J. K. B. 1031; Herbert *v.* Fox, [1916] 1 A. C. 405. **Consd.** Clarke *v.* Anderson & Andersons (1919), 12 B. W. C. C. 74. **Refd.** Williams *v.* Llandudno Coaching & Carriage Co., [1915] 2 K. B. 101; Scott *v.* Pearson, [1916] 2 K. B. 61; Wardle *v.* Enthoven (1916), 86 L. J. K. B. 309; L. & Y. Ry. *v.* Highley, [1917] A. C. 352; Maydew *v.* Chatterley-Whitfield Collieries, [1917] 2 K. B. 742; Bourton *v.* Beauchamp, [1920] A. C. 1001; Leivers *v.* Barber, Walker (1924), 93 L. J. K. B. 933; Upton *v.* G. C. Ry., [1924] A. C. 302.

2542. Firing charge without orders.]—One of the duties of a miner employed as a "pikeman" was to bore & charge holes for blasting, &, after waiting for the fireman's word, to light the fuses he had laid, & fire the holes. He bored & charged two holes, & then, without waiting for further instructions from the fireman, who was temporarily absent, fired both holes, & was killed by the explosion of the second:—*Held:* the prohibition he had disobeyed was not one limiting the sphere of employment but related to an act within that sphere, & the accident therefore arose out of his employment.—CORBETT *v.* PITT (H. S.) & CO. (1915), 8 B. W. C. C. 466, C. A.

2543. Crossing table in front of circular saw.]—Resps. were timber merchants. For cutting up the timber they had a circular saw, against which the wood to be sawn was pressed by a moving table, to which it was fastened down, worked by machinery. A lad helped the foreman sawyer to work the machine. The foreman said he would have his tea, & left the saw running, telling the lad to "clear up" while he was away. Some pieces of wood had to be cleared away on the opposite side of the table, & instead of going round he crossed the table. For some reasons unknown, the lever which held the table stationary became released, & the lad was pushed up against the saw & both feet were so injured that they had to be amputated. The county ct. judge rejected the employers' contention that, in crossing the table while the saw was running, the lad incurred a risk wholly outside his employment, & found that the accident arose out of employment & awarded him compensation:—*Held:* there was evidence to support the finding, & no misdirection.—CLARKE *v.* ANDERSON & ANDERSONS (1919), 12 B. W. C. C. 74, C. A.

2544. Girl tending machine with hair down.]—Appct., a girl of sixteen years old, was employed by resps. to take full bobbins off the frames & replace them with empty ones. When the bobbins were not full, she was told to go to a place called the "broad alley," to wait until she was required. While waiting there she sat on a skip with her back leaning against the frame of the machine, & her hair, which was down her back, was caught in the moving machinery & she was injured. There were typewritten notices in the mill prohibiting girls from wearing their hair down their backs, & the employers alleged that the girls had been warned against the practice. The county ct. judge, however, on a claim for compensation being made, found that this girl had not received adequate warning & had not seen the notices, & that in fact

it had been her custom to wear her hair in this way when working. He further found that although the girl was doing something in a wrong way she was not doing anything outside the scope of her employment, & he therefore made an award in her favour:—*Held:* there was evidence to support the findings & no misdirection.—MATTHEWS *v.* MCCLURE & SONS, LTD. (1920), 90 L. J. K. B. 510; 124 L. T. 10; *sub nom.* MCCLURE & SONS, LTD. *v.* MATTHEWS, 13 B. W. C. C. 221, C. A.

(d) Ambiguous Instructions.

2545. Workman entitled to compensation.]—A painter was engaged with his mate in painting a furnace from a scaffold on a gantry about 100 ft. above the ground. Owing to the proximity to the gantry of explosion doors, from which poisonous fumes escaped, when the furnace was in full blast, notices were placed in conspicuous places prohibiting workmen from working on the furnace without permission. The painter had for three days been prohibited from continuing his painting on the furnace. On the fourth day he delayed going up for about three hours, & ascended the furnace with his mate about 10 a.m. He subsequently fell to the ground & was killed. In arbn. proceedings commenced by the widow, the county ct. judge, at a late stage, admitted evidence by the mate that deceased man had told him that he had, on the previous evening, asked the furnace manager to allow him to continue his work on the following day, & that the manager had said that he would make arrangements for deceased workman to go up on the following morning. The county ct. judge found that the man went up in the *bonâ fide* belief that he had permission; & that in view of the ambiguity of the instructions, the employers could not be heard to say, when the workman adopted one of the courses, that those were not the instructions given. He therefore made an award in favour of the dependant:—*Held:* the evidence was admissible as evidence of a declaration or statement in the course of his duty; the facts justified the county ct. judge in making the award; & the appeal must be dismissed.—FINN *v.* SHELTON IRON, STEEL & COAL CO., LTD. (1924), 131 L. T. 213; 17 B. W. C. C. 69, C. A.

F. Seaman Leaving or Returning to Ship.

2546. Fall from ladder between quay & ship.]—Applt.'s husband was employed by resps. to watch trawlers as they lay in Granton Harbour. He was on duty for twenty-five hours, during which time he had to provide his own food; & in connection with his duties it was occasionally necessary for him to be on the quay. In the course of his watch he left the trawlers & went to an hotel which was a short distance away from the harbour, where he got half a glass of whiskey & a glass of beer. He was absent a very short time, & on his return to the quay, while descending a fixed ladder attached to the quay to go on board one of the trawlers, he fell into the water & was drowned:—*Held:* the accident arose "out of & in the course of" the employment of deceased within the meaning of Workmen's Compensation Act, 1906 (c. 58), for when the accident occurred he had returned to the quay which was the scene or sphere of his duty.

Qu.: must a party claiming compensation under Workmen's Compensation Act, 1906 (c. 58), prove affirmatively not only that the accident causing the injury happened during the workmen's employment, but also arose out of & in the course of his employment; & if the facts proved are equally consistent with the existence or non-existence of these essential conditions, must appct. fail.—LOW (OR JACKSON) *v.* GENERAL STEAM FISHING CO., LTD., [1909] A. C. 523; 78 L. J. P. C. 148; 101 L. T. 401; 25 T. L. R. 787; 53 Sol. Jo. 763; 2 B. W. C. C. 56, H. L.

Annotations:—**Distd.** Hewitt *v.* Ship Duchess, [1910] 1 K. B. 772. **Expld.** Moore *v.* Manchester Liners, [1910] A. C. 498. **Consd.** Webber *v.* Wansborough Paper Co., [1913] 3 K. B. 615. **Reld.** Sneddon *v.* Greenfield Coal & Brick Co. (1910), 3 B. W. C. C. 557; Kitchenham *v.* S.S. Johannesburg, Leach *v.* Oakley Street, [1911] 1 K. B. 523; Warren *v.* Hedley's Colliery Co. (1913), 6 B. W. C. C. 136; Trim Joint District School, Board of Management *v.* Kelly, [1914] A. C. 667; Braine *v.* Port of London Authority (1920), 13 B. W. C. C. 342.

2547. ——.]—(1) M. was a fireman employed on board a steamship. While that steamship was lying off Brooklyn, M. went ashore with leave for his own purposes to buy certain articles that he wanted. He arrived back at the quayside after midnight, & in climbing up the ladder which connected the ship with the quay he fell into the water & was drowned:—*Held:* the accident arose out of & in the course of M.'s employment, & therefore, his widow was entitled to claim compensation.

(2) An accident befalls a man "in the course of" his employment, if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, & at a place where he may reasonably be during that time (LORD LOREBURN, C.).—MOORE *v.* MANCHESTER LINERS, LTD., [1910] A. C. 498; 79 L. J. K. B. 1175; 103 L. T. 226; 26 T. L. R. 618; 54 Sol. Jo. 703; 3 B. W. C. C. 527, H. L.; *revsg.*, [1909] 1 K. B. 417, C. A.

Annotations:—*As to* (1) **Consd.** Low (or Jackson) *v* General Steam Fishing Co., [1909] A. C. 523; Watson *v.* Sherwood (1909), 2 B. W. C. C. 462. **Distd.** Hewitt *v.* Ship Duchess, [1910] 1 K. B 772. **Expld.** Kitchenham *v.* S.S. Johannesburg, Leach *v.* Oakley Street, [1911] 1 K. B. 523. **Consd.** Spencer *v.* Liberty (Owners) (1917), 86 L. J. K. B. 1381; Davidson *v.* M'Robb or Officer, [1918] A. C. 304; Howitson *v.* St. Helens Colliery Co. (1923), 16 B. W. C. C. 230. **Expld.** St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59. **Reld.** Bender *v.* S.S. Zent, [1909] 2 K. B. 41; Gilbert *v.* Nizam (Owners) (1910), 3 B. W. C. C. 455; Halvorsen *v.* Salveson (1911), 5 B. W. C. C. 519; Kitchenham *v.* S.S. Johannesburg, Leach *v.* Oakley Street, [1911] A. C. 417; Newson *v.* Burstall & Farrow (1915), 112 L. T. 792; Webber *v.* Wansborough Paper Co., [1915] A. C. 51. *As to* (2) **Consd.** Low (or Jackson) *v.* General Steam Fishing Co., [1909] A. C. 523; Kitchenham *v.* S.S. Johannesburg, Leach *v.* Oakley Street, [1911] A. C. 417. **Expld.** M'Lauchlan *v.* Anderson (1911), 4 B. W. C. C. 376. **Consd.** Parker *v.* Ship Black Rock, [1914] 2 K. B. 39; Davidson *v.* M'Robb or Officer, [1918] A. C. 304. **Reld.** Smith *v.* Fife Coal Co. (1913), 6 B. W. C. C. 435; White *v.* Avery (1915), 9 B. W. C. C. 663. Espie *v.* British Basket Co. (1920), 13 B. W. C. C. 492; St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59.

2548. Fall from gangway leading to ship.]—A sailor, having been absent on leave, was returning to his ship, when he fell into the water. There was no evidence whether he had ever reached the gangway which led from the wharf to the ship & was well lighted:—*Held:* the accident arose in the course of, but not out of the employment, & no compensation was payable.—KITCHENHAM *v.* JOHANNESBURG (OWNERS), [1911] A. C. 417; 80 L. J. K. B. 1102; 105 L. T. 118; 27 T. L. R. 504; 55 Sol. Jo. 599; 4 B. W. C. C.

PART XIV. SECT. 5, SUB-SECT. 2.—F.

2548 1. *Fall from gangway leading to ship.*]—The workman, an engineer, was returning to his ship to attend to the boilers on a dark night. He mistook the gangway to the tier of boats next to his proper tier for his own gangway, & fell therefrom & was drowned:—*Held:* the accident arose out of & in the course of the employment.—WILSON *v.* LYLE (1925), 18 B. W. C. C. 731.—**SCOT.**

q. *Fall when jumping from pier to ship—Return to duty.*]—KEARON *v.*

Sect. 5.—Right to compensation: Sub-sect. 2, F., G. & H.]

311, H. L.; *affg.* S. C. *sub nom.* KITCHENHAM *v.* JOHANNESBURG (OWNERS), LEACH *v.* OAKLEY STREET & Co., [1911] 1 K. B. 523, C. A.

Annotations:—**Apld.** Biggart *v.* S.S. Minnesota (1911), 5 B. W. C. C. 68. **Consd.** Booth *v.* Leeds & Liverpool Canal Co. (1914), 7 B. W. C. C. 434; Craig *v.* S.S. Calabria (1914), 7 B. W. C. C. 932; M'Crae *v.* Renfrew (1914), 7 B. W. C. C. 898; Parker *v.* Ship Black Rock, [1914] 2 K. B. 39; White *v.* Avery (1915), 9 B. W. C. C. 663. **Apld.** Spencer *v.* Liberty (Owners) (1917), 86 L. J. K. B 1381. **Consd.** Davidson *v.* M'Robb or Officer, [1918] A. C. 304. **Refd.** Amys *v.* Barton (1911), 105 L. T. 619; Greene *v.* Shaw (1911), 5 B. W. C. C. 573; Halvorsen *v.* Salvesen (1911), 5 B. W. C. C. 519; M'Laren *v.* Calc. Ry. (1911), 5 B. W. C. C. 492; Refuge Assce. *v.* Millar (1911), 5 B. W. C. C. 522; Martin *v.* Lovibond (1914), 7 B. W. C. C. 243; Webber *v.* Wansborough Paper Co., [1915] A. C. 51; Williams *v.* Llandudno Coaching & Carriage Co. (1915), 112 L. T. 848; M'Lean *v* Macbrayne (1916), 9 B. W. C. C. 687; Blake *v.* Ramsay (1917), 10 B. W. C. C. 500; St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59; Wilson *v.* Lyle (1925), 18 B. W. C. C. 731.

2549. Fall passing from ladder to rail of ship.]—A seaman had returned to his ship. He had passed over a gangway from the wharf, & had one foot on the rail of the ship & the other on a ladder leading from the rail to the deck, when he overbalanced & fell over the side of the ship & was drowned:—*Held:* the accident arose out of & in the course of the workman's employment.—CANAVAN *v.* UNIVERSAL (OWNERS) (1910), 3 B. W. C. C. 355, C. A.

2550. Fall from pier—While waiting for boat.]—The master of a ship, which was lying in Bangor Roads owing to stress of weather during a trading voyage from Liverpool to Penmaenmawr & back, went on shore in the evening &, after staying at an hotel for an hour, returned to the pier & hailed his ship to send a boat. Before the boat reached him he fell off the pier & was drowned. It was not proved that he went ashore on the ship's business, but it was proved that he had a right to be on shore. His dependants claimed compensation under Workmen's Compensation Act, 1906 (c. 58):—*Held:* the accident did not arise out of deceased's employment.—FLETCHER *v.* DUCHESS (OWNERS), [1911] A. C. 671; 81 L. J. K. B. 33; 27 T. L. R. 508; 55 Sol. Jo. 598; 4 B. W. C. C. 317; *sub nom.* HEWITT *v.* DUCHESS (OWNERS), 105 L. T. 121, H. L.

Annotations:—**Refd.** Halvorsen *v.* Salvesen (1911), 5 B. W. C. C. 519; Kitchenham *v.* S.S. Johannesburg, Leach *v.* Oakley Street, [1911] 1 K. B. 523.

2551. —— Bringing boat to return to ship.]—The mate of a barge went ashore, though under no obligation to do so, with the captain, who had to purchase provisions. He moored the boat they had used to the end of a floating pier. On returning in the evening the captain told the mate to go on the pier, get the boat, & bring it round to him at a landing stage. The night was dark, & no lights were permitted on or near the pier. He went on to the pier, but there was some doubt on the evidence whether he actually reached the boat or not. A splash was heard & he fell into the water & was drowned. The county ct. judge drew the inference that deceased had reached the boat & was therefore within the ambit of his employment, & the accident arose out of & in course of that employment:—*Held:* there was evidence to support the inference.—HARMAN *v.* CROW & Co. (1915), 9 B. W. C. C. 88, C. A.

2552. Fall from steps of jetty—Not property of employers.]—A ship's carpenter went on shore by leave & on his return, going up steps, which were part of a jetty which was not the property or under the control of the shipowners, the hand rail broke & he fell into a small boat in the water underneath the jetty. On a claim for compensation the county ct. judge made an award in favour of the employers on the ground that the accident did not arise in the course of the employment; that the jetty was not the property of nor under the control of the employers; & that the workman, though returning to his ship, had not reached it & was in effect still on land:—*Held:* it was not possible to say there was no evidence on which the county ct. judge could come to the conclusion he did come to, & the award must stand.—LASHBROOK *v.* TIMES SHIPPING CO. (1923), 129 L. T. 403; 16 Asp. M. L. C. 209; *sub nom.* LASHBROOK *v.* TIMES SHIPPING CO., LTD., ALCOCK *v.* TIMES SHIPPING CO., LTD., 16 B. W. C. C. 63, C. A.

G. Acts done under Orders from Superior.

2553. General rule.]—The master of a steam trawler proceeding upon a fishing voyage was warned by the Admlty., of an enemy's mine field, & directed to steer a roundabout course which would avoid it. In spite of these instructions he steered an easterly course directly through the mine field towards his fishing ground. While the vessel was in the mine field he saw some mines, which he buoyed, & then steered southward to warn some war ships, which he saw in that direction, of the mines. While on this course the vessel struck another mine, & was blown up. The chief engineer was severely injured by the explosion, & claimed compensation. He was unaware of the Admlty. instructions:—*Held:* the injury was caused by "accident," &, as it happened while the engineer was carrying out the lawful orders of the master, it arose out of & in the course of the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).

If a person is put over a subordinate employee, that employee is not at liberty in matters within the scope of the employment of the subordinate to disobey orders given to him by the superior & we cannot encourage any argument that if in those circumstances an accident arises the employer is not liable (COZENS-HARDY, M.R.).—RISDALE *v.* KILMARNOCK (OWNERS), [1915] 1 K. B. 503; 84 L. J. K. B. 298; 112 L. T. 439; 31 T. L. R. 134; 59 Sol. Jo. 145; 8 B. W. C. C. 7, C. A.

2554. Sphere of employment enlarged—Instruction by engineer to put machine in order.]—A machine for cutting tin lids, at which the workgirl was employed, jambed by reason of a piece of tin sticking in the machinery. She reported it, as was her duty, to the engineer in charge, who wrongly told her to see to it herself as he could not come then. While she was trying to remove the piece of tin she was seriously injured as the result of a fellow workgirl, who knew what was being done, interfering with & starting the machine by putting her foot on the treadle for some unknown reason:—*Held:* the scope of the employment had been enlarged by the direction of the engineer, & the accident arose out of & in the course of that employment.—GEARY *v.* GINZLER &

KEARON (1911), 45 I. L. T. 96; 4 B. W. C. C. 435.—IR.

r. *Fall from quay — Returning with own provisions—Employment on ship in port with liberty to go ashore.*]—CRAIG *v.* CALABRIA (OWNERS) (1914), 7 B. W. C. C. 932.—SCOT.

t. *Fall when jumping from ship to quay—Leaving ship in breach of regulations.*] — DURIE *v.* ANCHOR-DONALDSON LINE, [1926] S. C. 228.—SCOT.

PART XIV. SECT. 5, SUB-SECT. 2.—G.

a. *Sphere of employment enlarged —Roadman instructed to cut bracken for bedding.*]—COLLINS *v.* OPOTIKI COUNTY, [1923] N. Z. L. R. 747.—N.Z.

CO., LTD. (1913), 108 L. T. 286; 6 B. W. C. C. 72, C. A.

Annotation :—**Refd.** Risdale v. S.S. Kilmarnock (1914), 8 B. W. C. C. 7.

2555. —— Instruction to "go & find a job."]—The workman, a boy of fourteen, was employed as a truck boy on a machine for cutting & making tops of packing cases, his duty being to push trucks of wood from the machine to the stack yard. He had nothing to do with the machine itself. Whilst waiting for a truck to be filled for him to move, one of his employers, seeing him apparently idle, told him to "go & find a job." He accordingly got a short stick & endeavoured to clear out the blower of the machine, which had become choked with chips, & in so doing slipped, & putting out his hand to save himself brought it in contact with the rotary saw of the machine & was seriously injured. On an application by him for compensation the county ct. judge held that the accident did not arise out of & in the course of the employment :—*Held :* the direction by the employer to "go & find a job" must be taken to have meant that appct. was to do something which, although it was not within the scope of the employment was boys' work & was not improper for him to do; what appct. did was within that direction; & accordingly the accident arose out of & in the course of the employment.—LANE v. LUSTY (W.) & SON, [1915] 3 K. B. 230; 84 L. J. K. B. 1342; 113 L. T. 615; 8 B. W. C. C. 518, C. A.

2556. —— Instruction to use lift after forbidden hours.]—A lad worked on the top story in a building in which there was a lift. There was an old notice posted up to the effect that coal should only be taken up in the lift before 9 a.m. In the afternoon the lad was told to get some coal. He went downstairs & found a boy who helped him to fill a bath with coal & put it in the lift; & then he asked the man in charge of the lift to send it up & got into the lift himself. On the way up his foot was injured in some way by the lift. The county ct. judge held that the injury was due to an accident arising out of the lad's employment: —*Held :* there was no misdirection & the award was right.—MARSHALL v. RODGERS (JOSEPH) & SONS, LTD. (1917), 10 B. W. C. C. 588, C. A.

2557. —— Instruction by foreman to assist fellow employee.]—A steel dresser worked near a bandsaw at which a young woman was employed. On June 12, 1918, he helped her, at her request, to remove a blunt saw & put in a sharp one, & then to set her job, the steel casting to be worked being too heavy for her. While helping her further he overbalanced & was thrown against the saw, losing the first three fingers & part of the little finger of his right hand. His & the girl's evidence was that the assistant foreman had told him to help the girl in any difficulty, but the assistant foreman said he had told the girl to get the workman's help only in cleaning sand off the castings, & that if she was in difficulties in connection with her work at the saw she was to get a sawyer's help :—*Held :* the workman had been obeying the instructions of the assistant foreman in helping the girl, & therefore the accident arose out of & in the course of the employment, so that the workman was entitled to compensation.—CARS v. VICKERS, LTD. (1919), 88 L. J. K. B. 408; 120 L. T. 465; 12 B. W. C. C. 27, C. A.

H. Acts in accordance with Usage or Practice.

2558. Mines—Using sump shaft instead of ladder.]—The proper & safer way to proceed from a lower to a higher level of a mine was by a ladder, though the miners habitually used a sump shaft provided for raising metals. At the time of the accident a miner was leaving by way of the sump shaft :—*Held :* there was evidence that the accident arose out of & in the course of his employment, & was not due to serious & wilful misconduct.—DOUGLAS v. UNITED MINERAL MINING CO., LTD. (1900), 2 W. C. C. 15, C. A.

Annotation :—**Refd.** Harding v. Brynddu Colliery Co. (1911), 80 L. J. K. B. 1052.

2559. —— Miners leaving by usual route.]—(1) Where in a case under the Workmen's Compensation Act, 1906 (c. 58), the facts are either found or admitted, the only question to be decided is the inference to be drawn from those facts, which is a question of law, & it is open to the Ct. of Appeal in such a case to review the conclusion at which the county ct. judge has arrived, & to say whether it is or is not wrong in point of law, & whether or not he has misdirected himself.

(2) The employment of a workman is not limited to the moment when he reaches the place where he is to begin his work, & to the moment when he ceases that work. It includes a reasonable interval of time & space.

(3) A collier left his work, after coming up from the pit, by a route which crossed on the level some lines of rail belonging to & under the control of his employers. At the time the workman tried to cross there were some trucks standing on the line, & he tried to get under them; as he was doing so the trucks moved, & he was seriously injured. The county ct. judge found on the facts that there were three ways by which the workman might have gone home, but the way he went by was the shortest, was always used by all the workmen who lived in the same direction as appct., & was so used with the knowledge & consent of the employers :—*Held :* the accident arose out of & in the course of appct.'s employment within Workmen's Compensation Act, 1906 (c. 58), s. 1.—GANE v. NORTON HILL COLLIERY CO., [1909] 2 K. B. 539; 78 L. J. K. B. 921; 100 L. T. 979; 25 T. L. R. 640; 2 B. W. C. C. 42, C. A.

Annotations :—*As to* (1) **Refd.** Scott v. Pearson, [1916] 2 K. B. 61. *As to* (2) **Refd.** Hoskins v. Lancaster (1910), 26 T. L. R. 612. *As to* (3) **Distd.** Gilbert v. Nizam (Owners), [1910] 2 K. B. 555; Popo v. Hill's Plymouth Co. (1910), 102 L. T. 632. **Foll.** Nicol v. Young's Paraffin Light & Mineral Oil Co. (1915), 8 B. W. C. C. 395; Fox v. Rees & Kirby (1916), 86 L. J. K. B. 43. **Apld.** Longhurst v. Stewart (1912), Ltd., [1916] 2 K. B. 803. **Distd.** L. & Y. Ry. v. Highley, [1917] A. C. 352. **Consd.** St. Helens Colliery Co. v. Hewitson, [1924] A. C. 59. **Refd.** Brice v. Lloyd, [1909] 2 K. B. 804; Phillips v. Williams (1911), 4 B. W. C. C. 143; Cook v. Ship Montreal (1913), 108 L. T. 164; Webber v. Wansborough Paper Co., [1913] 3 K. B. 615; Usher's Wiltshire Brewery v. Bruce, (1914), 6 Tax Cas. 399; Baker v. Bradford (1915), 85 L. J. K. B. 1031; Williams v. Llandudno Coaching & Carriage Co. (1915), 112 L. T. 848; Palmer v. Harrod's (1916), 9 B. W. C. C. 291; Senior v. Brodsworth Main Colliery Co. (1917), 117 L. T. 496; Whittall v. Staveley Iron & Coal Co. (1917), 86 L. J. K. B. 985; Davidson v. M'Robb or Officer, [1918] A. C. 304; Gibbins v. British Dyes (1918), 11 B. W. C. C. 180; Stevens v. L. & S. W. Ry. (1918), 87 L. J. K. B. 756; Horner v. Wandsworth, Wimbledon & Epsom Gas Co. (1919), 88 L. J. K. B. 355; Armstrong, Whitworth v. Redford, [1920] A. C. 757; Bratton v. Jonas & Colver (1920), 13 B. W. C. C. 305; Brown v. Baton Colliery Co. (1921), 14 B. W. C. C. 265; Howells [1924] 2 W. W. R. 660.—**CAN.**

PART XIV. SECT. 5, SUB-SECT. 2.—H.

b. *Mines — Drawer letting down loaded hutch without waiting for pony driver.*]—BAIRD (WILLIAM) & CO., LTD. v. ROBSON (1914), 7 B. W. C. C. 925.—**SCOT.**

c. *Workmen climbing between cars when leaving work.*] — MACKENZIE v. GRAND TRUNK PACIFIC RY. CO., [1926] 1 D. L. R. 1; [1926] S. C. R. 178; *affg.*, [1925] 3 D. L. R. 621; [1925] 2 W. W. R. 393; 19 Sask. L. R. 448; *affd.*, [1924] 3 D. L. R. 47;

d. *Workmen exchanging work.*] — A workman was employed as a "barrow-man" by the consignee of a cargo, in the unloading of a ship. Other men working at the unloading were employed by a ship-broker,

Sect. 5.—Right to compensation: Sub-sect. 2, H. & I.]

v. Powell Duffryn Steam Coal Co., [1926] 1 K. B. 472. *Generally*, **Reld.** Wilmerson *v.* Lynn & Hamburg S.S. Co. (1913), 109 L. T. 53.

2560. —— Miners riding on trucks.] — A collier met his death by accident while riding on a tub between the pit bottom & his place of work. By the special rules of the colliery, riding on tubs was forbidden except where permitted by the manager or "under-looker," but there was no evidence that deceased knew of the prohibition. Such permission had been given as to certain parts of the mine, through the fireman on duty there, but not as to the part where the accident happened. There was evidence that it was the regular practice of men returning from the night shift in this part of the mine to ride on tubs when they could. By a special rule it was part of the fireman's duty to see that the rules were obeyed; but he, finding the practice existing when he was put on duty in that part of the mine, & believing that it had been authorised before he came, never interfered with it:—*Held:* the accident arose out of the employment.—RICHARDSON *v.* DENTON COLLIERY CO., LTD. (1913), 109 L. T. 370; 6 B. W. C. C. 629, C. A.

Annotations:—**Apld.** Williams *v.* Cleeves Western Valleys Anthracite Collieries (1924), 131 L. T. 231. **Reld.** Maydew *v.* Chatterley-Whitfield Collieries (1917), 117 L. T. 460.

2561. Ship's steward using cargo skid instead of gangway.]—A ship's steward, being at liberty to do so, went on shore when the ship was unloading cargo, & returned about 10 p.m. the same evening, being more or less under the influence of liquor. Instead of using the gangway, as he ought to have done, he came on board by the cargo skid, in stepping from which he slipped & fell into the hold, & was fatally injured. According to the rules, the crew were forbidden to come on board by the cargo skid, but they often did so, especially when they wished to escape observation:—*Held:* the accident arose out of & in the course of the steward's employment, notwithstanding that he was committing a breach of discipline in using the cargo skid instead of the gangway.—ROBERTSON *v.* ALLAN BROTHERS & CO. (LIVERPOOL & LONDON), LTD. (1908), 77 L. J. K. B. 1072; 98 L. T. 821; 1 B. W. C. C. 172.

Annotations:—**Apld.** Low (or Jackson) *v.* General Steam Fishing Co., [1909] A. C. 523; Hewitt *v.* Ship Duchess, [1910] 1 K. B. 772; Moore *v.* Manchester Liners, [1910] A. C. 498. **Distd.** Barnes *v.* Nunnery Colliery Co., [1912] A. C. 44. **Reld.** Pepper *v.* Sayor (1914), 83 L. J. K. B. 1756; Davidson *v.* M'Robb or Officer, [1918] A. C. 304.

2562. Carter giving lift to fellow workman.]—A carter driving towards his employer's yard in the course of his employment, was asked by a fellow workman going in the same direction for a lift. He consented, & stood up to fix a seat at the back of the cart. The horse suddenly moved on & he overbalanced, fell out, & was killed. There was evidence that the employers knew of & permitted the practice of giving lifts:—*Held:* the accident arose out of & in the course of the employment.—EVANS *v.* HOLLOWAY (1914), 7 B. W. C. C. 248, C. A.

Annotation:—**Distd.** Brinckman *v.* Harris (1916), 9 B. W. C. C. 200.

2563. Workmen using goods hoist instead of stairs.]—A bricklayer employed in the erection of a large mill was being carried up to his work, with two others, in a hoist, which had been installed for the purpose of lifting materials, when the chain broke & precipitated them to the ground. It appeared from the evidence that the employer told the men to use the staircase & not to go up in the hoist, but the prohibition was generally disregarded, even by the foreman, whose duty it would be to enforce it, & the hoist was constantly used by many of the men:—*Held:* the accident arose out of the employment.—MCGUIRE *v.* GABBOTT (1915), 8 B. W. C. C. 555, C. A.

2564. Casual labourer assisting to move machine.]—A farmer employed a proprietor of threshing machines to supply a threshing machine, accompanied by two men to drive & feed it, for the purpose of threshing his corn. It was the practice in the district for several casual labourers to follow a threshing machine in the expectation of being taken on by the various farmers for the threshing. Appct. was one of six men who were thus taken on by the farmer. After the threshing was finished & these men had been paid, they helped the men with the threshing machine to move it off the farm on to the roadway. In doing so appct. was injured, & he brought these proceedings, claiming compensation under Workmen's Compensation Act, 1906 (c. 58), from the farmer. It appeared from the evidence that the casual labourers always helped to get the threshing machine on to & off the farm, & that it often could not be done without their help. The farmer stated that, when he engaged the threshing machine with two men, he understood he would have to supply the rest of the labour on the farm:—*Held:* it was part of appct.'s employment by the farmer to help in getting the threshing machine on to & off the farm, & therefore the accident arose out of & in the course of his employment by the farmer, within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—NEWSON *v.* BURSTALL (1915), 84 L. J. K. B. 535; 112 L. T. 792; 59 Sol. Jo. 204; 8 B. W. C. C. 21, C. A.

2565. Working machine without guard.]—Appct. was employed to work a cartridge tapering machine, & while so engaged met with an injury to her hand. If there had been a guard on the machine the accident would not have happened. There was a conflict of evidence as to whether a guard was or was not provided by the employers, who asserted that a guard was provided, & that, in working the machine without the guard, appct. had exposed herself to a risk not incidental to her employment, & that the employers were therefore not liable. The county ct. judge went to see the machine himself, & in his subsequent award found, as a fact, that there was no guard, & that appct. had for a long period worked the machine in that condition. He therefore held that the accident arose out of the employment, & accordingly awarded her compensation:—*Held:* there was evidence to support the finding & no misdirection.—CROOKS *v.* GREENWOOD & BATLEY, LTD. (1918), 11 B. W. C. C. 128, C. A.

2566. Employee using lift.]—A woman went in the course of her employment with four other employees to see a cashier on the floor above where she worked. As they were returning she & three other employees travelled down by a lift descending from the first to the ground floor. It was the custom for employees to use the lift, & there was no effective prohibition against their doing so. The lift ultimately stuck about a yard from the ground floor, & the gate which travelled up as the lift travelled down was then about a

among them being some "tippers." The "barrow-man" changed places for a time with a "tipper," & met with an accident while at this work. | It was a practice of the men unloading ships at this port so to exchange work, & the practice was known to & not forbidden by the employers:—*Held:* | the accident arose out of & in the course of the employment.—HENNEBERRY *v.* DOYLE (1911), 46 I. L. T. 70; 5 B. W. C. C. 580.—IR.

foot from the floor of the lift. The three employees scrambled out by this gap to return to work, & this woman was following when the lift started to ascend, & she sustained injuries from which she died:—*Held:* the accident was not due to an added peril outside the sphere of the woman's employment, but that, as it was her duty to return to work, she was at most trying to do something in the course of her employment in a wrong way. Her dependant was, therefore, entitled to compensation under Workmen's Compensation Act, 1906 (c. 38).—GIBBINS *v.* BRITISH DYES, LTD. (1918), 88 L. J. K. B. 716; 11 B. W. C. C. 180, C. A.

2567. Carter delivering goods on to customer's premises.]—A driver employed by a general carrier was delivering meat at the shop of a butcher. He carried a box of meat weighing about 70 lbs. into the shop. The butcher's wife, who was the only person in the shop at the time, requested him to put it through to the back, & while attempting to do so with her assistance, the meat slipped out of the box & fell on his leg & broke it. The county ct. judge found that it was customary for carters to deliver or assist in delivering parcels on consignees' premises, & resp. had not given appct. instructions not to carry parcels into shops; but the judge was also of opinion that appct., in complying, of his good nature, with the request of the customer's wife, in going into the back premises had gone outside the scope of his employment, & he therefore made his award in favour of resp.:—*Held:* there was no evidence to support the finding that the man was acting outside the scope of his employment in taking the meat into the back premises, & the accident therefore arose out of & in the course of appct.'s employment.—BUGLASS *v.* GRAY (1920), 13 B. W. C. C. 147, C. A.

2568. Quarry labourer acting as rockman.]—The workman, a quarry labourer, was employed by resps. as a stonemason's helper or attendant. The stonemason had to leave work at 5 p.m. owing to train arrangements, but the workman worked on until 6 p.m. After the stonemason left, the workman went to work at a rubbish heap or tip. While he was so engaged, a fall occurred, & he was pinned between two heavy stones, receiving injuries which resulted in his death. The employers contended that the work at which deceased was engaged when he was injured was outside the sphere of his employment. The work on which he was engaged was rockmen's work. Evidence was given before the county ct. judge, by a number of labourers at the quarry, that labourers were in the habit of working occasionally on the tip, & that the practice was known to, & not objected to, by the officials of the quarry. On this point there was a conflict of evidence, but the county ct. judge came to the conclusion that the practice of the labourers of working occasionally on the tip was common, known to the officials, & not rigorously or effectively forbidden, but was tacitly sanctioned by the quarry officials, & that therefore the work on which the deceased was engaged at the time of the accident was within the scope of his employment. He therefore held that the accident arose out of & in the course of deceased's employment:—*Held:* this was a question of fact. There was evidence to support the finding of the county ct. judge, & no misdirection.—JONES *v.* ARENIG GRANITE CO., LTD. (1920), 13 B. W. C. C. 317, C. A.

2569. Waiting for pay in dangerous place.]—A lad of sixteen was employed at a pit, & one Friday morning, which was pay day, he overslept himself & did not come to work. He, however, went to the pit at about one o'clock to get his pay. Men could not draw their pay without their "pay lines," which had been distributed to them by the foreman during their work that morning. It was necessary for the lad to obtain his pay lines from the foreman personally, as he had not been at work. He therefore looked for & made inquiries for the foreman, but could not find him. One of the men from whom he inquired said that the foreman would soon be coming to give him his pay lines, & so the lad decided to wait near to meet the foreman when he came. The day was wet & cold & he sat on a log near a fire made between some railway lines, a thing which it was quite usual to do & which he had done before. He was seriously injured by a runaway waggon coming down the line owing to the carelessness of workmen further up the line. On a claim for compensation the sheriff-substitute awarded compensation, on the ground that the accident arose out of & in the course of the lad's employment:—*Held:* when the lad went to the pit to get his pay he was acting in the course of his employment. The accident also arose out of the employment.—BAIRD (W.) & CO., LTD. *v.* M'GRAW (1920), 89 L. J. P. C. 188; 124 L. T. 38; 64 Sol. Jo. 650; 13 B. W. C. C. 233, H. L.

2570. Workmen climbing over running machine—Prohibition not genuine.]—Spinners employed at a cotton mill, to save themselves going round the mules often climbed over the headstock when the machine was running. Accidents having occurred from this practice the mill owners posted notices throughout the mill to the effect that in the interest of the employees this practice was prohibited, & that if in future an accident happened from this cause to a workman objection would be taken if a claim for compensation was made. Appct. disregarded this notice, & in crossing over the headstock while the machine was running sustained an injury for which he sought compensation. The county ct. judge found on the evidence that the notice was not a genuine prohibition, & that it was disregarded in the presence of the overlooker, who did not attempt to stop it, & he awarded compensation:—*Held:* there was evidence to support the finding & no misdirection.—MELLOR *v.* ASHTON BROTHERS & CO., LTD. (1921), 14 B. W. C. C. 128, C. A.

2571. Riding on trucks—Prohibition not strictly enforced.]—WILLIAMS *v.* CLEEVES WESTERN VALLEYS ANTHRACITE COLLIERIES, LTD., No. 2512, *ante*.

I. Accidents resulting in Death or Serious and Permanent Disablement.

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 1 (2), incorporating Workmen's Compensation Act, 1923 (c. 42), s. 7.

2572. Scope & effect of Workmen's Compensation Act, 1923 (c. 42), s. 7.]—In contravention of his employers' express orders a workman unnecessarily went into a prohibited area to hang up his coat, & on turning round to return to his proper working place fell into a hole & was fatally injured. His widow claimed compensation, contending that the workman's acts of hanging up his coat & returning towards his work were acts done "for the purpose of & in connection with his employers' trade or business," so that under above sect. the fatal accident was to be deemed to arise out of & in the course of his employment notwithstanding that the workman was acting in contravention of his employers' orders.

The deputy county ct. judge held that the acts were done for the workman's own purposes & not

Sect. 5.—Right to compensation: Sub-sect. 2, I.; sub-sect. 3, A., B. & C.]

for the purposes of or in connection with his employers' trade or business, so that above sect. did not apply. On the widow's appeal:—*Held:* the deputy judge's decision was right.

Observations on the limited scope & effect of above sect.

The sect. does not apply to acts merely incidental to the employment.

Qu.: whether above sect. would apply to acts having no casual relation to the accident, or to acts at a workman's home, or to the acts of domestic servants.

Semble, although it would apply to unauthorised or forbidden conduct within the sphere of employment, it would not, as a rule, apply to acts in a prohibited area, such acts being *primâ facie* altogether outside that sphere.—DAVIES *v.* GWAUNCAEGURWEN COLLIERY, [1924] 2 K. B. 651; 94 L. J. K. B. 229; 132 L. T. 221; 40 T. L. R. 859; 68 Sol. Jo. 882; 17 B. W. C. C. 181, C. A.

Annotations:—**Apld.** Borley *v.* Ockenden, [1925] 2 K. B. 325. **Consd.** Jones *v.* Tarr, [1926] 1 K. B. 25. **Reld.** Clark *v.* Southwark Corpn. (1925), 133 L. T. 753; Hawkins *v.* Kendrick (1926), 19 B. W. C. C. 325.

2573. ——.]—A lad employed as a finisher of boots in applt.'s bootmaking business, took home, in disobedience of orders a customer's pair of boots in order to execute the necessary repairs to them, his motive being to improve his own skill & so become a repairer, instead of a finisher, of boots at an increased wage. While so working on the boots at home & out of business hours, the lad injured his eye with an awl, with the result that the eye had to be removed. The county ct. judge held that inasmuch as the work was being done for the purposes of & in connection with the employer's trade or business, the case was covered by Workmen's Compensation Act, 1923 (c. 42), s. 7, & he awarded compensation:—*Held:* the act which caused the injury did not arise out of & in the course of the lad's employment at all, & he was not entitled to recover.

Workmen's Compensation Act, 1923 (c. 42), s. 7, must be read as one with Workmen's Compensation Act, 1925 (c. 84), s. 1 (1), & the mere fact that the forbidden, or unbidden, act was done by the workman "for the purposes of & in connection with his employer's trade or business" will not entitle him to compensation where the act in question did not arise out of & in the course of his employment at all, so as to bring him in the first instance within Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).—BORLEY *v.* OCKENDEN, [1925] 2 K. B. 325; 95 L. J. K. B. 35; 133 L. T. 72; 69 Sol. Jo. 365; 18 B. W. C. C. 55; *sub nom.* BAILEY *v.* OCKENDEN, 41 T. L. R. 314, C. A.

Annotations:—**Consd.** Jones *v.* Tarr, [1926] 1 K. B. 25. **Reld.** Clark *v.* Southwark Corpn (1925), 133 L. T. 753.

2574. ——.]—JONES *v.* TARR, No. 2446, *ante*.

SUB-SECT. 3.—RISKS INCIDENTAL TO THE EMPLOYMENT.

A. Accidents during Meal Times and Other Intervals.

Interruption of course of employment, *see* Sub-sect. 2, C., *ante*.

2575. Workman undertaking unnecessary risk—Taking meal in dangerous place.] — BRICE *v.* EDWARD LLOYD, LTD., No. 2514, *ante*.

2576. —— **Relieving nature in dangerous place.**] —Deceased workman was a labourer employed in the construction of a dock, & at 11 p.m. the night gang, of whom he was one, were ordered to go from one part of the dock to another. They marched in single file, & deceased, who was the last man in the file, intimated to the next man in front that he wanted to stop to ease nature. The others went on, & after a while the next man called out to deceased asking him why he was not coming on. Getting no answer, he went back & found deceased dead, his body having been crushed between the upper & lower parts of a hoist. The structure was so low that deceased must have stooped down to enter. The scene of the accident was amply lighted. The arbitrator found as a fact that the man entered the hoist intentionally, & that it was an unreasonable place for him to go to for the purpose, & that therefore the accident did not arise out of the employment:—*Held:* there being evidence to support these findings, the arbitrator was justified in finding that the accident did not arise out of the employment, the risk taken by the workman not being one reasonably incident to the employment.—ROSE *v.* MORRISON & MASON, LTD. (1911), 80 L. J. K. B. 1103; 105 L. T. 2; 4 B. W. C. C. 277, C. A.

2577. —— ——.]—COOK *v.* MANVERS MAIN COLLIERIES, LTD., No. 2519, *ante*.

2578. Canteen provided by employer—Employee injured in public street.]—A munition worker, during an interval allowed by her employers for rest & refreshment, left the actual working premises of the employers in order to go to a canteen. The canteen was provided by the employers for their workers & was some 120 yards from the employers' gates at the opposite side of a public highway. While upon the highway, the worker was run down & killed by a lorry:—*Held:* although the canteen belonged to the employers, & the worker was properly going there, yet as she was in the street for her own purposes, & not on her employers' business, nor in respect of any duty which she owed to them, the accident did not arise out of or in the course of the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1). The fact that the employers, by installing the canteen, had in a sense invited her to go there did not affect the position.—BELL *v.* ARMSTRONG, WHITWORTH & CO. (1919), 88 L. J. K. B. 844; 121 L. T. 258; 35 T. L. R. 479; 63 Sol. Jo. 533; 12 B. W. C. C. 138, C. A.

Annotations:—**Consd.** Armstrong, Whitworth *v.* Redford, [1920] A. C. 757. **Reld.** St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59.

2579. —— **Employee injured on steps of canteen.**] —A girl employed as a machinist left the works where she was employed, during the dinner hour, as the rules required, & went to a canteen provided by the employers for their women workers in another part of the premises. The canteen & the works were within the same curtilage, but by day the canteen could only be reached by the street. The workers were invited, but were not obliged, to use the canteen. After finishing her dinner the girl was hurrying down a flight of stone

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PART XIV. SECT. 5, SUB-SECT. 3.—A.

2575 *i. Workman undertaking unnecessary risk—Taking meal in dangerous place.*]—CARINDUFF *v.* GILMORE (1914), 7 B. W. C. C. 981.—**IR.**

e. Housekeeper killed while resting — Accidental firing of revolver by son of employer.]—CLARK *v.* ALCOCK (1920), 20 S. R. N. S. W. 419; 37 N. S. W. W. N. 109.—**AUS.**

f. Workman emptying billycan during spell from work—Fall from steel chimney through opening—Spell authorised by employer.]—*Re* POLLARD & ADELAIDE ELECTRIC SUPPLY CO., LTD., [1924] S. A. S. R. 396.—**AUS.**

g. Fall from ladder to deck—While

stairs leading from the canteen into the street in order to return to her work when she slipped & broke her ankle. She claimed compensation under Workmen's Compensation Act, 1906 (c. 58):—*Held:* there was evidence upon which the arbitrator could find that the injury arose in the course of as well as out of the employment.—ARMSTRONG, WHITWORTH & CO. *v.* REDFORD, [1920] A. C. 757; 89 L. J. K. B. 495; 123 L. T. 114; 36 T. L. R. 451; 64 Sol. Jo. 388; 13 B. W. C. C. 68, H. L.; *affg.* S. C. *sub nom.* REDFORD *v.* ARMSTRONG, WHITWORTH & CO., 88 L. J. K. B. 850, C. A.

Annotations:—**Consd.** Hannifin *v.* Fitzmaurice (1920), 14 B. W. C. C. 320; Upton *v.* G. C. Ry., [1924] A. C. 302. **Refd.** St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59.

B. Acts of the Enemy.

2580. Floating mine—Injury to seaman on trawler.]—RISDALE *v.* KILMARNOCK (OWNERS), No. 2553, *ante.*

2581. Bombardment—By enemy warship—Injury to engine driver.]—An engine driver was attending to his duties on his engine near the Hartlepools when a bombardment of those places by enemy warships commenced, whereupon he left his engine & got under a truck attached to the engine. Two or three minutes afterwards he left the truck & returned to the engine to attend to the injector in order to prevent the boiler tubes from getting burnt. Having done this, he was returning to the truck, when he was struck by a shell & severely injured. Many people were killed & injured by the bombardment:—*Held:* the accident did not arise "out of" the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—COOPER *v.* NORTH-EASTERN RY. CO. (1915), 85 L. J. K. B. 187; 114 L. T. 55; 32 T. L. R. 131; 60 Sol. Jo. 105; 9 B. W. C. C. 129, C. A.

Annotation:—**Refd.** White *v.* Avery (1915), 9 B. W. C. C. 663.

2582. —— By enemy aircraft—Workman injured on street in course of employment.]—Applt. was employed by resp. as potman in a public-house, & was directed by his employer to clean a brass plate on the outside of the street door of the house. While he was so engaged a hostile aircraft dropped a bomb in the street & he was injured by the explosion:—*Held:* there was no evidence that the accident arose out of his employment within the meaning of the Workmen's Compensation Act, 1906 (c. 58).—ALLCOCK *v.* ROGERS (1918), 87 L. J. K. B. 693; 118 L. T. 386; 34 T. L. R. 324; 62 Sol. Jo. 421; 11 B. W. C. C. 149, H. L.

Annotations:—**Folld.** Knyvett *v.* Wilkinson (1918), 87 L. J. K. B. 722. **Refd.** Bird *v.* Keep, [1918] 2 K. B. 692; Upton *v.* G. C. Ry. (1923), 130 L. T. 577.

2583. —— —— ——.]—On June 13, 1917, deceased was passing along a street, on resps.' business, when an explosive bomb from hostile aircraft fell on the street & he was injured by the explosive force of the bomb. He was removed to hospital & died shortly afterwards. A claim for compensation was made against resps. by the dependants of deceased, which was followed in due course by a request for arbn. under the Workmen's Compensation Act, 1906 (c. 58), on the ground that the death of deceased had been caused by "accident arising out of & in the course of" his employment, within the meaning of sect. 1 of that Act:—*Held:* there was no special danger attaching to the spot to which deceased was sent, the danger of being struck by an explosive bomb from hostile aircraft not being what could properly be called a "street risk" specially attaching persons passing along the street; the risk of being killed by the bomb which injured deceased was precisely common to all who might be at or near the spot at the time, & had no relation to his employment; & the dependants were not, therefore, entitled to compensation.—KNYVETT *v.* WILKINSON BROTHERS, LTD. (1918), 87 L. J. K. B. 722; 118 L. T. 476; 11 B. W. C. C. 50, C. A.

2584. —— —— Workman employed on specially dangerous work.]—A workman was killed as the result of a bomb dropped by enemy aircraft on an oil & colour warehouse to which he was sent by his employer in the ordinary course of his employment. His widow applied for compensation. The facts proved before the county ct. judge were that in the case of a fire breaking out upon the premises in which deceased workman met his death dense & suffocating smoke would be produced from the materials stored there; that while he was upon the premises they were wrecked & set on fire by a bomb or bombs from hostile aircraft; & that deceased workman was found in the basement of the premises buried under the wreckage but without any apparent external marks of injury upon him. The county ct. judge held upon the evidence that the workman died of suffocation by smoke; that the employment exposed him to a special risk; & that he met his death by an accident arising out of & in the course of his employment:—*Held:* there was evidence from which the county ct. judge might reasonably & properly draw the conclusions of fact at which he arrived.—BIRD *v.* KEEP, [1918] 2 K. B. 692; 87 L. J. K. B. 1199; 118 L. T. 633; 34 T. L. R. 513 62 Sol. Jo. 666; 11 B. W. C. C. 133, C. A.

Annotations:—**Mentd.** Munro, Brice *v.* Marten, Munro, Brice *v.* R., [1920] 3 K. B. 94; Barnett *v.* Cohen, [1921] 2 K. B. 461; Smith *v.* G. W. Ry., [1921] 2 K. B. 237; *Re* Stollery, Weir *v.* Treasury Solicitor, [1926] Ch. 284.

C. Assaults.

Workmen larking.]—*See* Sub-sect. 2, D. (*f*), *ante.*

2585. Engine driver—Stone thrown at train by boy.]—Where an engine driver, while driving a train under a bridge, was injured through a stone wilfully dropped on the train by a boy from the bridge:—*Held:* his injuries were caused by an accident arising out of & in the course of his employment within Workmen's Compensation Act, 1897 (c. 37), s. 1.—CHALLIS *v.* LONDON & SOUTH WESTERN RY. CO., [1905] 2 K. B. 154; 74 L. J. K. B. 569; 93 L. T. 330; 53 W. R. 613; 21 T. L. R. 486; 49 Sol. Jo. 480; 7 W. C. C. 23, C. A.

Annotations:—**Consd.** Craske *v.* Wigan, [1909] 2 K. B. 635. **Apld.** Nisbet *v.* Rayne & Burn, [1910] 2 K. B. 689. **Consd.** Murray *v.* Denholm (1911), 5 B. W. C. C. 496; Trim Joint District School, Board of Management *v.* Kelly, [1914] A. C. 667. **Distd.** Clayton *v.* Hardwick Colliery Co. (1914), 111 L. T. 788. **Refd.** Fitzgerald *v.* Clarke, [1908] 2 K. B. 796; Brice *v.* Edward Lloyd, [1909] 2 K. B. 804; Mitchinson *v.* Day, [1913] 1 K. B. 603.

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descending to clock on at close of dinner hour—No payment made for dinner hour.]—GORMAN *v.* BARCLAY, CURLE & CO., [1926] S. C. 266.—SCOT.

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h. *Assault by third party — Cook attacked by hotel customer.*]—Applicant was employed as cook at a hotel in which the kitchen & the bar were on the same level, & a customer came out of the bar into the kitchen, where he had no business to be, & made a rush at the cook, who, in trying to avoid him, put her arm through a glass door & was seriously injured:—*Held:* this was not an accident arising out of the employment.—MURPHY *v.* BERWICK (1909), 43 I. L. T. 126; 2 B. W. C. C. 103.—IR.

k. —— *On workman when rescuing fellow workman from assault.*]—COLLINS *v.* COLLINS, [1907] 2 I. R. 104.—IR.

l. —— *Workman overbalanced into molten metal.*] — An ironmoulder's helper while engaged at work in a

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2586. Assault by workman on fellow workman.]—A workman for no apparent reason deliberately assaulted a fellow workman, who, in trying to prevent himself falling over a moving rope, swung up his hand which was holding a hammer, & injured the other workman's eye:—*Held:* the accident did not arise out of & in the course of the workman's employment.—SHAW *v.* WIGAN COAL & IRON CO., (1909), 3 B. W. C. C. 81, C. A.

2587. ——.]—WEEKES *v.* STEAD (WILLIAM), LTD., No. 2301, *ante*.

2588. ——.]—REID *v.* BRITISH & IRISH STEAM PACKET CO., No. 2173, *ante*.

2589. ——.]—PARKER *v.* FEDERAL STEAM NAVIGATION CO., LTD., No. 2297, *ante*.

2590. Cashier murdered while carrying money.]—NISBET *v.* RAYNE & BURN, No. 2298, *ante*.

2591. Assault by master on workman.]—An errand boy was attacked by his employer with a hatchet & seriously injured:—*Held:* a felonious act done by an employer is not an accident arising out of the employment within Workmen's Compensation Act, 1906 (c. 58), & therefore the boy was not entitled to compensation under that Act.—BLAKE *v.* HEAD (1912), 106 L. T. 822; 28 T. L. R. 321; 5 B. W. C. C. 303, C. A.

Annotations:—**Consd.** Mitchinson *v.* Day, [1913] 1 K. B. 603. **Reid.** Trim Joint District School, Board of Management *v.* Kelly, [1914] A. C. 667.

2592. Assault by strikers—On workman remaining in employment.]—A workman employed as a storekeeper in M. acted as carter for his employer at a time when the carters of M. were on strike, under a special contract by which the employer agreed to be responsible for any injury which he might sustain. He was on his way home from work & was passing through a market place about seven minutes' walk from his employer's premises, when he was attacked by strikers & seriously injured:—*Held:* the agreement while enlarging the liability of the employer could not bring within the operation of the Workmen's Compensation Act, 1906 (c. 58), an accident which was not in the course of the workman's employment, & an award of compensation under the Act could not be maintained.—POULTON *v.* KELSALL, [1912] 2 K. B. 131; 81 L. J. K. B. 774; 106 L. T. 522; 28 T. L. R. 329; 5 B. W. C. C. 318, C. A.

2593. Assault by third party.]—MITCHINSON *v.* DAY BROTHERS, No. 2299, *ante*.

2594. Schoolmaster of industrial school—Murder by school boys.]—TRIM JOINT DISTRICT SCHOOL BOARD OF MANAGEMENT *v.* KELLY, No. 2300, *ante*.

D. Attacks by Animals, etc.

2595. Workman employed by lion tamer—Injured in driving back escaped lion.]—A workman was employed by a lion tamer to look after baggage, clean out lion cages, & generally make himself useful, but it was no part of his duty to feed the lions. One afternoon the workman was left in sole charge of the cages of lions, with orders to see that no harm came to them or any one else by reason of their fierceness. One of the lions got out of a cage & into a dressing-room, but there was no evidence to show how this happened. The workman went into the dressing-room & tried to drive the lion back into the cage, when the lion turned on him & killed him. In a claim by the workman's dependants against the employer under Workmen's Compensation Act, 1906 (c. 58), the county ct. judge dismissed the claim, being of opinion that the facts were consistent only with the deceased having interfered with the lion for some purpose of his own, there being no evidence to support the theory that the lions had fought or that the deceased had acted otherwise on an emergency:—*Held:* as the deceased had been left in charge, it was his duty to try to get the lion back into the cage, & as he was killed in the discharge of that duty the accident arose "out of & in the course of his employment."—HAPELMAN *v.* POOLE (1908), 25 T. L. R. 155; 2 B. W. C. C. 48, C. A.

2596. Teamster—Bitten by stable cat.] — A teamster in the course of his employment was eating his dinner in his employer's stable, & while doing so was bitten by a cat belonging to the stable & was seriously injured. Upon an application for compensation under Workmen's compensation Act, 1906 (c. 58):—*Held:* the accident arose out of & in the course of his employment.—ROWLAND *v.* WRIGHT, [1909] 1 K. B. 963; 77 L. J. K. B. 1071; 99 L. T. 758; 24 T. L. R. 852; 1 B. W. C. C. 102, C. A.

Annotations:—**Consd.** Armstrong, Whitworth *v.* Redford, [1920] A. C. 757. **Reid.** Craske *v.* Wigan, [1909] 2 K. B. 635; Smidmore *v.* London & Thames Haven Oil Wharves (1921), 14 B. W. C. C. 116.

2597. Lady's maid sewing on employer's premises—Injury caused to eye in protecting face from insect.]—In the case of a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), s. 1 (1), for personal injury by accident, it is not enough for appct. to say that the accident would not have happened if he had not been engaged in the employment or had not been in the particular place in which the accident occurred. He must go further, & establish that the accident arose because of something he was doing in the course of his employment or because he was exposed by the nature of his employment to some peculiar danger.

A lady's maid in the course of her employment was one evening engaged in sewing in her employer's nursery. The electric light in the room was on, & the night being very hot the windows were open. A cockchafer flew in, & the maid in throwing up her hand to protect her face struck her right eye so violently with the bent knuckle of her right thumb that her sight was permanently affected:—*Held:* the injury was not an accident arising out of her employment, inasmuch as the risk of the occurrence in question was not incidental to the employment as a lady's maid, & she was not placed by reason of her employment in a position of special danger, & therefore she was not entitled to compensation.—CRASKE *v.* WIGAN, [1909] 2 K. B. 635; 78 L. J. K. B. 994; 101 L. T. 6; 25 T. L. R. 632; 53 Sol. Jo. 560; 2 B. W. C. C. 35, C. A.

Annotations:—**Apld.** Warner *v.* Couchman, [1911] 1 K. B. 351. **Folld.** Amys *v.* Barton, [1912] 1 K. B. 40. **Expld.** Mitchinson *v.* Day, [1913] 1 K. B. 603. **Apld.** Kinghorn *v.* Guthrie (1913), 6 B. W. C. C. 887; Plumb *v.* Cobden Flour Mills Co., [1914] A. C. 62; Chapman *v.* Ship John W. Pearn (1916), 32 T. L. R. 368. **Folld.** Griffiths *v.* Robins (1916), 10 B. W. C. C. 90; Fearnley *v.* Bates & Northcliffe (1917), 86 L. J. K. B. 1000. **Consd.** Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127. **Reid.** Dotzauer *v.* Strand Palace Hotel (1910), 3 B. W. C. C. 387; Sheehy *v.* G. S. & W. Ry. (1913), 6 B. W. C. C. 927; Carinduff *v.* Gilmore (1914), 7 B. W. C. C. 981; Shaw (Glasgow) *v.*

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stooping position using a hammer between his legs & in close proximity to two boxes of molten metal, was struck by an intoxicated stranger, & lost his balance & falling between the boxes sustained injuries by bruising & burning:—*Held:* the workman was injured by accident arising out of the employment.—SHAW (GLASGOW), LTD. *v.* MACFARLANE, [1915] S. C. 273; 52 Sc. L. R. 236; [1915] 1 S. L. T. 30; 8 B. W. C. C. 302.—**SCOT.**

Macfarlane (1914), 8 B. W. C. C. 382; Sheldon *v.* Needham (1914), 111 L. T. 729; Cooper *v.* N. E. Ry. (1915), 85 L. J. K. B. 187; Newson *v.* Burstall & Farrow (1915), 112 L. T. 792. White *v.* Avery (1915), 9 B. W. C. C. 663; Dennis *v.* White, [1916] 2 K. B. 1; Kettle *v.* McKay & Ryland (1916), 85 L. J. K. B. 1490; Whittall *v.* Staveley Iron & Coal Co. (1917), 86 L. J. K. B. 985; Wright & Greig *v.* M'Kendry (1918), 12 B. W. C. C. 410.

2598. Farm labourer—Sting of wasp.]—Upon a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), it appeared that on Oct. 18 a workman employed by a farmer as engine driver was driving the engine of his master's threshing machine while threshing wheat in a field. It was suggested that while so employed he was stung in the leg by a wasp. There was evidence that his fellow workmen had seen a few wasps close to the engine & that there were none about elsewhere. The workman did not complain of being stung at the time. On the next & the following days he complained of being drowsy & having pain in his leg, & that he was unfit for work, but he continued to work until Oct. 27, when he came home very ill. The doctor saw him on Oct. 28 & 29 & found him suffering from blood poisoning. On the latter day the workman made a statement to the doctor, in the presence of his wife, that his bad leg was caused by the sting of a wasp on Oct. 18. He died on Nov. 1. His widow claimed compensation:—*Held:* assuming that there was sufficient evidence that the accident occurred in the course of the workman's employment, there was no evidence that his employment exposed him to any such special risk as would enable the ct. to hold that it arose out of his employment, & the claim could not therefore be supported.—AMYS *v.* BARTON, [1912] 1 K. B. 40; 81 L. J. K. B. 65; 105 L. T. 619; 28 T. L. R. 29; 5 B. W. C. C. 117, C. A.

Annotations:—**Refd.** Tucker *v.* Oldbury U. D. C. (1912), 106 L. T. 669; Beare *v.* Garrod (1915), 113 L. T. 673; Sharp *v.* Loddington Ironstone Co. (1924), 132 L. T. 229.

E. Drunkenness—Effect of.

2599. General rule.]—If an accident happens to a workman whilst acting within the scope of his authority & doing an act which it was part of his duty to do, & the accident arises from his doing that act & being thereby exposed to a special risk beyond that of other persons not so engaged, the employer is liable to pay compensation under Workmen's Compensation Act, 1906 (c. 58), although the workman was doing the act negligently & contrary to rules laid down for his guidance.

If, therefore, a state of facts is proved which brings the workman within this proposition, the fact that he was drunk when the accident happened, or indeed the fact that the proximate cause of the accident was his drunkenness, will not disentitle him, or in the case of death his dependants, from recovering compensation from his employer where death or serious & permanent disablement results.

The workman was engaged by resps. as a stableman, his duty being to chop & mix feed for the horses & convey it to various stables by carts. The loft in which he performed his duty was reached by a vertical ladder, fixed a little distance from the wall, which he had to ascend & descend. In attempting to ascend the latter in the course of his employment the workman slipped & fell sideways, striking his head against a window sill causing injuries from which he died. At the time of the accident deceased was under the influence of drink. On an application by his dependants for compensation:—*Held:* the accident resulting in the death of the workman, though due to his serious & wilful misconduct, was none the less an accident arising out of & in the course of his employment, & his dependants were therefore entitled to compensation.—WILLIAMS *v.* LLANDUDNO COACHING & CARRIAGE CO., LTD., [1915] 2 K. B. 101; 84 L. J. K. B. 655; 112 L. T. 848; 31 T. L. R. 186; 59 Sol. Jo. 286; 8 B. W. C. C. 143, C. A.

Annotations:—**Folld.** Scrimgeour *v.* Thomson (1921), 14 B. W. C. C. 303. (*See* 91 L. J. P. C. 87.) **Consd.** Upton *v.* G. C. Ry., [1924] A. C. 302.

2600. Seaman returning to ship—Accident due solely to intoxication.]—A sailor went ashore without leave on the evening before his ship was due to sail from the port where she was lying. He remained ashore all night. The next morning, the ship's gangways having been taken in, the mooring ropes cast off, & the vessel being still alongside, the sailor returned & was pushed on board in a helpless state of intoxication by two persons who helped him along the quay. He reached the deck on his hands & knees & lay there for a minute or two while the ship was gradually moving away from the quayside. He then attempted to get up, staggered backwards, fell overboard, & was drowned. Upon a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), the county ct. judge held that, the sailor having gained his ship, the accident arose out of & in the course of his employment, & he awarded compensation:—*Held:* on appeal, the sailor had not regained his ship in a condition to perform his duties. The accident was due solely to his intoxication & did not arise out of his employment.—FRITH *v.* LOUISIANIAN (OWNERS), [1912] 2 K. B. 155; 81 L. J. K. B. 701; 106 L. T. 667; 28 T. L. R. 331; 5 B. W. C. C. 410, C. A.

Annotations:—**Folld.** Murphy & Sandwith *v.* Cooney (1913), 7 B. W. C. C. 962; Nash *v.* S.S. Rangatira, [1914] 3 K. B. 978. **Consd.** Williams *v.* Llandudno Coaching & Carriage Co., [1915] 2 K. B. 101. **Apprvd.** Thomson *v.* Anderson (or Scrimgeour) (1921), 91 L. J. P. C. 87.

2601. —— ——.]—A sailor who had been on shore with leave returned to his ship at night in a drunken condition & started to mount the gangway from the quay to the ship, holding on to the ropes on either side. When part of the way up he let go with one hand, overbalanced, & fell on to the quay & was killed. The county ct. judge found on the evidence that the primary cause of the accident was the man's drunken condition, but that there were really two concurrent causes for the accident, first, the fact that he was mounting the gangway to return to his employment, & was thereby subjected to a special risk; & secondly, his drunken condition. He therefore held that the accident arose out of the man's employment, & awarded compensation to his dependants:—*Held:* as the accident was caused by the sailor's drunken condition, it did not arise out of the man's employment & the dependants were not entitled to compensation. It made no difference for this purpose that the accident had

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PART XIV. SECT. 5, SUB-SECT. 3.—E.

m. *Seaman ordered from bridge—Found injured at foot of ladder—Accident due solely to intoxication.*]—MURPHY *v.* COONEY, [1914] 2 I. R. 76.—IR.

n. *Intoxicated commercial traveller killed at railway station — Returning home from town where no business transacted.*]—RENFREW *v.* M'CRAE, LTD., [1914] S. C. 539; 51 Sc. L. R. 467; [1914] 1 S. L. T. 354; 7 B. W. C. C. 898.—SCOT.

o. *Dock labourer ordered to leave work on ship & wait for pay—Found drowned at quayside.*]—A dock labourer engaged with others in unloading a ship was seen by the clerk in charge to be worse of drink, & told to leave the work & wait in the shed till his pay was brought him. Within half an

Sect. 5.—Right to compensation: Sub-sect. 3, E., F. & G.]

happened within the ambit of the employment.—NASH *v.* RANGATIRA (OWNERS), [1914] 3 K. B. 978; 83 L. J. K. B. 1496; 111 L. T. 704; 58 Sol. Jo. 705; 7 B. W. C. C. 590, C. A.

Annotations:—**Consd.** Williams *v.* Llandudno Coaching & Carriage Co., [1915] 2 K. B. 101. **Refd.** Thomson *v.* Anderson (or Scrimgeour) (1921), 91 L. J. P. C. 87.

2602. —— ——.]—Where the arbitrator, in a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), finds as a fact that the accident was due entirely to the workman's drunken condition, & did not arise out of his employment, he is entitled to refuse on that ground to make an award of compensation.

A ship was lying moored to a quay, & the only access to it was by a ladder which was quite sufficient for the purpose, & was properly secured, & lighted after dark. A member of the crew went ashore with leave for his own purposes, & was found some hours later by two other members of the crew in a dazed condition under the influence of drink. They helped him to the foot of the ladder, & he went up without help, but, in stepping from the ladder to the rail of the bulwark, he, as the arbitrator found, "as the result of his dazed condition due to the liquor which he had consumed," let go of the ladder, & lost his footing, & fell into the water, & was drowned. On these facts the arbitrator found that the accident did not arise out of the employment, & refused to make an award of compensation. He added a note to the case in which he said that the accident "arose entirely out of the man's state of drunkenness":—*Held:* this was a finding of fact with which the ct. could not interfere.—THOMSON (W.) & Co. *v.* ANDERSON (OR SCRIMGEOUR) (1921), 91 L. J. P. C. 87; 126 L. T. 386; 86 J. P. 53; 38 T. L. R. 206; 66 Sol. Jo. 169; 15 B. W. C. C. 77, H. L.

2603. Stableman—Falling off ladder in course of duty.]—WILLIAMS *v.* LLANDUDNO COACHING & CARRIAGE CO., LTD., No. 2599, *ante*.

F. Forces of Nature.

See Sub-sect. 1 C. (*c*), *ante*.

2604. General rule.]—(1) W., in the course of his employment with resp. C., a baker, while delivering bread on a round with a horse & cart was frost-bitten in the hand. The county ct. judge found that there was nothing in the man's employment which exposed him to more than the ordinary risk of cold to which any person working in the open on the day in question was exposed. The county ct. judge held that assuming the injury complained of was an accident, it was not an accident arising out of the employment, & on this ground made his award in favour of the employer:—*Held:* the county ct. judge, in substance, having found that appct., by reason of his employment, was not specially exposed to the severity of the weather, that was a finding which entitled him to hold that the injury by accident for which compensation was sought did not arise out of the man's employment in the sense that it was a risk incidental thereto.

(2) Now, FLETCHER MOULTON, L.J., who was the judge in the minority in the Ct. of Appeal, stated the law fairly enough, or rather stated what was the point of view with which a judge ought to approach cases of this kind. He said: "It is true that when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled & bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather to which persons in the locality, & whether so employed or not, were equally liable. If it is the latter it does not arise 'out of the employment,' because the man is not specially affected by the severity of the weather by reason of his employment" (LORD LOREBURN, C.).—WARNER *v.* COUCHMAN, [1912] A. C. 35; 81 L. J. K. B. 45; 105 L. T. 676; 28 T. L. R. 58; 56 Sol. Jo. 70; 5 B. W. C. C. 177, H. L.; *affg.*, [1911] 1 K. B. 351, C. A.

Annotations:—*As to* (1) **Apld.** Peel *v.* Lawrence (1912), 106 L. T. 482; Mitchinson *v.* Day, [1913] 1 K. B. 603. **Consd.** White *v.* Avery (1915), 9 B. W. C. C. 663. **Refd.** Davies *v.* Gillespie (1911), 105 L. T. 494; Karemaker *v.* S.S. Corsican (1911), 4 B. W. C. C. 295; Pierce *v.* Provident Clothing & Supply Co., [1911] 1 K. B. 997; Amys *v.* Barton, [1912] 1 K. B. 40; Chandler *v.* G. W. Ry. (1912), 106 L. T. 479; Sheldon *v.* Needham (1914), 111 L. T. 729; Trim Joint District School, Board of Management *v.* Kelly, [1914] A. C. 667; Cooper *v.* N. E. Ry. (1915), 85 L. J. K. B. 187; Coyle (or Brown) *v.* Watson, [1915] A. C. 1; Marsh *v.* Pope & Pearson (1917), 86 L. J. K. B. 1349; Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127; Wales *v.* Lambton & Hetton Collieries (1917), 86 L. J. K. B. 1346; Upton *v.* G. C. Ry. (1923), 130 L. T. 577.

2605. Risk greater than ordinary—Lightning.]—Where the place & circumstances in which a workman is employed involve a greater than ordinary risk of injury by lightning, such an injury may be considered as caused by an accident arising out of his employment within Workmen's Compensation Act, 1897 (c. 37), s. 1 (1).—ANDREW *v.* FAILSWORTH INDUSTRIAL SOCIETY, [1904] 2 K. B. 32; 73 L. J. K. B. 510; 90 L. T. 611; 68 J. P. 409; 52 W. R. 451; 20 T. L. R. 429; 48 Sol. Jo. 415; 6 W. C. C. 11, C. A.

Annotations:—**Folld.** Morgan *v.* S.S. Zenaida (1909), 25 T. L. R. 446. **Consd.** Nisbet *v.* Rayne & Burn, [1910] 2 K. B. 689; Pierce *v.* Provident Clothing & Supply Co., [1911] 1 K. B. 997; Warner *v.* Couchman, [1911] 1 K. B. 351; Cooper *v.* N. E. Ry. (1915), 85 L. J. K. B. 187. **Refd.** Fitzgerald *v.* Clark, [1908] 2 K. B. 796; Craske *v.* Wigan, [1909] 2 K. B. 635; Davies *v.* Gillespie (1911), 105 L. T. 494; Peel *v.* Lawrence (1912), 106 L. T. 482; Mitchinson *v.* Day, [1913] 1 K. B. 603; Plumb *v.* Cobden Flour Mills Co., [1914] A. C. 62; Sheldon *v.* Needham (1914), 111 L. T. 729; Trim Joint District School, Board of Management *v.* Kelly (1914), 111 L. T. 305; Slade *v.* Taylor (1915), 8 B. W. C. C. 65; Thorn *v.* Humm (1915), 84 L. J. K. B. 1459; White *v.* Avery (1915), 9 B. W. C. C. 663; Dennis *v.* White (1917), 86 L. J. K. B. 1074; Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127; Wales *v.* Lambton & Hetton Colliery Co. (1917), 117 L. T. 454; St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59.

2606. —— **Sunstroke.**]—MORGAN *v.* ZENAIDA (OWNERS), No. 2279, *ante*.

2607. —— ——.]—DAVIES *v.* GILLESPIE, No. 2280, *ante*.

2608. —— **Frost-bite.**]—WARNER *v.* COUCHMAN, No. 2604, *ante*.

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hour he was found drowned in the water at the quayside:—*Held:* his death did not result from accident arising out of or in course of his employment.—STEWART *v.* M'INTYRE, [1916] S. C. 91; 53 Sc. L. R. 62.—**SCOT.**

PART XIV. SECT. 5, SUB-SECT. 3.—F.

2604 i. *General rule.*]—In cases of injury due to natural causes a workman, in order to recover compensation under Workmen's Compensation Act, R. S. S., 1920, c. 210, must show that he was by reason of his employment exposed to greater danger & risk of injury from the elements than that to which persons are ordinarily exposed.—AHLQUIST *v.* CANADIAN PACIFIC RY. CO., [1923] 1 D. L. R. 382; 16 Sask. L. R. 420; [1923] 1 W. W. R. 82.—**CAN.**

2605 i. *Risk greater than ordinary—Lightning.*]—A workman engaged on the road during a storm, whose duty was to clean out the gullets to prevent the water flooding the road, was struck dead by lightning:—*Held:* the death was not occasioned by accident arising out of the employment.—KELLY *v.* KERRY COUNTY COUNCIL (1908), 42 I. L. T. 23; 1B. W. C. C. 194.—**IR.**

2608 i. —— *Frost bite.*]—NIKKICZUK *v.* MCARTHUR (1916), 24 W. L. R. 674; 10 W. W. R. 712.—**CAN.**

p. —— *Snowslide.*]—*Re* CULSHAW & CROW'S NEST PASS COAL CO.,

2609. ——— ———.]—A seaman at work on his ship at Halifax, N.S., sustained frost-bite. The judge found that the workman had not proved that the frost-bite was due to any particular circumstance in connection with his employment, nor that he had been exposed to more risk of frost-bite than is usual in winter at Halifax :—*Held :* the accident did not arise out of the employment.—KAREMAKER *v.* CORSICAN (OWNERS) (1911), 4 B. W. C. C. 295, C. A.

Annotations :—**Refd.** Davies *v.* Gillespie (1911), 105 L. T. 494 ; Marsh *v.* Pope & Pearson (1917), 86 L. J. K. B. 1349 ; Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127 ; Wales *v.* Lambton & Hetton Collieries (1917), 86 L. J. K. B. 1346.

2610. —— **Exposure to excessive cold.**] — HEWITT *v.* PARTRIDGE JONES & PATON (JOHN), LTD., No. 2289, *ante*.

G. Ordinary Accidents of Mankind.

2611. General rule.]—SMIDMORE *v.* LONDON & THAMES HAVEN OIL WHARVES, LTD., No. 2404, *ante*.

2612. Sprained finger.]—A cotton mill hand preparing to work barefooted, according to the universal custom prevailing in cotton mills, injured the middle finger of his left hand in removing one of his socks :—*Held :* although the accident arose " in the course of " the employment of the workman within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 1, it did not arise " out of " it ; & therefore his claim for compensation failed.—PEEL *v.* LAWRENCE (WILLIAM) & SONS, LTD. (1912), 106 L. T. 482 ; 28 T. L. R. 318 ; 5 B. W. C. C. 274, C. A.

Annotation :—**N.F.** Smidmore *v.* London & Thames Haven Oil Wharves (1921), 14 B. W. C. C. 116.

2613. Giddiness causing fall downstairs.]—The master of a workhouse was sitting on the top of some steps leading to his residence at the workhouse, there being nothing peculiar or particularly dangerous about them, talking to the labour master, when a fit of coughing came on, caused by a disease of his lung, which made him giddy, & he fell down the steps, & received an injury which caused his death a few days afterwards :—*Held :* the accident did not arise out of his employment, & his dependants were not entitled to compensation.—BUTLER *v.* BURTON-ON-TRENT UNION (1912), 106 L. T. 824 ; 5 B. W. C. C. 355, C. A.

Annotations :—**Refd.** Harder *v.* Gains (1916), 85 L. J. K. B. 866; Kettle *v.* McKay & Ryland (1916), 85 L. J. K. B. 1490.

2614. Drinking poisoned water by mistake.]—(1) A seaman on board a ship, which was in harbour in a hot climate, by mistake drank from a tin which he thought contained water a solution of soda & was badly burnt. The solution had been put into the tin by its owner, the boatswain, to clean it. It was the practice of the crew to carry the water obtained from the ship's pump in tins to a cool place & partake of it as required. This practice was sanctioned by the officers, but was not done by their orders. It was quite common for one man to drink water from another man's tin. The seaman found the tin in question in a place where there was sometimes a draught of air through the hawse holes. Upon a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), the sheriff-substitute found that the accident arose out of & in the course of the man's employment :—*Held :* the risk of drinking drugged water out of a tin belonging to another member of the crew was not shown to be reasonably incidental to the seaman's employment, & there was no evidence to support the finding of the sheriff-substitute.

(2) Arbitrators should, on the face of the award, distinguish between their rulings in law & findings of fact.—HUTCHISON *v.* M'KINNON, [1916] 1 A. C. 471 ; 85 L. J. P. C. 98 ; 114 L. T. 570 ; 32 T. L. R. 283 ; 60 Sol. Jo. 320 ; 9 B. W. C. C. 147, H. L.

Annotations :—*As to* (1) **Refd.** King *v.* Port of London Authority, [1920] A. C. 1 ; Slater *v.* Maconochie (1920), 89 L. J. K. B. 1238 ; St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59. *Generally*, **Mentd.** Larrinagar *v.* Soc. Franco-Americaine des Phosphates de Medulla (1922), 27 Com. Cas. 160.

2615. Slip on staircase.] — A carman, in the course of his duty, was coming down an ordinary stone staircase of easy gradient & in good repair from the first floor to the ground floor of Olympia, then used by the War Office, & closed to the public, when he fell on the staircase, & died of the injuries he sustained :—*Held :* the accident being an ordinary accident of life, was not made a special risk of the employment by the fact that the staircase could not be used by the general public, & the accident did not therefore arise " out of " the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—HARDER *v.* GAINS (A. E.) & SONS (1916), 85 L. J. K. B. 866 ; 114 L. T. 817 ; 9 B. W. C. C. 328, C. A.

2616. Injury by needle—Servant maid mending own dress.]—A girl, employed as a parlourmaid, was sitting in the kitchen occupying her spare time in mending a rent in her dress. Hearing a bell rung by her mistress, she left the darning-needle in her dress & went to answer the bell. In walking to the door she managed in some way to drive the needle into her knee, breaking it off short & causing herself serious injury. The county ct. judge made an award in her favour : —*Held :* there was no evidence to show that the injury was due to any risk incidental to her employment, & the accident did not therefore arise out of her employment.—GRIFFITHS *v.* ROBINS (1916), 10 B. W. C. C. 90, C. A.

2617. Slip at work — Causing choking.] — A workman employed in a colliery slipped while engaged in his employment. At the moment when he slipped he was eating a Barcelona nut, which choked him, with the result that he died.

The county ct. judge found that the workman's death resulted from an accident arising out of & in the course of his employment & awarded compensation to his widow :—*Held :* there was evidence to support the finding & no misdirection.—MORGAN *v.* BETTISFIELD COLLIERY CO. (1922), 15 B. W. C. C. 52, C. A.

2618. —— **Crossing railway platform on return from job.**]—UPTON *v.* GREAT CENTRAL RY. CO., No. 2336, *ante*.

LTD. (1914), 26 W. L. R. 619 ; 5 W. W. R. 1092 ; 15 D. L. R. 566 ; 19 B. C. R. 13.—**CAN.**

PART XIV. SECT. 5, SUB-SECT. 3.—G.

q. *Slip at work—Cook.*] — A cook was walking across the kitchen to get water from a tap when she found one of her slippers was falling off her foot. She tried to get it on again, &, in stooping down, fell on her knees & sustained injury :—*Held :* the accident did not arise out of the employment.—HANNIFIN *v.* FITZMAURICE (1920), 14 B. W. C. C. 320.—**IR.**

r. —— *Insurance collector.*] — A collector for an assurance co., whose duty it was to make a door-to-door collection of premiums, fell upon a stair which he had occasion to use while seeking to collect a premium, & was injured :—*Held :* the accident arose out of & in the course of the employment.—MILLAR *v.* REFUGE ASSURANCE CO., LTD., [1912] S. C. 37. —**SCOT.**

t. *Injury to eye by wood splinter when chopping wood—Preparation of own fire to boil food for pigs of employers.*] —PIKE *v.* MURRAY, [1921] N. Z. L. R. 830.—**N.Z.**

Sect. 5.—Right to compensation: Sub-sect. 3, H. & I.]

H. Risks Attaching to Particular Locality.

2619. General rule.]—If the conditions of a workman's employment oblige him to work in a particular place, & expose them to risk of an accident, such accident arises "out of his employment" within Workmen's Compensation Act, 1906 (c. 58), although the nature of the employment in no way conduced to the accident.

Applt. was employed by resp. as a fish worker, & had to work in a shed which was properly constructed & not in any way dangerous. While she was so working the wall of a neighbouring building, which did not belong to resp., fell upon the shed, causing the roof to give way, & applt. was seriously injured:—*Held:* the accident arose out of her employment & she was entitled to compensation.

My view of the statute is that the expression "arising out of employment" is not confined to the mere "nature of the employment." The expression, in my opinion, applies to the employment as such, to its nature, its conditions, its obligations, & its incidents. If by reason of any of these the workman is brought within the zone of special danger & is injured or killed, it appears to me that the broad words of the statute "arising out of the employment" apply. If the peril which he encountered was not an added peril produced by the workman himself, as in the case of *Plumb* v. *Cobden Flour Mills Co.*, No. 2415, *ante*, & *Barnes* v. *Nunnery Colliery Co.*, No. 2489, *ante*, in this house, then a case for compensation under the statute appears to arise (LORD SHAW OF DUNFERMLINE).—THOM (OR SIMPSON) *v.* SINCLAIR, [1917] A. C. 127; 86 L. J. P. C. 102; 116 L. T. 609; 33 T. L. R. 247; 61 Sol. Jo. 350; 10 B. W. C. C. 220, H. L.

Annotations:—**Folld.** Fearnley *v.* Bates & Northcliffe (1917), 86 L. J. K. B. 1000. **Apld.** Marsh *v.* Pope & Pearson (1917), 86 L. J. K. B. 1349; Wales *v.* Lambton & Hetton Collieries (1917), 86 L. J. K. B. 1346. **Consd.** Wright & Greig *v.* M'Kendry (1918), 12 B. W. C. C. 410. **Reid.** Dennis *v.* White, [1917] A. C. 479; Whittall *v.* Staveley Iron & Coal Co. (1917), 86 L. J. K. B. 985; Allcock *v.* Rogers (1918), 118 L. T. 386; Davidson *v.* M'Robb, or Officer, [1918] A. C. 304; Bell *v.* Armstrong, Whitworth (1919), 88 L. J. K. B. 844; Smidmore *v.* London & Thames Haven Oil Wharves (1921), 14 B. W. C. C. 114; St. Helens Colliery Co. *v.* Hewitson, [1924] A. C. 59; Upton *v.* G. C. Ry., [1924] A. C. 302.

2620. Seizure with fit—Fall into ship's hold.]—A workman was employed in the discharge of coal from the hold of a ship. His duty was to stand on a staging close to the open hold, direct the course up & down of a bucket in which the coal was being discharged, & give the necessary signals to the crane man. While so engaged he was suddenly seized with an epileptic fit, & the result was that he fell into the hold & was seriously injured. It appeared that on previous occasions he had been subject to fits:—*Held:* the workman's injuries were caused by an accident arising out of & in the course of his employment & he was entitled to compensation.—WICKS *v.* DOWELL & CO., LTD., [1905] 2 K. B. 225; *sub nom.* WILKES *v.* DOWELL & CO., 74 L. J. K. B. 572; 92 L. T. 677; 53 W. R. 515; 21 T. L. R. 487; 49 Sol. Jo. 480; 7 W. C. C. 14, C. A.

Annotations:—**Distd.** Rodger *v.* Paisley School Board (1912), 5 B. W. C. C. 547. **Consd.** Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127; Wright & Greig *v.* M'Kendry (1918), 12 B. W. C. C. 410. **Reid.** Hughes *v.* Clover, Clayton, [1909] 2 K. B. 798; Fennah *v.* Mid. & G. W. Ry. of Ireland (1911), 4 B. W. C. C. 440; Coyle (or Brown) *v.* Watson, [1915] A. C. 1; White *v.* Avery (1915), 9 B. W. C. C. 663; Williams *v.* Llandudno Coaching & Carriage Co. (1915), 112 L. T. 848.

2621. Injury by falling shed—Night watchman.]—Appct. was a watchman in the employment of a borough council, & was employed to watch at night some sewer works, his duty being to look after tools & traffic lamps, & to prevent accidents. There was a watch box for him to sit in. The tools were kept in a shanty which was constructed of scaffold poles, trestles, planks, & a tarpaulin. Upon the night in question there was a fire outside the watch box, but as it was raining appct. lighted a fire in the shanty & proceeded to cook his food there. While so engaged the shanty fell down & injured him. The evidence showed that the workmen were in the habit of having their food in the shanty in the daytime, & there was no evidence that appct. was expressly prohibited from making use of the shanty, though the borough engineer gave evidence that appct. had no business in the shanty at all, & that he would discharge a watchman if he had a fire in the shanty at night. In proceedings to assess compensation under the Workmen's Compensation Act, 1897 (c. 37), the county ct. judge found that appct. was not properly in the shanty, having regard to his duties, & that therefore the accident did not arise out of the employment:—*Held:* in the absence of a prohibition against appct. using the shanty, the evidence showed that the accident arose out of & in the course of the employment, & the Act applied.—MORRIS *v.* LAMBETH CORPN. (1905), 22 T. L. R. 22; 8 W. C. C. 1, C. A.

Annotations:—**Distd.** Brice *v.* Edward Lloyd, [1909] 2 K. B. 804. **Reid.** Gilbert *v.* Nizam (Owners), [1910] 2 K. B. 555; Redford *v.* Armstrong, Whitworth (1919), 88 L. J. K. B. 850.

2622. Injury by fall of adjoining wall—Girl employed in particular shed.]—THOM (OR SIMPSON) *v.* SINCLAIR, No. 2619, *ante*.

2623. Injury in crossing yard to reach lavatory.]—A woman had to cross a yard which was common to her employer's premises & the adjoining premises of another employer in order to go to the only women's convenience available for her,

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PART XIV. SECT. 5, SUB-SECT. 3.—H.

a. *Seizure with fit — Fall into ditch.*]—A worker employed in gorse grubbing was seized with a fit while at work by a ditch in which there was water. Falling face downwards he was drowned:—*Held:* the accident arose out of deceased's employment.—PUBLIC TRUSTEE *v.* GROOM, [1917] N. Z. L. R. 334.—**N.Z.**

b. *Railway brakesman run over by train.*]—In an action, under Workmen's Compensation Act, to recover damages for the death of a brakesman employed by deft. railway company, who was run over by a train:—*Held:* death was due to & resulted from a risk reasonably incident to the employment, & so arose "out of" the employment; & it arose "in the course" of the employment, deceased being where he was when the train passed over him in furtherance of his duty.—KENNEDY *v.* GRAND TRUNK PACIFIC RY. CO. (1913), 26 W. L. R. 120; 5 W. W. R. 747; 15 D. L. R. 172; 6 Sask. L. R. 286.—**CAN.**

c. *Injury to workman on railway by passing train.*]—The risk of being struck by a train or something projecting from the cars on a railway is a risk that a man working on a railway is specially exposed to & is incidental to his employment.—MORTON *v.* G. T. P. BRANCH LINES CO., [1917] 1 W. W. R. 1125; 10 Sask. L. R. 8.—**CAN.**

d. *Injury to eye by falling mortar.*]—A domestic servant was called by her mistress at 6 a.m. As she was in the act of getting up, a bit of mortar from the rendering attached to the slates in the roof of her bedroom fell into her right eye, with the result that she lost the sight of that eye. It was known to her mistress that handfuls of mortar had from time to time fallen from the slates:—*Held:* the accident arose out of & in the course of the employment.—ALDERIDGE *v.* MERRY (1912), 6 B. W. C. C. 450.—**IR.**

e. *Injury by slipping on snow-covered platform.*]—BLAKE *v.* RAMSAY (1916), 10 B. W. C. C. 500.—**IR.**

f. *Injury by falling slate.*]—During a severe gale an engineer's fitter was engaged in erecting machinery in an open yard near to a building from the roof of which slates were being blown. While stooping to adjust a large piece of machinery he was struck on the head by a falling slate & injured:—*Held:* the accident arose out of the

which was in the adjoining premises. In returning from the convenience she slipped on a small piece of wood lying in the yard, & injured herself severely. The yard was in good repair. The piece of wood had nothing to do with the employment:—*Held:* the accident arose "out of" the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—FEARNLEY *v.* BATES & NORTHCLIFFE, LTD. (1917), 86 L. J. K. B. 1000; 117 L. T. 193; 61 Sol. Jo. 506; 10 B. W. C. C. 308, C. A.

Annotations:—**Folld.** Marsh *v.* Pope & Pearson (1917), 86 L. J. K. B. 1349. **Refd.** Wales *v.* Lambton & Hetton Colliery Co. (1917), 117 L. T. 454; Wright & Greig *v.* M'Kendry (1918), 12 B. W. C. C. 410.

2624. Crossing rails on employers' premises.]—A boy going by his usual & proper way to work slipped on a tram rail in his employers' premises, & fell, injuring his face. The tram rails were properly laid & packed:—*Held:* the accident arose "out of" & "in the course of" the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1), inasmuch as it happened on the employers' premises by reason of a peril attached to those premises.—MARSH *v.* POPE & PEARSON, LTD. (1917), 86 L. J. K. B. 1349; 117 L. T. 456; 33 T. L. R. 523; 62 Sol. Jo. 9; 10 B. W. C. C. 566, C. A.

Annotations:—**Refd.** Wright & Greig *v.* M'Kendry (1918), 12 B. W. C. C. 410; Upton *v.* G. C. Ry. (1923), 130 L. T. 577.

2625. ——.]—A miner, who had left the pit & was returning home, but while still on the colliery premises, at an early hour in the morning, when it was quite dark & very frosty, slipped on some ice & fell on a railway siding & injured himself:—*Held:* although the peril of slipping was a peril to which every one in the country round was liable, yet, inasmuch as it was attached to the particular location in which by the obligation of service the workman was placed the injury resulting therefrom was caused by an accident "arising out of as well as in the course of his employment," & he was therefore entitled to compensation.—WALES *v.* LAMBTON & HETTON COLLIERIES (1917), 86 L. J. K. B. 1346; 117 L. T. 454; 33 T. L. R. 504; 61 Sol. Jo. 611; 10 B. W. C. C. 527, C. A.

Annotations:—**Folld.** Marsh *v.* Pope & Pearson (1917), 86 L. J. K. B. 1349. **Refd.** Wright & Greig *v.* M'Kendry (1918), 12 B. W. C. C. 410.

2626. Accident when cycling to work along employer's private road.]—Appct., a lad employed at resps.' colliery, used a bicycle to get to & from his work. On the morning of the accident he left his home, & after proceeding along the public road turned down into the co.'s private road some half mile long which led to the colliery. At the colliery end of this road the co. had provided a shed in which their employees' bicycles could be stored. He had nearly reached the shed when he was run into by a man leaving the colliery riding a bicycle.

On a claim for compensation, the county ct. judge found that it was an implied term of the contract of service with the colliery co. that employees should be allowed to ride bicycles along the employers' private road to & from work. He held that the accident arose out of & in the course of appct.'s employment:—*Held:* there was evidence to support the finding & no misdirection.—SIMPSON *v.* BOLSOVER COLLIERY CO., LTD. (1920), 13 B. W. C. C. 173, C. A.

I. Streets and Public Places.

2627. General rule.]—Where a workman is sent into the streets on his employer's business, whether habitually or occasionally, & whether on foot or on a bicycle, or on an omnibus or a car, & he meets with an accident by reason of a risk of the streets to which his employment exposes him, the accident arises out of as well as in the course of his employment; & it is immaterial that the risk which caused the accident is one which is shared by all members of the public using the streets under the like conditions.

A boy in the employment of a firm of builders was ordered to go through the streets of London on a bicycle to fetch some plaster. He came into collision with a motor car & was injured:—*Held:* (1) the accident arose out of the employment; (2) the facts being not in dispute, this was a question not of fact, but of law.

(3) It is the duty of the arbitrator to make definite findings of fact.—DENNIS *v.* WHITE (A. J.) & Co., [1917] A. C. 479; 86 L. J. K. B. 1074; 116 L. T. 774; 33 T. L. R. 434; 61 Sol. Jo. 558; 10 B. W. C. C. 280, H. L.; *revsg.*, [1916] 2 K. B. 1, C. A.

Annotations:—*As to* (1) **Folld.** Arkell *v.* Gudgeon (1918), 87 L. J. K. B. 1101. **Consd.** Hefferman *v.* Secretary of State for War (1918), 11 B. W. C. C. 424. **Apld.** Simpson *v.* Bolsover Colliery Co. (1920), 13 B. W. C. C. 173. **Expld.** Byrne *v.* Campbell (1923), 16 B. W. C. C. 355. **Refd.** Harder *v.* Gains (1916), 85 L. J. K. B. 866; Ince *v.* Reigate Education Committee, [1916] 2 K. B. 671; Kettle *v.* McKay & Ryland (1916), 85 L. J. K. B. 1490; Allcock *v.* Rogers (1918), 87 L. J. K. B. 693; Davidson *v.* McRobb, or Officer, [1918] A. C. 304; Knyvett *v.* Wilkinson (1918), 87 L. J. K. B. 722; Prophet *v.* Roberts (1918), 120 L. T. 239; Wright & Greig *v.* M'Kendry (1918), 12 B. W. C. C. 410; Armstrong, Whitworth *v.* Redford, [1920] A. C. 757; Clark *v.* Lord Advocate (1922), 15 B. W. C. C. 320; Upton *v.* G. C. Ry., [1924] A. C. 302. *As to* (2) **Apld.** Marsh *v.* Pope & Pearson (1917), 86 L. J. K. B. 1349. **Refd.** Read *v.* Baker, [1916] 1 K. B. 927.

2628. ——.]—If a workman while going on an errand for his master, slips & falls in the street & is injured, it is an accident arising out of & in the course of his employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1), for which he is entitled to compensation. Where, therefore, a woman employed at a dental surgery was sent by her employer on an errand & told to hurry, & while hurrying back slipped on something greasy on the pavement & fell & broke her wrist, it was held the injury was caused by accident arising

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employment.—ADAMSON *v.* ANDERSON & Co. (1905), LTD., [1913] S. C. 1038.—SCOT.

g. *Workman working amid shavings—Injury by fire caused by careless labourer dropping lighted match.*]—A ship's carpenter, while at work on board amid shavings & with oily trousers, was severely burned owing to the shavings being set on fire through a shore labourer, who had come on board, lighting a cigarette & throwing down a match:—*Held:* the accident arose out of the employment.—MANSON *v.* FORTH & CLYDE S.S. Co., LTD., [1913] S. C. 921; 50 Sc. L. R. 687; [1913] 1 S. L. T. 475; 6 B. W. C. C. 830.—SCOT.

h. *Injury by corrugated iron blown from roof.*]—A carter, while leading a horse and lorry out of his employer's yard in the course of his employment, was struck by a piece of corrugated iron blown by a high wind off the roof of a building adjoining employer's yard:—*Held:* the accident did not arise out of his employment.—KINGHORN *v.* GUTHRIE, [1913] S. C. 1155; 50 Sc. L. R. 863; [1913] 2 S. L. T. 153; 6 B. W. C. C. 887.—SCOT.

k. *Injury on wheeling steps of stairs—By waving hand of fellow servant.*]—CLARK *v.* LORD ADVOCATE, [1922] S. C. 561.—SCOT.

PART XIV. SECT. 5, SUB-SECT. 3.—I.

l. *Bicycle accident—Use by weighing supervisor.*]—HEFFERNAN *v.* SECRETARY OF STATE FOR WAR (1918), 11 B. W. C. C. 424.—IR.

m. —— *Use by salesman & collector.*]—A salesman & collector, while riding in a street upon a bicycle, in the course of his employment, was kicked on the knee by a passing horse & injured:—*Held:* the accident arose out of the employment.—M'NEICE *v.* SINGER SEWING MACHINE CO., LTD., [1911] S. C. 12; 48 Sc. L. R. 15; [1910] 2 S. L. T. 210; 4 B. W. C. C. 351.—SCOT.

n. —— *Use by herd — To & from work.*]—A herd employed upon two farms usually went from home to the farms by bicycle, with the sanction of his employer. He was setting out on his bicycle to go to one of the farms one

Sect. 5.—Right to compensation: Sub-sect. 3, I.; sub sect. 4, A.]

out of & in the course of her employment, & she was consequently entitled to compensation.—ARKELL *v.* GUDGEON (1917), 87 L. J. K. B. 1104; 118 L. T. 258; 62 Sol. Jo. 174; 10 B. W. C. C. 660, H. L.

Annotations:—**Refd.** Wright & Greig *v.* M'Kendry (1918), 12 B. W. C. C. 410. **Mentd.** Upton *v.* G. C. Ry., [1924] A. C. 302.

2629. Bicycle accident—Whether knowledge of employer material—Use by canvasser.]—A collector & canvasser to an industrial co. whilst riding a bicycle in the course of his employment was knocked down & killed by a tramcar. The fact that he used a bicycle for the purposes of his employment was known to & not forbidden by the co.:—*Held:* the accident arose out of the employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).—PIERCE *v.* PROVIDENT CLOTHING & SUPPLY CO., LTD., [1911] 1 K. B. 997; 80 L. J. K. B. 831; 104 L. T. 473; 4 B. W. C. C. 242; *sub nom.* PEARCE *v.* PROVIDENT CLOTHING & SUPPLY CO., LTD., 27 T. L. R. 299; 55 Sol. Jo. 363, C. A.

Annotations:—**Consd.** Greene *v.* Shaw (1911), 5 B. W. C. C. 573. **Distd.** Butt *v.* Provident Clothing & Supply Co. (1913), 6 B. W. C. C. 18. **Consd.** Bett *v.* Hughes (1914), 8 B. W. C. C. 362. **Distd.** Sheldon *v.* Needham (1914), 111 L. T. 729; Slade *v.* Taylor (1915), 8 B. W. C. C. 65. **Consd.** Thorn *v.* Humm (1915), 84 L. J. K. B. 1459; White *v.* Avery (1915), 9 B. W. C. C. 663. **Distd.** Ince *v.* Reigate Education Committee, [1916] 2 K. B. 671; Read *v.* Baker, [1916] 1 K. B. 927. **Expld.** Blake *v.* Ramsay (1917), 10 B. W. C. C. 500. **Consd.** Dennis *v.* White, [1917] A. C. 479. **Refd.** Karcmaker *v.* S.S. Corsican (1911), 4 B. W. C. C. 295; Rodger *v.* Paisley School Board (1912), 5 B. W. C. C. 547; Edwards *v.* Wingham Agricultural Implement Co. (1913), 82 L. J. K. B. 998; Mitchinson *v.* Day, [1913] 1 K. B. 603; Martin *v.* Lovibond, [1914] 2 K. B. 227; Pritchard *v.* Torkington (1914), 7 B. W. C. C. 719; Hadwin *v.* Shepherd (1915), 9 B. W. C. C. 60; Jibb *v.* Chadwick, [1915] 2 K. B. 94; Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127; Clark *v.* Lord Advocate (1922), 15 B. W. C. C. 320.

2630. —— —— ——.]—A workman employed as an assistant superintendent by a firm of credit tailors was killed by a fall from his bicycle, due to some defect in the machine. It was part of his duty to call on customers, but there was no evidence that the use of a bicycle was in any way necessary to his work; the employers were unaware that he did use it, & would have forbidden it had they known. The fall occurred fifteen minutes after he had made a business call on the bicycle, & five minutes after he had called for a bicycle lamp at his own home, which was on the way back to the office. There was no evidence that he wanted the lamp for business work:—*Held:* the accident did not arise out of & in the course of the employment.—BUTT *v.* PROVIDENT CLOTHING & SUPPLY CO., LTD. (1913), 6 B. W. C. C. 18, C. A.

2631. —— —— **Use by branch manager.**]—A manager of one branch shop had to take his books for inspection every Saturday to another branch two miles away. He used his bicycle for this purpose at the suggestion of the manager of this other branch. When returning one day after one o'clock, his closing hour, he met with a side slip, fell, & injured himself:—*Held:* the risk was not one to which he was exposed more than other members of the public, & the accident did not arise out of the employment.—SLADE *v.* TAYLOR (1915), 8 B. W. C. C. 65, C. A.

Annotations:—**Apld.** Read *v.* Baker, [1916] 1 K. B. 927. **Refd.** Dennis *v.* White, [1917] A. C. 479.

2632. —— —— **Use by solicitor's clerk.**]—A solr.'s clerk had to attend once a week a justices' ct. which was ten miles distant from his employer's office by road. He went to & returned from these cts. sometimes by train & sometimes by his bicycle. His train fares were office expenses. He used his bicycle with the knowledge & without the disapproval of his employer. One day in returning from a ct. on his bicycle, he was run into by a motor car & killed:—*Held:* the accident did not arise "out of" his employment within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1).

The facts being admitted or not disputed, it becomes a question of law whether or not an accident arises "out of" the employment.—READ *v.* BAKER, [1916] 1 K. B. 927; 85 L. J. K. B. 869; 114 L. T. 828; 32 T. L. R. 382; 60 Sol. Jo. 402; 9 B. W. C. C. 361, C. A.

Annotation:—**Folld.** Ince *v.* Reigate Education Committee, [1916] 2 K. B. 671.

2633. —— —— **Use by visiting nurse.**]—Appct. was employed as a visiting nurse by an education committee to visit children at their homes & was required by her employers to ride a bicycle provided by them for that purpose. Her duties necessitated her riding her bicycle from six to ten miles every day along one or other of the roads in her district, & the number of cases she visited averaged about one hundred & twenty a month. Each visit usually occupied only a few minutes. On leaving a house where she had been visiting a child, in attempting to cycle round a cart & horse which were standing across the road, her bicycle "skidded" & one of the wheels became locked in the back wheel of a passing cart, & she was thrown to the ground & seriously injured. The district in which appct.'s work lay was a residential rural district, & the road was an ordinary water-bound macadam road in fairly good condition:—*Held:* the accident did not arise out of the employment inasmuch as appct. had failed to prove that it exposed her to exceptional risks beyond those to which ordinary bicycle riders were exposed.—INCE *v.* REIGATE EDUCATION COMMITTEE, [1916] 2 K. B. 671; 85 L. J. K. B. 1283; 115 L. T. 402; 32 T. L. R. 721; 60 Sol. Jo. 666; 9 B. W. C. C. 595, C. A.

Annotation:—**Refd.** Blake *v.* Ramsay (1917), 10 B. W. C. C. 500.

2634. —— —— **Use by employee.**]—DENNIS *v.* WHITE (A. J.) & Co., No. 2627, *ante*.

2635. Running down.]—A brewer's drayman, whose duty it was from 8 a.m. till 8 p.m. to drive round a certain district in London a pair of horses in a dray belonging to his employers for the purpose of obtaining orders for & delivering beer to their customers, at about 2 p.m. left his dray at the side of the road opposite to a public-house, to which he went to get a glass of beer. After an absence of about 2 minutes he left the public-house to return to his dray, & while crossing the road was knocked down by a motor car, receiving injuries which resulted in his death. Upon a claim by his dependants for compensation under Workmen's Compensation Act, 1906 (c. 58):—*Held:* there was no break in the employment; what the man did was reasonably incident to his employment; he was exceptionally exposed to street accidents; the accident therefore arose out of & in the course of the employment; & the dependants were consequently entitled to compensation.—MARTIN *v.* LOVIBOND (J.) & SONS,

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day, when his own dog got in the way & upset him:—*Held:* the accident arose in the course of but not out of the employment.—GREENE *v.* SHAW (1911), 46 I. L. T. 18; 5 B. W. C. C. 573.—IR.

o. —— *Use by coachman—Calling for letters for employers—Drunken person lurching against bicycle.*]—BETT *v.* HUGHES (1914), 8 B. W. C. C. 362.—SCOT.

p. *Machine-fitter representing em-*

LTD., [1914] 2 K. B. 227; 83 L. J. K. B. 806; 110 L. T. 455; 7 B. W. C. C. 243, C. A.

Annotations:—**Expld.** Thom (or Simpson) *v.* Sinclair, [1917] A. C. 127. **Reld.** Slade *v.* Taylor (1915), 8 B. W. C. C. 65; Dennis *v.* White, [1916] 2 K. B. 1; Ince *v.* Reigate Education Committee, [1916] 2 K. B. 671; Bell *v.* Armstrong, Whitworth (1919), 88 L. J. K. B. 844.

2636. ——.]—A builder's labourer, working on a job in London, was ordered to go, in the breakfast hour, to a shop 100 yards from where he was working to obtain a supply of whitening, & to mix it before he went to his own breakfast. For this purpose he had to cross the road. This he did in a hurry, & was knocked down & injured by an electric tramcar:—*Held:* the accident did not arise out of the employment.—SYMMONDS *v.* KING (1915), 8 B. W. C. C. 189, C. A.

Annotation:—**Reld.** Thorn *v.* Humm (1915), 84 L. J. K. B. 1459.

2637. ——.]—A woman employed at a shop, had to go every morning over a public level crossing for the keys. She was on one occasion knocked down by a train & injured. On a claim for compensation the county ct. judge found that she incurred no greater risk of this than the general public, & consequently held that the accident did not arise out of the employment:—*Held:* there was no misdirection.—HADWIN *v.* SHEPHERD (1915), 9 B. W. C. C. 60, C. A.

Annotations:—**Folld.** Chapman *v.* S.S. John W. Pearn (1916), 9 B. W. C. C. 224. **Expld.** Dennis *v.* White, [1916] 2 K. B. 1.

2638. Servant slipping.]—It does not suffice to say that an accident which befalls a workman arises "out of" his employment as well as "in the course of" it in the sense that but for that employment the workman would not have gone to the spot & met with the accident; but the authorities show that there must be some special risk incidental to the workman's employment that imposes upon him a greater peril than an ordinary person incurs.

Where, therefore, a charwoman was sent to post a letter for her employer, & whilst proceeding to the post office, which was at a distance of about 100 yards from the house where she was employed, she slipped upon some object that was lying on the footpath & broke her leg, it was held that the accident did not arise "out of" as well as "in the course of" her employment, within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1); & she was not entitled to compensation under that Act.—SHELDON *v.* NEEDHAM (1914), 111 L. T. 729; 30 T. L. R. 590; 58 Sol. Jo. 652; 7 B. W. C. C. 471, C. A.

Annotations:—**Folld.** Hadwin *v.* Shepherd (1915), 9 B. W. C. C. 60; Slade *v.* Taylor (1915), 8 B. W. C. C. 65. **Apld.** Griffiths *v.* Robins (1916), 10 B. W. C. C. 90. **Overd.** Dennis *v.* White, [1917] A. C. 479. **Expld.** Byrne *v.* Campbell (1923), 16 B. W. C. C. 355. **Reld.** Bett *v.* Hughes (1914), 8 B. W. C. C. 362; Jibb *v.* Chadwick (1915), 112 L. T. 878; Williams *v.* Llandudno Coaching & Carriage Co., [1915] 2 K. B. 101; Upton *v.* G. C. Ry. (1923), 130 L. T. 577.

2639. ——.]—Appct., who was the skipper of a schooner belonging to the employer, went ashore on the ship's business, & as he walked along the street on his way back to the ship, he slipped on a piece of orange peel & fell & broke his thigh. The county ct. judge held that on the day of the accident, owing to there being fruit stalls in the street & to its being overcrowded, appct. incurred more risk of slipping on orange peel than persons in other streets, & that as he was compelled by his work to return along the street where the accident occurred the accident arose out of & in the course of the employment, & he awarded compensation:—*Held:* as there was nothing peculiarly incidental to the employment that made appct. more liable to accident by slipping on orange peel than any one else the accident did not arise out of the employment, & appct. was not entitled to compensation.—CHAPMAN *v.* JOHN W. PEARN (OWNER) (1916), 32 T. L. R. 368; 9 B. W. C. C. 224, C. A.

Annotations:—**Expld.** Dennis *v.* White, [1916] 2 K. B. 1. **Reld.** Ince *v.* Reigate Education Committee, [1916] 2 K. B. 671.

2640. ——.]—ARKELL *v.* GUDGEON, No. 2628, *ante*.

2641. Taxicab driver—Failure to hear sentry's challenge.]—A taxicab driver was employed to drive an officer to a fort guarded by sentries at two o'clock in the morning. The night was windy & rainy. The driver in approaching the fort was challenged by a sentry, but failed to hear the challenge owing to the wind & rain & the noise of the engine of the cab, & he was shot by the sentry. He sought to recover & was awarded by the arbitrator compensation for the accident from his employers:—*Held:* there was evidence on which the arbitrator could properly find the driver was, from his employment, more exposed to the risk of such an accident as occurred than an ordinary member of the public, & the arbitrator was justified in awarding compensation.—THORN *v.* HUMM & CO. (1915), 84 L. J. K. B. 1459; 112 L. T. 888; 31 T. L. R. 194; 8 B. W. C. C. 190, C. A.

SUB-SECT. 4.—PROOF OF ACCIDENTS ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

A. Onus of Proof.

2642. Onus on applicant—To show accident arose out of & in course of employment.]—MCNICHOLAS *v.* DAWSON & SON, No. 2652, *post*.

2643. —— ——.]—POMFRET *v.* LANCASHIRE & YORKSHIRE RY. CO., No. 2692, *post*.

2644. —— ——.]—BENDER *v.* ZENT (OWNERS), No. 2676, *post*.

2645. —— ——.]—BARNABAS *v.* BERSHAM COLLIERY CO., No. 2656, *post*.

2646. —— ——.]—A workman employed in fairly light work in a colliery was taken ill. He went home & died the same day from angina pectoris. The man's heart was found to be in a bad condition of long standing. The medical

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ployer on tour of inspection with inspector of weighing machines—Slipping on frosty road on journey to a machine.]—WHITE *v.* AVERY (W. & T.), LTD., [1916] S. C. 209; 53 Sc. L. R. 122; [1915] 2 S. L. T. 374; 9 B. W. C. C. 663.—**SCOT.**

PART XIV. SECT. 5, SUB-SECT. 4.—A.

2642 i. *Onus on applicant—To show accident arose out of & in course of employment.*]—The *onus* of proving on an arbn. under Workmen's Compensation Act, R. S. M., 1913, that the accident complained of arose out of & happened in the course of the injured workman's employment rests upon appct.—GOUSICK *v.* C. P. R. (Man.), [1917] 3 W. W. R. 807.—**CAN.**

2642 ii. —— ——.] — M'ADAM *v.* HARVEY, [1903] 2 I. R. 511.—**IR.**

2642 iii. —— ——.]—In a claim for compensation under Workmen's Compensation Act, 1906, the burden of proving that the accident arose both out of & in the course of the employment rests on appct.—GATTON *v.* LIMERICK S.S. CO., [1910] 2 I. R. 561.—**IR.**

2642 iv. —— ——.] — HOLLAND *v.* COMMUNITY OF CONVENT OF MERCY, NEWPORT (1913), 47 I. L. T. Jo. 29.—**IR.**

2642 v. —— ——.]—JARVIS *v.* OTAGO HARBOUR BOARD, [1925] N. Z. L. R. 619.—**N.Z.**

2642 vi. —— ——.]—In an application under the Workmen's Compensation Act, 1906, the *onus* is on claimant to prove that the accident arose out of & in the course of the workman's employment.—O'BRIEN *v.* STAR LINE, LTD., [1908] S. C. 1258.—**SCOT.**

2642 vii. —— ——.] — MILLER *v.* NORTH BRITISH LOCOMOTIVE CO., LTD., [1909] S. C. 698.—**SCOT.**

Sect. 5.—Right to compensation: Sub-sect. 4, A. & B. (a), (b) & (c).]

evidence was that angina pectoris might be brought on by several causes, & might be due to circumstances which could scarcely be called an accident at all:—*Held:* though as a matter of conjecture it was probable, it was not proved as a matter of legitimate inference from the facts, that the death was due to an accident arising out of & in the course of the employment.—HAWKINS *v.* POWELLS TILLERY STEAM COAL CO., LTD., [1911] 1 K. B. 988; 80 L. J. K. B. 769; 104 L. T. 365; 55 Sol. Jo. 329; 4 B. W. C. C. 178; *sub nom.* POWELLS TILLERY STEAM COAL CO., LTD. *v.* HAWKINS, 27 T. L. R. 282, C. A.

Annotations:—**Consd.** Fennah *v.* Mid. & G. W. Ry. of Ireland (1911), 4 B. W. C. C. 440; Euman *v.* Dalziel (1912), 6 B. W. C. C. 900; Stapleton *v.* Dinnington Main Coal Co. (1912), 107 L. T. 247. **Refd.** Beaumont *v.* Underground Electric Rys. of London (1912), 5 B. W. C. C. 247; Chandler *v.* G. W. Ry. (1912), 106 L. T. 479; Kerr (or Lendrum) *v.* Ayr Steam Shipping Co., [1915] A. C. 217.

2647. —— ——.]—A collier whose work was to lift loaded tubs on to the rails complained of great pain while so employed & went home. He remained in bed there & vomited continually. A week afterwards he was operated on for strangulated hernia, but death ensued. The only evidence which diminished at all the strong probability of the connection between the workman's exertions was that of the doctors who found an abnormal cavity, probably congenital, in the colon, & said that a gangrenous condition might be expected to be set up within a few hours to three days after the rupture, whereas that condition had not existed from the time of ceasing work until that period had passed. The county ct. judge rejected the employers' contention that the hernia was caused by the vomiting & decided that the injury arose by accident out of & in the course of employment:—*Held:* in cases where the admitted facts gave rise to conflicting inferences of equal degree so that the probability was a matter of conjecture appct. would rightly be required to prove affirmatively the claim made, but where the probabilities were not equal the county ct. judge was entitled to weigh them & draw an inference of fact therefrom & so long as there was evidence to support his finding the ct. had no jurisdiction to question his award.—LANCASTER *v.* BLACKWELL COLLIERY CO., LTD. (1919), 89 L. J. K. B. 609; 122 L. T. 162; 64 Sol. Jo. 113; 12 B. W. C. C. 400, H. L.

2648. —— **To show that he was acting for purpose of employer's trade.**]—GARRALLAN COAL CO. *v.* ANDERSON (OR DEVLIN), No. 2511, *ante*.

2649. Onus shifted to employer—On proof that applicant engaged in employer's work up to time of accident.]—Where the workman is engaged in his master's work up to his death & the last acts that are known are consistent with the continuance of that work it is for the person who alleges a cessation of his working for his master to prove it (FLETCHER MOULTON, L.J.).—ASTLEY *v.* EVANS (R.) & CO., LTD., [1911] 1 K. B. 1036; 80 L. J. K. B. 731; 104 L. T. 373; 4 B. W. C. C. 209, C. A.; *affd. sub nom.* EVANS (RICHARD) & CO., LTD. *v.* ASTLEY, [1911] A. C. 674, H. L.

Annotations:—**Consd.** Prosser *v.* Graham Navigation Collieries (1921), 14 B. W. C. C. 42. **Refd.** Dyhouse *v.* G. W. Ry. (1913), 109 L. T. 193; Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13; Warren *v.* Hedley's Colliery Co. (1913), 6 B. W. C. C. 136; Garrallan Coal Co. *v.* Anderson (or Devlin) (1926), 19 B. W. C. C. 356. **Mentd.** Southall *v.* Cheshire County News Co. (1912), 5 B. W. C. C. 251; Stapleton *v.* Dinnington Main Coal Co. (1912), 107 L. T. 247; Watkins *v.* Guest, Keen & Nettlefolds (1912), 106 L. T. 818; Wemyss Coal Co. *v.* Symon (1912), 6 B. W. C. C. 298; Plumb *v.* Cobden Flour Mills Co. (1913), 108 L. T. 161; Maxwell *v.* Ruabon Coal & Coke Co. (1916), 86 L. J. K. B. 428; Wardle *v.* Enthoven (1916), 86 L. J. K. B. 309; Rigling *v.* Minister of Munitions (1921), 14 B. W. C. C. 1.

2650. —— ——.]—(1) A workman was employed on premises through which four sets of railway lines ran from east to west. He was employed on the south side of these rails. In his dinner hour he crossed the lines by the level crossing to the north side in order either to go to the mess room or the lavatory, to either of which places at that time of the day he was entitled to go.

As he was returning to his work, the watchman, who was stationed at the north side of the level crossing, warned him that there was a passenger train due on the line he would have to cross first. He crossed those lines & reached the goods or southern lines, & then was seen to stop at a place of safety quite clear of the passenger train lines. The passenger train passed, & his dead body was found on the line. Although there was no evidence exactly as to how the accident happened the county ct. judge drew the inference that the man was acting in the course of his employment when it happened, & therefore held that it arose out of his employment, & awarded compensation:—*Held:* there was sufficient evidence to support the inference drawn by the county ct. judge, & no misdirection.

(2) Deceased was engaged on work within his employment up to a moment before his accident, & that being so, the *onus* was upon the employers to prove that his last act causing the accident was inconsistent with his continuing within his employment.—RIGLING *v.* MINISTER OF MUNITIONS (1921), 14 B. W. C. C. 1, C. A.

2651. —— **Proof that accident arose in course of employment—Allegation that accident caused by breach of regulation.**]—A fireman & a miner acting under his directions, while engaged in clearing gas from a mine, were killed by an explosion by gas. Upon a claim for compensation by the representatives of the miner the arbitrator found that the explosion was due to an attempt to relight the fireman's safety lamp in breach of Coal Mines Act, 1911 (c. 50), s. 34 (1) (iii), but that the evidence did not disclose by which of the men the attempt had been made, & he refused compensation:—*Held:* as it appeared *primâ facie* that the miner met his death by accident arising out of his employment, the *onus* lay on the employers of establishing that he had committed a breach of the regulation & that they had failed to discharge that *onus;* compensation should therefore be awarded.—MOORE (A. G.) & CO. *v.* BARKEY, [1923] A. C. 790; 93 L. J. P. C. 63; *sub nom.* BARKEY *v.* MOORE & CO., 130 L. T. 45; 16 B. W. C. C. 176, H. L.

B. Sufficiency of Proof.

(a) Accidents with Machinery.

2652. Claim successful—Workman drawn into machine.] — The burden of proving that an accident arose out of & in the course of the workman's employment lies on pltf.; but the burden of proving serious & wilful misconduct lies on deft.

2652 1. *Claim successful—Workman drawn into machine.*]—SEXTON *v.* HOSFORD (1916), 50 I. L. T. 91.—IR.

q. *Claim unsuccessful—Using hoist contrary to orders.*]—M'DAID *v.* STEEL, [1911] S. C. 859; 48 Sc. L. R. 765; [1911] 2 S. L. T. 13; 4 B. W. C. C. 412. —SCOT.

A workman employed by defts. to attend to a steam engine within a shed & to a mortar pan outside the shed worked by the steam engine & used to grind mortar for a building, was seen to start the engine. Very shortly afterwards he was found involved in the machinery, whereby he was killed. The shed had two doors, one of which was safe; the other, a small one, used occasionally for ventilating the shed, was dangerous by reason of proximity to a revolving shaft, & the man had been forbidden to use it. It appeared that the man was approaching the small door when he met with the accident:—*Held:* there was evidence that the accident arose out of & in the course of his employment.—MCNICHOLAS *v.* DAWSON & SON, [1899] 1 Q. B. 773; 68 L. J. Q. B. 470; 80 L. T. 317; 47 W. R. 500; 15 T. L. R. 242; 43 Sol. Jo. 312; 1 W. C. C. 80, C. A.

Annotations:—**Refd.** Hennessy *v.* McCabe (1899), 69 L. J. Q. B. 173; Rees *v.* Thomas (1899), 68 L. J. Q. B. 539; Fenn *v.* Miller, [1900] 1 Q. B. 788; Pomfret *v.* L. & Y. Ry. (1903), 89 L. T. 176; Upton *v.* G. C. Ry., [1924] A. C. 302.

2653. ——— ———.]—A boy employed in a shoe factory was in the course of his duty picking up pieces of card from the floor near running machinery, when he became caught in a loose driving belt. He was drawn up to a revolving shaft, & received severe injuries. According to his own evidence he did not touch the belt with his hand all that afternoon, but his shirt sleeve caught in it. The employers' case was that he was playing with the belt, which he had been cautioned not to do. The county ct. judge, after visiting the place of the accident, found that the boy had been caught by his sleeve, & to save himself had instinctively put his hand out & taken hold of the belt, & had so been carried up. He consequently found that the accident arose out of the employment.

The employers argued on appeal that the county ct. judge, not having escaped the workman's evidence as to how the accident happened, was not entitled to suggest a theory of his own:—*Held:* there was evidence to support the inference drawn by the judge as to how the accident happened, & no misdirection.—DURRANT *v.* SMITH & CO. (1914), 7 B. W. C. C. 415, C. A.

2654. Claim unsuccessful—Boy killed by machine in part of workshop where not employed.]—A lad was employed to control a motor engine by means of a switchboard, which was eighteen feet away from the engine. It was also his duty, when so ordered, to clean the engine when it was stationary. The engine was fenced off. Without known reason he left the switchboard & got through the fence when the engine was in motion, & was killed by being caught in a cog wheel:—*Held:* the dependant had not discharged the *onus* of proving the accident arose out of & in the course of the employment.—SMITH *v.* STANTON IRONWORKS CO. COLLIERIES, LTD. (1913), 6 B. W. C. C. 239, C. A.

2655. ——— **Workman using revolving shaft.**]—PLUMB *v.* COBDEN FLOUR MILLS CO., LTD., No. 2415, *ante*.

(*b*) *Apoplexy.*

2656. Claim unsuccessful—No evidence connecting fit with employment.]—(1) A workman while performing his ordinary duties in the ordinary way had an apoplectic seizure, from which he died shortly after. There was medical evidence that he was in such a state of health that the attack might have been brought on by exertion, or might have come on apart from any exertion on his part. There was no evidence that his work subjected him to any extraordinary strain:—*Held:* there was no evidence that his death was caused by an accident arising out of his employment, & his employers were not liable to pay compensation to his dependants.

(2) In cases under the Workmen's Compensation Act, as in other cases, the *onus* of proof of claim rests upon appct. (LORD LOREBURN, C.).—BARNABAS *v.* BERSHAM COLLIERY CO. (1910), 103 L. T. 513; 55 Sol. Jo. 63; 4 B. W. C. C. 119, H. L.

Annotations:—*As to* (1) **Consd.** Fennah *v.* Mid. & G. W. Ry. of Ireland (1911), 4 B. W. C. C. 440. **Distd.** Trodden *v.* McLennard (1911), 4 B. W. C. C. 190. **Expld.** Lewis *v.* Port of London Authority (1914), 111 L. T. 776. **Consd.** Maxwell *v.* Ruabon Coal & Coke Co. (1916), 86 L. J. K. B. 428. **Refd.** Euman *v.* Dalziel (1912), 6 B. W. C. C. 900; Lancaster *v.* Blackwell Colliery Co. (1918), 120 L. T. 3; Andrews *v.* Highley Mining Co. (1922), 15 B. W. C. C. 192. *As to* (2) **Apld.** Hawkins *v.* Powells Tillery Steam Coal Co., [1911] 1 K. B. 988; Kemp *v.* Clyde Shipping Co. (1918), 87 L. J. K. B. 861. **Refd.** Chandler *v.* G. W. Ry. (1912), 106 L. T. 479; Woods *v.* Wilson (1913), 29 T. L. R. 726. **Mentd.** Travers *v.* Cooper, [1915] 1 K. B. 73.

2657. ——— ———.]—A ship's stoker, while on duty on a ship in the tropics, went into a coal bunker adjoining the stokehold, & was soon afterwards found in a condition of heat apoplexy. Upon the medical evidence the arbitrator found that it might have been caused by the heat of the sun or of the stokehold, & that it was not proved that the fit had been brought on by the work the man had been doing at the time, & that therefore the apoplexy was not caused by accident arising out of the employment:—*Held:* there was no misdirection.—OLSON *v.* DORSET (OWNERS) (1913), 6 B. W. C. C. 658, C. A.

(*c*) *Asphyxiation.*

2658. Claim unsuccessful — No evidence that accident arose out of employment.]—A collier was found asphyxiated in a stall where men had been warned not to go because of the gas being dangerous. No explanations was forthcoming as to why he went there. The county ct. judge found that the *onus* on dependant of proving that deceased met his death by accident arising out of & in the course of his employment had not been discharged:—*Held:* the question was purely one of fact for the judge & there was no misdirection.—MORGAN *v.* CYNON COLLIERY CO. (1915), 8 B. W. C. C. 499, C. A.

2659. ——— ———.]—Deceased, who was a man of regular habits, sober & trustworthy, was a labourer in the employment of resps., & he was last seen alive shortly before noon on Sept. 29, 1917. At night an official on duty at resps.' works noticed a smell of coal gas issuing from a room which was used as the testing room, the door of which he found locked. The smell of gas being so strong, the official entered the room by way of the window, & there he found deceased, who had been obviously poisoned by gas, for close to him was a gaspipe with the gas turned on &

PART XIV. SECT. 5, SUB-SECT. 4.—B. (b).

2656 l. *Claim unsuccessful—No evidence connecting fit with employment.*]—BLAKEY *v.* ROBSON, ECKFORD & CO., LTD., [1912] S. C. 334.—**SCOT.**

r. *Claim successful—Evidence connecting fit with employment.*]—AITKEN *v.* FINLAYSON BONSFIELD & CO., LTD. (1914), 7 B. W. C. C. 918.—**SCOT.**

t. ———.] — A workman in the course of his employment in a bonded store, the floor of which was made of concrete, was seized by a fit & fell, fracturing his skull on the floor, & thereby sustaining injuries which caused his death:—*Held:* the death was caused by accident arising out of his employment.—M'KENDRY *v.* WRIGHT & GREIG, LTD., [1919] S. C. 98; 56 Sc. L. R. 39; [1918] 2 S. L. T. 282; 12 B. W. C. C. 410.—**SCOT.**

Sect. 5.—Right to compensation: Sub-sect. 4, B. (c) & (d).]

escaping. The purpose for which deceased was in the room did not appear. He had no right to be there on a Saturday afternoon. He had not been cleaning the machinery as he had no implements with him. Nor was there any explanation of the door being fastened. The question was whether appct., who was the widow & dependant of deceased, on whom the burden of proof lay, had proved to the satisfaction of the county ct. judge that deceased's death was caused by "accident arising out of & in the course of" his employment. The judge took the view that he was not judicially satisfied that deceased so met with his death:—*Held:* it was quite impossible for it to be said that the county ct. judge, having regard to the nature of the evidence before him, ought to have drawn a conclusion different from that which he did.—GRAY *v.* SOPWITH AVIATION CO., LTD. (1918), 88 L. J. K. B. 329; 119 L. T. 194; 11 B. W. C. C. 63, C. A.

(d) Blood Poisoning.

2660. Claim successful—Collier—Crushed finger.]—A workman, who was employed in a colliery, died from blood poisoning resulting from an injury to his finger. He was working at night, & on the evening of the accident he left his home, which was just over a mile from the pit, with his finger well. He arrived at the pit with his finger uninjured. He arrived home early next morning with his finger crushed. He continued to work for some days, when blood poisoning set in, & he died. His widow claimed compensation under the Workmen's Compensation Act, 1897 (c. 37), but the county ct. judge held that he was not entitled to draw the inference that the accident arose in the course of his employment, as it might have occurred on the way home:—*Held:* the judge was at liberty to draw the inference that the accident arose in the course of the employment.—MITCHELL *v.* GLAMORGAN COAL CO., LTD. (1907), 23 T. L. R. 588; 9 W. C. C. 16, C. A.

Annotations:—**Consd.** Rice *v.* Swansea Vale (Owners) (1910), 102 L. T. 270. **Expld. & Distd.** Jenkins *v.* Standard Colliery Co. (1911), 105 L. T. 730. **Apld.** Wright *v.* Kerrigan (1911), 4 B. W. C. C. 432. **Distd.** Howe *v.* Fernhill Collieries (1912), 107 L. T. 508. **Consd.** Dyhouse *v.* G. W. Ry. (1913), 109 L. T. 193; Shea *v.* Wilson, Barnsley (1916), 9 B. W. C. C. 633. **Reld.** McDonald *v.* Banana (Owners), [1908] 2 K. B. 926; Bender *v.* Zent (Owners), [1909] 2 K. B. 41; Hawkins *v.* Powells Tillery Steam Coal Co., [1911] 1 K. B. 988; Wood *v.* Davis (1911), 5 B. W. C. C. 113; Amys *v.* Barton, [1912] 1 K. B. 40.

2661. —— —— Injured foot.]—On the morning of Aug. 14, 1911, a collier started at his work in his employers' coal mine having made no complaint to any one, nor did any one see him walking as if there was anything the matter with his feet. Later on he came out of the stall where he had been working & complained to the headman that his foot hurt him. The headman found in the stall a piece of rock weighing about three or four pounds, on the floor, which had fallen from the roof during the working hours. On Aug. 19 a doctor examined the foot & found a small wound about half an inch in length of a kind that might have been caused, in the doctor's opinion, by a piece of stone falling on it, &, also, in the doctor's opinion, death was due to tetanus supervening on the wound. A scratch or nearly healed scar of the sole of the foot was also discovered. On Aug. 25 the workman was found to be suffering from tetanus, from which he died the next day.

It was decided by the county ct. judge, giving effect to what was laid down by the House of Lords in *Evans (Richard) & Co., Ltd.* v. *Astley*, No. 2693, *post*, that the more probable conclusion from the evidence was that an accident had happened to deceased arising out of & in the course of his employment, the inference to be drawn therefrom being that the wounds on his foot were caused by the fall of the stone; & that therefore his death was caused by that accident:—*Held:* there was evidence to support the finding of the county ct. judge.—STAPLETON *v.* DINNINGTON MAIN COAL CO., LTD. (1912), 107 L. T. 240; 5 B. W. C. C. 602, C. A.

2662. —— —— Knee grazed in moving tubs.]—HAYWARD *v.* WESTLEIGH COLLIERY CO., LTD., No. 2917, *post*.

2663. —— Workman re-opening old operation wound.]—A workman who had undergone an operation returned to work before the operation wound was completely healed, with instructions not to strain himself. He worked at the lever of a machine. A fellow workman, noticing that the machine was stopped, looked for the man, & saw that he was talking to the foreman some yards away. It was then seen that blood was flowing freely from the operation wound & soaking into his boots. Septic poisoning followed, & the man died. In the absence of direct evidence as to what had happened, the county ct. judge drew the inference that the wound had burst open through the strain of working the lever, & awarded compensation to the dependants:—*Held:* there was evidence from which the county ct. judge could draw this inference.—GROVES *v.* BURROUGHES & WATTS, LTD. (1911), 4 B. W. C. C. 185, C. A.

2664. —— Bricklayer—Sore on hand.]—A bricklayer in the employment of resps. returned from work on Dec. 27, 1911, with a sore on the back of the thumb of his left hand. The wound appeared to heal, but ultimately blood poisoning ensued in the armpit, & the workman died on Jan. 30, 1912. His dependants claimed compensation under Workmen's Compensation Act, 1906 (c. 58), & evidence was given that injuries such as this were common in the case of bricklayers. The workman was engaged in cutting grooves in a wall, & had to use a hammer & chisel. In doing such work the face of the hammer might slip off the chisel & hit the workman's hand. The medical evidence was that the inflammation started under the man's armpit in the form of an abscess, due to an inflamed gland, & that an injury to the back of the thumb might give rise to this. The doctor was of opinion that the bacillus got into the man through this injury, but he said in cross-examination that he could not say that a dirty condition of the armpit might not have caused the abscess. The county ct. judge drew the inference that the man died from septic poisoning resulting from an injury which arose out of & in the course of his employment, & awarded compensation:—*Held:* there was evidence from which the county ct. judge might infer that the injury to the workman happened to him while he was at work, & the county court judge was justified in accepting the evidence of the doctor & holding that the workman's death was due to the accident.—FLEET *v.*

a. *Claim successful—Injury to foot.]*—CONNELLY *v.* CROSS & SONS, LTD., [1917] S. C. 164; 54 Sc. L. R. 142; [1917] 1 S. L. T. 40; 10 B. W. C. C. 436.—SCOT.

JOHNSON & SONS (1913), 29 T. L. R. 207; 57 Sol. Jo. 226; 6 B. W. C. C. 60, C. A.

Annotation :—**Refd.** Munro, Brice *v.* Marten, Same *v.* R., [1920] 3 K. B. 94.

2665. —— Workman handling bone manure.]—A workman was employed for some time before his death in a manure factory & his work consisted in handling & bagging bone manure. He became ill with blood poisoning & subsequently died. It was proved in evidence, on a claim by his widow for compensation, that death was due to infection from germs known as streptococci & staphylococci. Such germs were found to exist in great numbers in the bone dust handled by deceased, but there was evidence that they also existed to a much lesser degree almost anywhere. The point of infection was a scratch on the leg, the origin of which was unexplained. The sheriff-substitute drew the inference & found that the infection was derived from the germs in the bone dust & held that the death consequently resulted from injury by accident arising out of & in the course of the employment :—*Held :* there was evidence to support the finding of the sheriff-substitute & no misdirection.

All that is material is that the infection should have been the result of contract at some one particular time, & that this one particular time should have been during the course of the employment. . . . What that particular time was is immaterial so long as it reasonably appears that it was in the course of the employment (LORD BIRKENHEAD, C.).—INNES (OR GRANT) *v.* KYNOCH, [1919] A. C. 765; 88 L. J. P. C. 85; 121 L. T. 39; 35 T. L. R. 392; 63 Sol. Jo. 444; 12 B. W. C. C. 78, H. L.

Annotations :—**Apld.** Burrell *v.* Solvage (1921), 90 L. J. K. B. 1340. **Consd.** Carr *v.* Port Glasgow Burgh (1923), 16 B. W. C. C. 331; Hutchinson *v.* Kiveton Park Colliery Co., [1926] 1 K. B. 279; Williams *v.* Guest, Keen & Nettlefolds, [1926] 1 K. B. 497. **Refd.** Dennis *v.* Mid. Ry. (1920), 13 B. W. C. C. 542; Walker *v.* Wynn, Timmins (1922), 15 B. W. C. C. 122.

2666. —— Girl finishing shell adaptors—Series of cuts & scratches.]—A girl worked for resps. at a lathe, finishing shell adaptors, & in the course of that work constantly sustained cuts & scratches on her hands. In Mar. 1918, she showed symptoms of blood poisoning from the pus formed in gatherings caused by the cuts. She continued to work until Apr. 27, during which time further cuts & scratches were caused. By that time the poisoning had so got into her system that she had to stop work & became totally incapacitated from arthritis. The county ct. judge found that the last cut of Apr. 27 was an accident, & that the incapacity thus resulted from injury by accident arising out of & in the course of the employment : —*Held :* although there was no evidence to support the finding that the incapacity resulted from the cut on Apr. 27, there was conclusive evidence that it resulted from the accumulative effect of the series of accidents met with at her work. It was impossible to hold that because the incapacity was caused not from a particular accident but from a series of accidents that that fact prevented appct. from recovering compensation.—BURRELL (CHARLES) & SONS, LTD. *v.* SELVAGE (1921), 90 L. J. K. B. 1340; 126 L. T. 49; 65 Sol. Jo. 734; 14 B. W. C. C. 158, H. L.; *affg.* S. C. *sub nom.* SELVAGE *v.* BURRELL (CHARLES) & SONS, LTD., [1921] 1 K. B. 355, C. A.

Annotation :—**Distd.** Williams *v.* Guest, Keen & Nettlefolds, [1926] 1 K. B. 497.

2667. —— Workman cleaning out tank.]—A workman cut his finger with a knife while at his home & no ill effects appeared. Three days later, while at work, he put his hand into a tank used for cooling & hardening metal & containing foul water which had been there for many years. While groping in the dirt at the bottom of the tank, he felt a sharp pain in his hand. On withdrawing his hand he observed a scaly substance on the finger which he had previously cut, & flicked it away. The finger very soon became poisoned, with the result that he was eventually incapacitated. Evidence was given to the effect that a germ known as streptococcus might have got into his hand at the time when he was searching in the tank. He applied for arbn. & the county ct. judge made an award in his favour :—*Held :* the evidence, though slight, was sufficient to justify the county ct. judge in coming to a decision that the injury by accident arose in the course of the employment, being due to the germ getting into the workman's hand while he was at work.—WALKER *v.* WYNN, TIMMINS & CO., LTD. (1922), 15 B. W. C. C. 122, C. A.

2668. —— Workman cleaning hurricane lamp.]—A workman employed by applts., on Dec. 5, 1923, had worked for two hours before breakfast on the cleaning of a mechanical navvy, part of the duty being to clean a hurricane lamp, & at 8.30, according to evidence given by M., a fellow workman, while having breakfast with M., showed him a nip in the skin of a finger of his right hand which had been wiped & cleaned, but the rest of his hand was very dirty & oily, thereupon M. said, he went & looked at the hurricane lamp which he found had been cleaned, but the glass was broken having a jagged edge which might have caused the injury to the finger. The workman rapidly got worse from the setting up by the cut of septic poisoning, & on Dec. 7 did not go to his work, & on Dec. 22 he died. An inquest was held on Dec. 24 at which the solr. of applts. was present & heard all the evidence as to how the death was brought about. Statutory notice of the accident was not given until Jan. 4, 1924. The widow of deceased workman made an application for compensation under Workmen's Compensation Act, 1906 (c. 58), & on the hearing on May 8 a doctor called on her behalf in cross-examination said that he had asked deceased how he got the cut & deceased said that he had cut himself on his bicycle lamp. The county ct. judge held that the evidence of the doctor as to what deceased said as to the cause of the accident was not admissible, & accepted the evidence of M. in full, & in consequence held that the fair inference to be drawn from the evidence was that the cut on the finger was caused by the broken glass of the hurricane lamp, & therefore the accident arose out of & in the course of the employment &, further, that appct. had discharged the *onus* of proving that the employers were not prejudiced by the want of notice of the accident, & that there was reasonable cause for its absence & made an award in favour of the widow of £269 2*s.*, the amount being agreed :—*Held :* the evidence of the doctor elicited on cross-examination clearly relating to the cause of the accident was inadmissible, & there was sufficient evidence to justify the finding that the employers had not been prejudiced by want of notice, & the evidence of M. having been accepted in full it was rightly decided that the accident arose out of & in the course of the employment.—SHARP *v.* LODDINGTON IRONSTONE CO., LTD. (1924), 132 L. T. 229; 17 B. W. C. C. 171, C. A.

2669. Claim unsuccessful—Death from erysipelas of face—Three months after wound on hand.]—At an arbn. there was a dispute between the medical experts as to whether or not a wound in the hand on Apr. 17 could cause erysipelas of the

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face on July 7. The question was as to whether or not the micro-organisms of erysipelas could have remained latent in the body from Apr. to July. There was no evidence that they had done so, & the doctor for appct. did not swear that in his opinion they had done so. The case was adjourned, & the medical referee sent for. He was merely asked the abstract question, as to whether or not the organisms could have been latent for so long a time. He said it was possible that the organism might have lain dormant & subsequently sprung to life if H. [pltf.] was in a devitalised condition :—*Held:* there was no evidence to justify the finding that deceased man died from personal injury by accident.—HUGO *v.* LARKINS (H. W.) & Co. (1910), 3 B. W. C. C. 228, C. A.

2670. —— Scratch—No evidence of receipt in course of employment.]—A workman in the employment of a colliery co. was engaged on the night shift, & went to his work on the night of Friday, Dec. 9, about eleven o'clock & returned at 7.30 the next morning. He then showed his wife a red patch on his right arm. The wife also noticed a scratch on the right thumb. The man died on Dec. 21 of blood poisoning which, according to the medical evidence, resulted from the scratch on the thumb. Evidence was given that some stone had fallen on the man while he was working on the Friday night, but the medical testimony was to the effect that the red patch on the arm was caused by inflammation from the scratch on the thumb, & that such inflammation would not appear in less than twelve hours after the introduction of the septic poisoning. The county ct. judge held that he was entitled to infer that the scratch was received while the man was at work at the colliery, & therefore the injury & death arose out of & in the course of his employment :—*Held:* there was no evidence to support such a finding, & the employers were not liable.—JENKINS *v.* STANDARD COLLIERY Co. (1911), 105 L. T. 730; 28 T. L. R. 7; 5 B. W. C. C. 71, C. A.

Annotations :—**Consd.** Innes (or Grant) *v.* Kynoch, [1919] A. C. 765. **Reld.** Wood *v.* Davis (1911), 5 B. W. C. C. 113; Howe *v.* Fernhill Collieries (1912), 107 L. T. 508.

2671. —— —— ——.]—A collier was washing on his return from work, when his wife saw a small scratch on his knee & a large lump on his groin. He died in a few days from blood poisoning which started from the scratch. There was no evidence as to how he got the scratch, but there was medical evidence that the scratch could not have caused the lump, if the scratch had only been made on the day the lump appeared. The county ct. judge inferred that the scratch had been caused at work, & that the accident accordingly arose in the course of the employment, & awarded compensation :—*Held:* there was no evidence to support the inference.—WOOD *v.* DAVIS (D.) & SONS, LTD. (1911), 5 B. W. C. C. 113, C. A.

Annotation :—**Reld.** Innes (or Grant) *v.* Kynoch, [1919] A. C. 765.

2672. —— —— ——.]—On Mar. 31 appct. was employed by resps. to clean drums, that had contained red oxide, with turpentine. She alleged that while so at work the thumb of her left hand was poisoned. She worked as usual on Apr. 1 to 5 inclusive, during which time there was evidence that she had a rag on her hand, but did not complain to any one or see a doctor. Apr. 6 & 7 were Easter holidays. On Apr. 8, Easter Sunday, she saw a doctor, who found she was suffering from a septic hand. The medical evidence called by the employers was that had she contracted septic poisoning on Mar. 31, the hand would have become very painful in forty-eight hours. Also red oxide would not set up septic poisoning, & turpentine, although it would make a cut tingle, was antiseptic & would kill germs. No medical evidence was called by the appct. :—*Held:* there was no evidence to connect the work she was employed at on Mar. 31 with the injury to her hand, & therefore appct. had not discharged the *onus* of proving any accident within the meaning of the Act.—MILLER *v.* JENSON & NICHOLSON, LTD. (1917), 10 B. W. C. C. 621, C. A.

2673. —— Finger cut at home—Work of dirty nature.]—A railway fireman cut his finger at home. Blood poisoning supervened & necessitated the amputation of the finger. The county ct. judge found that the poison germs entered with the dirty oil & coal to which danger the man was specially exposed, & that this was an accident arising out of & in the course of the employment :—*Held:* there was no evidence to support the finding.—CHANDLER *v.* GREAT WESTERN RY. Co. (1912), 106 L. T. 479; 5 B. W. C. C. 254, C. A.

Annotation :—**Consd.** Innes (or Grant) *v.* Kynoch, [1919] A. C. 765.

2674. —— Abscess on knee.]—A collier died of blood poisoning due to an abscess in his knee. There was no evidence as to how the abscess was caused. His work was in a very narrow seam, & necessitated his working on his knees :—*Held:* there was no evidence of personal injury by accident, arising out of & in the course of the employment.—HOWE *v.* FERNHILL COLLIERIES, LTD. (1912), 107 L. T. 508; 5 B. W. C. C. 629, C. A.

2675. —— Gamekeeper handling dead animals.]—A gamekeeper handled dead animals on July 31, Aug. 2, 3, & 5. The animals he handled on July 31 & Aug. 5 were handled in the course of his employment, but not those on Aug. 2 & 3. The animal he handled on Aug. 5, a dog, was proved to have died from anthrax; there was no evidence as to what the other animals died of. On Aug. 11 he fell ill, & died on Aug. 18. The county ct. judge found that deceased did not die from an accident, & that if he did the accident was not proved to have arisen out of the employment :—*Held:* the burden of proof was upon appct., & this had not been discharged.—SHERWOOD *v.* JOHNSON (1912), 5 B. W. C. C. 686, C. A.

(e) Disappearance of Seaman at Sea.

2676. Cook lost overboard—In fine weather.]—It is competent for the ct. to draw an inference from the facts proved that the accident causing injury or death did happen "in the course of" & arose "out of" the employment, although no person was present who could give direct evidence how & when the accident happened, but the *onus* of proof is on appct. in every case, & none the less so because by the death of the workman a greater burden is placed on the dependants of deceased.

While a steamship was on the high seas, the chief cook & baker was lost overboard; the weather was fine at the time, the ship was steady, & there was a four-foot rail & bulwark all round. Deceased was last seen at 5.35 a.m. going aft. His widow applied for compensation under the

2676 a. *Cook [lost overboard—In fine weather.*]—LYNCH *v.* CROWN S.S. Co., LTD. (1916), 9 B. W. C. C. 652.—SCOT.

b. *Steersman lost overboard — In fine weather—Onus of proof not discharged.*]—ROURKE *v.* HOLT & Co. (1917), 10 B. W. C. C. 740.—IR.

Workmen's Compensation Act, 1906 (c. 58):—*Held:* there was no evidence which would enable the ct. to draw the necessary inference that the accident causing death arose "out of" as well as "in the course of" the employment.—BENDER *v.* ZENT (OWNERS), [1909] 2 K. B. 41; 78 L. J. K. B. 533; 100 L. T. 639; 2 B. W. C. C. 22, C. A.

Annotations:—**Consd.** Marshall *v.* Wild Rose (Owners), [1909] 2 K. B. 46. **Folld.** Gilbert *v.* Nizam (Owners), [1910] 2 K. B. 555. **Distd.** Rice *v.* Swansea Vale (Owners) (1910), 102 L. T. 270. **Consd.** Astley *v.* Evans, [1911] 1 K. B. 1036. **Apld.** Ayr Steam Shipping Co. *v.* Lendrum (1912), 6 B. W. C. C. 326; Burwash *v.* Frederick Leyland (1912), 107 L. T. 735. **Refd.** Rourke *v.* Holt (1917), 10 B. W. C. C. 740.

2677. —— Rough weather.]—The second cook employed on board a steamship left his duties in the galley in the course of a voyage when the ship was rolling heavily, & he was not seen again. He suffered from a disease of the kidneys which would necessitate his going repeatedly to the urinal:—*Held:* the inference was irresistible that deceased accidentally fell overboard & was drowned; but that, in the absence of any evidence to show how he got out of his galley & fell overboard, there was nothing to take the case out of the region of "mere surmise, conjecture, or guess," which did not suffice to establish dependants' claim for compensation.—BURWASH *v.* LEYLAND (FREDERICK) & CO., LTD. (1912), 107 L. T. 735; 28 T. L. R. 546; 5 B. W. C. C. 663; *sub nom.* BURWASH *v.* OXONIAN (OWNERS), 56 Sol. Jo. 703, C. A.

Annotation:—**Apld.** Ayr Steam Shipping Co., Ltd. *v.* Lendrum (1912), 6 B. W. C. C. 326.

2678. Fireman lost overboard—Coming on deck in course of duty.]—Where a fireman employed on board a steamship came on deck in order better to perform his duties on returning to the stokehold, namely, for the purpose of obtaining a drink & fresh air, while at work in the course of a voyage in tropical regions & was not afterwards discovered, the inevitable conclusion being that he had lost his life by falling overboard, it was held that the county ct. judge was justified in drawing the inference that the fireman's death was due to an accident arising "out of" & "in the course of" his employment; & that therefore his dependant was entitled to compensation under Workmen's Compensation Act, 1906 (c. 58).—LEE *v.* STAG LINE, LTD. (1912), 107 L. T. 509; 56 Sol. Jo. 720; 5 B. W. C. C. 660, C. A.

Annotations:—**Consd.** Ayr Steam Shipping Co. *v.* Lendrum (1912), 6 B. W. C. C. 326. **Refd.** Proctor *v.* S.S. Serbino, [1915] 3 K. B. 344.

2679. —— No reason for being at side of ship.]—A fireman on a steamer at sea left the stokehold during the night at about 1.30 a.m., apparently to get water at the pump, which was on deck. He disappeared & must have gone overboard. His cap & water can were found on deck, but nothing was discovered which threw any light on how he came to go overboard. In proceedings by the widow the county ct. judge found that the accident to deceased arose in the course of his employment, but that there was nothing to take him to the side of the ship, & the probabilities were that he fell overboard while doing something in no way connected with his employment. He found that there was no evidence that the accident arose out of his employment, & in the absence of such evidence he held that appct.'s claim for compensation failed:—*Held:* there was no misdirection & the award could not be disturbed.—CARNABY *v.* BROMSGROVE (OWNERS) (1921), 14 B. W. C. C. 84, C. A.

2680. Officer lost overboard—In fine weather—Previous complaint of giddiness.]—An officer of a ship, who was on duty on deck, disappeared from the ship in broad daylight, in fine, calm weather. No one saw what happened to him, but there was evidence that not long before he had complained of feeling sick & giddy:—*Held:* there was evidence from which the ct. might infer that he fell overboard from an accident arising not only "in the course of" but "out of" his employment, within Workmen's Compensation Act, 1906 (c. 58), & his dependants were entitled to compensation under the Act.—SWANSEA VALE (OWNERS) *v.* RICE, [1912] A. C. 238; 81 L. J. K. B. 672; 104 L. T. 658; 27 T. L. R. 440; 55 Sol. Jo. 497; 4 B. W. C. C. 298; 12 Asp. M. L. C. 47, H. L.; *affg.* S. C. *sub nom.* RICE *v.* SWANSEA VALE (OWNERS) (1910), 102 L. T. 270, C. A.

Annotations:—**Consd.** Fleet *v.* Johnson (1912), 57 Sol. Jo. 226. **Folld.** Lee *v.* Stag Line (1912), 107 L. T. 509. **Distd.** Kerr (or Lendrum) *v.* Ayr Steam Shipping Co., [1915] A. C. 217. **Apld.** Proctor *v.* S.S. Serbino, [1915] 3 K. B. 344; Bird *v.* Keep, [1918] 2 K. B. 692. **Refd.** Ayr Steam Shipping Co. *v.* Lendrum (1912), 6 B. W. C. C. 326; Warren *v.* Hedley's Colliery Co. (1913), 6 B. W. C. C. 136; Innes (or Grant) *v.* Kynoch, [1919] A. C. 765. **Mentd.** Watkins *v.* Guest, Keen & Nettlefolds (1912), 5 B. W. C. C. 307; Smith *v.* Mid. Ry. (1918), 88 L. J. K. B. 868; Gibbs *v.* Gibbs & Heathcote (1920), 123 L. T. 206; Munro, Brice *v.* Marten, Same *v.* R., [1920] 3 K. B. 94; Smith *v.* G. W. Ry., [1921] 2 K. B. 237.

2681. ——.]—A seaman was chief engineer on a steamship & was responsible for the working of all machinery in the ship. He was troubled because there was something wrong with the propeller. On the evening before the ship arrived in port he told the steward to call him before his usual hour & bring him tea. This was done; he got up about 5.40, dressed in his working clothes, & was last seen going to the stern of the ship. His watch would not have begun until 8 o'clock:—*Held:* there was evidence to support the inference of the county ct. judge that he went to the stern to look at the propeller, & his finding that his death was caused by accident arising out of & in the course of his employment within Workmen's Compensation Act, 1906.—SERBINO (OWNERS) *v.* PROCTOR, [1916] 1 A. C. 464; 85 L. J. K. B. 599; 114 L. T. 431; 32 T. L. R. 280; 60 Sol. Jo. 272; 9 B. W. C. C. 182, H. L.; *affg.* S. C. *sub nom.* PROCTOR *v.* SERBINO (OWNERS), [1915] 3 K. B. 344, C. A.

Annotations:—**Apld.** Armstrong *v.* Gregson (1916), 9 B. W. C. C. 468. **Refd.** Lynch *v.* Crown S.S. Co. (1916), 9 B. W. C. C. 652; Spencer *v.* S.S. Liberty (1917), 117 L. T. 449.

(f) Disease Caused or Accelerated by Injury.

2682. Claim successful—Injury to ribs—Death from pneumonia.]—A healthy & steady workman was employed to pick up cotton waste on the decks of a ship in dock. At 1 p.m. he was sent to work in No. 6 hold; at 3 p.m. he climbed up the ladder of the hold, apparently in great pain, & he was sent home. He was medically attended, & marks were found on his ribs; three days later he developed pneumonia, from which he died. The doctor who attended him attributed the pneumonia to the injury to his sides:—*Held:* there was evidence that the workman had died from personal injury by accident arising out of & in the course

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of his employment.—LOVELADY *v.* BERRIE (1909), 2 B. W. C. C. 62, C. A.

2683. —— —— Death from syncope.]—A miner who had left home in the morning apparently perfectly well, returned complaining of pain in his side, & later a fractured rib was diagnosed. He subsequently died of syncope either brought on or accelerated by the injury. The only admissible evidence of the fact of the accident consisted in a notice of accident he sent to the proper quarter, & the payment two days before his death, of a sum of £1 12*s.* as compensation money to his wife, who called for it. The county ct. judge found that the death resulted from injury by accident arising out of & in the course of the employment:—*Held:* there was evidence to support the finding.—HARLEY *v.* WALSALL WOOD COLLIERY CO., LTD. (1915), 8 B. W. C. C. 86, C. A.

2684. —— Strain at work—Death from paralysis.]—(1) A workman was put to do unusually heavy work. An hour & a half later he was found to be suffering from some injury which necessitated ambulance aid & his removal home. He gave no written notice, but informed the works foreman, at the time the ambulance was brought, that he had fallen & hurt himself while working. He returned to work a fortnight later but complained of pain in his back. Five & a half months later he had to go to the hospital where he remained until he died six months after. The death was due to paralysis from the fracture of one of the lumbar vertebræ. This, according to the medical evidence, might have been caused by the strain of the work & probably happened when he first complained of pain. The county ct. judge drew the inference that the injury from which death resulted was due to accident arising out of the employment:—*Held:* there was evidence to support the finding.

(2) *Semble:* deceased's statements, though evidence of notice, were not admissible as proof of an accident. Notice to the works foreman was notice to the employers.—HEWITT *v.* STANLEY BROTHERS, LTD. (1913), 109 L. T. 384; 6 B. W. C. C. 501, C. A.

2685. —— —— Death from pneumonia.]—Two workmen were lifting a drill weighing 1½ cwt. when the drill slipped. One of the men on getting back to his home told his wife he had a pain in his side. Two days later the wife called in a doctor. The doctor treated the pain in the man's side as being due to a strain, but there were no objective symptoms of strain. Five weeks later the man died from broncho-pneumonia, & the doctor then expressed the opinion that the man had strained his liver, & that the injury extended ultimately to the lungs. The widow further gave evidence that during the time that the man was ill he was visited by his employer, who asked him what was the matter, & the man said he had strained himself lifting the drill, whereupon the employer gave him £2 "to go on with," & told him that his compensation would amount to 35*s.* per week. This evidence was objected to.

The county ct. judge found that deceased had suffered injury by accident in the way alleged, & that death from broncho-pneumonia had resulted therefrom. He further stated that in coming to this conclusion he did not rely upon deceased's statement to his employer, "except as not being inconsistent with the facts of the case":—*Held:* there was sufficient evidence to support the findings & no misdirection. The statement was admissible not as direct evidence of the facts therein stated, but as showing the conduct of the employer on hearing such statement, upon which the judge was at liberty to draw inferences of fact.—CHANTLER *v.* BROMLEY (1921), 14 B. W. C. C. 14, C. A.

2686. —— Blow on thigh—Death from osteomyelitis.]—On Apr. 18, 1916, a collier was dragging a rail along, when he backed into a prop, with the result that the rail struck him a blow on the fleshy part of the thigh. He went on working until May 29, although suffering pain in the thigh. He then saw his panel doctor, who treated him for contused tissue. There was at this time no external mark on the man's thigh. He grew worse, & on June 10 a consultant was called in, who diagnosed an obscure disease called osteomyelitis. An immediate operation was attempted, but the man died the next day. No written notice of the accident was given until June 12, although a verbal report of it was given on or about May 29. The panel doctor gave evidence that the disease would be caused by a slight strain or a blow, & should develop within a week, but thought that the disease was probably connected with the accident. The consultant said it was often impossible to discover a cause for the disease. As a rule it appeared within forty-eight hours after an injury, & it could not therefore be attributed in this case to the accident. No evidence was called by the employers to prove that they were prejudiced by the delay in giving notice of the accident; & the consultant was not asked whether he thought he could have diagnosed the disease at an earlier stage:—*Held:* there was evidence to support a finding by the county ct. judge that the disease was attributable to an accident on Apr. 18 arising out of & in the course of the employment, & there was also evidence from which the county ct. judge could reasonably infer, in the absence of evidence to the contrary by the employers, that the employers were not prejudiced by the failure to give notice of the accident as soon as practicable.—MILLS *v.* DINNINGTON MAIN COAL CO., LTD. (1916), 86 L. J. K. B. 231; 116 L. T. 181; 61 Sol. Jo. 202; 10 B. W. C. C. 153, C. A.

Annotation:—**Reld.** Howard *v.* Sun Hill (1920), 13 B. W. C. C. 46.

2687. Claim unsuccessful—Alleged accident—Death from pneumonia.]—A workman died of pneumonia. His dependants contended that the pneumonia resulted from lowered vitality caused by an accident to the workman arising out of & in the course of his employment. The only evidence that there had been an accident consisted of several inconsistent statements made by the workman, to various persons, on the day after the alleged accident, which were admitted without objection being taken. The medical referee gave a report that the pneumonia could not have been caused by the alleged accident. The county ct. judge said that he was not bound to surrender his judgment to the medical referee, & held that there had been an accident causing the pneumonia, & so he awarded compensation:—*Held:* there was no evidence that there had been any accident arising out of & in the course of his employment.

BAIRD (W.) & CO., LTD., [1912] S. C. 343; 49 Sc. L. R. 278; [1912] 1 S. L. T. 90; 5 B. W. C. C. 542.—SCOT.

h. —— *Amputation of foot.]*—STRONGE *v.* HAZLETT (1909), 44 I. L. T. 10; 3 B. W. C. C. 581.—IR.

k. —— *Pleurisy.]*—M'MILLAN *v.* SINGER SEWING MACHINE CO., LTD., [1913] S. C. 346.—SCOT.

l. —— *Injury to hand.]*—CARR *v.* PORT-GLASGOW BURGH, [1923] S. C. 844.—SCOT.

—LANGLEY *v.* REEVE (1910), 3 B. W. C. C. 175, C. A.

2688. —— Strain at work—Death from uræmia.] —A collier suffering from Bright's disease told a mate that he had hurt himself, & the mate saw marks of a tub, which deceased had been filling, having come off the rails, though the tub was on the rails. He went home & died in a short time from uræmia, as the post mortem proved. The county ct. judge awarded for the employers, on the ground that there was not sufficient evidence that the man had met with an accident:—*Held:* the evidence justified the award.—ASHLEY *v.* LILLESHALL CO., LTD. (1911), 5 B. W. C. C. 85, C. A.

2689. —— —— Death from intestinal obstruction.]—A man at work called out that he had hurt his back. No one saw what had happened. He was taken home, complaining of pains in the back & stomach. He died a week after, of intestinal obstruction. There was evidence of previous illnesses & pains in the stomach:—*Held:* the *onus* of proving an accident had not been discharged.—FARMER *v.* STAFFORD, ALLEN & SONS, LTD. (1911), 4 B. W. C. C. 223, C. A.

(g) Eye Injuries.

2690. Claim unsuccessful—No evidence connecting injury with employment.]—A weaver got dust in his eye. He rubbed the eye & an abrasion appeared, into which a microbe, having no special relation to his employment, subsequently entered & set up inflammation causing incapacity. There was no evidence as to when the microbe entered. The county ct. judge assumed the abrasion had been caused by rubbing on account of the dust, but as the microbe might have entered at any time & at any place, he found in favour of the employers:—*Held:* there was evidence to support the finding.—BELLAMY *v.* HUMPHRIES (J.) & SONS, LTD. (1913), 6 B. W. C. C. 53, C. A.

Annotations:—**Consd.** Saddington *v.* Inslip Iron Co. (1917), 87 L. J. K. B. 184; Carr *v.* Port Glasgow Burgh (1923), 16 B. W. C. C. 331.

2691. —— Injury followed by suicide—No evidence of insanity from accident.]—(1) A workman who injured his eye by accident arising out of & in the course of his employment, suffered great pain from it, became depressed, & eventually committed suicide, cannot be held to have been insane without strict evidence that he was in that condition. In the absence of evidence of insanity as the cause of suicide that act will be treated as *novus actus interveniens* & his death will be held not to be the result of the accident.

(2) Where notice of an accident under Workmen's Compensation Act, 1906 (c. 58), has been duly given by an injured workman who subsequently dies, no further notice of the accident need be given by his dependants; & where notice has not been given as soon as practicable by the workman the omission cannot be cured by subsequent notice given by his dependants.—GRIMME *v.* FLETCHER, [1915] 1 K. B. 734; 84 L. J. K. B. 847; 112 L. T. 840; 31 T. L. R. 158; 59 Sol. Jo. 233; 8 B. W. C. C. 69, C. A.

Annotations:—*As to* (1) **Distd.** Marriott *v.* Maltby Main Colliery Co. (1920), 90 L. J. K. B. 349. **Reid.** Withers *v.* L. B. & S. C. Ry., [1916] 2 K. B. 772; Bird *v.* Keep, [1918] 2 K. B. 692.

(h) Falls from Vehicles.

2692. Claim successful — Railway employee travelling back from work.]—In an arbn. under the Workmen's Compensation Act, 1897 (c. 37), the burden is upon appct. to prove that the injury was caused by accident arising "out of" as well as "in the course of" the employment of the workman, & if appct. leaves the case in doubt as to whether those conditions are fulfilled or not, the evidence being equally consistent with their being fulfilled or not fulfilled, he has not discharged the burden of proof.

A workman in the employ of a railway co. was in the course of his employment travelling in an ordinary compartment of a passenger train. Persons travelling in the same compartment gave evidence that they saw him put the window down & place his basket in the rack, standing close to the door with his face towards it, but they did not see him do anything else, until, when the train had travelled three hundred yards only from the place at which he entered it, they hard a crash, & he had disappeared. The workman was found lying close to the rail suffering from injuries which caused his death:—*Held:* there being evidence that the workman was simply passing as an ordinary passenger might pass, & acting as an ordinary passenger might act, in a train upon a railway, there was evidence on which the county ct. judge was justified in finding that the accident arose "out of" as well as "in the course of" his employment.—POMFRET *v.* LANCASHIRE & YORKSHIRE RY. CO., [1903] 2 K. B. 718; 72 L. J. K. B. 729; 89 L. T. 176; 52 W. R. 66; 19 T. L. R. 649; 47 Sol. Jo. 469; 5 W. C. C. 22, C. A.

Annotations:—**Apld.** Mitchell *v.* Glamorgan Coal Co. (1907), 23 T. L. R. 588. **Expld.** Fitzgerald *v.* Clarke, [1908] 2 K. B. 796. **Consd.** McDonald *v.* Banana (Owners), [1908] 2 K. B. 926. **Mentd.** Douglas *v.* Smith, [1907] 2 K. B. 568; Smith *v.* G. W. Ry., [1921] 2 K. B. 237.

2693. —— Brakeman trying to alight.] — A train consisting of an engine & three trucks, which were being pushed by the engine, was in charge of a brakesman, who was riding in the foremost truck. This train overtook another train travelling in the same direction, which consisted of an engine & brakes van, the engine being in front. The two trains proceeded buffer to buffer but were not coupled. After they had passed one set of points, which had been operated by the brakesman in the brakes van, & while they were on the way to another set of points a quarter of a mile off, the brakesman in the truck attempted to climb out of the truck into the brakes van ahead, & while doing so fell & was killed. The trains would have had to pass over the second set of points & then stop, & one of the brakesmen would have had to

PART XIV. SECT. 5, SUB-SECT. 4.—B. (g).

2690 l. *Claim unsuccessful—No evidence connecting injury with employment.*]—While several boys in the employment of deft. co. were engaged in a scuffle, during working hours, one of them, pltf., was injured losing the sight of an eye:—*Held:* the accident was not one arising "out of or in the course of the common employment."—DOYLE *v.* MOIRS, LTD. (1915), 48 N. S. R. 473.—CAN.

m. *Claim successful—Injury caused by flying splinters.*]—Claimant was set to work by resps. chipping a casting with a cold-chisel & hammer; a piece of metal from the chisel or casting flew into his eye & damaged it so that the eye had to be removed:—*Held:* the injury was caused by an accident arising out of & in the course of claimant's employment.—*Re* MILHOLM & CONATY STACK CO. (1911), 19 W. L. R. 860.—CAN.

n. —— ——.] — HOLLAND *v.* RUMELY PRODUCTS CO., [1917] 1 W. W. R. 454.—CAN.

o. ——.] — HAZELL *v.* BURGESS (1915), 35 N. Z. L. R. 132.—N.Z.

p. ——.] — M'GHEE *v.* SUMMERLEE IRON CO., LTD., [1911] S. C. 870; 48 Sc. L. R. 807; [1911] 2 S. L. T. 16; 4 B. W. C. C. 424.—SCOT.

PART XIV. SECT. 5, SUB-SECT. 4.—B. (h).

q. *Claim successful — Jumping off car — Master's business.*]— YEABSLEY *v.* KAIKOURA COUNTY, [1918] N. Z. L. R. 313.—N.Z.

r. —— *Workman injured in picking up pipe.*]—M'LAUCHLAN *v.* ANDERSON, [1911] S. C. 529; 48 Sc.

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alight & raise a lever to allow the trains to pass back over the points in the reverse direction on to a branch line. The brakes van was furnished with a step, whereas the truck had none. The railway & trains were the property of a colliery co. whose servants the men were. The widow of the deceased man claimed compensation under the Workmen's Compensation Act, 1906 (c. 58):—*Held:* there was evidence from which the arbitrator could infer that deceased was trying to climb into the brakes van with a view to alighting therefrom by the step for the purpose of attending to the points as the train was passing, & the accident arose out of as well as in the course of the employment.—EVANS (RICHARD) & CO., LTD. *v.* ASTLEY, [1911] A. C. 674; 80 L. J. K. B. 1177; 105 L. T. 385; 27 T. L. R. 557; 55 Sol. Jo. 687; 4 B. W. C. C. 319, H. L.; *affg.* S. C. *sub nom.* ASTLEY *v.* EVANS (R.) & CO., LTD., [1911] 1 K. B. 1036, C. A.

Annotations:—**Consd.** Wardle *v.* Enthoven (1916), 86 L. J. K. B. 309; Rigling *v.* Minister of Munitions (1921), 14 B. W. C. C. 1. **Refd.** Southall *v.* Cheshire County News Co. (1912), 5 B. W. C. C. 251; Stapleton *v.* Dinnington Main Coal Co. (1912), 107 L. T. 247; Watkins *v.* Guest, Keen & Nettlefolds (1912), 106 L. T. 818; Wemyss Coal Co. *v.* Symon (1912), 6 B. W. C. C. 298; Dyhouse *v.* G. W. Ry. (1913), 109 L. T. 193; Plumb *v.* Cobden Flour Mills Co. (1913), 108 L. T. 161; Warren *v.* Hedley's Colliery Co. (1913), 6 B. W. C. C. 136; Maxwell *v.* Ruabon Coal & Coke Co. (1916), 86 L. J. K. B. 428; Prosser *v.* Graham Navigation Collieries (1921), 14 B. W. C. C. 42; Garrallan Coal Co. *v.* Anderson (or Devlin) (1926), 19 B. W. C. C. 356. **Mentd.** Jones *v.* Canadian Pacific Ry. (1913), 33 L. J. P. C. 13.

2694. —— Fall off bicycle riding to work.]—A butcher's canvasser, who rode a bicycle in the course of his work, arrived at his employer's shop on a certain Saturday morning in Sept. 1911, lame, covered with mud, & wheeling the machine. He complained of injury caused by a side slip, & went home, where he rested for two days. He then returned to work, though still suffering slightly from the effects of the fall. By Dec. 26 the pain became worse, & he consulted a doctor. On Jan. 7, 1912, an operation was performed & cancer diagnosed. Notice was given on Jan. 14 to employer's manager by the doctor, who said that, in his opinion, the disease was brought about by the accident, of the happening of which the manager was aware. Two other operations were performed, but the workman died of sarcoma in June. The county ct. judge, sitting with a medical assessor, drew the inference that injury was caused on the Saturday in Sept. 1911, by accident arising out of & in the course of the employment from which the death resulted; that there was reasonable cause for not giving notice until Dec. 26, in that the injury was latent; & that there was evidence that the employers were not prejudiced by any delay in the notice:—*Held:* there was evidence to support the inference & findings, & no misdirection.—HAWARD *v.* ROWSELL & MATTHEWS (1914), 111 L. T. 771; 7 B. W. C. C. 552, C. A.

2695. Claim unsuccessful—No evidence connecting accident with employment.]—A carman fell from his van & sustained injuries. He died three weeks later. No evidence was produced to show the connection between the accident & death, the doctor who had attended the man being abroad:—*Held:* there was no evidence that the death was due to the accident.—HONOR *v.* PAINTER (1911), 4 B. W. C. C. 188, C. A.

2696. —— ——.]—A workman fell from a cart & was injured. He died nine days afterwards. The only medical evidence called was to the effect that there was no connection between the accident & the death. The county ct. judge, however, found that death was due to the accident, & awarded compensation:—*Held:* the dependant had not discharged the *onus* of proving that death was due to the accident.—BROWN *v.* KIDMAN (1911), 4 B. W. C. C. 199, C. A.

See, also, Nos. 2707, 2708, *post.*

(*i*) *Found Drowned.*

Seamen leaving or returning to ships.]—*See* Sub-sect. 4, B. (*l*), *post.*

Disappearance of seaman at sea.] — *See* Sub-sect. 4, B. (*e*), *ante.*

2697. Claim unsuccessful—No evidence connecting death with employment.] — An engineer employed on board a steam trawler lying in a harbour basin went on deck, as he said, to cool himself on a very hot night. His dead body was found the next morning in the water just under the rail on the starboard quarter where he was in the habit of sitting in hot weather. There was no evidence how the death happened:—*Held:* as a matter of fact there was no evidence to show that the engineer's death was caused by an accident arising out of his employment.—MARSHALL *v.* WILD ROSE (OWNERS), [1910] A. C. 486; 79 L. J. K. B. 912; 103 L. T. 114; 26 T. L. R. 608; 54 Sol. Jo. 678; 3 B. W. C. C. 514; 11 Asp. M. L. C. 409, H. L.

Annotations:—**Apld.** Gilbert *v.* Nizam (Owners), [1910] 2 K. B. 555. **Distd.** Rice *v.* Swansea Vale (Owners) (1910), 102 L. T. 270. **Consd.** Kitchenham *v.* S.S. Johannesburg, Leach *v.* Oakley Street, [1911] 1 K. B. 523; Proctor *v.* S.S. Serbino, [1915] 3 K. B. 344. **Refd.** Barnabas *v.* Bersham Colliery Co. (1910), 103 L. T. 513; Moore *v.* Manchester Liners (1910), 103 L. T. 226; Traynor *v.* Addie (1910), 4 B. W. C. C. 357; Lee *v.* Stag Line (1912), 107 L. T. 509; Swansea Vale (Owners) *v.* Rice, [1912] A. C. 238; Kerr (or Lendrum) *v.* Ayr Steam Shipping Co., [1915] A. C. 217; Davidson *v.* M'Robb, or Officer, [1918] A. C. 304.

2698. —— ——.]—A sailor was seen at 8 p.m. about to leave his ship, which was at the quay side, to get provisions. Early the next morning he was found drowned in the dock, 10 or 15 feet from the gangway of the ship, & 3 feet from the quay side. His cap was found on the quay, & there was a fresh wind blowing. The county ct. judge found that the accident did not arise out of his employment:—*Held:* there was evidence to support the finding.—MITCHELL *v.* SAXON (OWNERS) (1912), 5 B. W. C. C. 623, C. A.

Annotation:—**Refd.** Parker *v.* Black Rock (Owners), [1914] 2 K. B. 39.

2699. —— ——.]—A workman, with his mate, was left in charge of a barge moored near a wharf. He left the cabin at 5.30 & was not seen alive again. There was a strong tide at the time, running downstream. He was found drowned 150 feet from the barge, up the river; & although the tide had turned since the man left the barge, the county

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L. R. 349; [1911] 1 S. L. T. 127; 4 B. W. C. C. 376.—**SCOT.**

t. —— *Fall off engine — Driver intoxicated.*] — FRAZER *v.* RIDDELL (JOHN) & CO. (1913), 7 B. W. C. C. 841. —**SCOT.**

2695 *i. Claim unsuccessful—No evidence connecting accident with employment.*]—BECHTEL *v.* CANADIAN PACIFIC RY. (1916), 33 W. L. R. 426; 9 W. W. R. 1005.—**CAN.**

PART XIV. SECT. 5, SUB-SECT. 4.—B. (*i*).

2697 *i. Claim unsuccessful—No evidence connecting death with employment.*] —MCINTYRE *v.* STEWART, [1916] S. C. 91.—**SCOT.**

a. Claim successful — Crossing & recrossing ford—To & from employment.]—CONNORS *v.* HALPIN, [1919] N. Z. L. R. 673.—**N.Z.**

b. —— *Engineer falling from tug —In sleeping clothes.*]—MACKINNON *v.* MILLER, [1909] S. C. 373; 46 Sc. L. R. 299; [1909] 1 S. L. T. 65; 2 B. W. C. C. 64.—**SCOT.**

ct. judge found that the body could not have been carried away by the adverse tide, & awarded for the employers, there being no evidence as to how the workman met with his death:—*Held:* the dependants had not discharged the *onus* of proof that the accident was one arising in the course of the employment.—CHARVIL *v.* MANSER & CO., LTD. (1912), 5 B. W. C. C. 385, C. A.

2700. —— ——.]—A seaman, returning to his ship, was on a jetty hailing the ship for a boat. He had a parcel of food with him. He fell from the jetty & was drowned. There was no evidence whether he was on shore with leave or not. The county ct. judge found that he had not yet reached the ambit of his employment when the accident happened, & awarded for the employers:—*Held:* there was evidence to support the finding.—DIXON *v.* AMBIENT (OWNERS) (1912), 5 B. W. C. C. 428, C. A.

2701. —— ——.]—A waterman, six minutes after leaving a fellow waterman, with whom he had been talking on the wharf, was found drowned 90 yards away & 20 yards from his barge. The county court judge said he was not "satisfied" that the death was due to an accident arising out of & in the course of the employment:—*Held:* there was no misdirection.—BINES *v.* GUERET (L.), LTD. (1913), 6 B. W. C. C. 120, C. A.

2702. —— ——.]—A man was employed as a watchman on lighters moored in the river Thames. His duties were twenty-four hours on & twenty-four hours off. He could leave the lighters for the purpose of fetching officials from the shore, & also to pay the wages of his mate if his mate hailed him to do so. For these purposes he was provided with a boat by his employers. On the day of the accident he had been paid his own wages & those of his mate, & in the evening he went ashore & fastened his boat up at the landing steps. He paid his mate & then went home & saw his wife. About 8.15 he left home, & nothing more was known of his movements. The next morning his dead body was found in the water near his boat. The county ct. judge found that the accident did not arise out of & in the course of deceased's employment, & made the award in favour of the employers:—*Held:* there was evidence to support the finding & no misdirection.—BRAINE *v.* PORT OF LONDON AUTHORITY (1920), 13 B. W. C. C. 342, C. A.

2703. —— **Alleged suicidal tendency following accident.**]—A workman was injured in his head by a fall. Traumatic neurasthenia supervened, & gradually became worse. About eight months after the accident he was found drowned in a canal 400 yards from his home. The county ct. judge found that he committed suicide, & that the suicidal tendency was the result of the accident:—*Held:* there was no evidence to justify the finding.—SOUTHALL *v.* CHESHIRE COUNTY NEWS CO., LTD. (1912), 5 B. W. C. C. 251, C. A.

2704. Claim successful—Workman proceeding from one part of works to another.]—A workman in an ironworks went from his furnace to the blacksmith's shop, the route running along a canal bank. Not returning, he was sought for, but not found. Some hours later, he was found drowned in the canal. The county ct. judge, in the absence of direct evidence as to how the man came to be in the canal, inferred that the accident arose out of the employment, & awarded compensation:—*Held:* there was evidence to support the inference.

Suicide, being a crime, cannot be inferred (FARWELL, L.J.).—FURNIVALL *v.* JOHNSON'S IRON & STEEL CO., LTD. (1911), 5 B. W. C. C. 43, C. A.

Annotation:—**Refd.** Proctor *v.* S.S. Serbino, [1915] 3 K. B. 344.

2705. —— **Watchman attending to mooring ropes.**]—A ship in dock was moored to a jetty. The watchman on board had to attend to the ship & the moorings. He was seen ashore one evening, with a parcel, at a time when he was accustomed to attend to the shore end of the mooring ropes. The next morning he was found drowned in the dock, at a point forty yards from the ship, between the gangway & the shore end of the mooring ropes; the parcel was found between the mooring ropes & the gangway. The county ct. judge, in the absence of direct evidence, drew the inference that the death arose out of the employment, & awarded compensation:—*Held:* there was evidence to support the inference.—RICHARDSON *v.* AVONMORE (OWNERS) (1911), 5 B. W. C. C. 34, C. A.

2706. —— **Seaman subject to attacks of nausea & vomiting.**]—A steward employed in a steamship of resps., which was lying in a harbour, was seen by the captain lying in his bunk at about 4.30 p.m. partially dressed. The captain told him to prepare tea for the crew before the ship sailed at 6 p.m. He was never seen alive again. His clothing, boots, cap, purse & watch were found on a settee in the saloon out of which his cabin opened, & the next day his body was found in the water dressed only in his underclothing. There were no marks of violence, & death was due to drowning. There was evidence that he was a good-tempered, sober, sociable man, & that he suffered from attacks of nausea & vomiting. In a proceeding by his dependants under Workmen's Compensation Act, 1906 (c. 58), the arbitrator held that he met his death by an accident arising out of & in the course of his employment:—*Held:* on the facts admitted & proved there was evidence to support such finding.—KERR (OR LENDRUM) *v.* AYR STEAM SHIPPING CO., LTD., [1915] A. C. 217; 84 L. J. P. C. 1; 111 L. T. 875; 30 T. L. R. 664; 58 Sol. Jo. 737; 7 B. W. C. C. 801, H. L.

Annotations:—**Apld.** Taylor *v.* Clark (1914), 84 L. J. P. C. 14. **Folld.** Proctor *v.* S.S. Serbino, [1915] 3 K. B. 344. **Apld.** Armstrong *v.* Gregson (1916), 9 B. W. C. C. 468; Watson *v.* Brown (1925), 18 B. W. C. C. 419. **Refd.** M'Kenna *v.* Niddrie & Benhar Coal Co. (1915), 9 B. W. C. C. 411; Bird *v.* Keep, [1918] 2 K. B. 692. **Mentd.** Gibbs *v.* Gibbs & Heathcote (1920), 123 L. T. 206; Munro, Brice *v.* Marten, Munro, Brice *v.* R., [1920] 3 K. B. 94; Smith *v.* G. W. Ry., [1921] 2 K. B. 237.

(j) *Heart Failure.*

2707. Claim unsuccessful—Cause of death unexplained.]—A bus driver was sitting on the box of his bus; a thud was heard, & he was found to have fallen from it; there was no evidence as to how it happened. Conflicting medical evidence as to the cause of death was given, but as to the state of the man's heart it was agreed it was abnormal, & the county ct. judge stated that on the evidence he believed that the man had died from heart failure & not from the fall, & that appct., therefore, had not discharged the *onus* of proving that the cause of death was a personal injury by accident arising out of & in the course of deceased's employment:—*Held:* the death had not been shown to

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PART XIV. SECT. 5, SUB-SECT. 4.—B. (j).

2707 i. *Claim unsuccessful—Cause of death unexplained.*]—SPENCE *v.* BAIRD (W.) & CO., LTD., [1912] S. C. 343; 49 Sc. L. R. 278; [1912] 1 S. L. T. 90; 5 B. W. C. C. 542.—**SCOT.**

2707 ii. —— ——.]—RITCHIE *v.* KERR, [1913] S. C. 613.—**SCOT.**

2707 iii. —— ——.]—PATON *v.* DIXON (WILLIAM), LTD., [1913] S. C. 1120; 50 Sc. L. R. 866; [1913] 2 S. L. T. 149; 6 B. W. C. C. 882.—**SCOT.**

Sect. 5.—Right to compensation: Sub-sect. 4, B. (l), & (m).]

means of access from his barge to the canal bank, had been removed. There was, however, another ready means of access. Three days later his body was found drowned in the canal with the bow rope of another barge, not forming any means of approach to his own, coiled round his arm, & the barge to which the rope belonged was found adrift. The county ct. judge drew the inference that the man had been drowned whilst attempting to use the other barge as a means of access to his own barge :—*Held :* this was mere surmise & conjecture with no evidence to support it. The accident was not proved to have arisen out of the man's employment.—BOOTH *v.* LEEDS & LIVERPOOL CANAL CO. (1914), 7 B. W. C. C. 434, C. A.

Annotation :—**Refd.** Nash *v.* S.S. Rangatira (1914), 7 B. W. C. C. 590.

2724. —— ——.]—A fireman on a ship in port at Aberdeen went ashore at about 6.30 p.m. on Dec. 21, 1916, with another seaman. He had no work which required his presence on board until the next day when the ship sailed, but there was evidence that he was a steady, respectable man, who never stayed ashore from his ship at night. The two men went to the theatre, & left again at about 8.30 p.m. with a friend they had met. They then all went & got some drinks, & shortly afterwards started to return to the ship. After they had gone a little way one of the men with the fireman collapsed, & had to be helped along by his friends to the ship, but when they were still some distance from the ship the fireman left them, & turned back saying he was not going abroad at present. He was never seen alive again, but some weeks later his body was found in the dock in which the ship had lain a short distance ahead of where the bow of the ship had been. On an application by the dependants of deceased for compensation under Workmen's Compensation Act, 1906 (c. 58) :—*Held :* the county ct. judge was not entitled to draw the inference that the man's death was due to an accident arising out of his employment. There was no evidence from which it could be reasonably inferred that the man met with his death in returning to his ship the same night & after he had reached the quayside.—SPENCER *v.* LIBERTY (OWNERS) (1917), 86 L. J. K. B. 1381 ; 117 L. T. 449 ; 61 Sol. Jo. 645 ; 10 B. W. C. C. 533, C. A.

(m) Other Accidents.

2725. Claim unsuccessful—Engine driver leaving engine—Found on line.]—While a goods train was standing in a siding, having drawn up there for the purpose of allowing an express train to pass, the engine driver alighted from the engine. Shortly afterwards his body was found on the railway line, he having, it was assumed, been knocked down & killed by a light engine which came alone :—*Held :* the burden had not been discharged which lay upon appct. for compensation as the sole dependant of deceased of showing that the accident was one which arose " out of & in the course of the employment " of deceased within Workmen's Compensation Act, 1906 (c. 58), s. 1.—DYHOUSE *v.* GREAT WESTERN RY. CO. (1913), 109 L. T. 193 ; 6 B. W. C. C. 691, C. A.

2726. —— Injury from object thrown from window—No evidence why or by whom thrown.]—A workman, whilst engaged in work in a mill yard, was struck on the back by the lid of a soap barrel which must have been deliberately thrown out of one of the upper windows of the mill, & could not have fallen from it. There was no evidence to show by whom or for what purpose the lid had been thrown :—*Held :* there was no evidence that the accident arose out of the employment.—BATEMAN *v.* ALBION COMBING CO., LTD. (1914), 7 B. W. C. C. 47, C. A.

2727. —— Strain from work.]—A workman alleged that he had strained himself while carrying a bar of iron. He continued to work for three weeks, after which time he was examined by a doctor. The doctor was of opinion that the pain was consistent with a strain such as the man said he had suffered. The case was referred to specialists whose reports were not submitted to the ct. The only evidence in support of the alleged accident was that of appct. & his mate W. The county ct. judge was not satisfied with the way they gave their evidence. One D., who was present at the time of the alleged accident, & was stated to have heard the workman's complaint, was subpœnaed, as one of appct.'s witnesses but was not called by him, whereupon the solr. for the employers asked the judge to call D. as he was a material witness. The judge assented without formal opposition from workmen's counsel. The judge did not question D., but the employer's solr. did, & elicited from him that he had not heard any complaint at the time when the alleged strain occurred. The judge found that the *onus* of proving an accident had not been discharged :—*Held :* apart from D.'s evidence, the workman had not discharged *onus* of proving an accident, & whether or not D.'s evidence had been wrongly admitted, it was not sufficiently material to have caused a miscarriage of justice, & therefore there was no reason for granting a new trial.—TRIGG *v.* VAUXHALL MOTORS, LTD. (1914), 7 B. W. C. C. 462, C. A.

2728. —— Stable boy kicked by horse—No duties in stable at time of injury.]—Deceased workman, who was employed as a stable boy by resps. was found in their stable in a dying condition suffering from a kick behind the ear from one of their horses. There was no direct evidence as to how the accident happened, there was evidence that when the boy was found he was clutching in his hand a halter ; that at the time when the

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WILSON *v.* LYLE, [1925] S. C. 824.—**SCOT.**

PART XIV. SECT. 5, SUB-SECT. 4.—B. (m).

g. *Claim unsuccessful — Cerebral hæmorrhage.*]—FEDERAL GOLD MINE, LTD. *v.* ENNOR (1910), 13 C. L. R. 276.—**AUS.**

h. —— *Plumber doing another person's work.*] — MCMANNAMIN *v.* CHESTNUT (R.) & SONS, LTD. (1917), 44 N. B. R. 571 ; 37 D. L. R. 302.—**CAN.**

k. —— *Fever.*] — COSTANZA *v.* DOMINION CANNERS, LTD. (1921), 67 D. L. R. 413 ; 51 O. L. R. 166.—**CAN.**

l. —— ——.] — FINLAY *v.* TULLAMORE UNION GUARDIANS (1914), 7 B. W. C. C. 973.—**IR.**

m. —— *Death caused by falling masonry.*]—A., in the course of his employment, was walking on the pavement of a thoroughfare when the parapet of a house which he was about to pass collapsed, & he was killed by the falling masonry. Dependants of deceased claimed compensation from the employer :—*Held :* the death was not caused by accident arising out of the employment.—COOPER *v.* HEALY, [1916] 2 I. R. 33.—**IR.**

n. —— *Workman climbing spiked wall.*]—GIBSON *v.* WILSON (1901), 3 F. (Ct. of Sess.) 661 ; 38 Sc. L. R. 450 ; 8 S. L. T. 497.—**SCOT.**

o. —— *Intoxicated seaman — Falling down hold of ship.*]—O'BRIEN *v.* STAR LINE, LTD., [1908] S. C. 1258 ; 45 Sc. L. R. 935 ; 15 S. L. T. 88 ; 1 B. W. C. C. 177.—**SCOT.**

p. —— *Workmen "larking" in mine.*]—BURLEY *v.* BAIRD & CO., LTD., [1908] S. C. 545.—**SCOT.**

q. —— *Death in prohibited place.*] —MILLER *v.* NORTH BRITISH LOCOMOTIVE CO., LTD., [1909] S. C. 698 ; 46 Sc. L. R. 755 ; [1909] 1 S. L. T. 509 ; 2 B. W. C. C. 80.—**SCOT.**

r. —— *Giddiness causing fall in street.*]—A school janitor was sent a

accident happened the boy had nothing to do with the halter & had nothing to do in the stable; & that the horse was a quiet horse. There was evidence that the foreman of resps.' yard had some time previously had occasion to speak to the boy about hitting the horses with a halter & teasing them. The county ct. judge held that the boy must have done something to the horse, which was a quiet one, to make it kick out, & that at the time of the accident the boy's duties in the stable were over, & accordingly that the accident did not arise out of his employment:—*Held:* there was sufficient evidence upon which the county ct. judge might come to the conclusions he did.—JOY *v.* PHILLIPS, MILLS & CO., LTD., [1916] 1 K. B. 849; 85 L. J. K. B. 770; 114 L. T. 577; 9 B. W. C. C. 242, C. A.

2729. —— Miner found dead in part of mine where not employed.]—Deceased workman was a shackler working in a coal mine, at the pit bottom. His work consisted in moving coal trams to & from the cages. His dead body was found under a cage, in a part of the mine where he had no business to be, & there was no evidence before the county ct. judge how he got there. When last seen alive, he was at his work in his appropriate position, & his dead body was found soon after. The county ct. judge said that he could not, on the evidence, find that deceased man's death "arose out of the course of his employment," & made an award in favour of the employers:—*Held:* there was evidence on which to support the finding & no misdirection.—PROSSER *v.* GRAHAM NAVIGATION COLLIERIES, LTD. (1921), 14 B. W. C. C. 42, C. A.

2730. —— Railway employee jumping in front of train.]—A workman was employed as a milk checker on a narrow station platform. His duty was to assist in rolling milk-churns. His dead body was found lying between the lines after a train had passed through the station. He was fifty-six years of age, & had been in resps.' employment for years & those working with him on the day of his death observed nothing wrong with him either on that morning or the previous day. He was temperate, happy & cheerful. He was wearing the livery of his employment. The platform was greasy, slippery, & dangerous. The engine of the train struck him on the left side of his head. The fireman of the train which struck deceased gave evidence that he saw deceased take two strides to reach the edge of the platform & jump on the rails. The deputy county ct. judge, on the fireman's evidence, found that the accident did not arise out of the employment & made an award in favour of the employers:—*Held:* there was evidence to support the finding & no misdirection.—POCOCK *v.* EDWARDS & SON, LTD. (1921), 14 B. W. C. C. 95, C. A.

2731. —— Miner dying from self-inflicted injuries.]—A workman, B., a miner, went to work as a stallman for the night shift of Feb. 17–18, 1921. He was then in good health, affable, cheerful, jovial & normal. He was seen by another stallman going to his place at the coal face along a short passage. The other stallman left him for a few minutes, & on his return found B. lying on his back with his face towards the coal face. His 7-pound hammer, which appeared not to have been used for any work in the stall, was lying a few inches from the left side of his head with the handle pointing towards the coal face. There was a wound on B.'s forehead from which blood was welling. He was unconscious, but when he had been carried about 350 yards on a stretcher he recovered consciousness, & after being seen by a doctor he got off the stretcher, lit his pipe, sent for his coat, & walked a considerable distance. He was then seen by the undermanager who afterwards gave evidence that at that time he seemed to be out of his mind. He went home & was seen by the doctor twice on that day. The doctor found him quiet & making no complaint. During the night he was restless, & the next morning he cut his throat. The county ct. judge gave the dependant the benefit of two presumptions, viz. (*a*) that as the workman when last seen before the blow on the forehead was acting not outside the course of his employment there was a presumption that he was within it, & (*b*) that there was no presumption, in the absence of special facts or circumstances, that the injuries were self-inflicted, but on reviewing the whole of the evidence he held that the wound on the forehead was self-inflicted & dismissed the application for compensation:—*Held:* there was evidence to support the findings & no misdirection.—BROWN *v.* KINGSBURY COLLIERIES, LTD. (1921), 14 B. W. C. C. 244, C. A.

2732. Claim successful—Fall from scaffolding.]—A mason's labourer was engaged to clean down the ceiling of an arch of a doorway from the outside. There was some scaffolding erected on the outside of the arch. For some unexplained reason the workman took his pail & brush on to the scaffold. He fell from the scaffold with the brush in his hand, & died from the injuries he received. The county ct. judge drew the inference that getting on the scaffold was for some purpose connected with his employment, & that, in consequence, the accident arose out of & in the course of his employment:—*Held:* the inference was supported by the evidence.—ROBERTS *v.* TROLLOP (GEORGE) & SONS & COLLS (1914), 7 B. W. C. C. 678, C. A.

2733. —— Fall on concrete flooring.]—A boy, aged seventeen, was employed as a labourer by resp., a firewood merchant. While working on resp.'s premises, he turned round to pick up a sack in the course of his work, slipped, fell, & fractured his skull on the concrete flooring, & sustained injuries from which he died. A fellow workman gave evidence that he did not fall over anything, that his lips & nose were blue, but there was no medical evidence with regard to these symptoms. The boy's mother said in evidence that he never

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message on a hot day. He fainted in the street from the heat, & fell backwards, striking his head on the pavement, subsequently dying from the effects of the injury:—*Held:* the accident did not arise out of the employment.—RODGER *v.* PAISLEY SCHOOL BOARD, [1912] S. C. 584; 49 Sc. L. R. 413; [1912] 1 S. L. T. 271; 5 B. W. C. C. 547.—**SCOT.**

t. —— *Workman struck by iron sheet—During gale.*]—During a severe gale a carter in charge of a horse & lorry within his employer's yard was struck by a sheet of corrugated iron blown from the roof of an adjoining building, & was injured:—*Held:* the accident did not arise out of the employment.—GUTHRIE *v.* KINGHORN, [1913] S. C. 1155; 50 Sc. L. R. 863; [1913] 2 S. L. T. 153.—**SCOT.**

a. *Claim successful—Resting place on buffer stop.*]—SHEEHY *v.* GREAT SOUTHERN & WESTERN RY. CO. (1913), 47 I. L. T. 161; 6 B. W. C. C. 927.—**IR.**

b. —— *Farm labourer kicking detonator.*]—BYRNE *v.* CAMPBELL, [1923] 2 I. R. 106; 16 B. W. C. C. 355.—**IR.**

c. —— *Injury by runaway horse.*]—DEVINE *v.* CALEDONIAN RY. CO. (1899), 1 F. (Ct. of Sess.) 1105; 36 Sc. L. R. 877; 7 S. L. T. 99.—**SCOT.**

d. —— *Workman helping other workmen.*]—GOSLAN *v.* GILLIES & CO., [1907] S. C. 68.—**SCOT.**

e. —— *Miner's death from scalding.*]—SNEDDON *v.* GREENFIELD COAL & BRICK CO., LTD., [1910] S. C. 362.—**SCOT.**

f. —— *Engine driver's fall in permanent way.*]—FENNAH *v.* MIDLAND & GREAT WESTERN RY. OF IRELAND (1911), 4 B. W. C. C. 440.—**IR.**

g. —— *Ship's carpenter severely*

Sect. 5.—Right to compensation: Sub-sect. 4, B. (m); sub-sect. 5, A. & B. (a).]

suffered from fits. Another witness said that the boy had not had any fits during the eight years he had known him. Deceased boy had been to a special school for defective children. The doctor who made a post mortem examination found a fracture of the skull sufficient to cause death. He found the brain normal & the organs healthy. The deputy county ct. judge made an award in favour of the employers on the ground that there was no evidence of an accident arising out of the employment:—*Held:* the facts afforded evidence that the accident arose out of the workman's employment. The evidence was more consistent with an accidental fall than a fit, but whether the evidence conclusively established an accident was a question of fact for the arbitrator, & the case must be remitted to the county ct. for a new trial.

The only inference that could be drawn from the evidence was that deceased met with an accident arising out of & in the course of the employment (ATKIN, L.J.).—HUNTER *v.* SIMNER (1922), 14 B. W. C. C. 327, C. A.

Annotation:—**Refd.** Upton *v.* G. C. Ry., [1924] A. C. 302.

2734. —— Miner killed by explosion of gunpowder.]—A man was employed in a mine as a brusher. His duties included having to fetch gunpowder for blasting & to prepare the hole for the charge, but did not include packing the powder into the hole or firing the shot. While carrying powder, which was loose in a cannister, from the store to a hole for the purpose of blasting, the powder exploded, fatally injuring the man. It was not known what caused the powder to ignite. The place where it happened was about 3 yards or so on the store side of the hole.

The county ct. judge said that the accident could not have happened unless some one had uncovered the powder, &, from the fact that deceased was the only man who had touched the powder, he drew the inference that he had uncovered it for the purpose of charging the hole. He consequently held that the accident did not arise out of the employment:—*Held:* there was no evidence to support the inference drawn by the county ct. judge. On the evidence, the accident must be held to have arisen out of & in the course of the employment.—PUGH *v.* DUDLEY (EARL) (1914), 7 B. W. C. C. 528, C. A.

2735. —— Ship's carpenter falling down hold.]—A workman, employed as a carpenter on board a ship lying in dock & instructed to do certain work at or near a hatchway covering No. 5 hold, was missed, & shortly afterwards was found to have fallen down a hatchway into No. 6 hold, a distance of 50 feet or so from his place of work. The place where he fell was in darkness. There was no direct evidence to show how he got there or what he was doing there, but the county ct. judge found upon evidence as to the habits of men working on ships in port, that the man must have intended to go into a corner to relieve himself, & have fallen down the hold in the dark. He therefore held that the accident arose out of & in the course of the employment:—*Held:* there was evidence to support the finding, & no misdirection.—ARMSTRONG *v.* GREGSON & CO. (1916), 9 B. W. C. C. 468, C. A.

2736. —— Strain at work.]—A workman was getting coal with a crowbar & was heard to call. He seemed to be suffering considerable pain internally. He was taken home & continued very ill until his death, which occurred about four months after the date of the accident. Some of his fellow-workmen were told of the accident; but no formal notice was given to the employers until two months after the workman's death. The county ct. judge held that deceased suffered a strain while working which caused his death, & that the accident arose out of & in the course of the employment. He also found that the employers had not been prejudiced by the delay in giving them notice of the accident, & he made an award in favour of the dependant:—*Held:* both questions were questions of fact, & there was evidence to support the findings of the county ct. judge, & no misdirection.—JOHNSON *v.* FLORENCE COAL & IRON CO., LTD. (1921), 14 B. W. C. C. 201, C. A.

2737. —— Arsenical poisoning.]—Two workmen were employed as gardeners on a piece of land adjacent to a field where sheep were dipped. The dip used was a preparation containing arsenic, & it was proved that the grass & weeds on the ground where the men worked were discoloured by arsenic from the dip sprayed by the sheep as they shook themselves after being dipped. Both workmen were taken ill about the same time, with symptoms consistent with arsenical poisoning. Both were admitted to hospital, where their illness was diagnosed as arsenical poisoning. In each case the certifying surgeon certified that the workman was suffering from arsenical poisoning. At the hearing before the county ct. judge evidence was given by medical men on behalf of the workmen that the arsenical poisoning from which they suffered had been contracted from contact with arsenic from the sheep dip. The employer called no medical witness, but a research student in toxicology, who said that he was familiar with the symptoms of arsenical poisoning & was associated with many industries in which arsenic compounds were used, & gave evidence to contradict the medical evidence called for the workmen. The county ct. judge found that the poisoning was not due to the nature of the workmen's employment, & that it did not arise out of or in the course of the employment:—*Held:* (1) on the evidence the inference that the arsenical poisoning was due to the nature of the workmen's employment was conclusive, & there was no evidence to the contrary; (2) the opinion as to a medical matter given by a non-medical witness should not have been admitted.—NIGHTINGALE *v.* BIFFEN, HEWITT *v.* BIFFEN (1925), 18 B. W. C. C. 358, C. A.

SUB-SECT. 5.—SERIOUS AND WILFUL MISCONDUCT.

A. In General.

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 1 (1) (*b*).

2738. "Serious misconduct"—What amounts

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burnt.]—MANSON *v.* FORTH & CLYDE S.S. CO., LTD., [1913] S. C. 921.—**SCOT.**

h. —— *Displaced cartilage in knee.*]—A workman, the cartilage of whose right knee had been previously displaced so often that it was liable to become displaced at any moment without any appreciable extrinsic cause, bent his right leg under him for the purposes of the work which he was doing, & the cartilage was displaced as a result of bending his knee. The work he was doing was ordinary everyday work, & the movement of his leg was usual & ordinary:—*Held:* the workman had sustained injury by accident, in respect that the displacement was not inevitable or designed, but was accidentally caused.—M'GUIRE *v.* WATSON (JOHN), LTD., [1924] S. C. 752.—**SCOT.**

PART XIV. SECT. 5, SUB-SECT. 5.—A.

2738 i. "Serious misconduct"—What amounts to.]—Misconduct is not "serious" merely because the actual consequences in the particular case are

to.]—(1) A workman was found fatally injured in a lift on his employers' premises without a load. Upon the lift was a notice that no one was allowed to use it except in charge of a load. There was no evidence as to the circumstances under which the workman entered the lift. In an application for compensation by the widow:—*Held:* (1) the burden of proving that the workman was guilty of "serious & wilful misconduct" within the meaning of the Workmen's Compensation Act, 1897 (c. 37), lay upon the employers; (2) there was no evidence of serious & wilful misconduct within the meaning of the Act; & appct. was entitled to compensation.

(3) In the expression "serious & wilful misconduct," the word "serious" applies to the misconduct itself & not to the actual consequences of it & the word "wilful" imports that the misconduct was deliberate & not merely a thoughtless act on the spur of the moment.—JOHNSON *v.* MARSHALL, SONS & CO., LTD., [1906] A. C. 409; 75 L. J. K. B. 868; 94 L. T. 828; 22 T. L. R. 565; 8 W. C. C. 10; 70 J. P Jo. 244, H. L.

Annotations:—As to (1) **Folld.** Bist *v.* L. & S. W. Ry., [1907] A. C. 209. **Refd.** Bist *v.* L. & S. W. Ry., [1907] A. C. 209. *As to* (3) **Refd.** Casey *v.* Humphries (1913), 6 B. W. C. C. 520. *Generally,* **Refd.** Robertson *v.* Allan (Liverpool & London) (1908), 77 L. J. K. B. 1072; Wemyss Coal Co. *v.* Symon (1912), 6 B. W. C. C. 298. **Mentd.** Poad *v.* Scarborough Grdns., [1914] 3 K. B. 959.

2739. "Wilful misconduct"—What amounts to.]—JOHNSON *v.* MARSHALL, SONS & CO., LTD., No. 2738, *ante*.

2740. Onus of proof on employer.]—JOHNSON *v.* MARSHALL, SONS & CO., LTD., No. 2738, *ante*.

2741. Question of fact.]—RUMBOLL *v.* NUNNERY COLLIERY CO., No. 2743, *post*.

2742. ——.]—Applt., who was employed at a mid-working in a mine, called to the bottomer at the foot of the shaft to send up the cage. The latter signalled to the engineman to raise the cage. By the system of signalling in use in the mine, the engineman, on receiving a signal to raise the cage, was entitled, unless stopped by a further signal, to raise the cage to the pit head, without stopping at the mid-working. Applt., without ascertaining whether the cage had stopped or not, opened the gate fencing the shaft, pushed his hutch forward, & fell with it down the shaft & was injured. In opening the gate fencing the shaft before the cage was stopped at the mid-working, applt. committed a breach of a rule in operation in the mine. Applt. knew of the rule, & was warned regarding it only a few days before the accident occurred. In an application for compensation under Workmen's Compensation Act, 1906 (c. 58), the arbitrator found that applt. had been guilty of "serious & wilful misconduct" within the meaning of s. 1 (1) (*c*), of the Act, & was consequently not entitled to compensation:—*Held:* the question was one of fact for the arbitrator & there was evidence to support his finding.

It is not the province of the ct. to lay down that the breach of a rule is *primâ facie* evidence of serious & wilful misconduct. That is a question purely of fact to be determined by the arbitrator, who must decide it for himself, & ought not to be affected by artificial presumptions of fact (LORD LOREBURN, C.).—GEORGE *v.* GLASGOW COAL CO., LTD., [1909] A. C. 123; 78 L. J. P. C. 47; 99 L. T. 782; 25 T. L. R. 57; 2 B. W. C. C. 125, H. L.

Annotations:—**Refd.** Casey *v.* Humphries (1913), 6 B. W. C. C. 520; Smith *v.* Russell (1921), 14 B. W. C. C. 278.

B. What Constitutes.

(*a*) *Breach of Statutory Regulations.*

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 1 (2).

2743. Not necessarily serious & wilful misconduct.]—A breach by workmen of the rules of a coal-mine which are authorised by statute does not necessarily involve serious & wilful misconduct, which is a question of fact to be determined by the arbitrator.—RUMBOLL *v.* NUNNERY COLLIERY CO. (1899), 80 L. T. 42; 63 J. P. 132; 43 Sol. Jo. 242; 1 W. C. C. 28, C. A.

Annotation:—**Consd.** Johnson *v.* Marshall, [1906] A. C. 409.

2744. Failure to comply with rules under Factory & Workshops Acts.]—Appct. for compensation was a girl of fourteen, who was engaged as a bottler in a soda water factory. While she was at work a bottle exploded in the machine, & a piece of glass struck & injured her right wrist, with the result that she was disabled for fourteen weeks. At the time of the accident she was wearing a glove on her left hand, but had no protection on the right as required by the special rules, under the Factory & Workshop Acts for the bottling of soda water, which were posted up. The employer set up that the accident was due to

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serious; the misconduct must be serious in itself.—HILL *v.* GRANBY CONSOLIDATED MINES, LTD. (1906), 12 B. C. R. 118; 4 W. L. R. 104.—**CAN.**

2738 ii. —— ——.]—DARNLEY *v.* CANADIAN PACIFIC RY. CO. (1908), 14 B. C. R. 15; 2 B. W. C. C. 505.—**CAN.**

2738 iii. ——.]—Action by widow of workman killed in defts.' factory. Deceased was temporarily employed, could speak & understand, but not read & write English, & while so employed, although directed not to touch the elevator, was caught therein & was killed:—*Held:* the accident arose out of & in the course of the employment, but deceased was guilty of wilful & serious misconduct.—GRANICK *v.* BRITISH COLUMBIA SUGAR REFINERY CO. (B. C.) (1909), 10 W. L. R. 256.—**CAN.**

2738 iv. —— ——.]—MURPHY & SANDWITH *v.* COONEY (1913), 7 B. W. C. C. 962.—**IR.**

2738 v. —— ——.]—Neither disobedience, carelessness, recklessness, nor negligence necessarily disentitle claimant to compensation if the workman, when he was injured, was doing the work for which he was employed.—MILLIN *v.* FOWLER, [1926] N. Z. L. R. 372.—**N.Z.**

2738 vi. —— ——.]—CONDRON *v.* GAVIN, PAUL & SONS, LTD. (1903), 6 F. (Ct. of Sess.) 29; 41 Sc. L. R. 33; 11 S. L. T. 383.—**SCOT.**

2738 vii. —— ——.]—A miner while riding on the top of a loaded hutch in the mine, in breach of one of the rules in force in the mine, was killed by the fall of a stone from the roof of the tunnel in which the hutch was running:—*Held:* although the miner was guilty of serious & wilful misconduct, his death was not "attributable" thereto within the Act, & his widow was not barred from claiming compensation.—GLASGOW COAL CO. *v.* SNEDDON (1905), 7 F. (Ct. of Sess.) 485.—**SCOT.**

2738 viii. ——.]—Being drunk & unfit to work is serious & wilful misconduct on the part of the workman, within the Act.—M'GROARTY *v.* BROWN (JOHN) & CO., LTD. (1906), 8 F. (Ct. of Sess.) 809.—**SCOT.**

2738 ix. —— ——.]—WALLACE *v.* GLENBOIG FIRE CLAY CO., [1907] S. C. 967.—**SCOT.**

2738 x. —— ——.]—LEISHMAN *v.* DIXON (WILLIAM), LTD., [1910] S. C. 498; 47 Sc. L. R. 410; [1910] 1 S. L. T. 273; 3 B. W. C. C. 560.—**SCOT.**

2738 xi. —— ——.]—VICTORIA FALLS POWER CO., LTD. *v.* LLOYD, N.O., [1908] T. S. 1161.—**S. AF.**

2738 xii. —— ——.]—Misconduct which is deliberate, systematic, & in breach of orders, may be "serious & wilful misconduct" within the meaning of these words in Workmen's Compensation Act, even though the result be to endanger the safety of the wrongdoer alone, & not that of his fellow-workmen.—BERTHOLDI *v.* CENTRAL SOUTH AFRICAN RYS., [1910] T. P. D. 141.—**S. AF.**

2740 i. *Onus of proof on employer.*]—MOUCHEMORE *v.* LIGHT (1915), 17 W. A. L. R. 139.—**AUS.**

2740 ii. ——.]—The burden of proving that an accident is attributable solely to the neglect of a workman is upon his employers.—*Re* MCALONEY & WESTERN FUEL CO. (B. C.) (1906), 5 W. L. R. 163.—**CAN.**

PART XIV. SECT. 5, SUB-SECT. 5.—B. (a).

2743 i. *Not necessarily serious & wilful misconduct.*]—MITCHELL *v.* WHITTON, [1907] S. C. 1267.—**SCOT.**

Sect. 5.—Right to compensation: Sub-sect. 5, B. (a), (b) & (c), & C.; sub-sect. 6. Sect. 6: Sub-sect. 1.]

appct.'s serious & wilful misconduct in not wearing protective gauntlets on both arms as required by the rules, & as she had been told to do by himself & the forewoman. The county ct. judge found that gauntlets were provided, that appct. knew she had to wear them, but that the forewoman whose duty it was to see that appct. wore them had allowed her to do the work without a gauntlet on her right hand & to disregard the rules, & only verbally told appct. to obey the rules to protect herself with the employer. The county ct. judge therefore held that the defence of serious & wilful misconduct had not been established:—*Held:* the ct. would not interfere with the decision of the county ct. judge.—CASEY *v.* HUMPHRIES (1913), 29 T. L. R. 647; 57 Sol. Jo. 716; 6 B. W. C. C. 520, C. A.

Breach of Coal Mine Regulations.]—*See* Sub-sect. 2, E. (*b*) iii., *ante*.

(*b*) *Breach of Employer's Orders.*

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 1 (1) (*b*), (2).

2745. Leaning across machine in motion.]—Appct. was a lad who worked at a machine used to cut slits in the heads of screws. He had been frequently warned not to put his hand near the wheel while it was in motion. There was no guard on the wheel. A screw having fallen out on to the table before it was cut, he leaned over the machine to pick it up & replace it, & two of his fingers were cut off.

The county ct. judge found that though the lad was negligent, he was not "guilty of serious & wilful misconduct":—*Held:* the element of wilfulness did not enter at all into what the lad did, as he seemed to have acted on a sudden impulse, & therefore the award could be supported.—REEKS *v.* KYNOCH, LTD. (1901), 50 W. R. 113; 18 T. L. R. 34; 46 Sol. Jo. 48; 4 W. C. C. 14, C. A.

Annotation:—**Consd.** Johnson *v.* Marshall, [1906] A. C. 409.

2746. Neglect to employ guard to machine.]—A workman was employed in a factory at a circular saw which was driven by machinery. His duty was to hold the wood & guide it when it was being sawn. He was told on several occasions, both by his employer & by the factory inspector, to keep the guard upon the saw when it was in use. The object of the guard was to prevent the wood which was being sawn, if it was jerked up, from being caught by the teeth at the back of the saw & hurled about the workshop, to the danger of those at work there. The workman had worked for several years at circular saws before the guard was invented, & he had a great aversion to using a guard. Upon the day in question he intentionally did not place the guard upon the saw when using it, & the piece of wood which was being sawn jerked up & was hurled by the saw against him, & he was killed. The county ct. judge found that the injury to the workman was not attributable to his serious & wilful misconduct within Workmen's Compensation Act, 1897 (c. 37), s. 1 (2) (*c*), & made an award of compensation in favour of his widow:—*Held:* the injury was caused by the serious & wilful misconduct of the workman, & his widow was not entitled to compensation under the Act.—BROOKER *v.* WARREN (1906), 23 T. L. R. 201; 51 Sol. Jo. 171; 9 W. C. C. 26, C. A.

2747. ——.]—BREWER *v.* SMITH (1913), 6 B. W. C. C. 651, C. A.

2748. Workmen ordered not to ride in lift without load — Riding without load.] — JOHNSON *v.* MARSHALL, SONS & CO., LTD., No. 2738, *ante*.

2749. Driver leaving engine while in motion to go to tender—In breach of well known rule.]—An engine driver left the foot plate of his engine & went on to the tender while the engine was in motion, in breach of a rule of the railway co. prohibiting the act & well known to him, & was killed by collision with a bridge. In a claim by the widow for compensation the county ct. judge found upon the evidence that there was nothing to justify the driver in going on to the tender at the time in question, & that his act amounted, in fact, to "serious & wilful misconduct," within Workmen's Compensation Act, 1897 (c. 37), & made his award in favour of the co.:—*Held:* there was evidence upon which the judge might properly find as he did.—BIST *v.* LONDON & SOUTH WESTERN RY. CO., [1907] A. C. 209; 76 L. J. K. B. 703; 96 L. T. 750; 23 T. L. R. 471; 51 Sol. Jo. 444; 9 W. C. C. 19, H. L.

Annotations:—**Consd.** George *v.* Glasgow Coal Co. (1908), 1 B. W. C. C. 239; Casey *v.* Humphries (1913), 6 B. W. C. C. 520. **Reld.** Williams *v.* Llandudno Coaching & Carriage Co., [1915] 2 K. B. 101; Bourton *v.* Beauchamp & Beauchamp (1919), 121 L. T. 196.

2750. Opening gate fencing shaft before cage stopped.]—GEORGE *v.* GLASGOW COAL CO., LTD., No. 2742, *ante*.

2751. Workman touching machine in motion.]—A boy, in disobedience to orders, was cleaning a machine in motion: his right hand was drawn into the machine, & the top joint of the first & third fingers torn off. The county ct. judge held that the injury was attributable to the serious & wilful misconduct of the workman, but that it resulted in serious & permanent disablement, & he therefore awarded compensation:—*Held:* the injury

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PART XIV. SECT. 5, SUB-SECT. 5.—B. (b).

2751 i. *Workman touching machine in motion.*]—A woman employed in a spinning mill was injured through attempting to clean a teaser card-machine, at which she was working, while it was in motion. It was the rule & practice of the factory, known to the woman that no cleaning of machinery was to be done unless the machinery were stopped:—*Held:* the injuries to the woman were attributable to her serious & wilful misconduct.—GUTHRIE *v.* BOASE SPINNING CO., LTD. (1901), 3 F. (Ct. of Sess.) 769; 38 Sc. L. R. 483.—**SCOT.**

2751 ii. ——.]—M'DIARMID *v.* OGILVY BROTHERS, [1913] S. C. 1103.—**SCOT.**

2751 iii. ——.]—GAUNT *v.* BABCOCK & WILCOX, LTD., [1918] S. C. 14.—**SCOT.**

k. *Explosives used contrary to instructions.*]—RUSH *v.* GIBSON (1917), 19 W. A. L. R. 123.—**AUS.**

l. *Riding on loaded cart.*]—SMITH *v.* KALGOORLIE BOULDER FIREWOOD CO., LTD. (1918), 20 W. A. L. R. 54.—**AUS.**

m. *Obedience to orders of "mucker boss."*]—CERVIO *v.* GRANBY CONSOLIDATED MINING, SMELTING & POWER CO. (1910), 15 B. C. R. 192.—**CAN.**

n. *Injury in freight lift.*] — Deceased, a foreigner, but able to speak & understand, though not to read or write English, entered the employment of defts. at work in which he had had no previous experience. Before commencing work, a fellow labourer was cautioned by the foreman, in presence of deceased, not to allow the latter to use a freight lift. He nevertheless attempted to use it, & was cautioned not to do so. He was later in the day killed in the lift:—*Held:* he was not guilty of serious & wilful misconduct.—GRANICK *v.* BRITISH COLUMBIA SUGAR REFINERY CO. (1910), 14 B. C. R. 251; 15 B. C. R. 198; 44 S. C. R. 105.—**CAN.**

o. *Remaining in place of danger—When blast fired.*]—RUDLAND *v.* SMITH (1917), 50 N. S. R. 434; 33 D. L. R. 536.—**CAN.**

p. *Fall through aperture — Aperture open contrary to notice.*]—O'HALLORAN *v.* CHAMBERS & SON, LTD. (1914), 33 N. Z. L. R. 643.—**N.Z.**

q. *Crossing stream contrary to orders.*]—GIBSON *v.* MCKELVIE, [1925] N. Z. L. R. 351.—**N.Z.**

r. *Injury caused by threshing machine.*]—CALLAGHAN *v.* MAXWELL (1900), 2 F. (Ct. of Sess.) 420; 37 Sc. L. R. 313; 7 S. L. T. 339.—**SCOT.**

t. *Defective condition of hoist —*

resulted in permanent disablement, & there was evidence on which the county ct. judge could find that the disablement was serious.—HOPWOOD *v.* OLIVE & PARTINGTON, LTD. (1910), 102 L. T. 790; 3 B. W. C. C. 357, C. A.

2752. ——.]—FOULKES *v.* ROBERTS, No. 2536, *ante*.

2753. ——.]—Appct., when working a machine, touched it whilst in motion, contrary to orders, & injured her hand, with the result that the first joint of the index finger of her left hand was amputated. The insurance co., acting on behalf of resps., in reply to a claim made by appct.'s solrs. for damages, stated in a letter dated May 26, 1923, "We are, however, prepared to admit liability under the Workmen's Compensation Acts, & have already instructed our assured to pay thereunder at the rate of £1 13. 11*d.* per week. Unless, therefore, you are prepared to advise your client to accept such weekly payment we must leave you to take what steps you deem advisable in her interests." On July 21, 1923, appct. issued a writ claiming damages for personal injuries in an action by her under Employers' Liability Act, 1880 (c. 42). The county ct. judge dismissed the action on the ground that pltf. had been expressly forbidden to touch the machine whilst in motion. Application was then made for an award under the Workmen's Compensation Act, 1906 (c. 58), which was refused on the ground that appct. had been guilty of wilful misconduct. Appct. appealed & relied on the letter admitting liability under the Workmen's Compensation Act:—*Held:* (1) the letter could not be used under the Workmen's Compensation Act proceedings as a complete admission of liability, as its purpose was completed at the date of the writ, & the employers were not estopped from resisting the claim for compensation; (2) the case, must however, go back for further hearing, as it was not shown that the county ct. judge had in mind whether the disablement was serious & permanent within Workmen's Compensation Act, 1906 (c. 58), s. 1 (2) (*c*).—MALONEY *v.* PINK (E. & T.), LTD. (1923), 130 L. T. 500; 16 B. W. C. C. 217, C. A.

(*c*) *Disregard of Warning of Danger.*

2754. Collier warned of approaching tram journey.]—A collier whose lamp had gone out & who had been to the lamp station to obtain a light was obliged, in order to get back to where his work was, to pass along a way over which trams were hauled by a rope. On reaching the way he was told that a journey of trams was approaching. He proceeded, & when making for a manhole was injured in consequence of the rope slipping:—*Held:* there was no evidence of serious & wilful misconduct.—REES *v.* POWELL DUFFRYN STEAM COAL CO., LTD. (1900), 64 J. P. 164; 4 W. C. C. 17, n., C. A.

Annotation:—**Consd.** John *v.* Albion Coal Co. (1901), 65 J. P. 788.

2755. ——.]—A miner proceeding along the main haulage road of the mine when he was warned by a fellow workman to get into a manhole, as a journey of trams was approaching. He disregarded the warning & went on, with the result that he was overtaken by the trams & killed. The county ct. judge found that the accident was attributable to the serious & wilful misconduct of deceased man:—*Held:* there was evidence to support that finding.—JOHN *v.* ALBION COAL CO., LTD. (1901), 65 J. P. 788; 18 T. L. R. 27; 4 W. C. C. 15, C. A.

C. Serious and Permanent Disablement.

See Sub-sect. 6, *post*.

SUB-SECT. 6.—SERIOUS AND PERMANENT DISABLEMENT.

See Workmen's Compensation Act, 1925 (c. 84), s. 1 (1) (*b*), (2).

2756. What amounts to—Loss of finger joint.]—HOPWOOD *v.* OLIVE & PARTINGTON, LTD., No. 2751, *ante*.

2757. ——.]—A county ct. judge found the amputation of the top joint of the middle finger of the right hand of a machinist in the joinery trade to be serious & permanent disablement within Workmen's Compensation Act, 1906 (c. 58), s. 1 (2):—*Held:* there was evidence to support the finding.—BREWER *v.* SMITH (1913), 6 B. W. C. C. 651, C. A.

2758. ——.]—FOULKES *v.* ROBERTS, No. 2536, *ante*.

SECT. 6.—**DEATH OR INCAPACITY RESULTING FROM THE INJURY.**

SUB-SECT. 1.—IN GENERAL.

2759. Need not be the natural or probable consequence.]—(1) Workmen's Compensation Act, 1897 (c. 37), Sched. I., para. 1 (*a*), prescribes a scale of compensation payable to the dependants of a workman "where death results from the injury":—*Held:* the dependants are entitled to compensation on that scale if death results in fact from the injury, even though at the time of the injury it could not be reasonably expected as the probable consequence thereof.

Workman forbidden to ascend thereby.]—LOGUE *v.* FULLERTON (1901), 3 F. (Ct. of Sess.) 1006.—**SCOT.**

a. *Jumping from quay to vessel.*]—MARTIN *v.* FULLERTON & Co., [1908] S. C. 1030.—**SCOT.**

b. *Jumping on train before train stops.*]—M'WILLIAM *v.* GREAT NORTH OF SCOTLAND RY. CO., [1914] S. C. 453.—**SCOT.**

c. *Paperhanger using wrong ladder.*]—A workman who had been furnished by his employers with an 8 ft. ladder suitable for the purposes of paperhanging in a certain room, introduced & made use of a 6 ft. ladder, which was unsafe & which he was warned not to use. He was injured by slipping from this ladder:—*Held:* the action of the workman did not constitute "serious & wilful misconduct."—VERMEULEN *v.* HEYNE, [1913] App. D. 542.—**S. AF.**

d. *Entering unsafe electric chamber.*]—VAN BREDA *v.* VICTORIA FALLS & TRANSVAAL POWER CO., LTD., [1916] App. D. 325.—**S. AF.**

PART XIV. SECT. 5, SUB-SECT. 5.—B. (c).

e. *Repeated warnings by employer.*]—ROWE *v.* REYNOLDS (1910), 12 W. A. L. R. 75.—**AUS.**

f. ——.]—Pltf. was accidentally injured while working for deft. in a machine-shop, under a foreman, applied for compensation under Workmen's Compensation Act:—*Held:* the accident was the result of pltf.'s serious & wilful misconduct, the disobedience of an order in the face of repeated warnings; & the application failed.—CLAYTON *v.* HANBURY (1914), 27 W. L. R. 893; 17 D. L. R. 384.—**CAN.**

g. —— *Spragging wheels.*]—Some boys employed in steel works were allowed an interval of half an hour for rest between two jobs. During this interval they got into one of a number of waggons that were standing on a steeply inclined line of rails in the yard of the works. After the boys had got into the waggon, the waggons began to move down the incline, & one of the boys jumped off the waggon in order to sprag the wheels. While thus engaged he was caught by the sprag & being thrown under the wheels sustained injuries so that he died. The boys had no occasion to be near the waggons, & had repeatedly been warned not to go near them:—*Held:* the accident was attributable to the "serious & wilful misconduct" of the boy.—POWELL *v.* LANARKSHIRE STEEL CO. (1904), 6 F. (Ct. of Sess.) 1039.—**SCOT.**

S.ct. 6.—Death or incapacity resulting from the injury: Sub-sects. 1, 2, 3 & 4.]

(2) If the chain of causation is broken by a *novus actus interveniens* so that the old cause goes & a new one is substituted for it, that is a new act which gives a fresh origin to the after-consequences (COLLINS, M.R.).—DUNHAM *v.* CLARE, [1902] 2 K. B. 292; 71 L. J. K. B. 683; 86 L. T. 751; 66 J. P. 612; 50 W. R. 596; 18 T. L. R. 645; 4 W. C. C. 102, C. A.

Annotations:—As to (1) **Consd.** Ystradowen Colliery Co. *v.* Griffiths, [1909] 2 K. B. 533; Taylorson *v.* Framwellgate Coal & Coke Co. (1913), 6 B. W. C. C. 56. **Folld.** Saddington *v.* Inslip Iron Co. (1917), 87 L. J. K. B. 184. **Refd.** Bellamy *v.* Humphries (1913), 6 B. W. C. C. 53; Shaw (Glasgow) *v.* Macfarlane (1914), 8 B. W. C. C. 382; Jones *v.* Guest, Keen & Nettlefolds (1915), 9 B. W. C. C. 113; Coltness Iron Co. *v.* Brownlee (1917), 10 B. W. C. C. 462. *As to* (2) **Apld.** Mutter, Howey *v.* Thomson (1913), 6 B. W. C. C. 424. **Consd.** Laverick *v.* Gray (1919), 121 L. T. 289; Carr *v.* Port Glasgow Burgh (1923), 16 B. W. C. C. 331. **Apld.** Williams *v.* Gralgola Merthyr Co. (1924), 132 L. T. 227. **Consd.** Hutchinson *v.* Kiveton Park Colliery Co., [1926] 1 K. B. 279. **Refd.** Brown *v.* Kent, [1913] 3 K. B. 624; Law *v.* Baird (1914), 7 B. W. C. C. 846; Doolan *v.* Hope (1918), 87 L. J. K. B. 671. *Generally,* **Mentd.** The Amerika, [1914] P. 167.

2760. —— Must in fact be the result.]—Where a workman receives personal injury from an accident arising out of & in the course of his employment & disease ensues which incapacitates him for work, the incapacity may be the result of the injury within Workmen's Compensation Act, 1906 (c. 58), Sched. 1., para. 1 *(b)*, even though it is not the natural result of the injury. The question to be determined on a claim for compensation is whether the incapacity is in fact the result of the injury.—YSTRADOWEN COLLIERY CO., LTD. *v.* GRIFFITHS, [1909] 2 K. B. 533; 78 L. J. K. B. 1044; 100 L. T. 869; 25 T. L. R. 622; 2 B. W. C. C. 357, C. A.

Annotations:—**Refd.** Alloa Coal Co. *v.* Drylie (1913), 6 B. W. C. C. 398; Brown *v.* Kent, [1913] 3 K. B. 624; Saddington *v.* Inslip Iron Co. (1917), 87 L. J. K. B. 184; Carr *v.* Port Glasgow, Burgh (1923), 16 B. W. C. C. 331; Hutchinson *v.* Kiveton Park Colliery Co., [1926] 1 K. B. 279.

2761. No liability for incapacity not result of injury.]—A workman was being paid compensation under an agreement in respect of an injury, caused by ricking his neck when lifting an iron girder on Oct. 7. He subsequently underwent an operation for middle-ear disease. The employers applied to review & terminate payments, on the ground that the man was no longer incapacitated by injury due to the accident on Oct. 7. The man had himself attributed his condition, when he went to the hospital, to some accident which occurred on Oct. 4, & in evidence he simply referred to an accident in Oct. The medical evidence at the arbitration turned on the man's then incapacity, but all the doctors agreed that it could not be attributed to the accident on Oct. 7. The medical assessor examined the man, & reported that he was still incapacitated as a result of the accident on Oct. 7. Upon this the county ct. judge dismissed the employers' application:—*Held:* the evidence showed that any incapacity the man was suffering from was not due to the accident of Oct. 7, for which alone the employers had agreed to be liable, but to some other cause, & consequently, the employers' application to review should be granted & payments terminated.—BOOTH *v.* CARTER (1915), 8 B. W. C. C. 106, C. A.

SUB-SECT. 2.—CAUSE OF DEATH OR INCAPACITY A QUESTION OF FACT.

2761a. General rule.]—A gas fitter inhaled some coal gas, & three days later suffered from paralysis due to cerebral hæmorrhage, from which he died shortly after. Seven months previously he had had a transient attack of paralysis from the same cause. After his death his widow contended that the death was due to the gas poisoning, but the county ct. judge decided against her:—*Held:* it was a question of fact for the county ct. judge.—DEAN *v.* LONDON & NORTH WESTERN RY. CO. (1910), 3 B. W. C. C. 351, C. A.

Annotation:—**Refd.** Russell *v.* Docherty (1917), 11 B. W. C. C. 311.

2762. ——.]—A workman knocked his elbow at work, & afterwards suffered from eczema in the forearm. On medical evidence the judge found that the eczema was not caused by the knock, & awarded for the employers:—*Held:* there was evidence to support the finding.—SWINBANK *v.* BELL BROTHERS, LTD. (1911), 5 B. W. C. C. 48, C. A.

2763. ——.]—A workman met with an accident to his arm, he was taken to a hospital, his arm put in splints, & he was sent home. He complained to his wife of pain in the right side the next day, & on the day following he again went to the hospital, where he was retained as suffering from an acute attack of pneumonia from which he died two days later. The county ct. judge, sitting with an assessor, found that death did not result from the injury:—*Held:* this was a question of fact, & consequently not open to appeal.—CAMERON *v.* PORT OF LONDON AUTHORITY (1912), 5 B. W. C. C. 416, C. A.

2764. ——.]—A workman died four years after an accident. Two doctors attributed the death to the accident; two to other causes. The county ct. judge, taking into consideration the length of time between the accident & death, found that death did not result from the injury:—*Held:* there was no misdirection.—TAYLORSEN *v.* FRAMWELLGATE COAL & COKE CO. (1913), 6 B. W. C. C. 56, C. A.

Annotation:—**Refd.** Comery *v.* New Hucknall Colliery Co. (1919), 88 L. J. K. B. 462.

2765. ——.]—A workman applied for arbitration five years after he had burnt his arm in an accident. He had been working at light work but had refused to go back to his old work on the ground that he was still incapacitated as a result of the accident. The county ct. judge, following the answers given to some questions referred to the medical assessor sitting with him, found that, although the man was incapacitated, the incapacity was not the result of the accident:—*Held:* there was evidence to support the finding.—HUGGINS *v.* GUEST, KEEN & NETTLEFOLDS, LTD. (1913), 6 B. W. C. C. 80, C. A.

2766. ——.]—(1) When a claimant proves an injury by accident, & then a continuous physical condition set up by the injury, & then a further injury which may be the result either of the physical condition or of *novus actus interveniens*, the *onus* of proof shifts to the employer to show that the further injury is not the result of the accident, but of *novus actus interveniens*.

(2) A miner had his back severely crushed by a fall of coal. He received compensation for six months, when he returned to the light work of

2761a l. *General rule.*]—EUMAN *v.* DALZIEL & CO., [1913] S. C. 246; 50 Sc. L. R. 143; [1912] 2 S. L. T. 464; 6 B. W. C. C. 900.—SCOT.

painting wagons. He did this work regularly for eighteen months. He was then taken ill with tuberculosis of the lungs, & died of this disease just over two years after the accident. His dependants claimed compensation for his death :—*Held :* the death did not result from the accident within Workmen's Compensation Act, 1906 (c. 58), Sched. 1 (1) (*a*).—COMERY *v.* NEW HUCKNALL COLLIERY CO., LTD. (1919), 88 L. J. K. B. 462 ; 120 L. T. 456 ; 12 B. W. C. C. 1, C. A.

2767. ——.]—A fitter, aged thirty, was struck on the right cheek while at work by a broken axle shaft. After having the wound dressed, he returned to work the same day, & remained at work for four months, when he had a stroke & died a few hours later. Death was found by post mortem examination to have been due to hæmorrhage into the brain. The county ct. judge said as a layman he could not account for the man's death apart from the accident, but he accepted the medical evidence for the employers that this accident could in no way be connected with the cause of death. It was alleged that this medical evidence constituted "surprise" & that appct. had no opportunity of rebutting it :—*Held :* there was no ground for saying that applt. had been taken by surprise. If applt. desired to supplement the evidence, the proper course would have been to have applied to the county ct. judge for an adjournment.

I am not at all satisfied that, looking at the limited jurisdiction given to a Ct. of Appeal in workmen's compensation cases, it would have been possible to order a new trial upon the ground of surprise (LORD DUNEDIN).—GOLDEN *v.* SWIFT OF COVENTRY, LTD. (1924), 93 L. J. K. B. 488 ; 131 L. T. 68 ; 40 T. L. R. 315 ; 68 Sol. Jo. 438 ; 17 B. W. C. C. 1, H. L.

2768. ——.]—A workman met with an accident in Jan., & became incapacitated in July. In Aug. the employers agreed to pay full compensation as from the commencement of the incapacity. On Oct. 14, they sent the workman a copy of a certificate of a medical practitioner that the incapacity was no longer due to the accident, together with a notice of their intention to end the weekly payment. The workman did not send any report disagreeing with the certificate, & the employers ended the payments. The workman applied for arbn., & the county ct. judge found that the incapacity from which the workman was then suffering was not due to the accident, but to a tuberculous condition of the workman :—*Held :* the employers were not estopped by their recognition of liability & agreement to pay compensation, from ending the weekly payments in accordance with Workmen's Compensation Act, 1923 (c. 72), s. 14, & the cause of the incapacity was a question of fact as to which there was evidence to support the finding, & no misdirection.—DAVIES *v.* MIDLAND RAILWAY CARRIAGE & WAGGON CO., LTD. (1926), 19 B. W. C. C. 69, C. A.

2769. Fraudulent claim.]—It is the duty of a county ct. judge, when sitting as an arbitrator under Workmen's Compensation Act, 1906 (c. 58), to state the grounds of his decision.

A workman injured his eye many years ago & lost the vision entirely. Ten years later he again hurt the same eye with a jet of steam. He received compensation for a few weeks, & did some work. The eye was removed ten months after the alleged injury by the steam, & he claimed compensation for incapacity resulting from such injury. The county ct. judge refused to award compensation, &, at the request of the Ct. of Appeal, stated his reasons to be that he entirely disbelieved the man's statements ; that the injury by steam had in no way affected the man's vision, which had been destroyed many years before ; & that the case was a fraudulent attempt to get money out of the employers :—*Held :* there was evidence to support the finding.—MARSHALL *v.* PRICE, WILLS & REEVES (1914), 30 T. L. R. 248 ; 7 B. W. C. C. 385, C. A.

SUB-SECT. 3.—PROOF.

See, generally, EVIDENCE, Vol. XXII., pp. 19 *et seq.*

Admissibility of evidence—Bodily feelings.]—*See* EVIDENCE, Vol. XXII., pp. 70–71, Nos. 415–417.

—— **Admissions.**]—*See* EVIDENCE, Vol. XXII., pp. 80, 81, 82, Nos. 489, 515.

—— **Statement in presence of master.**]—*See* EVIDENCE, Vol. XXII., p. 80, No. 478.

—— **Statement by deceased person.**] — *See* EVIDENCE, Vol. XXII., p. 114, No. 871.

SUB-SECT. 4.—ONUS OF PROOF.

2770. Death or incapacity due to accident—Lies on workman.]—CHARLES *v.* WALKER, LTD., No. 2805, *post.*

2771. —— ——.]—COMERY *v.* NEW HUCKNALL COLLIERY CO., LTD., No. 2766, *ante.*

2772. —— ——.]—Applt., a domestic servant, cut her finger while slicing bacon in the course of her employment. She was incapacitated & was paid compensation by her employer until her hand was healed. Applt. then took proceedings for compensation & the county ct. judge found that her hand had healed & that she was fit to resume her work. He also found, on the evidence, that if she was incapacitated at all, her incapacity was due to mental defects which were not shown to have been the result of the injury to her finger. He accordingly made an award in favour of the employer :—*Held :* the *onus* lay on applt. to show that her incapacity was caused by the accident & she had failed to satisfy that *onus ;* there was evidence to support the finding & no misdirection. —JOY *v.* MORTON (1922), 15 B. W. C. C. 33, C. A.

2773. Existence of novus actus interveniens—Lies on employer.]—Where a workman has been injured by accident arising out of & in the course of his employment, & claims compensation under Workmen's Compensation Act, 1906 (c. 58), the *onus* of proving that the existing incapacity is no longer due to the accident, but is attributable to a *novus actus interveniens,* such as improper medical treatment owing to an incorrect diagnosis, is on the employer.

A deal carrier met with an accident arising out of & in the course of his employment, causing injury to one of his knees. He was treated at a

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PART XIV. SECT. 6, SUB-SECT. 4.

2770 i. *Death or incapacity due to accident—Lies on workman.*]—BODEAN *v.* CHAGNON (Que.) (1917), 37 D. L. R. 392.—**CAN.**

2770 ii. —— ——.]—GRANT *v.* GLASGOW & SOUTH WESTERN RY. CO., [1907] S. C. 187 ; 45 Sc. L. R. 128 ; 15 S. L. T. 585 ; 1 B. W. C. C. 17.—**SCOT.**

2770 iii. —— ——.]—MALONE *v.* CAYZER, IRVINE & CO., [1908] S. C. 479 ; 45 Sc. L. R. 361 ; 15 S. L. T. 837 ; 1 B. W. C. C. 27.—**SCOT.**

2773 i. *Existence of novus actus interveniens—Lies on employer.*]—REMNANT *v.* DEMPSKY, [1920] N. Z. L. R. 6122.—**N.Z.**

2773 ii. —— ——.]—BORLAND *v.* WATSON, GOW & CO., LTD., [1912] S. C. 15.—**SCOT.**

Sect. 6.—Death or incapacity resulting from the injury: Sub-sect. 5, B. (a) & (b); sub-sect. 6.]

Medical evidence was given attributing his incapacity to "stiffness, hernia, prostate, & old age." The county ct. judge said he need not consider whether the accident could have caused partial incapacity since he found that the workman was totally incapacitated by a disease in no way connected with the accident, & made an award in favour of the employers:—*Held:* this was misdirection; a workman is not disentitled to compensation, during disability from the injury by accident, merely because he becomes totally incapacitated by a disease unconnected with the accident. Case sent back to assess compensation for incapacity, if any, resulting from the injury by accident.—STOWELL *v.* ELLERMAN LINES, LTD. (1923), 128 L. T. 823; 16 B. W. C. C. 46, C. A.

2788. —— ——.] WILLIAMS *v.* GRAIGOLA MERTHYR CO., LTD., No. 2804, *post.*

——.]—*See, also,* Sub-sect. 7, H., *post.*

2789. Incapacity due to accident ended—Illness supervening.]—A workman fell & injured his back. He received compensation under an award until he was able to do light work, when the compensation was reduced. After some time the employers applied to terminate. There was medical evidence that the man had entirely recovered from the effects of the injury, but that tubercular disease of the lungs & bladder from which the man suffered prevented him working, though it could in no way be connected with the accident. The county ct. judge, sitting with a medical assessor, terminated the liability:—*Held:* there was sufficient evidence upon which to terminate.—WESTCOTT & LAWRENCE LINES, LTD. *v.* PRICE (1912), 5 B. W. C. C. 430, C. A.

2790. —— ——.]—Upon an application by employers for the termination of a weekly payment made by them on the footing of total incapacity to a workman who had lost an eye by accident arising out of & in the course of his employment, the arbiter found that the incapacity had ceased & that the workman was fit to resume his former work; that since the accident incipient cataract had appeared in his other eye; & that the cataract was not due to the accident:—*Held:* on these findings the arbiter was right in ending the compensation.—HARGREAVE *v.* HAUGHHEAD COAL CO., LTD., [1912] A. C. 319; 81 L. J. P. C. 167; 106 L. T. 468; 56 Sol. Jo. 379; 5 B. W. C. C. 445, H. L.

Annotations:—**Consd.** Law *v.* Baird (1914), 7 B. W. C. C. 846; Jackson *v.* Hunslet Engine Co., [1916] 2 K. B. 8. **Folld.** Hart *v.* Cory, [1916] 1 K. B. 172. **Apld.** Leverington *v.* Dodman, [1916] 1 K. B. 964. **Consd.** Foster *v.* Wharncliffe Woodmoor Colliery Co., [1922] 2 K. B. 701. **Apld.** Lomax *v.* Sutton Heath & Lea Green Collieries (1926), 135 L. T. 564. **Refd.** Dempsey *v.* Caldwell (1913), 7 B. W. C. C. 823; Green *v.* Cammell, Laird, [1913] 3 K. B. 665; Watson *v.* Beardmore (1914), 7 B. W. C. C. 913; Wardell *v.* Cargo Fleet Iron Co. (1916), 10 B. W. C. C. 124; Baynton *v.* Manganese Bronze & Brass Co. (1919), 12 B. W. C. C. 59.

2791. —— ——.]—The workman, a fitter, met with an accident. Some hot sparks flew into his eye. A doctor who saw him a month after the accident said that his eye was then practically well. Later, his eye became worse, & he was seen from time to time by the doctor, who treated him. The doctor stated in evidence that the condition of his eye on those later occasions pointed to some constitutional disease. Another doctor who examined appct.'s eye five months after the accident, said that the condition of the eye at that time was consistent with the accident. The medical assessor who advised the county ct. judge was of opinion that the injury from which appct. was suffering was not the result of the accident. The county ct. judge found as facts that appct. met with a slight accident to his eye arising out of & in the course of his employment; that he had recovered from the effects of that accident, & that the incapacity from which he was suffering was not caused by the accident. He made an award in favour of the employers:—*Held:* there was evidence to support the findings, & no misdirection.—TUCKER *v.* MANGANESE BRONZE & BRASS CO. (1921), 14 B. W. C. C. 38, C. A.

2792. —— **Inflammation in second eye following injury to first.**]—A workman met with an accident in his employers' colliery whereby he lost the use of one of his eyes. Compensation was accordingly paid to the workman by the employers. Several months afterwards the workman was employed again by the same employers, not in the mine but on its surface. About a year later the workman applied for an award of compensation. Upon that application the county ct. judge made a suspensory award of 1*d.* per week, the employers not objecting to an award of that nature. The workman went back to work again as a collier until the sight of his uninjured eye became affected & he had to take work on the surface of the mine once more. Ultimately he applied for a review of the weekly payment of 1*d.* The county ct. judge, sitting with a medical referee, found that, although the workman was suffering from inflammation of the optic nerve of the uninjured eye, yet there was no connection between that & the accident that had originally occurred; that the workman was not therefore suffering from incapacity for work as a result of that accident; & that there could be no review of the weekly payment of 1*d.* The workman appealed:—*Held:* the county ct. judge was right in declining to review the weekly payment; but if a further injury should arise either by the breaking out of inflammation in the injured eye or by injury to the other eye through sympathy, then under the existing suspensory award it would be open to the workman to apply again for a review.—HART *v.* CORY BROTHERS, LTD., [1916] 1 K. B. 172; 85 L. J. K. B. 116; 114 L. T. 25; 60 Sol. Jo. 89; 9 B. W. C. C. 32, C. A.

Annotations:—**Refd.** Leverington *v.* Dodman, [1916] 1 K. B. 964. **Mentd.** Jackson *v.* Hunslet Engine Co., [1916] 2 K. B. 8.

2793. —— ——.]—A collier earning 32*s.* per week lost his right eye in 1915 & received compensation, but in 1916 was again employed by his former employers as a dataller at 42*s.* per week, so that no compensation was payable. He continued as a dataller until Oct. 1925, when he had to cease work owing to the loss of the sight of his other eye from disease in no way connected with the accident. At that time the average earnings of a collier were 55*s.* per week & those of a dataller 43*s.* 9*d.* per week. The county ct. judge held he was entitled to half the difference between the average weekly earnings of a dataller & those of a collier, namely 5*s.* 7½*d.* a week:—*Held:* Workmen's Compensation Act, 1906 (c. 58), sched. I. (3), no compensation was payable prior to Oct. 1925, & the employers could not be made liable thereafter by the happening of an event in no way connected with the employment.—LOMAX *v.* SUTTON HEATH & LEA GREEN COLLIERIES, LTD. (1926), 135 L. T. 564; 19 B. W. C. C. 301, C. A.

(b) Particular Cases.

2794. Debilitated condition due to accident—Rendering bronchitis fatal.]—A workman met with an accident. After recovering from the direct effects of the accident, he did not regain his normal health, but continued in a weak & debilitated state. He eventually died thirteen months after the accident from bronchitis following influenza. The county ct. judge found that the bronchitis proved fatal because of the condition to which the accident had reduced deceased, & that death resulted from the injury:—*Held:* there was evidence to support the finding.—THOBURN *v.* BEDLINGTON COAL CO., LTD. (1911), 5 B. W. C. C. 128, C. A.

Annotation:—**Refd.** Comery *v.* New Hucknall Colliery Co. (1919), 88 L. J. K. B. 462.

2795. Incapacity impossible from illness alone.]—A workman met with an accident in the course of & arising out of his employment which made it necessary to remove a cartilage from his knee. After the operation, which appeared successful, he caught scarlet fever while in a provincial hospital & was removed to an isolation hospital. While he was there, the wound became unhealthy & suppurated. Another operation was then found necessary which caused the knee to become permanently stiff & immovable. There was evidence that the scarlet fever alone could not have caused the incapacity, if there had been no accident, but that it had aggravated the effects of the accident:—*Held:* the incapacity was caused by the accident, & the workman was entitled to compensation under Workmen's Compensation Act, 1906 (c. 58).—BROWN *v.* KENT (GEORGE), LTD., [1913] 3 K. B. 624; 82 L. J. K. B. 1039; 109 L. T. 293; 29 T. L. R. 702; 6 B. W. C. C. 745, C. A.

Annotations:—**Consd.** Saddington *v.* Inslip Iron Co. (1917), 87 L. J. K. B. 184. **Foll.** Laverick *v.* Gray (1919), 121 L. T. 289. **Distd.** Hutchinson *v.* Kiveton Park Colliery Co., [1926] 1 K. B. 279. **Refd.** Comery *v.* New Hucknall Colliery Co. (1919), 88 L. J. K. B. 462. **Mentd.** Marshall *v.* Clayton & Shuttleworth, [1919] 1 K. B. 509.

2796. Lapse of time—Death from tuberculosis—Two years after accident.]—COMERY *v* NEW HUCKNALL COLLIERY CO., LTD., No. 2766, *ante*.

Nervous diseases.]—*See* Sect. 5, sub-sect. 1, C. (*b*), *ante*.

SUB-SECT. 6.—TWO ACCIDENTS.

2797. Claim in respect of first accident—Whether second accident result of first.]—In 1902 a workman employed by applts. was injured by an accident which resulted in the loss of the index finger of his right hand. He was totally incapacitated for work for six months, during which period he received compensation. He was then given lighter work by applts. at his original wages. In 1920, while still in the same employment, he met with a further injury to his hand, which according to medical evidence was not the result of the original accident. Being again totally incapacitated for work, he claimed compensation under Workmen's Compensation Act, 1897 (c. 37), in respect of the accident of 1902. The county ct. judge held that the accident of 1902 was a contributing cause of the incapacity & awarded compensation:—*Held:* on appeal, the county ct. judge had taken a wrong view of the law, & the workman was not entitled to compensation in respect of the original accident.—NODEN *v.* GALLOWAYS, LTD., [1912] 1 K. B. 46; 81 L. J. K. B. 28; 105 L. T. 567; 28 T. L. R. 5; 55 Sol. Jo. 838; 5 B. W. C. C. 7, C. A.

Annotations:—**Appld.** Roberts *v.* Broughton & Plas Power Colliery Co. (1921), 14 B. W. C. C. 186. **Foll.** Hutchinson *v.* Kiveton Park Colliery Co., [1926] 1 K. B. 279.

2798. ——— ———.]—A charwoman claimed compensation for an injured knee alleged to have been caused by a fall on her employers' office staircase. She informed the caretaker the same day that she had slipped & twisted her leg. She, however, was able to do some further work, sweeping, before she left the office. The next day she went to work but limped, & on returning home she fell on her own staircase & fractured her knee cap. No notice whatever was given to the employers until three weeks later, when it was alleged that the fracture at home was the result of the fall at the office. The county ct. judge found that this was in fact so. He also found that the employers were not prejudiced by the delay in notice:—*Held:* there was evidence to support the first finding, but none to support the second.—HODGSON *v.* ROBINS, HAY, WATERS & HAY (1914), 7 B. W. C. C. 232, C. A.

Annotation:—**Refd.** Hutchinson *v.* Kiveton Park Colliery Co., [1926] 1 K. B. 279.

2799. — — ———.]—The workman, a miner, met with an accident on July 4, 1924, by which his right knee was injured & he was incapacitated from work. He received full compensation until Aug. 19, 1921, when he returned to work. He continued in employment until Apr. 6, 1925, on which date he slipped at his home & injured the same knee. He was unable to work for nine weeks, & claimed compensation. The county ct. judge found that although the workman had a knee liable to slip, the second accident was not directly caused by the first, & the man's disability resulted from this second accident. He accordingly made an award in favour of the employers, holding that the accident causing the incapacity did not arise out of & in the course of the man's employment:—*Held:* it was a question of fact as to which there was evidence to support the finding, & there was no misdirection.—HUTCHINSON *v.* KIVETON PARK COLLIERY CO., LTD., [1926] 1 K. B. 279; 95 L. J. K. B. 531; 134 L. T. 423; 18 B. W. C. C. 508, C. A.

2800. —— **Termination of injury caused by first accident—Workman as well as before second accident.**]—A workman was permanently injured. His employers paid him compensation for some time, & then gave him light work. He had another accident, & had to give up the light work. The employers paid further compensation for some months, & then stopped. The county ct. judge found that the man was as well as he had been when he was working at the light work previously, & terminated the payments:—*Held:* there was misdirection, & the case must be remitted to decide what incapacity remained from the original injury.—WILKINSON *v.* FRODINGHAM IRON & STEEL CO., LTD. (1913), 6 B. W. C. C. 200, C. A.

2801. Claim in respect of second accident—Incapacity must be caused by second accident.]—A carman ten years ago received a blow on the temple which injured his eye so much that he could only perceive hand movements in front of it, rendering it useless for many purposes. On June 22, 1909, this same eye was struck by his horse's tail & inflammation ensued. The eye was removed in hospital. The county ct. judge awarded compensation, holding that his incapacity

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PART XIV. SECT. 6, SUB-SECT. 6.

2797 i. *Claim in respect of first accident—Whether second accident result of first.*]—BOYD *v.* NAPIER HARBOUR BOARD, [1919] N. Z. L. R. 353.—**N.Z.**

2797 ii. —— ———.]—GILMOUR *v.* GARRALLAN COAL CO., LTD., [1926] S. C. 736.—**SCOT.**

Sect. 6.—Death or incapacity resulting from the injury: Sub-sects. 6 & 7, A., B. & C. (a) & (b).]

for work was caused by the second injury. On appeal it was contended for the employer that the medical evidence showed that the eye was removed owing to the first injury, & that therefore the incapacity did not arise from the second accident: —*Held:* the county ct. judge's decision was correct.—MARTIN *v.* BARNETT (1910), 3 B. W. C. C. 146, C. A.

SUB-SECT. 7.—NEW CAUSE SUPERVENING.

A. In General.

2802. Old cause must cease—Substituted cause giving fresh origin to after consequences.]—DUNHAM *v.* CLARE, No. 2759, *ante*.

2803. Old cause continuing—New cause equally resulting in incapacity.]—A workman who has brought himself within Workmen's Compensation Act, 1906 (c. 58), by proving that he has sustained personal injury by accident arising out of & in the course of his employment, & that incapacity has resulted from the injury, is not disentitled to compensation under the Act by reason of some supervening infirmity, not due to the accident, which has equally resulted in his incapacity. —HARWOOD *v.* WYKEN COLLIERY CO., [1913] 2 K. B. 158; 82 L. J. K. B. 414; 108 L. T. 283; 29 T. L. R. 290; 57 Sol. Jo. 300; 6 B. W. C. C. 225, C. A.

Annotations:—**Apld.** McNally *v.* Furness, Withy, [1913] 3 K. B. 605. **Distd.** Lomax *v.* Sutton Heath & Lea Green Collieries (1926), 135 L. T. 564. **Refd.** Lewis *v.* Wrexham & Acton Collieries (1916), 9 B. W. C. C. 518; Ling *v.* De Dion Bouton, [1920] 1 K. B. 88; Murray *v.* Portland Colliery Co. (1922), 15 B. W. C. C. 262; Stowell *v.* Ellerman Lines (1923), 128 L. T. 823.

2804. —— ——.]—A miner was receiving treatment for sub-cutaneous cellulitis, miner's beat knee, an industrial disease numbered 19 in the extended Sched. III. of Workmen's Compensation Act, 1906 (c. 58). His wife applied a poultice of cow manure to the knee. Two days later, the knee being worse, the patient's doctor, in ignorance of the application of the poultice of cow manure, lanced the knee. Tetanus set in & the patient died. In arbitration proceedings commenced by the widow the county ct. judge found that the death was due to tetanus germs, from the manure poultice, which had entered the knee through the opening made by the lance. He found also that there was no evidence that the condition of the knee, which made lancing advisable, was brought about by the manure poultice, the only effect of the poultice being to produce germs on the knee. He, therefore, held that the death was caused by the disease within Workmen's Compensation Act, 1906 (c. 58), s. 8, & that it must therefore be treated as having been caused by an accident arising out of & in the course of the man's employment, & he made an award in favour of appct. The employers appealed:—*Held:* applying the test applicable in cases where there is a *novus actus interveniens*, laid down by LORD COLLINS in *Dunham* v. *Clare*, No. 2759, *ante*, the facts did not establish a new cause of death in the sense that the old cause was removed & a new cause substituted; the act of the wife did not put an end to the old cause, but supervened; the county ct. judge had properly directed himself, & the appeal must be dismissed.—WILLIAMS *v.* GRAIGOLA MERTHYR CO., LTD. (1924), 132 L. T. 227; 69 Sol. Jo. 9; 17 B. W. C. C. 202, C. A.

Annotation:—**Consd.** Hutchinson *v.* Kiveton Park Colliery Co., [1926] 1 K. B 279.

—— ——.]—*See, also*, Sub-sect. 5, B. (*a*), *ante*.

B. Death from Surgical Operation.

2805. Death under anæsthetic—Cause of death must be proved.]—A workman received an injury in the course of his employment which necessitated the amputation of one of his fingers. He was put under anæsthetics & the finger was amputated. As he was recovering from the effects of the anæsthetic the surgeons decided to remove a bad tooth of which the workman had complained; further anæsthetics were administered, & an unsuccessful attempt was made to remove the tooth. The workman was then removed to a ward, & shortly afterwards he died. In a claim for compensation by his widow the county ct. judge held on the evidence that the workman died from failure of respiration caused by the administration of an anæsthetic, that it was at least as probable that his death resulted solely from a spasm induced by an attempt to swallow oozing blood in his mouth as that it resulted from the anæsthetic administered for the first operation, & consequently that the widow had not discharged the *onus* which rested upon her of proving that the workman's death resulted from his injury by the accident. He therefore refused to award compensation under Workmen's Compensation Act, 1906 (c. 58). The widow appealed: —*Held:* the county ct. judge had arrived at a right conclusion.—CHARLES *v.* WALKER, LTD. (1909), 25 T. L. R. 609; 2 B. W. C. C. 5, C. A.

2806. —— **Test whether operation a reasonable step—To obviate consequences of accident.**]—Where a workman is injured by an accident arising out of & in the course of his employment within Workmen's Compensation Act, 1906 (c. 58), & death ensues from an operation consequent thereon, the test of the question whether death was caused by the accident so as to entitle his dependants to compensation is whether in the circumstances the operation was a reasonable step to be taken to obviate the consequences of the accident.

A workman met with an accident arising out of & in the course of his employment whereby his hand was badly lacerated. A competent surgeon proposed, instead of amputating the hand by means of a double operation, to graft skin on it which would completely preserve the hand. An anæsthetic was properly administered at each stage of the operation, but on the second occasion death unexpectedly ensued. Upon an application by the widow under Workmen's Compensation Act, 1906 (c. 58), the county ct. judge found that death was caused not by the accident, but by the administration of the anæsthetic, & held that the employers were not liable:—*Held:* the county ct. judge had misdirected himself in not applying his mind to the question whether deceased had acted reasonably, & the widow was entitled to compensation.—SHIRT *v.* CALICO PRINTERS' ASSOCN., [1909] 2 K. B. 51; 78 L. J. K. B. 528; 100 L. T. 740; 25 T. L. R. 451; 53 Sol. Jo. 430; 2 B. W. C. C. 342, C. A.

C. Refusal to Undergo Surgical Operation.

(a) In General.

2807. Right to compensation after refusal—Continued incapacity due to refusal.]—A seaman on board ship, having injured his finger as the result of an accident arising out of & in the course of his employment, refused to undergo a slight operation proposed by the ship's doctor. After his discharge he was compelled to have his finger amputated. Upon an application by him for compensation under Workmen's Compensation Act, 1906 (c. 58), the county ct. judge found that appct. acted unreasonably in refusing to submit to the operation proposed by the ship's doctor, but, having regard to the conflict of medical testimony, was unable to come to any conclusion upon the question whether the operation would have saved the finger:—*Held:* the employers had failed to discharge the *onus* which lay upon them of proving that the loss of the finger was due not to the accident, but to the refusal to submit to the operation, & appct. was entitled to compensation.—MARSHALL *v.* ORIENT STEAM NAVIGATION CO., LTD., [1910] 1 K. B. 79; 79 L. J. K. B. 204; 101 L. T. 584; 26 T. L. R. 70; 54 Sol. Jo. 64; 3 B. W. C. C. 15, C. A.

Annotations:—**Apld.** Bower *v.* Meggitt & Jones (1916), 86 L. J. K. B. 463. **Consd.** Saddington *v.* Inslip Iron Co. (1917), 87 L. J. K. B. 184. **Refd.** Walsh *v.* Lock (Newland) (1914), 110 L. T. 452; Marshall *v.* Clayton & Shuttleworth, [1919] 1 K. B. 509; Carr *v.* Port Glasgow Burgh (1923), 16 B. W. C. C. 331; Fitzwilliam's Collieries *v.* Crossley (1925), 133 L. T. 495.

2808. —— —— Depends on reasonableness of refusal.]—The question whether a workman who has met with an accident & refuses to submit to a surgical operation is entitled to compensation under Workmen's Compensation Act, 1906 (c. 58), beyond the period when he might have been expected to recover from the effects of the accident if he had submitted to the operation depends on the question whether his refusal is in the circumstances reasonable; & where the operation is of a serious character, & the workman, in good faith, follows the advice of his own doctor, whose honesty & competency are not impeached, he cannot be said to be acting unreasonably, although on the balance of the medical testimony given at the hearing the county ct. judge may find that the operation was one which might reasonably & properly have been performed.—TUTTON *v.* MAJESTIC (OWNERS), [1909] 2 K. B. 54; 78 L. J. K. B. 530; 100 L. T. 644; 25 T. L. R. 482; 53 Sol. Jo. 447; 2 B. W. C. C. 346, C. A.

Annotations:—**Expld.** Marshall *v.* Orient Steam Navigation Co., [1918] 1 K. B. 79. **Consd.** O'Neill *v.* Brown (1913), 6 B. W. C. C. 428. **Refd.** Higgs & Hill *v.* Unicume, [1913] 1 K. B. 595; Walsh *v.* Locke (Newland) (1914), 7 B. W. C. C. 117; Fitzwilliam's Collieries *v.* Crossley (1925), 133 L. T. 495.

2809. —— —— ——.]—The refusal by a workman to undergo a surgical operation must be reasonable, or he will not be entitled to continue to receive compensation from his employers under Workmen's Compensation Act, 1906 (c. 58).—PADDINGTON BOROUGH COUNCIL *v.* STACK (1909), 2 B. W. C. C. 402, C. A.

2810. Onus of proof—Continued incapacity due to refusal.]—MARSHALL *v.* ORIENT STEAM NAVIGATION CO., LTD., No. 2807, *ante*.

2811. —— ——.]—In proceedings under Workmen's Compensation Act, 1906 (c. 58), the burden of proof is on the employer to show that the workman's incapacity is due to his unreasonable refusal to undergo a surgical operation which might materially improve his condition.—FIFE COAL CO. *v.* CANT (1920), 90 L. J. P. C. 69; 124 L. T. 545; 65 Sol. Jo. 204; 13 B. W. C. C. 449, H. L.

2812. —— **Reasonableness of refusal.**]—EARL FITZWILLIAM'S COLLIERIES *v.* CROSSLEY, No. 2815, *post*.

(b) Reasonableness of Refusal.

2813. Question of fact.]—A workman, after being for some long period in receipt of compensation, refused to undergo an operation. On an application to review, the employers' doctors were unanimous as to the advisability & as to the strong probability of the success of the suggested operation. The workman called two doctors, whose opinions disagreed:—*Held:* the finding of the county ct. judge that this workman was not unreasonable, was a fact which could not be upset on appeal.—RUABON COAL CO. *v.* THOMAS (1909), 3 B. W. C. C. 32, C. A.

Annotation:—**Refd.** Walsh *v.* Locke (Newland) (1914), 7 B. W. C. C. 117.

2814. ——.]—A bricklayer's labourer injured his hand. In June, 1914, he was awarded 7*s.* a week as partially incapacitated from a stiff finger & told that a slight operation would cure him. He made no attempt to have the operation. In Aug. he was called to the colours & received the pay, & his wife the separation allowance of a soldier.. In Jan. 1915, the employers applied for an order to terminate the payment of 7*s.* a week on the ground that the man had recovered, or alternatively if not that he was unreasonable in not undergoing the operation. The county ct. judge found in favour of the employers on both grounds & terminated the payments:—*Held:* there was evidence to support the finding.—DOLAN & SON *v.* WARD (1915), 8 B. W. C. C. 514, C. A.

2815. ——.]—The workman as the result of an accident on Apr. 11, 1922, had the little finger of his left hand amputated & received a weekly payment as compensation. In May, 1924, a reference was made to the medical referee, who reported that the workman was able to do certain work on the screens but not his old work as boilersmith, that the incapacity was due to the accident, that there remained a painful scar on the stump & "he will need a small surgical operation to remove this incapacity." The employers asked for a review, & at the hearing in Nov. 1924, & again in Jan. 1925, medical advisers of the workman said an operation would do no good, & the workman for that reason declined to undergo it. The employers alleged that the continued incapacity of the workman was due to his unreasonable refusal to undergo the operation. The county ct. judge found that the employers had failed to prove that the refusal of the workman to undergo an operation was unreasonable, but after making an award of a weekly payment of 4*s.* 6*d.* suspended the payments until further order in view of the medical referee's report which, by Workmen's Compensation Act, 1906 (c. 58), sched. I. (15), was said to be final:—*Held:* the certificate of the

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v. MUTTER, HOWEY & CO., [1913] S. C. 619.—SCOT.

PART XIV. SECT. 6, SUB-SECT. 7.—C. (a).

2807 i. *Right to compensation after refusal—Continued incapacity due to refusal.*]—O'NEILL *v.* ROPNER & CO. (1908), 42 I. L. T. 3; 2 B. W. C. C. 334.—IR.

2807 ii. —— ——.]—DONNELLY *v.* BAIRD & CO., LTD., [1908] S. C. 536; 45 Sc. L. R. 394; 15 S. L. T. 799; 1 B. W. C. C. 95.—SCOT.

2807 iii. —— ——.]—O'NEILL *v.* BROWN (JOHN) & CO., LTD., [1913] S. C. 653; 50 Sc. L. R. 450; [1913] 1 S. L. T. 210; 6 B. W. C. C. 428.—SCOT.

Sect. 6.—Death or incapacity resulting from the injury: Sub-sect. 7, C. (b), D., E., F. & G.]

medical referee was not final & conclusive in so far as it dealt with matters of cure. There was evidence to support the finding that the refusal to undergo the operation was not unreasonable & there was therefore no proper ground for suspending the weekly payments.

There is no authority for suspending the payment of compensation even when the workman does unreasonably refuse to have an operation. The true inference in such a case is that the incapacity is due, not to the accident, but to the refusal of the operation, & the proper course in such a case is not to suspend, but to terminate the compensation (ATKINS, L.J.).—EARL FITZWILLIAM'S COLLIERIES *v.* CROSSLEY (1925), 133 L. T. 495; 18 B. W. C. C. 109, C. A.

2816. Operation attended by risk.]—Incapacity may none the less result from an injury, should the workman refuse to undergo a surgical operation which, though attended with risk, would probably be successful.—ROTHWELL *v.* DAVIES (1903), 19 T. L. R. 423; 47 Sol. Jo. 470; 5 W. C. C. 141, C. A.

Annotations:—**Consd.** Tutton *v.* S.S. Majestic, [1909] 2 K. B. 51. **Distd.** Warneken *v.* Moreland, [1909] 1 K. B. 184.

2817. Reasonable & safe operation.]—Where a workman refuses to undergo a reasonable & safe operation which will relieve or remove his incapacity, his continued inability to work at his trade is the result of his refusal of remedial treatment, & not the result of the original accident, & consequently he is not entitled to further compensation under Workmen's Compensation Act, 1906 (c. 58).—WARNCKEN *v.* MORELAND (R.) & SON, LTD., [1909] 1 K. B. 181; 78 L. J. K. B. 332; 100 L. T. 12; 25 T. L. R. 120; 53 Sol. Jo. 134; 2 B. W. C. C. 350, C. A.

Annotations:—**Distd.** Tutton *v.* S.S. Majestic, [1909] 2 K. B. 54. **Apld.** Marshall *v.* Orient Steam Navigation Co., [1910] 1 K. B. 79; Walsh *v.* Lock (Newland) (1913), 110 L. T. 452. **Reld.** Amys *v.* Barton (1911), 5 B. W. C. C. 117; Higgs & Hill *v.* Unicume (1913), 82 L. J. K. B. 369; Stride *v.* Southampton Gas Light & Coke Co. (1916), 85 L. J. K. B. 1449.

2818. Workman following his doctor's advice—In good faith—Balance of medical testimony other way.]—TUTTON *v.* MAJESTIC (OWNERS), No. 2808, *ante*.

2819. —— Cure not guaranteed.]—A workman was injured & claimed compensation under Workmen's Compensation Act, 1906 (c. 58), making no reference to the Employers' Liability Act, 1880 (c. 42). Later he returned to work, and at the instance of his employers he signed a receipt for £35 "in full settlement of all claims which I may have under the Employers' Liability Act, 1880 (c. 42) . . . & in full discharge of all claims . . . arising out of the said accident." The actual money paid at the time was only £17 10*s.*, & the balance which had been paid after was found by the arbitrator as a fact to have been wages. He then again broke down in health, filed a request for arbn. under Workmen's Compensation Act, 1906 (c. 58), & refused to undergo an operation. The employers pleaded accord & satisfaction evidenced by the receipt, & further contended, that if the receipt took effect under Workmen's Compensation Act, 1906 (c. 58), the matter had been "settled by agreement," if under Employer's Liability Act, 1880 (c. 42), the man had "taken proceedings independently of Workmen's Compensation Act, 1906 (c. 58), s. 1 (2) (*b*)." They also alleged that the man had been unreasonable in refusing to undergo the operation of trephining. This was recommended by his own doctor, who, however, could not guarantee the cure:—*Held:* the workman had not been unreasonable in refusing to undergo the operation.—HAWKES *v.* COLES (RICHARD) & SONS (1910), 3 B. W. C. C. 163, C. A.

Annotation:—**Mentd.** Howell *v.* Bradford (1911), 104 L. T. 433.

2820. Doctors unanimous—As to success & safety of operation—"Guarantee of success."]—A miner crushed the middle finger of his right hand, & his employers paid him voluntary compensation for nine months. The finger healed but remained stiff, & the man was unable to handle his pick properly. After an unsuccessful operation to join a broken tendon, & a course of massage without permanent result, he was advised to have the finger amputated at the knuckle joint. It was asserted by all the doctors consulted that this would soon enable him to do his old work again. The doctors were unanimous that the operation was a simple one, without risk & with little pain. In view of the inefficacy of the previous medical treatment, the man refused to follow the doctors' advice, unless he had a "guarantee of success" of the operation, which was denied him. The employers then stopped the payment of compensation. The county ct. judge found that the workman's refusal was reasonable:—*Held:* there was no evidence to support the finding.—WALSH *v.* LOCK & CO. (NEWLAND), LTD. (1913), 110 L. T. 452; 7 B. W. C. C. 117, C. A.

D. Neglect to Follow Medical Advice.

2821. Question of fact—Whether incapacity result of accident or neglect.]—Whether present incapacity for work results from the injury or from neglect of medical or surgical advice, is a question of fact.—SMITH *v.* CORD TATON COLLIERY CO., LTD. (1900), 2 W. C. C. 121, C. A.

2822. —— Whether neglect unreasonable.]—A workman with an injured hand was advised by his own doctor that he could not recover the use of it, but the employers' doctor advised that he ought to exercise it, & that he would soon recover if he did so. He did not exercise it, & the employers applied for a review of the weekly payments, on the ground that the incapacity was due not to the injury but to the unreasonable conduct of the man in not exercising the hand. The county ct. judge held that the man had not behaved unreasonably, & dismissed the application to review:—*Held:* the question was one of fact, & there was evidence to support the decision.—MOSS & CO. *v.* AKERS (1911), 4 B. W. C. C. 204, C. A.

2823. Effect of unreasonable neglect—Terminates incapacity from accident.]—WRIGHT *v.* SNEYD COLLIERIES, LTD., No. 3188, *post*.

PART XIV. SECT. 6, SUB-SECT. 7.—C. (b).

2816 i. *Operation attended by risk.*]—PRICE *v.* ASHBURTON BOROUGH, [1916] N. Z. L. R. 870.—**N.Z.**

2816 ii. ——.]—SWEENEY *v.* PUMPHERSTON OIL CO. (1903), 5 F. (Ct. of Sess.) 972.—**SCOT.**

2817 i. *Reasonable & safe operation.*]—SHEA *v.* O'NEILL & O'NEILL (1920), 54 I. L. T. 117.—**IR.**

2817 ii. ——.]—ANDERSON *v.* BAIRD (1903), 5 F. (Ct. of Sess.) 373.—**SCOT.**

n. *Workman following his doctor's advice.*]—GRACIE *v.* CLYDE SPINNING CO., LTD. (1915), 8 B. W. C. C. 630.—**SCOT.**

PART XIV. SECT. 6, SUB-SECT. 7.—D.

2822 i. *Question of fact—Whether neglect unreasonable.*]—DUNNIGAN *v.* CAVAN & LIND, [1911] S. C. 579; 48 Sc. L. R. 459; [1911] 1 S. L. T. 274; 4 B. W. C. C. 386.—**SCOT.**

2823 i. *Effect of unreasonable neglect—Terminates incapacity from accident.*]—GORMLEY *v.* BRISBANE TRAMWAYS

E. Improper Medical Treatment.

2824. Arm badly set—Duty of arbitrator—To consider whether incapacity due to improper treatment.]—A workman's forearm was broken by accident. He had it set by a bonesetter, who did the work so negligently that there was a vicious union, the bones being united, but overlapping & at a bad angle, preventing use of wrist. The man being for this reason still incapacitated, the employers requested him to have the arm broken again & reset. This he refused. Employers applied for review on the ground that the incapacity was no longer due to the injury, but either to the workman's unreasonable refusal of operation, or to the negligence of the bonesetter. The county ct. judge found the workman's refusal was reasonable, &, without deciding the point as to the negligence of the bonesetter, dismissed the application :—*Held :* this point should be decided ; rehearing ordered.—HUMBER TOWING CO., LTD. *v.* BARCLAY (1911), 5 B. W. C. C. 142, C. A.

Annotations :—**Folld.** Rocca *v.* Jones (1914), 7 B. W. C. C. 101. **Consd.** Lakey *v.* Blair (1916), 10 B. W. C. C. 58.

2825. ——.]—A workman broke his arm, fracturing his radius at the wrist. His employers sent him to the hospital. The arm was only bandaged & put in a sling. He went back to work the next day & continued for about nine weeks. A bad union of the bone resulted & the employers dismissed him for not doing his work properly. He then claimed compensation, but the employers, by their answers, generally denied liability. At the hearing they set up the defence that the man's incapacity was due to bad medical treatment at the hospital & not to the accident. The county ct. judge, with the advice of a medical assessor, decided in favour of the employers on this point. The workman appealed on the ground that the question before the county ct. judge was as to degree of incapacity, & that the point of bad medical treatment being taken, he had the right to a new trial on the ground of surprise :—*Held :* (1) this question of bad medical treatment having been raised at the trial, & no application made for adjournment, the point of surprise could not be raised on appeal ; (2) there was also evidence to support the finding as to the cause of incapacity.—ROCCA *v.* JONES (STANLEY) & CO., LTD. (1914), 7 B. W. C. C. 101, C. A.

Annotation :—**Consd.** Lakey *v.* Blair (1916), 10 B. W. C. C. 58.

2826. Failure to discover fracture.]—A foreman was working upon a scaffolding. One of the supports broke & he injured his knee. He attended a local hospital for some weeks with little improvement. He was then X-rayed at a London hospital, when a fracture was discovered & suitable treatment administered. It was argued (*inter alia*) that any incapacity, at the time of arbitration, was due to improper medical treatment at the local hospital, & not to the accident. The county ct. judge found that the condition was not due to improper or insufficient treatment, & that the incapacity was due to the accident which had arisen out of & in the course of the man's employment, & awarded in the favour of the workman :—*Held :* there was evidence to support the award.—HARRISON *v.* FORD (1915), 8 B. W. C. C. 420, C. A.

2827. ——.]—BOWER *v.* MEGGITT & JONES, No. 2773, *ante*.

2828. Unnecessary amputation.]—A workman met with an accident which injured his great toe, not causing a wound, but much pain & inflammation. For two years he remained under the care of his doctor, the incapacity continued, & the inflammation recurred at intervals. The case was referred by doctors on both sides to a specialist, who reported that the workman was, in his opinion, almost fit to return to work. A fortnight later the man's own doctor, who took a much more serious view of the case, amputated the toe. There was medical evidence that amputation was unnecessary & inadvisable. The county ct. judge found that the existing incapacity was due to the operation, which was unnecessary & improper, & not to the original accident :—*Held :* there was evidence to support his finding, & no misdirection. —LAKEY *v.* BLAIR & CO., LTD. (1916), 10 B. W. C. C. 58, C. A.

Onus of proof.]—*See* Nos. 2770–2773, *ante*.

F. Insanity.

2829. Not caused by accident Does not affect question of compensation.]—A riveter lost the sight of one eye by an accident. Six months later he became insane & went into an asylum for seven months. Immediately he came out he got wages of 33*s.* 9*d.* a week, though not riveting work. The county ct. judge found that the insanity had nothing to do with the accident. He also found that, but for his insanity, the man would have been able to earn something at the date he entered the asylum, & reduced the compensation from £1 to 10*s.* a week as from that date. The workman appealed on the ground that he was entitled to £1 a week whilst in the asylum :—*Held :* the amount of compensation is within the discretion of the county ct. judge.—SLATER *v.* BLYTH SHIPBUILDING & DRY DOCKS CO., LTD. (1914), 7 B. W. C. C. 193, C. A.

2830. Evidence as to cause of insanity must be admitted.]—WESTMINSTER BRYMBO COAL & COKE CO., LTD. *v.* EVANS, No. 3171, *post*.

G. Suicide.

2831. General rule.]—In order to show that suicide has been caused by injury resulting from accident so as to give a claim for compensation it is necessary to prove that the suicide was caused by insanity & that the insanity was the direct result of the accident, not an indirect result caused

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CO., LTD., [1909] S. R. Q. 329.—**AUS.**

2823 ii. —— ——.]—The action or neglect of appct. only affects the liability of the employer, if it has aggravated the injury so that the condition of appct. is no longer due to the injury caused by the accident, but arises from such neglect or unreasonable conduct on his part.—POWELL *v.* CROW'S NEST PASS COAL CO. (1915), 32 W. L. R. 218 ; 23 D. L. R. 57 ; *affd.* 34 W. L. R. 32 ; 10 W. W. R. 107.—**CAN.**

2823 iii. ——.]—Appct. for compensation under Workmen's Compensation Act, R. S. B. C. 1911, is not entitled to compensation beyond the date when he neglected to follow the instructions of his medical advisers which would, if followed, have effected a cure.—GORGNIGIANI *v.* WELCH (B. C.), [1918] 3 W. W. R. 797.—**CAN.**

2823 iv. ——.]—On an application to review, there was medical evidence that the incapacity a work-girl was suffering was due to the wasting of her arm, which had been injured by accident. This was entirely due to her not exercising the arm. If she exercised the arm, she would recover her capacity. Upon this the arbitrator terminated the payment of compensation :—*Held :* there was evidence to support the award.—SIMPSON *v.* BYRNE (1913), 47 I. L. T. 27 ; 6 B. W. C. C. 455.—**IR.**

2823 v. —— ——.]—*Held :* an employer was not bound to continue weekly payments to an injured workman when the continuance of his incapacity was due to his neglect to comply with certain simple medical directions which had been given to him.—DOWDS *v.* BENNIE & SON (1902), 5 F. (Ct. of Sess.) 268 ; 40 Sc. L. R. 219 ; 10 S. L. T. 439.—**SCOT.**

PART XIV. SECT. 6, SUB-SECT. 7.—F.

o. Onus of proof.]—The *onus* of proving that the insanity was due to the accident lies upon the workman. —BROWNLEE *v.* COLTNESS IRON CO., LTD., [1917] S. C. 409.—**SCOT.**

Sect. 7.—Conditions of compensation: Sub-sect. 1, C., D. & E. (a) i.]

A workman was injured on July 12. He saw his employer the same evening, but did not mention the accident. He alleged that on the following day he sent notice by messenger. On July 23, he again saw his employer, but said nothing about compensation. He alleged that on Aug. 6 he again sent notice by registered post. On Aug. 12, a solr. sent formal notice on his behalf. The employer denied having received any but the last notice. The county ct. judge found that notice of the accident had not been given as soon as practicable after the happening thereof, & that it had not been established that the employer had not been prejudiced by the delay:—*Held:* there was evidence to support the finding.—LEACH *v.* HICKSON (1911), 4 B. W. C. C. 153, C. A.

2851. —— ——.]—SANDERSON *v.* PARKINSON & SONS, LTD., No. 2881, *post.*

2852. —— ——.]—A miner hurt his hand. He complained to the manager the next day, but the manager was too busy to attend to him. The employer's doctor saw & reported on the hand four days after the accident. He did not again see the manager until a fortnight after the accident. Compensation was then refused on the ground that the injury had been increased by a fall outside a public-house on the evening of the accident. The fall was admitted, but the injury denied. Written notice was given some days later. The county ct. judge found that written notice had not been given as soon as practicable & the workman had not discharged the *onus* of proving that the employers had not been prejudiced by the delay:—*Held:* there was evidence to support the finding.—MURPHY *v.* SHIREBROOK COLLIERY, LTD. (1913), 6 B. W. C. C. 237, C. A.

2853. —— ——.]—The widow of deceased workman claimed compensation for the death of her husband. The only evidence of accident was that deceased said to the employers' engineer that "a week or two ago" he had hurt himself by a chip of brick hitting him. Next day he had acute inflammation of the private parts where it was alleged the clip had hit him. He died three weeks later of septic poison. No written notice was given until a week after death:—*Held:* (1) notice had not been given as soon as practicable; & (2) there was no evidence that the employers had not been prejudiced.—HUNT *v.* HIGHLEY MINING CO., LTD. (1914), 7 B. W. C. C. 716, C. A.

2854. —— ——.]—A hairdresser's assistant entered the service of an employer in Oct. On Jan. 17 his hands began to tingle & smart, and he subsequently lost his nails. He was advised by a doctor, in Feb., that he was suffering from dermatitis, & he alleged that this was due to an injurious ingredient added to the dry shampoo. He left the service on Mar. 30. The only notice which was given was contained in two letters sent to the employer on Apr. 1 & 28 respectively. He alleged that the injury was due to accident on Jan. 17; & the county ct. judge awarded compensation:—*Held:* there was no evidence of an accident at a definite time & place, & even if there had been the application should be dismissed, as no notice was given as soon as practicable.—PETSCHETT *v.* PREIS (1915), 31 T. L. R. 156; 8 B. W. C. C. 44, C. A.

Annotation:—**Mentd.** Scott *v.* Pearson, [1916] 2 K. B. 61.

2855. —— ——.]—On Sept. 17, 1916, a workman's finger was struck by a small piece of screw head. He picked out the burr. There was no blood or wound or anything that could then in the ordinary sense be called an accident. The injury appeared to be quite trivial. He continued work for three days, when he had to stop, & consulted a doctor. This doctor first attributed his incapacity to influenza, but soon after stated that he was suffering from blood poisoning. On Oct. 24 he sent a letter to the employers stating that he had contracted blood poisoning while in their employment. There was nothing in the letter to show that the man attributed the blood poisoning to the injury of Sept. 17. The doctor who had first attended him, died in Jan. 1917, & a new doctor was called in who traced the blood poisoning to the injury of Sept. 17. Thereupon, on Jan. 5, formal notice was sent to the employers. The county ct. judge found that notice had been given as soon as practicable, & stated that, if not, there was reasonable cause for the delay, & the employers had not been prejudiced. He also drew the inference that the blood poisoning was the result of the injury on Sept. 17, & found the same to be an accident within the meaning of the Act:—*Held:* there was evidence to support the findings & no misdirection.—WHITE *v.* FORD MOTOR CO. (ENGLAND), LTD. (1917), 10 B. W. C. C. 334, C. A.

Annotation:—**Refd.** Aldridge *v.* Warwickshire Coal Co. (1925), 133 L. T. 439.

2856. —— —— **Question of fact.**]—On Feb. 29, 1924, the workman performed a piece of work involving unusual muscular exertion. He complained of pain that evening, but continued to work until Mar. 29, when he was advised by a doctor to go to hospital. He was admitted to hospital on Apr. 28, & was operated on for hernia, but died on May 6. Notice of the accident was given on Mar. 31. The county ct. judge held that notice had been given as soon as was reasonably practicable & that the employers were not prejudiced by not having had notice earlier:—*Held:* it was a question of fact & there was evidence to support the finding & no misdirection.—FEARNLEY BROTHERS *v.* RICHMOND (1925), 18 B. W. C. C. 81, C. A.

2857. —— —— **Realisation by workman of condition.**]—A girl of fifteen, on Jan. 22, 1925, while employed by resps., knocked some bobbins off the creel, one of which dropped on her nose causing it to bleed, but she continued at work after going to her superintendent, who wiped her nose. Her nose swelled & was treated by her mother with poultices, but she did not have to leave work until Mar. 12, 1925; she then went to a doctor, who found the wound was septic. She was able to return to work on Mar. 30, 1925. On a claim for compensation for the loss of wages during her absence the county ct. judge, without deciding at what date notice ought to have been given of the accident, said that the girl admitted that she knew from notices posted in the workroom she should have immediately reported any accident, whether slight or serious, & if she had done so she would have had treatment to render the small wound aseptic, & held that there was no reasonable cause for the delay in giving notice & the employers were prejudiced by want of proper notice:—*Held:* there was no evidence to support the finding that notice should have been given immediately.

Notice to be given as soon as practicable must

WEAVING CO. (1911), 45 I. L. T. 74. —IR.

b. Seven days' notice — From what date calculated.]—POTTER *v.* MCCANN (1908), 16 O. L. R. 535; 11 O. W. R. 417.—CAN.

a. Notice given under wrong Act.]—LAWRENCE *v.* KELLY (1909), 11 W. L. R. 347.—CAN.

be given as soon as the workman realises his condition entitles him to compensation for injury by accident. This date not having been found, it was impossible to say whether the employers would have been prejudiced at that time.—ALBISON *v.* NEWROYD MILL, LTD. (1925), 95 L. J. K. B. 667; 134 L. T. 171; 18 B. W. C. C. 474, C. A.

2858. Failure of workman to give notice—Subsequent death—Notice by dependants invalid.]—GRIME *v.* FLETCHER, No. 2691, *ante*.

Delay in giving notice—Whether employer prejudiced in defence.]—*See* Sub-sect. 1, E. (*a*) ii., *post*.

D. Service of Notice.

See Workmen's Compensation Acts, 1923 (c. 42), s. 28; 1925 (c. 84), ss. 14, 15.

2859. On whom—Servant of employer—Cashier.]—A workman, an ostler, was injured after working for eight days, & as a result he was away from work for two or three weeks, & a year & a half later he died from the effects of the accident. He gave no written notice of the accident. A man described as a clerk & cashier of the employers, a colliery co., knew of the accident shortly after it occurred, visited the workman when he was ill at his home, paid him full wages when he was away, a strike was in progress, & appointed & paid a substitute for that period:—*Held:* (1) verbal notice to the cashier was notice to the employer, & (2) there was evidence that the employers were not prejudiced in their defence by the want of written notice of the accident. The inability of the employer to give notice to their insurance co. is not relevant, as it does not prejudice their defence to the workman's claim.—BUTT *v.* GELLYCEIDRIM COLLIERY CO., LTD. (1909), 3 B. W. C. C. 44, C. A.

Annotations:—As to (2) **Apld.** Kirk *v.* Lochgelly Iron & Coal Co. (1916), 9 B. W. C. C. 696. **Refd.** Snelling *v.* Norton Hill Colliery Co. (1913), 109 L. T. 81; Wassall *v.* Russell (1915), 84 L. J. K. B. 1606. *Generally,* **Refd.** Pimm *v.* Clement Talbot (1914), 7 B. W. C. C. 565.

2860. —— —— Foreman.]—HEWITT *v.* STANLEY BROTHERS, LTD., No. 2684, *ante*.

2861. —— —— ——.]—A workman alleged he sustained an accident to his knee on Friday, June 27, 1913. He went about, apparently well, until Wednesday, July 2, when he became incapacitated. On that day he wrote to the foreman, informing him of the accident. There was a rule of the shop that all accidents should be reported to the foreman. The judge found upon conflicting evidence that the notice was received. The foreman apparently did not inform the employers. No formal notice was given the employers until Nov. 14, 1913. The man had been away for several weeks earlier in the year for a bad knee due to footballing. The judge found that the want of notice was excused as he considered that the man must have mistaken the foreman for the proper person to give notice to; & that there was no prejudice, or, if there was, it was due not to any default of the workman, but to the failure of the foreman to inform his employers of the accident:—*Held:* there was no evidence that the foreman was the proper person to receive notice under Workmen's Compensation Act, 1906 (c. 58), or that the workman thought he was such person, or that the employers were not prejudiced.—PIMM *v.* CLEMENT TALBOT, LTD. (1914), 7 B. W. C. C. 565, C. A.

2862. —— —— ——.]—A sheet metal worker showed several cuts on his hand to his insurance doctor on Mar. 8. The doctor treated him, & suggested he could claim compensation for accident. He showed the hand to his foreman on Mar. 13. The cuts did not heal, & he again saw the doctor, complaining of blood poisoning on Mar. 20. The next day the workman's brother informed the foreman that he could not come to work. He ultimately went to a hospital, & was still under treatment for poisoning, & totally incapacitated from work. No written notice was given until June 4. The county ct. judge held that notice should have been given on Mar. 8, or at latest Mar. 21, that the foreman was not a proper person to whom to give notice, & that the workman had not proved the employers not to have been prejudiced by the delay. He consequently awarded in favour of the employers:—*Held:* there was no misdirection.—PLUMLEY *v.* EWART & SON, LTD. (1915), 8 B. W. C. C. 464, C. A.

2863. —— —— Measurer & storekeeper.]—An injured workman informed a measurer & a storekeeper of his accident at the time, but gave his employers no notice until he was cured, four months after the accident. The employers did not hear of the accident till then. The county ct. judge found that the measurer was a proper person to receive verbal notice of the accident on behalf of the employers, & that the employers were not prejudiced by the delay in written notice:—*Held:* there was no evidence to support the findings.—JACKSON *v.* VICKERS, LTD. (1912), 5 B. W. C. C. 432, C. A.

2864. —— —— Time-keeper.]—A dock labourer slightly injured his leg. He went on working for four days, when the wound became septic. He poulticed it, but, as it did not get better, he reported it to the timekeeper a week after the accident. Written notice was not given until a fortnight after the accident. The county ct. judge found that the workman, in reporting to the timekeeper, had given notice to the proper person as soon as practicable, & awarded compensation:—*Held:* there was misdirection.—BRADY *v.* CANADIAN PACIFIC RY. CO. (1913), 6 B. W. C. C. 680, C. A.

2865. —— Overman—Agent for both parties.]—STEVENS *v.* INSOLES, LTD., No. 2880, *post*.

2866. —— Master of ship.]—THE RIGEL, No. 2066, *ante*.

2867. —— Sub-contractor.]—GRIFFITHS *v.* ATKINSON, No. 2923, *post*.

2868. By whom—Person other than workman—Workman's father.]—STEVENS *v.* INSOLES, LTD., No. 2886, *post*.

2869. —— ——.]—HOWARTH *v.* CLIFTON & KERSLEY COAL CO., LTD., No. 2901, *post*.

E. Want of or Inaccuracy in Notice—Whether Proceedings Maintainable.

(a) Employer Not Prejudiced in Defence.

i. In General.

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

2870. General rule.]—HAYWARD *v.* WESTLEIGH COLLIERY CO., LTD., No. 2917, *post*.

PART XIV. SECT. 7, SUB-SECT. 1.—E. (a) i.

2870 i. *General rule.*]—Notice may be dispensed with where there is reasonable excuse for the want thereof, the employer not being prejudiced thereby.—ARMSTRONG *v.* CANADA ATLANTIC RY. CO. (1902), 22 C. L. T. 379; 4 O. L. R. 560.—**CAN.**

Sect. 7.—Conditions of compensation: Sub-sect. 1, E. (a) i. & ii.]

2871. Absence of prejudice must be found in fact.]—LEACH *v.* HICKSON, No. 2850, *ante*.

2872. ——.]—HODGSON *v.* ROBINS, HAY, WATERS & HAY, No. 2798, *ante*.

2873. ——.]—HUNT *v.* HIGHLEY MINING CO., LTD., No. 2853, *ante*.

2874. ——.]—A stage carpenter complained to a superior workman of having run a splinter into his left hand. The next evening his right hand was painful & swollen. He saw a doctor who advised an operation. He died in the hospital after the operation about a fortnight after the complaint as to the splinter. The employers were given notice of the post mortem, but no notice of the accident was given until a fortnight after the death. There was very contradictory evidence, at the hearing of a claim by dependants, as to which arm was in fact poisoned. The doctor said it was the right arm, but the county ct. judge did not accept this evidence, & found it to be the left arm. He also found that the employers were not prejudiced by the delay in giving notice, & that death was due to blood poisoning in the left arm resulting from the accident of piercing the finger of the left hand with the splinter:—*Held:* there was no evidence that death resulted from an accident arising out of & in the course of the employment, nor that the employers were not prejudiced by the delay in giving notice.—FORD *v.* GAIETY THEATRE CO., LTD. (1914), 7 B. W. C. C. 197, C. A.

2875. ——.]—A labourer injured his left arm &, after receiving compensation, was put on to very light work by his employers. He was told, on one occasion, to move some tools, &, in doing so, he alleged, he ricked his injured shoulder. He was, at that time, being medically attended for the first accident. He stated, at the hearing, that he told the ganger this the same day, & said that he would have to stop work. The ganger, however, was not called. As a matter of fact, the man worked on for four more days, to the end of the week, &, on being paid off, made some complaint then to the employers' agent, but it was not definite what the complaint was. The man gave written notice of the alleged second accident three & a half weeks after it was alleged to have occurred. The medical evidence at the hearing was to the effect that he was suffering no incapacity from the alleged second accident. The county ct. judge found that there was the alleged second accident, & that the man was totally incapacitated therefrom:—*Held:* without deciding the question of accident or incapacity the award must be set aside, as there was no evidence that the employer was not prejudiced by the delay in giving notice.—LACEY *v.* MOWLEM (JOHN) & CO., LTD. (1914), 7 B. W. C. C. 135, C. A.

2876. ——.]—Appct. on June 26, 1914, met with an accident in the course of his employment, which resulted in his losing the sight of one eye. No notice of the accident was given to the employer until July 6. In proceeding for compensation the county ct. judge found that there was no evidence before him on which he could find that the employer was not prejudiced in his defence by the want of notice, & dismissed the application:—*Held:* the proviso in Workmen's Compensation Act, 1906 (c. 58), s. 2 (1) (*a*), that the want of notice shall not be a bar to proceedings in the cases there mentioned only applies when there is an express finding in the proceedings "that the employer is not . . . prejudiced in his defence by the want," & in the absence of such finding the appeal must be dismissed.—MILLER *v.* RICHARDSON, [1915] 3 K. B. 76; 84 L. J. K. B. 1366; 113 L. T. 609; 8 B. W. C. C. 439, C. A.

Annotations:—**Refd.** Burvill *v.* Vickers (1915), 114 L. T. 29; Plumley *v.* Ewart (1915), 8 B. W. C. C. 464.

2877. Liability of employer to notify insurance company.]—BUTT *v.* GELLYCEIDRIM COLLIERY CO., LTD., No. 2859, *ante*.

2878. Existence of prejudice independent of notice—Effect of absence of notice.]—HOWARTH *v.* CLIFTON & KERSLEY COAL CO., LTD., No. 2901, *post*.

Sufficiency of notice.]—*See* Nos. 2843–2845, *ante*.

Delay in receipt of notice.]—*See* Sub-sect. 1, E. (*a*) ii., *post*.

ii. *Delay in Receiving Notice.*

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

2879. Whether employer prejudiced in defence—Employer's knowledge of accident—Informal notice.]—A waitress was injured by accident in June, 1910. She told her employer the same day. No effects of the accident were apparent until she fell ill in Aug., & she did not know until Nov. that the illness was an effect of the accident. Notice under Workmen's Compensation Act, 1906 (c. 58), was not given until Nov. or Dec. 1910. The county ct. judge found that the employers were not prejudiced by the delay:—*Held:* there was evidence to support the finding.—EATON *v.* EVANS (1911), 5 B. W. C. C. 82, C. A.

2880. ——.]—A workman met with an accident in a colliery. There was a special rule in the collieries that accidents were to be reported before leaving the mine. His father, in his presence, told the overman & an undermanager, who happened to pass, & the overman wrote down the particulars in a book supplied by the employers for the purpose. The workman returned to work, cured, in eighteen days. He claimed compensation, & the employers objected that they had not had notice of the accident, & that they were prejudiced by the absence of notice. The county ct. judge found that the employers were prejudiced, & awarded for them:—*Held:* the entry of the particulars in the book by the overman was written notice by the workman to the employers in accordance with Workmen's Compensation Act, 1906 (c. 58), s. 2, as the overman was in that instance agent for both parties.

Semble: there was no evidence of prejudice.—STEVENS *v.* INSOLES, LTD., [1912] 1 K. B. 36; 81 L. J. K. B. 47; 105 L. T. 617; 5 B. W. C. C. 164, C. A.

2881. ——.]—A lad, a painter, left off work because he felt ill on July 15, 1912. On Aug. 13 he consulted a doctor who sent him to bed, & he did not get up until Dec. The doctor told the lad to leave everything alone & not to worry about business. In Dec., as soon as he could get out, the lad went to the employers & told them all about his illness, saying that the doctor thought it was lead poisoning. The employers' secretary wrote this down. The lad subsequently became worse, & on Feb. 11, 1913, his solr. made a formal claim for compensation, & on Feb. 13 the certifying surgeon gave his

2871 b. *Notice of objection by defendant—Time for.*]—CAVANAGH *v.* PARK (1896), 23 A. R. 715.—**CAN.**

certificate that the boy was suffering from lead poisoning, & stating that the disablement commenced in the last week of July, 1912. The certificate was appealed against by the employer, but the medical referee dismissed the appeal. On the application for compensation the county ct. judge found (1) that notice of the accident was given as soon as practicable after the happening thereof; (2) that a claim for compensation was in fact made within six months of the time of the accident; (3) that in any case failure to give notice, if any, did not prejudice the employers in their defence; & (4) that if his previous findings were not justified, delay in notice & claim was occasioned by reasonable cause:—*Held:* there was evidence to support the findings.—SANDERSON *v.* PARKINSON & SONS, LTD. (1913), 6 B. W. C. C. 648, C. A.

2882. ——.]—A workman, engaged in lifting heavy weights, suddenly felt that he had strained himself. He had suffered from slight rupture three years before, & he now informed his foreman that this rupture had come down, & that he would consult his doctor. Having done so, & hearing that he would have to undergo an operation, he informed his employer, who agreed to make a weekly payment of half wages. He paid these while the workman was in hospital, but subsequently, at the hearing, stated they were only intended as a loan. Written notice was not given until four months after the accident. The county ct. judge found that the employer had been informed of the accident as soon as practicable, & had not been prejudiced by the delay in giving written notice:—*Held:* there was evidence to support the finding.—RALPH *v.* MITCHELL (1913), 6 B. W. C. C. 678, C. A.

2883. ——.]—The following are the facts as found by the county ct. judge. A workman dropped a heavy weight on to his foot, on July 27, 1910. He went on working for two days, & then knocked off for a week on account of the pain in his foot. He returned & worked till Sept. 24. His foot was very painful, & he had to give up work altogether. He was treated for rheumatism in his foot, which was thought to be causing the pain. On Sept. 17 & on Sept. 25 it was found that he had gangrene in the foot, & he was sent to a hospital on Oct. 19. Three weeks afterwards his foot was amputated below the ankle, & five weeks later his leg was amputated below the knee. No statutory notice was given to the co. The secretary of the co. paid the man full wages, 30*s.* for the first week after he finally stopped work, 20*s.* for the second week, & 10*s.* per week subsequently, & was given full information of the man's progress. The county ct. judge found that the employers knew of the injury as soon as was practicable after the happening thereof, that they had not been prejudiced by want of statutory notice, & that there was reasonable cause for not giving it. He awarded full compensation:—*Held:* there was evidence to support the finding.—STINTON *v.* BRANDON GAS CO., LTD. (1912), 5 B. W. C. C. 426, C. A.

Annotation:—**Distd.** Webster *v.* Cohen (1913), 108 L. T. 197.

2884. ——.]—HARRIS *v.* THOMAS & CO., No. 2329, *ante.*

2885. ——.]—FENTON *v.* KELVIN (OWNERS), No. 2939, *post.*

2886. —— **Question of fact.**]—Towards the end of Mar. 1915, a workman suffered great pain in his hand, which appeared to be caused from a wound. His daughter bathed & bandaged his hand daily, before he went to work. A month later the man saw a doctor who told him he was suffering from septic poisoning & gave a certificate that the man was unfit for work. The certificate was sent to the employers & notice given. The man did no work after that date, & died a month after from blood poisoning. The county ct. judge was not satisfied on the evidence that the injury to the hand was an injury received at his work, but without deciding the question whether the injury arose out of & in the course of the employment, he found that the employers were prejudiced by the delay in giving notice as soon as practicable, & made his award in their favour on that ground:—*Held:* there was evidence to support the finding.—JONES *v.* THOMAS (RICHARD) & CO., LTD. (1916), 9 B. W. C. C. 237, C. A.

2887. ——.]—A workman injured his finger. He told a man who was working with him, & went to the first aid room & had it bandaged. A doctor later attended him for sore finger & whitlow. After this he made several attempts to work, but failed. Five weeks after the accident the workman saw the manager & told him of the accident. A claim for compensation was then made & the county ct. judge found that the first time the employers knew or should have known of the accident was when the manager was told by the workman five weeks after the accident. The judge also said that he was not satisfied by the evidence that the employers were not prejudiced by the workman's omission to give notice of the accident:—*Held:* the question was one of fact upon which there was evidence to support the finding & no misdirection.—HOWARD *v.* SUN HILL, LTD. (1920), 13 B. W. C. C. 46, C. A.

2888. ——.]—JOHNSON *v.* FLORENCE COAL & IRON CO., LTD., No. 2736, *ante.*

2889. ——.]—DAY *v.* BERNARDES (G.) & SON, No. 2900, *post.*

2890. ——.]—FEARNLEY BROTHERS *v.* RICHMOND, No. 2856, *ante.*

2891. —— **Voluntary payment of compensation.**]—TURNBULL *v.* VICKERS, LTD., No. 3013, *post.*

2892. —— **Notice after death of workman.**]—FORD *v.* GAIETY THEATRE CO., LTD., No. 2874, *ante.*

2893. ——.]—HUNT *v.* HIGHLEY MINING CO., LTD., No. 2853, *ante.*

2894. ——.]—HAYWARD *v.* WESTLEIGH COLLIERY CO., LTD., No. 2917, *post.*

2895. ——.]—A joiner, while at work on Feb. 19, cut his thumb slightly. He bandaged it, but treated the accident as trivial. The wound had not healed on Mar. 10, when he accidentally hit his thumb again & re-opened the wound. Two days later there was evidence that it looked bad to a fellow workman. A week later the man went to his doctor, feeling very ill. The doctor found an open sore on the thumb, with inflammation, indicating blood poisoning. A few days later another doctor was called in, but the man's condition was hopeless, & he died on Mar. 27. No notice was given to the employers till after his death. The county ct. judge held that the failure to give notice after the original accident would be fatal to the claim, but, assuming that this accident was too trivial for notice, the condition caused by the second was such that notice should have

PART XIV. SECT. 7, SUB-SECT. 1.—E. (a) ii.

2884 i. *Whether employer prejudiced in defence—Employer's knowledge of accident.*]—QUIST *v.* SERPENT RIVER LOGGING CO. (1912), 23 O. W. R. 151; 4 O. W. N. 159; 7 D. L. R. 463.—CAN.

c. ——.]—STRONGE *v.* HAZLETT (1909), 44 I. L. T. 10; 3 B. W. C. C. 581.—IR.

Sect. 7.—Conditions of compensation: Sub-sect. 1, E. (a) ii. & iii.]

been given immediately after Mar. 10, or, at the very latest, on Mar. 19, & that the employers were prejudiced by want of notice:—*Held:* there was evidence to support the county ct. judge's findings, & no misdirection.—TAYLOR *v.* NICHOLSON & SON (1915), 8 B. W. C. C. 114, C. A.

2896. —— ——.]—BURVILL *v.* VICKERS, LTD., No. 2919, *post*.

2897. —— —— **Sudden death from heart failure —No application by employers for post-mortem.**]—(1) A workman was taken ill while at work, & died within a few hours. Notice of the death was not given to the employers for nine days. Deceased man had then been buried, & there was no post mortem examination. In a proceeding by his widow for compensation under Workmen's Compensation Act, 1906 (c. 58), it was contended on her behalf that death was caused by heart failure brought on by a strain in the course of his work, & on behalf of the employers that death resulted from another cause independent of his work, & that in any case notice of the accident had not been given as soon as practicable, as required by sect. 2 (1) of the Act. The arbitrator found that death was caused by heart failure, resulting from a strain in his work; that notice of the accident had been given as soon as was reasonably practicable under the circumstances; & that in any case the employers had not been prejudiced in their defence by the delay; & he made an award in favour of appct.:—*Held:* assuming that notice had not been given as soon as practicable, there was evidence on which the arbitrator could find that the employers were not thereby prejudiced in their defence.

In order to succeed in setting aside the finding of the . . . arbitrator . . . applt. has got to show either that there was no evidence at all on which the arbitrator could reasonably proceed or that on the face of his award there is a mistake in law (LORD HALDANE).

(2) The finding of the arbitrator cannot be set aside unless there is no evidence or the circumstances are such that no reasonable man could come to the conclusion to which he came. LORD LOREBURN points out in *Hayward* v. *West Leigh Colliery Co., Ltd.*, No. 2917, *post*, that the arbitrator in coming to a decision should look at all the matters before him without a presumption one way or the other (LORD PARMOOR).—LOCHGELLY IRON & COAL CO., LTD. *v.* KIRK (1916), 86 L. J. P. C. 61; 115 L. T. 642; 33 T. L. R. 31; 61 Sol. Jo. 41; 10 B. W. C. C. 1, H. L.

Annotation:—As to (1) **Reid.** Graham *v.* Christie (or Fleming) (1917), 10 B. W. C. C. 486.

2898. —— ——.]—JOHNSON *v.* FLORENCE COAL & IRON CO., LTD., No. 2736, *ante*.

2899. —— **Immediate notice of no benefit to employer.**]—MILLS *v.* DINNINGTON MAIN COAL CO., LTD., No. 2686, *ante*.

2900. —— ——.]—D., who was a waterside labourer, on Aug. 28, 1923, applied for a job & was taken on by resps. (now applts.) to assist in the unloading of a ship. The unloading was completed on Aug. 31, but on that day, whilst stowing tree trunks from the ship into a barge, D. caught his right ring finger in a piece of wire from a runner hook which drew a little blood, but he continued his work, telling the foreman who had asked him about it, that it would be all right. He applied next day for a job but was not successful. His finger becoming swollen he went on Sept. 4 to his panel doctor, who did not inquire & was not told the cause of the injury, & having treated the injury sent him later to Guy's Hospital, where he was an out patient until Sept. 10 when he was sent to the R. Infirmary where he had his finger amputated, & was discharged on Oct. 17. On Oct. 18 he gave notice of the accident & the loss of the finger to applts., alleging that he had not given notice before because he was unaware by whom he had been employed as the jobs being often only for a day, workmen did not trouble to find out who employed them, & in his evidence said that he feared the loss of a job if he said anything. On an application for compensation under Workmen's Compensation Act, 1906 (c. 58), applts., relying upon sect. 2 (1) (*a*), (*b*), of the Act, denied liability on the ground that they were prejudiced in their defence by notice not having been given to them as soon as practicable after the happening of the accident. They alleged that they were unable to get evidence from his fellow workmen, who, being casual labourers, could not be traced, & that they had had no opportunity to instruct their own doctor to examine the finger so that he might have formed an opinion as to the cause of the injury which might have happened from various causes. The judge made an award of 35*s.* a week to appct., whose evidence satisfied him that resps. had not been prejudiced by the want of notice at the proper time. Resps. had not proved that they were prejudiced as, if they had had notice of the accident at the time, they could have done nothing more than was in fact done:—*Held:* the county ct. judge had accurately applied the law as laid down in the House of Lords as to whether the employers were prejudiced by want of notice as soon as practicable, & as to the *onus* of proof of such prejudice, so that it became a question of fact upon which there was evidence to support the finding, & there was no misdirection.—DAY *v.* BERNARDES (G.) & SON (1924), 131 L. T. 397; 17 B. W. C. C. 62, C. A.

Annotation:—**Reid.** Sharp *v.* Loddington Ironstone Co. (1924), 132 L. T. 229.

2901. —— **Notice to authorised official—Failure of official to inform employer.**]—A miner, blind in one eye, while working in the pit sustained injury by accident to the other eye. No one saw the accident, & its result at first was trivial, but later, owing to poisoning, it became more serious. The workman himself gave no formal or other notice to any person, but one of his fellow workmen, who had called upon him, informed the fireman, an official to whom notice of accidents was required by the Coal Mines Regulations to be given, that appct.'s absence from work was due to his having met with an accident in the course of his employment. The fireman did not note or report this, & the employers were in fact unaware for more than three months that an accident had happened The county ct. judge found that they were not, on these facts, prejudiced in their defence by the absence of the notice required by Workmen's Compensation Act, 1906 (c. 58), s. 2:—*Held:* (1) there was evidence upon which the judge could properly so find & no misdirection; the notice required need not be given by the workman himself, & if received by a proper official, the fact that he does not report it can make no difference to the workman's rights; (2) the question whether or not the employers were prejudiced was a question independent of notice; there might be a complete absence of prejudice even though they should receive no notice at all until the claim was actually made.—HOWARTH *v.* CLIFTON & KERSLEY COAL CO., LTD. (1920), 89 L. J. K. B. 1249; 124

L. T. 45; 64 Sol. Jo. 635; 13 B. W. C. C. 179, C. A.

Annotations:—*As to* (2) **Consd.** Day *v.* Bernardes (1924), 131 L. T. 397; Sharp *v.* Loddington Ironstone Co. (1924), 132 L. T. 229.

2902. —— Date when workman's condition becomes serious—Not found.]—ALBISON *v.* NEWROYD MILL, LTD., No. 2857, *ante*.

iii. *Onus of Proof.*

See Workmen's Compensation Act, 1925 (c. 58), ss. 14, 15.

2903. On workman.]—The notice of the accident which is to be given to the employer under Workmen's Compensation Act, 1906 (c. 58), s. 2 (1), must be in writing. Under proviso (*a*) of sub-sect. 1 the *onus* lies on the workman of showing that the employer has not been "prejudiced in his defence by the want, defect or inaccuracy" of any such notice.—HUGHES *v.* COED TALON COLLIERY CO., LTD., [1909] 1 K. B. 957; 78 L. J. K. B. 539; 100 L. T. 555; 2 B. W. C. C. 159, C. A.

Annotations:—**Distd.** Eaton *v.* Evans (1911), 5 B. W. C. C. 82. **Apld.** Ing *v.* Higgs (1914), 110 L. T. 442. **Reid.** Butt *v.* Gellycedrim Colliery Co. (1909), 3 B. W. C. C. 44.

2904. ——.]—TIBBS *v.* WATTS, BLAKE, BEARNE & CO., LTD., No. 2931, *post*.

2905. ——.]—A workman was discharged from his employment on Oct. 2, 1909. On Oct. 11 he saw a doctor, & was found to be suffering from rupture. On Oct. 13 he gave his employers written notice of an accident which, he said, had occurred on July 14, 1909, & on Oct. 22 he was examined by the employers' doctor in the presence of his own. The man's doctor admitted that it was possible that the rupture commenced at some date earlier than July 14. The workman had not given to the employers written notice of the accident before Oct. 13, but it appeared that he had complained to a man under the foreman, the "leading hand" from whom he took orders, that he had "strained himself":—*Held:* the workman had not discharged the *onus* that was upon him of proving that the employers were not prejudiced in their defence by the want of notice.—HANCOCK *v.* BRITISH WESTINGHOUSE ELECTRIC CO. (1910), 3 B. W. C. C. 210, C. A.

Annotation:—**Apld.** Dalgiesh *v.* Gartside (1914), 7 B. W. C. C. 535.

2906. ——.]—A workman claimed compensation in respect of an alleged injury to his ankle. He had said nothing at the time of the alleged injury, & had walked home. He swore that he had sent notice the next day to the foreman carpenter under whom he worked. This the foreman denied. The job finished on the day of the alleged accident, & all the men were paid off. Formal notice was given two months later. The county ct. judge found that, though the notice had not been given as soon as practicable, the workman had discharged the *onus* of showing that the employers were not prejudiced by the delay:—*Held:* there was no evidence to support the finding.—BURRELL *v.* HOLLOWAY BROTHERS (LONDON), LTD. (1911), 4 B. W. C. C. 239, C. A.

Annotations:—**Consd.** Dalgiesh *v.* Gartside (1914), 7 B. W. C. C. 535. **Reid.** Egerton *v.* Moore, [1912] 2 K. B. 308.

2907. ——.]—EGERTON *v.* MOORE, No. 2940, *post*.

2908. ——.]—MURPHY *v.* SHIREBROOK COLLIERY, LTD., No. 2852, *ante*.

2909. ——.]—WEBSTER *v.* COHEN BROTHERS, No. 2930, *post*.

2910. ——.]—A cotton operator, on Nov. 24, cut his thumb badly. There was a clear written notice posted up requiring all accidents to be reported at once to the overseer. The workman knew of this rule & had acted upon it on three former occasions when he had injured himself. On this occasion he went to find the overseer, but he was away, & the hand was shown to & attended by the first aid man. On the next day & on the following day, the workman was attended to by the same man, who then told him to use some plaster, & that it would be all right. He continued at work for a month, but the wound gave him increasing pain all the time until at last he consulted a doctor. The wound was then found to be in a septic condition. Written notice of the accident was given four days later. The county ct. judge found that the workman had not discharged the *onus* of proving that resps. were not prejudiced by the delay in giving notice:—*Held:* there was no misdirection.—DALGIESH *v.* GARTSIDE & CO., LTD. (1914), 7 B. W. C. C. 535, C. A.

2911. ——.]—A fish porter alleged that he pricked his finger with a fish bone when gutting fish. He continued to work for a week. He felt pain in his arm three or four days after the alleged accident, but attributed it to rheumatism. Eight days after the alleged accident, as his arm was very painful he went to the hospital, where he was told that the prick was the cause of the trouble. He there had to undergo an operation for blood poisoning due to the pricked finger. He was discharged from the hospital a fortnight after the alleged accident, but gave no notice until a week later. At the hearing the employer's witnesses were unable to remember what work was done on the morning of the accident. The county ct. judge found that the employer had been prejudiced by the delay in giving notice as these witnesses' memories were bad owing to the lapse of time between the accident & inquiry after notice was given:—*Held:* the workman had not discharged the *onus* of proving that the employer had not been prejudiced by the delay in giving notice.—UNGAR *v.* HOWELL (1914), 7 B. W. C. C. 36, C. A.

2912. ——.]—Appct. was employed by resp. in a hop garden. On Feb. 18, 1913 he was using a heavy beadle for driving piles into the ground, but he had to drop it as he felt that he injured himself. He suffered pain in his left side, but he continued to work till Mar. 14. He made no communication at all to resp. relating to his injury, & although there was a change of his work, & it was of a lighter description, the change was not due in any respect to what had happened on Feb. 18. In Mar. appct. consulted his doctor who advised him to go to a hospital. On May 23, he was discharged from the hospital, & it was not until June 23, that he gave any notice of the accident which was alleged to have taken place on Feb. 18. The ailment from which appct. was found to be suffering was weakness of heart consequent upon strain continuing for some time thereon. It was a strain, however, which without appct. being conscious of it might certainly have been due not to any one single occurrence which could be called an "accident" within Workmen's Compensation Act, 1906 (c. 58), but to a course

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PART XIV. SECT. 7, SUB-SECT. 1.—E. (a) iii.

2903 i. *On workman.*]—The *onus* of establishing that the employer has not been prejudiced lies on the claimant in those cases where notice has not been given as soon as practicable.—RAVEN *v.* TEMBY (1914), 16 W. A. L. R. 196.—**AUS.**

2903 ii. ——.]—The *onus* lies on a workman of showing that his employer has not been prejudiced by the workman's failure to give due notice of the accident.—SHEARER *v.* MILLER (1899), 2 F. (Ct. of Sess.) 114.—**SCOT.**

Sect. 7.—Conditions of compensation: Sub-sect. 1, E. (b) i. & ii., & (c) i. & ii.]

of the injury:—*Held:* there being no notice given of either accident, there was no mistake made by the workman within Workmen's Compensation Act, 1925 (c. 84), to excuse the want of any notice. The claim was therefore barred.—ALDRED *v.* ROSCOE (J.) & SONS (1926), 19 B. W. C. C. 352, C. A.

ii. *Other Reasonable Cause.*

See Sub-sect. 1, E. (*c*), *post.*

(*c*) *Other Reasonable Cause.*

i. *In General.*

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

2926. Reasonable cause unconnected with prejudice to employer—Through want of notice.]—EKE *v.* HART-DYKE, No. 2304, *ante.*

2927. What amounts to reasonable cause—Conduct of parties—Payment & acceptance of weekly payment.]—An employer may waive his right to notice in writing of the accident by the workman under Workmen's Compensation Act, 1906 (c. 58), s. 2 (1), & such right is in fact waived, where, after verbal notice, the employer pays & the workman accepts a weekly payment during incapacity.—DAVIES *v.* POINT OF AYR COLLIERIES, LTD. (1909), 2 B. W. C. C. 157, C. A.

2928. —— Ignorance of law.]—ROGERS *v.* PASCALL & SONS, No. 2921, *ante.*

2929. —— Unwillingness to apply for compensation—Fear of unemployment.]—An elderly cripple met with an accident. He gave no notice to his employers, not knowing that he had permanently overstrained his diseased heart, & fearing that, if he obtained compensation, the insurance co. would prevent his being taken back to work on recovery, & intending not to claim compensation if he recovered quickly. Four months after the accident, he learnt for the first time that he was incapacitated for life, & he thereupon gave notice & brought proceedings:—*Held:* the delay was due to reasonable cause within Workmen's Compensation Act, 1906 (c. 58), s. 2.—BREAKWELL *v.* CLEE HILL GRANITE CO., LTD. (1911), 5 B. W. C. C. 133, C. A.

Annotation:—**Refd.** Webster *v.* Cohen (1913), 108 L. T. 197.

2930. —— —— Expectation of recovery.]—On Apr. 3, a workman met with an accident, & though he continued at his work, the injury caused him severe pain daily. In June he had to give up work, & notice of the accident was first given in that month. He did not give notice earlier because he hoped he would get better & would not have to make any claim:—*Held:* this was not reasonable cause for the delay in giving notice.—WEBSTER *v.* COHEN BROTHERS (1913), 108 L. T. 197; 29 T. L. R. 217; 57 Sol. Jo. 244; 6 B. W. C. C. 92, C. A.

Annotations:—**Apld.** Clapp *v.* Carter (1914), 110 L. T. 491. **Folld.** Potter *v.* Welch, [1914] 3 K. B. 1020. **Distd.** Thompson *v.* North Eastern Marine Engineering Co. (1914), 110 L. T. 441. **Consd.** Fox *v.* Barrow Hematite Steel Co. (1915), 84 L. J. K. B. 1327. **Apld.** Clay *v.* Sherwood Colliery Co. (1922), 92 L. J. K. B. 169. **Consd.** Fenton *v.* Ship Kelvin, [1925] 2 K. B. 473; Atherton *v.* Chorley Colliery Co. (1926), 135 L. T. 660. **Refd.** Miller *v.* Richardson (1915), 113 L. T. 609; Watts *v.* Vickers (1916), 86 L. J. K. B. 177; Lingley *v.* Firth, [1921] 1 K. B. 655; Johnson *v.* Harland & Wolff (1922), 16 B. W. C. C. 164; Albison *v.* Newroyd Mill (1925), 95 L. J. K. B. 807.

—— **Injury latent.**]—*See* Sub-sect. 1, E. (*c*) ii., *post.*

—— **Injury trivial.**]—*See* Sub-sect, 1, E. (*c*) iii., *post.*

ii. *Injury Latent.*

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

2931. When a reasonable cause.]—When a workman receives an injury arising out of & in the course of his employment, which is not apparent at the time it is received, in consequence of which notice of accident is not given for a considerable time, & no claim for compensation is made within six months of the time when the injury was actually sustained, want of such notice or claim may be due to a reasonable cause, although the *onus* is upon the workman or his representatives to show that the employer was not prejudiced by failure or delay in giving such notice:—*Held:* though the *onus* is on the workman to show that his employers were not prejudiced by want of proper notice or by his failure to make the claim within six months, yet, the fact that the injury was not apparent at the time when it was received, was a reasonable cause for the absence of such notice of claim.—TIBBS *v.* WATTS, BLAKE, BEARNE & CO., LTD. (1909), 2 B. W. C. C. 164, C. A.

Annotation:—**Refd.** Webster *v.* Cohen (1913), 108 L. T. 197.

2932. ——.]—A saleswoman in a shop received a shock from a fire which burnt part of the shop. Thinking she was only suffering from temporary nervous derangement she gave her employers no notice of accident, & made no claim for compensation. More than six months after the accident, it was discovered that she was suffering from a serious nervous disease. Some time after this, notice & claim were for the first time given & made. The county ct. judge found that the delay was due to reasonable cause within Workmen's Compensation Act, 1906 (c. 58), & that the employers were not prejudiced by the delay, & awarded for the workman:—*Held:* there was evidence to support the award.—HOARE *v.* ARDING & HOBBS (1911), 5 B. W. C. C. 36, C. A.

Annotations:—**Distd.** Egerton *v.* Moore, [1912] 2 K. B. 308; Webster *v.* Cohen (1913), 108 L. T. 197. **Apld.** White *v.* Ford Motor Co. (England) (1917), 10 B. W. C. C. 334. **Refd.** Breakwell *v.* Clee Hill Granite Co. (1911), 5 B. W. C. C. 133; Ellis *v.* Fairfield Shipbuilding & Engineering Co. (1912), 6 B. W. C. C. 308; Dalgiesh *v.* Gartside (1914), 7 B. W. C. C. 535; Burvill *v.* Vickers (1915), 114 L. T. 29; Fenton *v.* Ship Kelvin, [1925] 2 K. B. 473.

2933. ——.]—A workman was injured, but the injury was not apparent at first, & he continued his work for about nine months, when he became incapacitated, & had to undergo an operation. He did not give notice till the day before the operation, & did not claim compensation or bring proceedings for some time after that. The county ct. judge found that his condition was due to the accident, that the employers had not been prejudiced, & that there was reasonable cause for the delay. The employers relied upon Public Authorities' Protection Act, 1893 (c. 61), alleging that

PART XIV. SECT. 7, SUB-SECT. 1.—E. (c) i.

2928 i. *What amounts to reasonable cause—Ignorance of law.*]—Ignorance of the law is not a "reasonable excuse."—GIOVINAZZO *v.* CANADIAN PACIFIC RY. CO. (1909), 13 O. W. R. 24, 1200; 19 O. L. R. 325.—**CAN.**

2928 ii. —— ——.]—Ignorance by a foreigner of his legal rights is neither a mistake nor reasonable cause, within the Act, to serve as an excuse for appt.'s failure to give the notice in time.—*Re* BRUNO & INTERNATIONAL COAL & COKE CO. (1913), 24 W. L. R. 729; 4 W. W. R. 888; 12 D. L. R. 745; 6 Alta. L. R. 269.—**CAN.**

d. —— *Unwillingness to apply for compensation.*]—LIVINGSTONE *v.* SUMMERLEE IRON CO., LTD., [1922] S. C. 272.—**SCOT.**

PART XIV. SECT. 7, SUB-SECT. 1.—E. (c) ii.

2931 i. *When a reasonable cause.*]—RANKINE *v.* FIFE COAL CO., [1915] S. C. 476; [1915] 1 S. L. T. 213.—**SCOT.**

proceedings should have been commenced within six months of the accident:—*Held:* (1) there was evidence upon which the county ct. judge could find the delay was reasonable & the employers were not prejudiced; (2) the Public Authorities' Protection Act, 1893 (c. 61), does not apply to proceedings under Workmen's Compensation Act, 1906 (c. 58).—FRY *v.* CHELTENHAM CORPN. (1911), 81 L. J. K. B. 41; 105 L. T. 495; 76 J. P. 89; 28 T. L. R. 16; 56 Sol. Jo. 33; 10 L. G. R. 1; 5 B. W. C. C. 162, C. A.

Annotations:—As to (1) **Apld.** Webster *v.* Cohen (1913), 108 L. T. 197. *As to* (2) **Consd.** Tuckwood *v.* Rotherham Corpn., [1921] 1 K. B. 526.

2934. ——.]—BREAKWELL *v.* CLEE HILL GRANITE CO., LTD., No. 2929, *ante*.

2935. ——.]—SANDERSON *v.* PARKINSON & SONS, LTD., No. 2881, *ante*.

2936. ——.]—POTTER *v.* WELCH (JOHN) & SONS, LTD., No. 4082, *post*.

2937. ——.]—Where a workman sustained an "injury by accident arising out of & in the course of" his employment within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 1, which injury fell within the term "latent," it is a "reasonable cause" for his not giving notice of the accident as soon as practicable after the happening thereof, as required by sect. 2 of that Act, where he was unaware that the illness from which he was suffering was attributable to & due to the accident.—THOMPSON *v.* NORTH EASTERN MARINE ENGINEERING CO. (1914), 110 L. T. 441; 7 B. W. C. C. 49, C. A.

2938. ——.]—WALTERS *v.* WALL & SONS, LTD., No. 2719, *ante*.

2939. ——.]—On Feb. 6, 1924, appct., who was one of the crew of a steam trawler, was wrecked off the coast of Iceland. He was exposed to the weather in a leaky boat & remained in his wet clothes for some days, being unable to obtain a change of clothing until Feb. 10. For some time after this appct. felt a certain amount of "shakiness," but no other ill effects from the shipwreck, & he subsequently went on two other voyages to Iceland in another of resps.' trawlers. On his return he felt ill, & found he was afflicted with bladder trouble. He saw a doctor, but was not physically tested or examined by him. He subsequently went for three other voyages, each lasting for about three weeks, & suffered from the same symptoms. On June 12, 1924, he again saw his doctor, who informed him that he was in a very serious condition & ought not to go to sea again. In Oct. he commenced arbitration proceedings, claiming compensation on the ground that he was totally incapacitated by chronic gastritis & haematuria occasioned by the exposure to which he had been subjected to in the shipwreck. He alleged that he had given verbal notice of the accident to the employers on Aug. 1. The employers denied liability on the grounds that the incapacity was not due to the shipwreck & that they had not received notice of the accident as soon as practicable after the happening thereof & were prejudiced in their defence by want of such notice. The county ct. judge found that the events in Iceland constituted an "accident"; that the disease from which appct. was suffering on June 12, & subsequently was the consequential result of the accident; that the claim for compensation was made within six months; that the notice was not given as soon as practicable; & that the employers were in fact prejudiced by the delay in giving notice. He held, however, that appct. was not bound to give notice until he realised the connection of his illness with the accident & the possibility of a claim for compensation, & that looking at all the facts of the case, & particularly having regard to the extreme medical obscurity of the particular case, there was reasonable excuse for appct.'s delay in giving notice:—*Held:* there was evidence before the county ct. judge on which he could find that it was not until the end of July when appct. communicated with the employers that he realised the connection of cause & effect between the accident & the incapacity from which he was suffering, & there was reasonable cause for the delay in giving notice until that time. *Qu.:* whether the words "knowledge of the accident" in Workmen's Compensation Act, 1923 (c. 42), s. 10 (2), mean knowledge of the actual occurrence of the accident or knowledge of the accident occasioning injury to a particular workman.—FENTON *v.* KELVIN (OWNERS), [1925] 2 K. B. 473; 95 L. J. K. B. 316; 133 L. T. 664; 18 B. W. C. C. 328, C. A.

Annotations:—**Consd.** Albison *v.* Newroyd Mill (1925), 95 L. J. K. B. 667. **Distd.** Atherton *v.* Chorley Colliery Co. (1926), 135 L. T. 660.

2940. —— **Delay after appearance of serious symptoms.**]—A workman who seeks to obtain the benefit of the proviso to Workmen's Compensation Act, 1906 (c. 58), s. 2 (1), in respect of failure to give notice of the accident as soon as practicable after the happening thereof, must prove affirmatively that the employer has not been prejudiced thereby, otherwise the circumstances may be such as to lead the ct. to conclude that the mere lapse of time must necessarily have prejudiced the employer in his defence.

A workman who has sustained an injury of such a latent nature that he does not know for some time whether it will have any serious result may make a mistake of fact, within the meaning of "mistake" in the proviso to sect. 2 (1), of the Act, in not giving notice as soon as practicable after the happening of the accident, but so soon as he realises that he is suffering from some ailment upon which he may have occasion to rely as a consequence of the accident, he should give notice to his employer, & his failure so to do, even though it proceed from a desire to do the best for himself or his employer, will not amount to "mistake or other reasonable cause" within the proviso to the sub-sect.

Mistake does not mean mistake of law (COZENS-HARDY, M.R.).—EGERTON *v.* MOORE, [1912] 2 K. B. 308; 106 L. T. 663; 5 B. W. C. C. 281, C. A.; *sub nom.* EDGERTON *v.* MOORE, 81 L. J. K. B. 696.

Annotations:—**Consd.** Ellis *v.* Fairfield Shipbuilding & Engineering Co. (1912), 6 B. W. C. C. 308. **Folld.** Clapp *v.* Carter (1914), 110 L. T. 491. **Apld.** Fenton *v.* Ship Kelvin, [1925] 2 K. B. 473. **Reld.** Euman *v.* Dalziel (1912), 6 B. W. C. C. 900; Webster *v.* Cohen (1913), 108 L. T. 197; Albison *v.* Newroyd Mill (1925), 95 L. J. K. B. 667.

2941. —— ——.]—(1) In Mar. 1912, appct. while he was engaged in working for resp. fell from a loft in the stable, & injured his head. He was semi-conscious for a time. He was away from his work for two & a half days. He then returned & continued to work until Oct. 1912. But during all that time he was suffering from headache, which he attributed to the fall that he had had. His mind went off its balance at that date & he became in a condition not to give notice of the accident which had happened to him. It was not until Mar. 1913, that any written notice of the accident was given, or claim for compensation was made, as required by Workmen's Compensation Act, 1906 (c. 58), s. 2:—*Held:* the circumstances of the case were not such as to render applicable the proviso to Workmen's Compensation Act,

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1906 (c. 58), s. 2, there being no mistake or other reasonable cause" on which appct. could rely; &, therefore, he was not entitled to compensation.

(2) Order for costs of appeal made against approved society on their admitting that they had instituted proceedings in the workman's name in accordance with National Insurance Act, 1911 (c. 55), s. 11 (2).—CLAPP *v.* CARTER (1914), 110 L. T. 491; 58 Sol. Jo. 232; 7 B. W. C. C. 28, C. A.

Annotations:—As to (1) **Distd.** Clay *v.* Sherwood Colliery Co. (1922), 92 L. J. K. B. 169. **Refd.** Potter *v.* Welch, [1914] 3 K. B. 1020; Thompson *v.* North Eastern Marine Engineering Co. (1914), 7 B. W. C. C. 49; Zillwood *v.* Winch (1914), 7 B. W. C. C. 60; Fox *v.* Barrow Hematite Steel Co. (1915), 84 L. J. K. B. 1327. *As to* (2) **Refd.** Rushton *v.* Skey (1914), 83 L. J. K. B. 1503.

iii. *Injury apparently Trivial.*

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

2942. When a reasonable cause.]—POTTER *v.* WELCH (JOHN) & SONS, LTD., No. 4082, *post*.

2943. ——.]—HAWARD *v.* ROWSELL & MATTHEWS, No. 2694, *ante*.

2944. ——.]—A bricklayer ruptured himself lifting an unusually heavy bucket of cement. He felt pain but thought he had only ricked himself. In a few minutes he was able to go on with his work. On getting home he found a lump the size of a small marble in the place where he had felt the pain. He did not know it was rupture. He went on working some three months without much inconvenience. The rupture then gave him pain. He saw a doctor who ordered him to wear a truss. He said he could not work with a truss, & gave notice of accident, & claimed compensation. The county ct. judge found that the man reasonably did not know that he was suffering from rupture or an injury that was likely to incapacitate him in any way. He found upon this that there was a reasonable cause for the delay in giving notice:—*Held:* there was evidence to support the finding.—ZILLWOOD *v.* WINCH (1914), 7 B. W. C. C. 60, C. A.

2945. ——.]—WHITE *v.* FORD MOTOR CO. (ENGLAND), LTD., No. 2855, *ante*.

2946. ——.]—HOWARTH *v.* CLIFTON & KERSLEY COAL CO., LTD., No. 2901, *ante*.

2947. ——.]—In July, 1918, a workman met with a slight injury to his eye, but continued to do his work. This injury set up inflammation, & he was seen from time to time by two medical men, who took the view that the eye might get well again, & that an operation would not be necessary. Some ten months after the accident, the eye being no better, he was advised to go into hospital & have it removed. The eye was removed, & immediately on his coming out of hospital he gave notice to his employers of the accident & made a claim for compensation. The county ct. judge found as a fact that the delay in giving notice had not prejudiced the employers in their defence, & that in the circumstances there was reasonable cause for not giving notice or making the claim earlier. Accordingly he awarded the compensation:—*Held:* there was evidence to support the findings, & no misdirection.—DOBSON *v.* ANGLO-SAXON PETROLEUM CO., LTD. (1921), 14 B. W. C. C. 95, C. A.

2948. ——.]—ATKISON *v.* NEWROYD MILL, LTD., No. 2857, *ante*.

2949. —— Possibility of serious development.]—(1) If a workman who has been injured by "accident arising out of & in the course of" his employment, within Workmen's Compensation Act, 1906 (c. 58), s. 1, has reason to believe that, although he is apparently well, the accident may be attended with serious consequences, then he must give notice to his employer "as soon as practicable after the happening thereof" as required by Workmen's Compensation Act, 1906 (c. 58), s. 2 (1). But it is not necessary for such notice to be given by every workman who has suffered some slight injury such as a scratch on his finger.

(2) Where, however, a workman sustained what was apparently only an abrasion on the palm of his hand, but, although his hand gradually got worse, he continued working at his employment for some days after the happening of the accident & he delayed in giving notice thereof to his employers until he was found to be suffering from septic poisoning:—*Held:* in the circumstances of the case the county ct. judge had come to a perfectly right conclusion in deciding that the delay was not brought within the exception "mistake or other reasonable cause," & the employers were thereby "prejudiced in their defence."—SNELLING *v.* NORTON HILL COLLIERY CO. (1913), 109 L. T. 81; 6 B. W. C. C. 506, C. A.

Annotations:—As to (1) **Refd.** Dalgiesh *v.* Gartside (1914), 7 B. W. C. C. 535; Potter *v.* Welch, [1914] 3 K. B. 1020; Eydmann *v.* Premier Accumulator Co. (1915), 8 B. W. C. C. 121; Fox *v.* Barrow Hematite Steel Co. (1915), 84 L. J. K. B. 1327. *As to* (2) **Apld.** Eydmann *v.* Premier Accumulator Co. (1915), 8 B. W. C. C. 121. **Consd.** Wassall *v.* Russell (1915), 84 L. J. K. B. 1606.

2950. —— Delay after serious developments.]—On Thursday, Aug. 20, 1914, a miner, while working in his employment, was struck in the eye by a piece of coal. It caused a certain amount of pain & pricking. He stopped work, washed his eye, & did no more work that day, except that he assisted a fellow employee to push tubs. He did not go to work on Friday because of his injury. From Saturday the colliery was closed for a five days' holiday. He first saw a doctor on Monday, Aug. 24. Before seeing the doctor he had treated his eye with a lotion himself. The eye ultimately became septic, & he lost the sight of it. He gave no notice of the accident until Aug. 27. Upon a claim for compensation the original triviality of the injury was alleged as "reasonable cause" for want of notice; it was not contended that the employers were not prejudiced:—*Held:* there was no "reasonable cause" for the want of notice within Workmen's Compensation Act, 1906 (c. 58), s. 2 (1) (*a*), & the claim was therefore barred.—FOX *v.* BARROW HEMATITE STEEL CO., LTD. (1915), 84 L. J. K. B. 1327; 113 L. T. 528; 8 B. W. C. C. 431, C. A.

2951. —— ——.]—On Wednesday, Sept. 24, 1913, a workman slightly injured a finger while working in his employment. He got it bound up with a rag, but went on working for that & the two following days. On Saturday, Sept. 27, he went to work as usual in the morning, but at 10 a.m. had to cease working, because he could not hold his hammer. He first saw a doctor on Monday morning, Sept. 29, who found that the finger was then in a septic condition, & had been so for some time before. He gave no notice till Monday morning:—*Held:* as from 10 a.m. on Saturday, Sept. 27, there was no reasonable cause for the want of notice, & the employers had been

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2942 i. *When a reasonable cause.*]—RANKINE *v.* ALLOA COAL CO. (1904), 6 F. (Ct. of Sess.) 375.—SCOT.

2942 ii. ——.]—FLOOD *v.* SMITH & LEISHMAN, [1915] S. C. 726.—SCOT.

prejudiced thereby, & the proceedings were therefore barred under Workmen's Compensation Act, 1906 (c. 58), s. 2 (1) (*a*).—WASSALL *v.* RUSSELL (JAMES) & SONS, LTD. (1915), 84 L. J. K. B. 1606; 112 L. T. 902; 8 B. W. C. C. 230, C. A.

SUB-SECT. 2.—LIMITATION OF TIME FOR CLAIM.

See Sect. 8, sub-sects. 3 & 4, *post.*

SUB-SECT. 3.—CONDITIONS AS TO RESIDENCE.

See Workmen's Compensation Act, 1925 (c. 84), s. 16; Workmen's Compensation Rules, 1926, rr. 66, 67.

2952. Workman enlisting in army—Sent to India with regiment—Whether ceasing to reside within United Kingdom.]—HARRISON (J. & C.), LTD. *v.* DOWLING, No. 2969, *post.*

SUB-SECT. 4.—MEDICAL EXAMINATION.

A. Examination in First Instance.

See Workmen's Compensation Act, 1925 (c. 84), ss. 17, 19, 20; Statutory Rules & Orders (1907), No. 505; Workmen's Compensation Rules, 1926, r. 58.

2953. Right of employer to examination—Although no notice given of accident—By workman.]—(1) Where proceedings by a workman for compensation under Workmen's Compensation Act, 1897 (c. 37), are pending the employer may, under Sched. I., clause 3, require the workman to submit himself for examination by a duly qualified medical practitioner, notwithstanding that the workman has not given notice of the accident in respect of which the compensation is claimed.

(2) An arbitrator has no power to make it a condition of an order that a workman shall submit himself for examination by a duly qualified medical practitioner that the employer shall pay the expense of the attendance at such examination of a medical practitioner on the workman's behalf. —OSBORN *v.* VICKERS, SONS & MAXIM, [1900] 2 Q. B. 91; 69 L. J. Q. B. 606; 82 L. T. 491; 16 T. L. R. 333; 2 W. C. C. 130, C. A.

Annotations:—As to (1) **Refd.** Morgan *v.* Dixon (1910), 4 B. W. C. C. 363; Major *v.* South Kirkby, Featherstone & Hunsworth Collieries, [1913] 2 K. B. 145.

2954. —— Whether limited to one examination.]—(1) Under Sched. I., clause (4), which provides for medical examinations between the accident & the award, the employer is not restricted to one examination only, immediately after notice.

(2) The regulations of the Secretary of State dated June 28, 1907, as to times & intervals at which examinations may be required are made applicable by Sched. I., clause (15), to both clauses (4) & (14) of Sched. I.

(3) A workman was severely injured by an accident arising in the course of his employment. His employers admitted liability & paid him the weekly compensation to which he would have been entitled under Workmen's Compensation Act, 1906 (c. 58), but by arrangement with him, & not under the Act. He was attended by the employers' doctors. At the end of three years upon their doctors' advice the employers stopped payment of the compensation. The workman then commenced proceedings under the Act claiming compensation from the time when the payment was stopped. Thereupon the employers required the workman to submit himself to medical examination at their expense, but the workman refused:—*Held:* the proceedings must be suspended until the examination had taken place as provided by Sched. I., clause (4), of the Act.—MAJOR *v.* SOUTH KIRKBY, FEATHERSTONE & HUNSWORTH COLLIERIES, LTD., [1913] 2 K. B. 145; 82 L. J. K. B. 452; 108 L. T. 534; 29 T. L. R. 223; 57 Sol. Jo. 244; 6 B. W. C. C. 169, C. A.

Annotations:—As to (1) **Consd.** Smith *v.* Davis, [1915] A. C. 528; Pudney *v.* France, Fenwick, Smith *v.* Leach, [1925] 1 K. B. 346. *As to* (3) **Foll.** Longhurst *v.* S.S. Clement (1913), 6 B. W. C. C. 218.

2955. —— ——.]—In July, 1911, an accident occurred, & compensation was voluntarily paid until Sept. 16, 1911. The workman was medically examined on more than one occasion on behalf of the employers during this period. Compensation was stopped in Sept. 1912, & the workman filed an application for arbitration, claiming continuation of compensation. The employers requested that he should again be medically examined, but he refused. The county ct. judge found that the refusal was unreasonable, & suspended the proceedings pending examination: —*Held:* the proceedings were properly suspended. —LONGHURST *v.* CLEMENT (OWNERS) (1913), 6 B. W. C. C. 218, C. A.

2956. —— —— Further examination reasonable.]—Para. 4 of Sched. I. of Workmen's Compensation Act, 1906 (c. 58), which provides that where a workman has given notice of an accident he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner, & if he refuses to submit to such examination, that his right to take or prosecute any proceeding under the Act in relation to compensation shall be suspended until such examination has taken place, does not contemplate only one such examination, & after the workman has been examined once the county ct. judge has power to suspend the proceedings if he refuses to submit a further medical examination when such examination appears to be reasonable. Para. 14 of the Sched. applies only to the case of a workman who is actually at the time receiving weekly payments under the Act.—SMITH *v.* DAVIS (D.) & SONS, LTD., [1915] A. C. 528; 84 L. J. K. B. 1125; 113 L. T. 250; 31 T. L. R. 356; 59 Sol. Jo. 397; 8 B. W. C. C. 313, H. L.

*Annotations:—***Mentd.** Davies *v.* Glyncorrwg Colliery Co., [1925] 2 K. B. 339; Guest, Keen & Nettlefolds *v.* Williams (1925), 18 B. W. C. C. 68; Pudney *v.* France, Fenwick, Smith *v.* Leach, [1925] 1 K. B. 346.

2957. —— Power of arbitrator to impose condition.]—OSBORN *v.* VICKERS, SONS & MAXIM, No. 2953, *ante.*

2958. Presence of workman's own medical attendant—Workman not entitled as of right.]—A workman who had given notice of an accident within Workmen's Compensation Act, 1906 (c. 58), refused to submit himself for medical examination by a medical practitioner provided by his employers except upon the condition that his own medical attendant should be present throughout the examination. There were no special circumstances which required the presence of the medical attendant:—*Held:* (1) in the absence of special circumstances the workman was not entitled as of right to have his medical attendant present at the examination; (2) whether a request for the presence of the medical attendant was under

• *Necessity for certificate.*]—*Ex p.* MARTIN (1923), 23 S. R. N. S. W. 411; 40 N. S. W. W. N. 91.—AUS.

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the circumstances reasonable is question of fact to be determined by the arbitrator under the Act.

The question whether there is a refusal or not, under Workmen's Compensation Act, 1906 (c. 58), to submit to an examination is a question of fact, & any reasonable requirement that may be put forward by the workman, such as, for instance, having his own medical man present, ought not & would not by any reasonable arbitrator be held to amount to a refusal to submit to examination (LORD ATKINSON).—MORGAN *v.* DIXON (WILLIAM), LTD., [1912] A. C. 74; 81 L. J. P. C. 57; 105 L. T. 678; 28 T. L. R. 64; 56 Sol. Jo. 88; 5 B. W. C. C. 184, H. L.

Annotation:—*As to* (2) **Expld.** Smith *v.* Davis, [1915] A. C. 528.

2959. —— Request for presence—Whether reasonable or question of fact.]—MORGAN *v.* DIXON (WILLIAM), LTD., No. 2958, *ante*.

2960. Times & intervals of examinations—Regulations of Secretary of State.]—MAJOR *v.* SOUTH KIRKBY, FEATHERSTONE & HUNSWORTH COLLIERIES, LTD., No. 2954, *ante*.

2961. Refusal of workman to submit to examination—Suspension of proceedings.]—MAJOR *v.* SOUTH KIRKBY, FEATHERSTONE & HUNSWORTH COLLIERIES, LTD., No. 2954, *ante*.

2962. — —— ——.]—LONGHURST *v.* CLEMENT (OWNERS), No. 2955, *ante*.

2963. — — ——.]—SMITH *v.* DAVIS (J.) & SONS, LTD., No. 2956, *ante*.

2964. —— Refusal a question of fact.]—MORGAN *v.* DIXON (WILLIAM), LTD., No. 2958, *ante*.

B. While Workman in Receipt of Weekly Payments.

See Workmen's Compensation Act, 1925 (c. 84), ss. 18, 19, 20; Statutory Rules & Orders (1907), No. 505; Workmen's Compensation Rules, 1926, r. 58.

2965. Refusing or obstructing examination—Refusal of further examination by medical referee—After previous examination by employer's doctor.]—A workman in receipt of weekly payments by way of compensation under Workmen's Compensation Act, 1897 (c. 37), who has at the request of the employer, under Sched. I., clause 11, to the Act, submitted to examination by the employer's doctor, cannot be required by the employer to submit to a further examination by a medical referee appointed under the Act, & he may, if the employer suspends the weekly payments, proceed to arbitration under the Act.—NEAGLE *v.* NIXON'S NAVIGATION CO., LTD, EDWARDS *v.* GUEST, KEEN & NETTLEFOLDS, LTD., [1904] 1 K. B. 339; 73 L. J. K. B. 165; 68 J. P. 297; 52 W. R. 356; 20 T. L. R. 160; *sub nom.* NEAGLE *v.* NIXON'S NAVIGATION CO., EDWARDS *v.* GUEST, KEEN & NETTLEFOLDS, HIATT *v.* GUEST, KEEN & NETTLEFOLDS, 90 L. T. 49; 6 W. C. C. 140, C. A.

2966. —— What amounts to refusal—Request for presence of own medical attendant.]—A medical man instructed by the employers asked a workman in receipt of weekly payments under Workmen's Compensation Act, 1906 (c. 58), to submit himself to examination. The man answered that he had no objection provided his own medical man was present:—*Held:* he had not refused to submit himself to examination within the meaning of the Act.—DEVITT *v.* BAINBRIDGE (OWNERS), [1909] 2 K. B. 802; 78 L. J. K. B. 1059; 101 L. T. 299; 2 B. W. C. C. 383, C. A.

Annotation:—**Consd.** Morgan *v.* Dixon, [1912] A. C. 74.

—— —— ——.]—*Compare* No. 2958, *ante*.

2967. —— —— Demand for examination in office of workman's solicitor—& in presence of solicitor.]—A workman in receipt of compensation under Workmen's Compensation Act, 1906 (c. 58), was required by his employers to submit himself for examination by a certain duly qualified medical practitioner. The workman refused to do so unless the examination was at his solrs.' office or in his solrs.' presence. The employers repeated their request, but stated that the workman's medical adviser might attend at the examination. The workman again refused unless his conditions were complied with:—*Held:* on these facts, there was a refusal to submit to examination within Workmen's Compensation Act, 1906 (c. 58), Sched. I. (14).

It cannot be too well known that a solr.'s office is not, in ordinary circumstances, a proper place at which to hold a medical examination of a workman (COZENS-HARDY, M.R.).—WARBY *v.* PLAISTOWE & CO. (1910), 4 B. W. C. C. 67, C. A.

2968. —— —— Demand for examination at surgery of workman's doctor.]—A workman refused to attend for medical examination at the residence of the employer's medical man, but offered to submit himself to examination at the surgery of his own doctor:—*Held:* on the facts, there was evidence to support the finding of the county ct. judge that the workman had not refused to submit himself for examination within Workmen's Compensation Act, 1906 (c. 58), Sched. I. (14).—HARDING *v.* ROYAL MAIL STEAM PACKET CO. (1910), 4 B. W. C. C. 59, C. A.

Annotation:—**Refd.** Warby *v.* Plaistowe (1910), 4 B. W. C. C. 67.

2969. —— What amounts to obstruction—Departure abroad—With territorial regiment.]—A workman, who had met with an accident in the course of his employment was in receipt of co pensation for partial incapacity under an award, enlisted in a Territorial regiment. The employers subsequently applied for a review & termination of the compensation, but, on their writing to the workman's solrs. requiring him to be medically examined, they were told that he was in India with his regiment. Thereupon they applied to suspend the payments of compensation, on the grounds, first, that by going abroad the workman had obstructed his being medically examined; & secondly, that he had ceased to reside in the United Kingdom:—*Held:* the workman had in no way obstructed the medical examination so as to entitle the employers to a suspension of the compensation under Workmen's Compensation Act, 1906 (c. 58), Sched. I., clause 14, & he had not ceased to reside in the United Kingdom within the meaning of Sched. I., clause 18, of the Act.—HARRISON (J. & C.), LTD. *v.* DOWLING, [1915] 3 K. B. 218; 84 L. J. K. B. 1412; 113 L. T. 622; 31 T. L. R. 486; 59 Sol. Jo. 612; 8 B. W. C. C. 544, C. A.

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f. Refusing or obstructing examination — What amounts to refusal.]—DAVIDSON *v.* SUMMERLEE & MOSSEND IRON & STEEL CO. (1903), 5 F. (Ct. of Sess.) 991; 40 Sc. L. R. 764; 11 S. L. T. 269.—**SCOT.**

g. —— *What amounts to obstruction—Departure abroad.*]—FINNIE *v.* DUNCAN (1904), 7 F. (Ct. of Sess.) 254.—**SCOT.**

h. —— —— ——.]—BAIRD *v.* KANE (1905), 7 F. (Ct. of Sess.) 461.—**SCOT.**

k. Refusal to comply with medical directions.]—In a case stated under Workmen's Compensation Act, 1897:—*Held:* an employer was not bound to continue weekly payments to an injured workman when the continuance of his incapacity was due to his neglect to comply with certain simple

2970. Time & interval of examinations—Regulations of Secretary of State.]—MAJOR *v.* SOUTH KIRKBY, FEATHERSTONE & HUNSWORTH COLLIERIES, LTD., No. 2954, *ante*.

SECT. 8.—THE CLAIM FOR COMPENSATION.

SUB-SECT. 1.—IN GENERAL.

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

2971. Meaning of "claim for compensation"—Notice of claim for compensation—Not initiation of arbitration proceedings.]—(1) By Workmen's Compensation Act, 1897 (c. 37), s. 2 (1), proceedings for the recovery under that Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable, & unless "the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury. . . ."

A workman who had been injured in the course of his employment sent to his employers within six months a notice of the accident, & also a notice stating that he claimed a certain amount as compensation for the injury received by him. More than six months after the accident he filed a request for arbn. in the county ct.:—*Held*: the proceedings were in time.

(2) An employer can be an appct. for arbn.

(3) "The claim for compensation" means, not the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of a claim for compensation sent to the workman's employer.

The requirement of Workmen's Compensation Act, 1897 (c. 37), s. 2 (1), that the claim for compensation is to be made within six months of the accident is fulfilled by a written notice served within the time limited by the injured workman on the employer, referring by date to the accident & stating the amount of compensation demanded.

(4) Construction of the Acts (*see* No. 2030, *ante*).—POWELL *v.* MAIN COLLIERY CO., [1900] A. C. 366; 69 L. J. Q. B. 758; 83 L. T. 85; 65 J. P. 100; 49 W. R. 49; 16 T. L. R. 466; 2 W. C. C. 29, H. L.

Annotations:—*As to* (1) **Refd.** Leslie *v.* Robson (1920), 13 B. W. C. C. 150. *As to* (2) **Refd.** King *v.* Port of London Authority, [1920] A. C. 1. *As to* (3) **Refd.** Wright *v.* Bagnall, [1900] 2 Q. B. 240; Oliver *v.* Nautilus Steam Shipping Co., [1903] 2 K. B. 639; Rouse *v.* Dixon, [1904] 2 K. B. 628; Thompson *v.* Goold, [1910] A. C. 409; Stevens *v.* Thorne, [1916] 2 K. B. 69; King *v.* Port of London Authority, [1920] A. C. 1; Leslie *v.* Robson (1920), 13 B. W. C. C. 150; Lingley *v.* Firth, [1921] 1 K. B. 655; Atherton *v.* Chorley Colliery Co. (1926), 135 L. T. 660; Bennett *v.* Whitehead, [1926] 2 K. B. 380. *As to* (4) **Consd.** Lowe *v.* Myers, [1906] 2 K. B. 265; Darlington *v.* Roscoe, [1907] 1 K. B. 219. **Refd.** Thompson *v.* North Eastern Marine Engineering Co., [1903] 1 K. B. 428; Sutton *v.* G. N. Ry., [1909] 2 K. B. 791; Carolan *v.* Harrington, [1911] 2 K. B. 733; Taylor *v.* Cripps (1914), 7 B. W. C. C. 623; Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169; King *v.* Edinburgh Collieries Co. (1923), 17 B. W. C. C. 324.

2972. Whether claim must specify any sum.]—POWELL *v.* MAIN COLLIERY CO., No. 2971, *ante*.

2973. ——.]—A claim for compensation "as per claim in the Employers' Liability Act" is a valid claim.—LINKLATER *v.* WEBSTER & SON, LTD. (1904), 6 W. C. C. 50, C. A.

Annotation:—**Refd.** Thompson *v.* Goold (1910), 103 L. T. 81.

2974. ——.]—In making a claim for compensation under Workmen's Compensation Act, 1897 (c. 37), it is not necessary to specify any sum.—THOMPSON *v.* GOOLD & CO., [1910] A. C. 409; 79 L. J. K. B. 905; 103 L. T. 81; 26 T. L. R. 526; 54 Sol. Jo. 599; 3 B. W. C. C. 392, H. L.

Annotations:—**Refd.** Allen *v.* Hoey (1914), 8 B. W. C. C. 424; Coulson *v.* South Moor Colliery Co. (1915), 112 L. T. 901; Prophet *v.* Roberts (1918), 88 L. J. K. B. 975; Lingley *v.* Firth, [1921] 1 K. B. 655.

2975. Erroneous claim—Claim under wrong statute—Employers' Liability Acts.]—LINKLATER *v.* WEBSTER & SON, LTD., No. 2973, *ante*.

2976. When claim "made"—Letter duly posted to employers—Presumption of delivery—Rebuttal.]—A claim for compensation under Workmen's Compensation Act, 1906 (c. 58), is not "made" by a workman within sect. 2 of the Act until it has been communicated to the employers; but when a letter making a claim has been properly addressed, stamped, & posted, a presumption arises that it has been delivered, which it is for the employers to rebut.

On & prior to Sept. 18, 1915, a munition worker met with accidents arising out of & in the course of her employment whereby one of her eyes was injured, & after working on for about a fortnight became incapacitated until the following July. On Mar. 22, 1916, the employers received notice of claim for compensation under Workmen's Compensation Act, 1906 (c. 58), but refused to accept it, as it was not made within six months of the accident as required by sect. 2 of the Act. The worker, however alleged that she had posted a notice of claim to the works manager on Dec. 29, 1915. The employers called evidence to show that all letters were received by their correspondence department & sorted & remitted to the various departments, & proved that no such letter had been received by the claims department. No one was called from the correspondence department. The county ct. judge held that a notice of claim had been duly posted to the employers on Dec. 29, 1915, & made an award in favour of the worker without making it clear by the judgment whether he was of opinion that the letter had been received & lost in the correspondence department or lost in the post. He also took the view that in any case the failure to give notice within six months was occasioned by reasonable cause:—*Held*: (1) there was no ground on which the failure to give notice of claim within six months could be held to be occasioned by reasonable cause; but (2) the county ct. judge must be taken to have decided that the letter had reached the employers' correspondence office & been lost there.—WATTS *v.* VICKERS, LTD. (1916), 86 L. J. K. B. 177; 116 L. T. 172; 33 T. L. R. 137; 10 B. W. C. C. 126, C. A.

SUB-SECT. 2.—FORM.

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

2977. General rule—Form making clear to employer that compensation claimed.]—(1) Appct., having been injured by accident while in deft.'s service, claimed compensation under Workmen's Compensation Act, 1906 (c. 58). He did not

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medical directions which had been given him.—DOWDS *v.* BENNIR & SON (1902), 5 F. (Ct. of Sess.) 268; 40 Sc. L. R. 239; 10 S. L. T. 439.—**SCOT.**

PART XIV. SECT. 8, SUB-SECT. 1.

2972 i. *Whether claim must specify any sum.*]—In order to satisfy the requirements of Workmen's Compensation Act, 1897, a "claim" for compensation must be a claim for a definite & specified amount, & not merely an intimation of a demand, for compensation.—MAVER *v.* PARK (1905), 8 F. (Ct. of Sess.) 250.—**SCOT.**

2972 ii. ——.]—A "claim for compensation" under Workmen's Compensation Act, 1897, must be a claim for a specific sum, & not merely an intimation of a demand for compensation.—KILPATRICK *v.* WEMYSS COAL CO., LTD., [1907] S. C. 320.—**SCOT.**

Sect. 8.—*The claim for compensation: Sub-sects.* 2, 3 & 4, *A.*]

suggest that he had himself given notice of any claim for compensation under the Act, but his wife gave evidence to the effect that she had written to resp. each week for her husband's wages, & that resp. had paid five weeks immediately after the accident & then stopped payment. During the sixth week she saw resp. at his house & asked him, if he would not compensate appct., whether he would compensate her & the children. He replied she was nothing to him or he to her, but he was sorry for them:—*Held:* there had been no notice of a claim for compensation under the Act, & appct. was therefore not entitled to an award of compensation.

(2) A claim need not be in formal words, but it must be made in some way which makes it clear to resp.'s mind that a claim for compensation under the Act is being made (COZENS-HARDY, M.R.).—JOHNSON *v.* WOOTTON (1911), 27 T. L. R. 487; 4 B. W. C. C. 258, C. A.

Annotation:—As to (2) **Reld.** King *v.* Port of London Authority, [1920] A. C. 1.

2978. —— ——.]—A workman was injured on Sept. 14, 1920. A letter was written to the employers on Sept. 16 intimating that compensation would be claimed. This was followed by an interview between the employers' insurance co. & appct.'s solr. which showed that the insurance co. were clearly under the impression that a claim under Workmen's Compensation Act, 1906 (c. 58), was being put forward. Appct. did not make an application for proceedings until July, 1921, & the employers raised the issue that no claim under Workmen's Compensation Act, 1906 (c. 58), was made within six months of the occurrence of the accident. The county ct. judge made an award in favour of the employers on this point, but also made an alternative award in the event of his being mistaken:—*Held:* on the evidence, appct. had discharged the *onus* of showing that it was brought to the mind of the employers that a claim was being made, & there was no evidence to support the award.—CRAIG *v.* CRYPTO ELECTRICAL CO., LTD. (1922), 15 B. W. C. C. 71, C. A.

2979. Need not be in writing.]—LOWE *v.* MYERS (M.) & SONS, No. 3012, *post.*

2980. Formal words unnecessary.]—JOHNSON *v.* WOOTTON, No. 2977, *ante.*

2981. Verbal claim—Interview with employer—By wife of workman.]—JOHNSON *v.* WOOTTON, No. 2977, *ante.*

2982. —— ——.]—A workgirl had her finger injured by accident in the course of her employment on Mar. 20, 1920. She became partially incapacitated in consequence. On Aug. 5, 1920, the secretary of a friendly society in which the girl was insured wrote to the employers, notifying them that the society, pursuant to National Insurance Act, 1911 (c. 55), s. 11 (3), "is making advances to Miss Nancy Jacobs . . . an insured person, pending the settlement of her claim against you for compensation or damages. . . ." Appct., in her evidence, spoke of an interview which she had had with her employer after the accident. According to the notes of the county ct. judge that interview was as follows: "I went & saw resp. & showed him a certificate I got from the doctor. He refused to look at it, said, 'I cannot help it in any way because you are not in the Compensation Act.'" The county ct. judge made an award in favour of the employer, saying that he could not hold that the visit to resp., spoken to by appct., was the making of the claim, & that the letter from the secretary of the friendly society only appeared to assume that a claim either had been made, or probably would be made, & he could find no facts from which to infer that the failure to make a claim within six months was due to mistake or to any reasonable cause:—*Held:* there must be a new trial, as the notes of the county ct. judge appeared to be incomplete.—JACOBS *v.* MANDELBAUM (1921), 14 B. W. C. C. 206, C. A.

2983. Claim by letter—Request for wages.]—A woman engaged as cook at a hospital, living at her own home, injured her knee while at work, & was incapacitated. A fortnight later she wrote to the employers, asking what they would do for her as she had got to find & pay a substitute at her work, & her approved society upon which she was claiming, wanted to know what she was receiving from her employers. Some wages then due to her were subsequently paid. No other claim was made until after the lapse of more than six months:—*Held:* the letter was a claim for wages due, & not a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), & there being no other claim within six months of the accident proceedings to recover compensation could not be maintained.—ABBOTT *v.* BIGGLESWADE JOINT HOSPITAL BOARD (1915), 9 B. W. C. C. 107, C. A.

Annotations:—**Reld.** Hillman *v.* L. B. & S. C. Ry., [1920] 1 K. B. 284; King *v.* Port of London Authority, [1920] A. C. 1.

2984. —— **Letter "without prejudice."**]—A workman was injured by accident on Feb. 7, 1918, when in the employment of resps. In Sept. 1921, he filed a request for arbitration, claiming compensation under Workmen's Compensation Act, 1906 (c. 58). On the claim coming on for hearing, the county ct. judge said that no claim had been made within six months of the occurrence of the accident. He declined to accept, as evidence that a claim had been made, a letter marked "without prejudice," & made an award in favour of the employers without hearing further evidence. No other evidence of a claim having been made was tendered:—*Held:* the learned county ct. judge was right in rejecting the letter marked "without prejudice," & as there was no evidence of any claim having been made within six months, the award was justified.—BISHOP *v.* CIVIL SERVICE SUPPLY ASSOCN. (1922), 15 B. W. C. C. 128, C. A.

2985. —— **Claiming damages.**]—The father of a workman, who on June 14, 1924, when twenty years old, was killed in an accident during his employment, wrote to the employers on June 28, 1924, that he was submitting a claim for £1,500 for the loss of his son, & on June 11, 1925, brought an action in the K. B. Div. for damages, but gave notice of discontinuance of that action on Aug. 28, 1925. On Oct. 15, 1925, he filed a request for arbitration, claiming as a dependant of his son under Workmen's Compensation Acts. The claim for damages was relied upon as sufficient claim under Workmen's Compensation Acts. The county ct. judge found that no claim for compensation had been made within six months from the time of the death of the son, & consequently the claim was barred by Workmen's Compensation Act, 1906 (c. 58), s. 2 (1). It was not suggested that there was any reasonable cause for delay in making a claim under Workmen's Compensation Acts:—*Held:* the claim for damages contained in the letter of June 28, 1924, was not a claim under Workmen's Compensation Acts, & such claim being out of time was therefore barred.—STAFFORD *v.* PETTIT (D.), LTD. (1926), 19 B. W. C. C. 185, C. A.

2986. Printed exception in statutory form—Release by seaman of claims on discharge—Exception of claims under Compensation Acts.]—HARPER *v.* HARPER, No. 3014, *post.*

2987. Inquiry of employer by workman—As to likelihood of obtaining compensation.]—PROPHET *v.* ROBERTS, No. 3020, *post.*

SUB-SECT. 3.—TIME FOR MAKING.

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

2988. Within six months — Of accident.]—POWELL *v.* MAIN COLLIERY CO., No. 2971, *ante.*

2989. ——— ———.]—A workman in 1901 became a member of an accident society, a scheme certified under Workmen's Compensation Act, 1897 (c. 37), s. 3, for five years from 1898, & shortly afterwards met with an accident causing permanent incapacity. In 1903 the scheme expired by effluxion of time, & a new scheme having the same funds was certified; the workman did not become a member of this new scheme, but weekly payments were continued. Under Workmen's Compensation Act, 1906 (c. 58), the scheme was not re-certified. Weekly payments, however, were still made to the workman out of the funds as long as they lasted, but in Nov. 1912, they became completely exhausted. The workman then claimed compensation from the employers:—*Held:* as the workman had contracted out of the Act, the employers were under no liability to him under the Act. *Semble:* delay in making a claim would have been sufficient to avoid liability.—HAWORTH *v.* ANDREW KNOWLES & SONS, LTD. ACCIDENT SOCIETY (1903), 19 T. L. R. 658; 5 W. C. C. 57, C. A.

Annotation:—**Expld.** Allen *v.* G. E. Ry., [1914] 2 K. B. 243.

2990. ——— ———.]—SANDERSON *v.* PARKINSON & SONS, LTD., No. 2881, *ante.*

2991. ——— **Of death—Claim by dependant—Claim by workman previously lodged.**]—A claim by dependant of deceased workman, being an entirely separate & independent claim from any claim made by the workman before his death, must be made within six months of the death, in accordance with Workmen's Compensation Act, 1906 (c. 58), s. 2, notwithstanding that a claim had previously been made by deceased.—WILSON *v.* MAPLE MILL, LTD. (1925), 95 L. J. K. B. 666; 134 L. T. 138; 18 B. W. C. C. 465, C. A.

2992. Unaffected by Public Authorities Protection Act, 1893 (c. 61).]—FRY *v.* CHELTENHAM CORPN., No. 2933, *ante.*

2993. Proof that claim within time—Onus on applicant.]—A professional football player was injured when playing, & claimed compensation under Workmen's Compensation Act, 1906 (c. 58). The employers contended that no claim for compensation had been made within six months from the date of the injury. The judge made no finding on that point:—*Held:* the *onus* is upon appct. to prove that a claim was made within six months, or if he does not prove this, he must then show that he comes within the proviso of s. 2 (1) (*b*) of the Act.—ROBERTS *v.* CRYSTAL PALACE FOOTBALL CLUB, LTD. (1909), 3 B. W. C. C. 51, C. A.

2994. Industrial disease — Certificate dating further back than six months.]—MOORE *v.* NAVAL COLLIERY CO., LTD., No. 3033, *post.*

———.]—*See, generally,* Sect. 22, *post.*

2995. Whether limitation formality or technicality.]—PROPHET *v.* ROBERTS, No. 3020, *post.*

2996. ———.]—ATHERTON *v.* CHORLEY COLLIERY CO., LTD., No. 3030, *post.*

2997. No obligation to make "as soon as practicable."]—HILL *v.* HOLLIDAY (L. B.) & CO., No. 3037, *post.*

SUB-SECT. 4.—FAILURE TO CLAIM WITHIN TIME—REASONABLE CAUSE.

A. In General.

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

2998. Question of law.]—MOORE *v.* NAVAL COLLIERY CO., LTD., No. 3033, *post.*

2999. ———.]—On Jan. 31, 1917, appct., while in the employ of resp. railway co., sustained a rupture. He reported the accident to an official of the co., who told him to get first aid, which he did, & was supplied with a truss. He continued to work for the co., though not doing his usual heavy work, for which he was incapacitated, & the co. paid him his full wages until Apr. 5, 1919, when he was discharged. He then made a claim for compensation, & his application was refused by the county ct. judge on the ground that the claim had not been made within six months from the occurrence of the accident, & that the failure to make a claim was not occasioned by "reasonable cause" within Workmen's Compensation Act, 1906 (c. 58), s. 2 (1) (*b*). The workman appealed:—*Held:* the function of the arbitrator in such a case was to find the facts, & then to direct himself, as matter of law, whether those facts constituted "reasonable cause" within the sect. It was open to the Ct. of Appeal if they thought that the arbitrator had come to a wrong conclusion of law to reverse his decision & send the case back to him. In the present case the failure to make a claim within six months was, under the circumstances, occasioned by "reasonable cause."

[The employer] ought not to be deprived of the

PART XIV. SECT. 8, SUB-SECT. 3.

2988 i. *Within six months—Of accident.*]—SMOLIK *v.* WALTERS (1912), 20 W. L. R. 57; 4 Alta. L. R. 179.—**CAN.**

2988 ii. ——— ———.]—BERGE *v.* MACKENZIE, MANN & CO. (1915), 31 W. L. R. 936; 24 D. L. R. 575; 8 Alta. L. R. 235.—**CAN.**

2988 iii. ——— ———.]—ALLEN *v.* HOEY (1914), 8 B. W. C. C. 424.—**IR.**

2988 iv. ——— ———.]—An application to the sheriff as arbiter under the Act to fix the compensation is itself "a claim for compensation," & if brought within six months of the accident does not require to be preceded by any other form of claim.—FRASER *v.* GREAT NORTH OF SCOTLAND RY. CO. (1901), 3 F. (Ct. of Sess.) 908; 38 Sc. L. R. 653; 9 S. L. T. 96.—**SCOT.**

2988 v. ——— ———.]—O'NEILL *v.* MOTHERWELL, [1907] S. C. 1076.—**SCOT.**

2988 vi. ——— ———.]—A workman who was injured through an accident occurring at 11.30 a.m. Nov. 24, 1908, lodged a claim for compensation with his employers under Workmen's Compensation Act, 1906, at 5.30 p.m. May 24, 1909. In an application for compensation:—*Held:* the claim had been made within six months from the accident as required by s. (2) (1) of the Act.—PEGGIE *v.* WEMYSS COAL CO., LTD., [1910] S. C. 93.—**SCOT.**

2988 vii. ——— ———.]—DEVONS *v.* ANDERSON (ALEXANDER) & SONS, [1911] S. C. 181; 48 Sc. L. R. 187; [1910] 2 S. L. T. 401; 4 B. W. C. C. 354.—**SCOT.**

l. ——— *Of death.*]—FOLEY *v.* HARDIE & CO., [1923] 2 I. R. 85; 16 B. W. C. C. 350.—**IR.**

m. ——— ———.]—KYLE *v.* M'GINTY, [1911] S. C. 589; 48 Sc. L. R. 474; [1911] 1 S. L. T. 272; 4 B. W. C. C. 389.—**SCOT.**

n. *Within one year—Of death.*]—CANADIAN PACIFIC RY. CO. *v.* ROBINSON (1891), 19 S. C. R. 292; *revsd.* [1892] A. C. 481.—**CAN.**

PART XIV. SECT. 8, SUB-SECT. 4.—A.

o. *Different cause from cause pleaded.*]—BUTT *v.* EATON (JOHN W.), LTD. (1920), 21 S. R. N. S. W. 390.—**AUS.**

Sect. 8.—The claim for compensation: Sub-sect. 4, A., B., C. & D.]

protection [given by the Act] unless all the circumstances warrant the conclusion that reasonable cause for not complying with the statute has been proved to exist. I think that the length of time which has elapsed since the expiry of the six months must always be a very material factor in determining whether or not that state of things has been proved to exist (EVE, J.).—HILLMAN *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO., [1920] 1 K. B. 284; 89 L. J. K. B. 334; 122 L. T. 214; 64 Sol. Jo. 82; 12 B. W. C. C. 323, C. A.

Annotations:—**Distd.** Leslie *v.* Robson (1920), 13 B. W. C. C. 150. **Apld.** Lingley *v.* Firth, [1921] 1 K. B. 655.

3000. Further delay after reasonable cause established—Whether bar to proceedings.]—PROPHET *v.* ROBERTS, No. 3020, *post.*

3001. —— ——.] — HILLMAN *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO., No. 2999, *ante.*

3002. —— ——.]—LINGLEY *v.* FIRTH (THOMAS) & SONS, No. 3035, *ante.*

B. Mistake—Ignorance of Law.

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

3003. Ignorance of law no mistake—Ignorance of statutory right.]—A housemaid injured her knee. She continued to receive her full wage for a year & seven months, being ill for a good part of the time. She was then discharged, & brought proceedings. She had made no claim for compensation & gave as her reason for not having done so that she did not know of the Act of Parliament:—*Held:* this was not a mistake or other reasonable cause for not making claim.—JUDD *v.* METROPOLITAN ASYLUMS BOARD (1912), 5 B. W. C. C. 420, C. A.

Annotation:—**Follid.** Leslie *v.* Robson (1920), 13 B. W. C. C. 150.

3004. —— ——.]—Appct. had her wrist injured, while in resp.'s employment, on Apr. 11, 1919. She told her employer of the injury, & he gave her advice as to treatment. She continued to do light work with her right hand, & was paid full wages until Aug., when she was informed that she would have to leave. She was paid up to Oct. 6, & left on the following day. On Nov. 2, she went to see a doctor, who told her to go & see her solr., which she did, & on Jan. 26, 1920, she filed a request for arbn. The county ct. judge in his judgment, said: "The only inference to be drawn from the evidence of the doctor & the visit of appct. to her solr., is that up to that time she was not aware she had any rights under Workmen's Compensation Act, 1906 (c. 58), but if she was aware of them, no reasonable ground has been shown for not making the claim within the statutory six months." He therefore made an award in favour of resp.:—*Held:* there was evidence to support the finding, & no misdirection.—LESLIE *v.* ROBSON (1920), 13 B. W. C. C. 150, C. A.

3005. —— ——.]—A workman was injured by accident arising out of & in the course of his employment on Oct. 13, 1922. He was taken to hospital, where he remained until Nov. 3, 1923. He made no claim for compensation until Nov. 6, 1923. Medical evidence was given that while in hospital appct. was not in a fit state to transact business. The county ct. judge held that in these circumstances there was reasonable cause for his failure to make a claim within six months, & made an award accordingly. The workman stated at the hearing that he was ignorant of the provisions of Workmen's Compensation Act, 1906 (c. 58):—*Held:* there was evidence to support the finding, & no misdirection. Ignorance of the Act, though not in itself reasonable cause for failure to make a claim, does not necessarily mean there cannot at the same time be reasonable cause on other sufficient evidence.—MAUND *v.* BARTON (1924), 17 B. W. C. C. 131, C. A.

Annotation:—**Consd.** Aldridge *v.* Warwickshire Coal Co. (1925), 133 L. T. 439.

3006. —— **Ignorance of statutory requirements.**]—While in applt.'s employment, on May 13, 1923, the workman had an accident &, later on, feeling unwell he went to his panel doctor who diagnosed influenza & treated him for that complaint for two weeks; he then said he thought it was lumbago & for five weeks attended him, but then sent him to a surgeon who said he had twisted his back & should have an operation. On Aug. 4, 1923, notice of the accident was given, & on Oct. 5 a bone was removed by operation. No claim for compensation was raised until Nov. 19, 1923, which was six days over the period of six months from the date of the accident within which time the claim had to be made under Workmen's Compensation Act, 1906 (c. 58), s. 2 (1). The workman in his evidence said that he thought the delay in making his claim was covered by the notice given of the accident. The county ct. judge found that owing to conflicting medical advice & the conclusion of the workman that all legal requirements had been satisfied there was justification for the delay in making the claim & made an award:—*Held:* the claim not having been made within the time laid down by Workmen's Compensation Act, 1906 (c. 58), s. 2 (1), & there being no reasonable cause shown for the delay within the meaning of sub-clause (*b*) of that sect., as ignorance of what was required by the Act was not reasonable cause & it had not been shown that the workman was at the material time unfit to transact business, the decision of the county ct. judge was wrong.—ALDRIDGE *v.* WARWICKSHIRE COAL CO., LTD. (1925), 133 L. T. 439; 18 B. W. C. C. 131, C. A.

Annotation:—**Reid.** Atherton *v.* Chorley Colliery Co. (1926), 135 L. T. 660.

3007. —— **Other reasonable cause not excluded.**]—MAUND *v.* BARTON, No. 3005, *ante.*

C. Absence from United Kingdom.

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

3008. Absence a question of fact—Ability of workman to return within time limit.]—A sailor employed on board a ship on the west coast of South America met with an accident in Oct. 1910, as a result of which he sustained a severe wound on the head. The captain took him on shore & had the wound stitched up, but he did not recover,

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PART XIV. SECT. 8, SUB-SECT. 4.—B.

3003 1. *Ignorance of law no mistake—Ignorance of statutory right.*]—A workman failed to make a claim within six months of the accident owing to his ignorance of the existence of the Act:—*Held:* this was not a mistake or other reasonable cause within Workmen's Compensation Act, 1906, & he was barred from recovering compensation.—MELVILLE *v.* MCCARTHY (1912), 47 I. L. T. 57.—IR.

p. *Whether mistake reasonable.*]—"Mistake" referred to in Workmen's Compensation Act, 1910, s. 12, includes a mistake of law or of mixed law & fact, as well as a mistake of fact, & a mistake having been established no question of the reasonableness of that mistake arises.—MURRAY *v.* BAXTER (1914), 15 S. R. N. S. W. 171; 32 N. S. W. W. N. 9.—AUS.

& was eventually discharged. He went to various hospitals in America, but in vain, & was sent back to England in Sept. 1912, as a distressed seaman. In Nov., 1912, he made a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), & the county ct. judge found that his failure to make a claim within six months was "due to" his absence from the United Kingdom, although he might have returned to England as a distressed seaman in time to make a claim within six months from the date of the accident, as provided by Workmen's Compensation Act, 1906 (c. 58), s. 2 (1) (*b*):—*Held:* no distinction could be drawn between the words "due to" used by the judge & the language of the Act "occasioned by"; whether the workman's delay in claiming was occasioned by absence from the United Kingdom or not was a question of fact to be decided by the judge; & appct. ought not to be precluded from obtaining compensation because he had stuck to his work.—DIGHT *v.* CRASTER HALL (OWNERS), [1913] 3 K. B. 700; 82 L. J. K. B. 1307; 109 L. T. 200; 29 T. L. R. 676; 6 B. W. C. C. 674, C. A.

D. Conduct of Employer.

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

3009. Admission of liability by employer—Amount of compensation left open.]—The provision of Workmen's Compensation Act, 1897 (c. 37), s. 2 (1), which requires the claim for compensation to be made within six months of the occurrence of the accident causing the injury, is not necessarily an absolute bar to proceedings for the assessment of compensation commenced after six months by an injured workman, & the county ct. judge or other arbitrator has jurisdiction to inquire whether there are any circumstances in the case to debar the employer from raising that defence. An agreement arrived at between the parties shortly after the accident that there is a statutory liability on the employer to pay compensation, the amount of compensation being left open for future settlement, is evidence upon which the judge or arbitrator may properly find that the employer is estopped from setting up the defence that the request for arbitration was not filed within six months of the accident.—WRIGHT *v.* BAGNALL (JOHN) & SONS, LTD., [1900] 2 Q. B. 240; 69 L. J. Q. B. 551; 82 L. T. 346; 64 J. P. 420; 48 W. R. 533; 16 T. L. R. 327; 44 Sol. Jo. 376; 2 W. C. C. 36, C. A.

Annotations:—**Distd.** Rendall *v.* Hill's Dry Docks & Engineering Co., [1900] 2 Q. B. 245. **Consd.** Luckie *v.* Merry, [1915] 3 K. B. 83. **Refd.** Oliver *v.* Nautilus Steam Shipping Co., [1903] 2 K. B. 639.

3010. Payment by employer—On account of compensation due—No admission of liability.]—A workman having been injured by an accident, his employers paid him weekly through an insurance co. one-half the amount of his wages, taking a receipt which expressed that the money was received "on account of compensation which may be or become due to me under Workmen's Compensation Act, 1897 (c. 37)"; the payments continued to be made for ten months after the accident, when they ceased. The workman then filed a request for arbn. in the county ct.:—*Held:* there being no evidence of any admission on the part of the employers of their liability under Workmen's Compensation Act, 1897 (c. 37), to pay compensation, they were not estopped from taking the objection that the request for arbn. was out of time.—RENDALL *v.* HILL'S DRY DOCKS & ENGINEERING CO., LTD., [1900] 2 Q. B. 245; 64 J. P. 451; 48 W. R. 530; 16 T. L. R. 368; 2 W. C. C. 40; *sub nom.* RANDALL *v.* HILL'S DRY DOCK & ENGINEERING CO., 69 L. J. Q. B. 554; 82 L. T. 521, C. A.

Annotations:—**Consd.** Oliver *v.* Nautilus Steam Shipping Co., [1903] 2 K. B. 639; Luckie *v.* Merry, [1915] 3 K. B. 83.

3011. —— ——.]—*Semble:* notice of injury, payment of compensation, & a request for arbn. do not amount to a claim.

The evidence . . . seemed to be in favour of the view that there was an estoppel (COLLINS, M.R.).—LEE *v.* CORTONWOOD COLLIERIES CO. (1901), 4 W. C. C. 32, C. A.

3012. —— ——.]—(1) A claim for compensation under Workmen's Compensation Act, 1897 (c. 37), need not be in writing.

(2) Resps. to an application for compensation under Workmen's Compensation Act, 1897 (c. 37), by their answer stated as a fact which they desired to bring to the notice of the arbitrator that within a few weeks of the accident they had paid to appct. a certain sum which he had accepted in satisfaction of all claims, & they denied any further liability under the Act. The answer also raised the defence that no claim for compensation was made within six months of the accident. The county ct. judge dismissed the application on the ground that there was no evidence of a claim having been made within the statutory six months:—*Held:* the statement in the answer as to the payment of compensation was an admission of fact on which appct. was entitled to rely & afforded some evidence of a claim having been made, & the application ought to be remitted to the county ct. judge for a rehearing.—LOWE *v.* MYERS (M.) & SONS, [1906] 2 K. B. 265; 75 L. J. K. B. 651; 95 L. T. 35; 22 T. L. R. 614; 8 W. C. C. 22, C. A.

Annotation:—*As to* (1) & (2) **Refd.** Bennett *v.* Whitehead, [1926] 2 K. B. 380.

3013. —— **Payment ex gratiâ—While workman incapacitated.**]—A workman earning at piece work from £4 to £5 injured his eye. He went into an eye infirmary for about five weeks, & his employers paid him £1 a week for about six months. No memorandum of agreement was recorded. He then resumed work as a time worker, at an average of 39*s.* a week, & compensation was stopped. This lasted for about five months, when he left to better his position. Four months later he again became totally incapacitated by reason of his eye, & claimed compensation. Employers denied liability on the ground that the claim was made out of time, & that they were prejudiced by having received no written notice as soon as practicable:—*Held:* the employers were estopped from setting up these defences.—TURNBULL *v.* VICKERS, LTD. (1914), 7 B. W. C. C. 396, C. A.

Annotations:—**Apld.** King *v.* Port of London Authority, [1920] A. C. 1. **Refd.** Hillman *v.* L. B. & S. C. Ry., [1920] 1 K. B. 284.

3014. —— —— ——.]—(1) A seaman met with an accident on board ship while at sea & was incapacitated thereby. On reaching port he signed the usual form of release under M. S. Act, 1894 (c. 60), from all claims for wages or otherwise in respect of the voyage, but by a note on the back of the form he excepted therefrom any claim under Workmen's Compensation Act, 1906 (c. 58):—*Held:* this did not operate as a notice of claim under the Act.

(2) The ship was worked on the "thirds" system, under which the master took two thirds of the gross profits, making certain payments & engaging the crew, while the owners took the remaining third. The master knew of the accident

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& told the workman, who was his brother, to apply to the managing owner, which he did, & for a period of four years from the accident he received from him weekly payments which were made *ex gratiâ* & without any acknowledgment of liability. The owner having ceased to make payments, the workman commenced proceedings for compensation against the master:—*Held:* there was "reasonable cause" within Workmen's Compensation Act, 1906 (c. 58), s. 2 (1), for his failure to make a claim against the master within six months from the occurrence of the accident, & consequently the proceedings were maintainable.—HARPER *v* HARPER, [1916] 2 K. B. 811; 85 L. J. K. B. 1466; 115 L. T. 360; 9 B. W. C. C. 485, C. A.

3015. —— Wages.]—TURNBULL *v.* VICKERS, LTD., No. 3013, *ante*.

3016. —— ——.]—On Oct. 31, 1913, appct., a horse keeper, severely injured the fingers of his left hand while in the employ of resp. Next day he told resp., who said, "You can potter about the factory until you are better," & continued to pay him his full wages until June 13, 1914, when he was dismissed for misconduct not connected with the accident. At this time he was nearly doing his old work again. Appct. said that he told resp.'s foreman that his doctor had told him to claim compensation, & that the foreman replied that he should have his wages. Appct. had been seventeen years in resp.'s employment. Appct. made no claim for compensation within the six months prescribed by Workmen's Compensation Act, 1906 (c. 58), s. 2 (1), & resp. denied liability on this ground when proceedings were commenced on Dec. 21, 1914:—*Held:* without deciding that in all cases payment of wages is "reasonable cause" for not making a claim within the prescribed period, the payment of wages, coupled with the other circumstances of this case, was "reasonable cause" for not making the claim within Workmen's Compensation Act, 1906 (c. 58), s. 2 (1), & the employer was therefore liable to pay compensation.—LUCKIE *v.* MERRY, [1915] 3 K. B. 83; 84 L. J. K. B. 1388; 113 L. T. 667; 31 T. L. R. 466; 59 Sol. Jo. 544; 8 B. W. C. C. 447, C. A.

Annotations:—**Consd.** Harper *v.* Harper, [1916] 2 K. B. 811. **Folld.** Hillman *v.* L. B. & S. C. Ry., [1920] 1 K. B. 284. **Apld.** King *v.* Port of London Authority, [1920] A. C. 1. **Consd.** Lingley *v.* Firth, [1921] 1 K. B. 655; Atherton *v.* Chorley Colliery Co. (1926), 135 L. T. 660. **Reld.** Abel *v.* Estler (1919), 89 L. J. K. B. 164.

3017. —— ——.]—HILLMAN *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO., No. 2999, *ante*.

3018. —— ——.]—KING *v.* PORT OF LONDON AUTHORITY, No. 3548, *post*.

3019. Correspondence with regard to threatened claim.]—BURR *v.* WHITELEY (W.), LTD. (1902), as reported in Ruegg's Employers' Liability & Workmen's Compensation, 8th ed. 469, C. A.

Annotations:—**Mentd.** Green *v.* Britten & Gilson, [1904] 1 K. B. 350; Moreton *v.* Reeve, [1907] 2 K. B. 401.

3020. Legal advice of employer—Against right to compensation—Advice valid at time given.]—A domestic servant, who had been sent out into the street on an errand in Jan. 1914, fell over an obstruction & bruised her elbow. She had tubercular disease in the joint, & the effect of the accident was to aggravate it, but for some time she was able with assistance to do her work. In July, 1914, she was advised to go into the hospital for an operation, & did so, but before going she had an interview with her master, & asked him if he would get her compensation in case her arm got worse. He replied that he could not, as the accident happened in the street. An operation was performed, but the tubercular trouble continued, & two years later, in June, 1916, the arm had to be amputated. In Apr. 1918, appct. was asked to give, & did give a retainer to the solr. of her approved society to make a claim in regard to her "recent" accident. The claim was made, & proceedings were commenced in Aug. 1918:—*Held:* (1) there was no claim made within six months, the inquiry by appct. of her master was not a claim. The fact that the master might have prevented her from making a claim by giving her advice which was sound in law at the time, was not a reasonable cause for failure to make the claim within the statutory period; (2) the period of limitation of six months is not a mere technicality but is intended as a substantial protection to the employer.

It was contended that statutory requirement of a claim within six months was a mere formality or technicality. I cannot take that view at all . . . The words of the statute [Workmen's Compensation Act, 1906 (c. 58)] create a limitation (DUKE, L.J.).

(3) Though there may be a reasonable cause for not making a claim within six months, yet the claim, in order to be successful, must be made within a reasonable time.—PROPHET *v.* ROBERTS (1918), 88 L. J. K. B. 975; 120 L. T. 239; 11 B. W. C. C. 301, C. A.

Annotations:—*As to* (1) **Reld.** Williams *v.* Guest, Keen & Nettlefolds (1925), 133 L. T. 111; Atherton *v.* Chorley Colliery Co. (1926), 135 L. T. 660. *As to* (2) **Apld.** Lingley *v.* Firth, [1921] 1 K. B. 655. **Consd.** Aitken *v.* Hemsley (1926), 19 B. W. C. C. 88. **Reld.** Hillman *v.* L. B. & S. C. Ry., [1920] 1 K. B. 284.

E. Injury Latent.

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

3021. Whether a reasonable cause.]—TIBBS *v.* WATTS, BLAKE, BEARNE & CO., LTD., No. 2931, *ante*.

3022. ——.]—FRY *v.* CHELTENHAM CORPN., No. 2933, *ante*.

3023. ——.]—HOARE *v.* ARDING & HOBBS, No. 2932, *ante*.

3024. ——.]—SANDERSON *v.* PARKINSON & SONS, LTD., No. 2881, *ante*.

3025. ——.]—A miner met with an accident while at work on Nov. 21, 1911, which caused a swelling in his groin. After resting for an hour he was able to resume work & the swelling went down by the next day & he was able to go to work as usual. Four months later, & again nine months after that, this swelling reappeared while he was at work, but subsided, & he was able to go on working. Ultimately in Feb. 1914, the swelling

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PART XIV. SECT. 8, SUB-SECT. 4.—D.

3015 i. *Payment by employer—Wages.*]—SMITH *v.* MCINTOSH (1906), 8 O. W. R. 472; 13 O. L. R. 118.—**CAN.**

3015 ii. —— ——.]—Mere payment of wages, or part wages, by an employer to an injured workman after the latter has been injured is, by itself, a neutral fact, & is not sufficient to enable the ct. to draw the inference that the workman had "reasonable cause" within Workmen's Compensation Act, 1906 (c. 58), for not making a claim within six months of the date of the accident.—LYNCH *v.* LANSDOWNE (MARQUIS) (1913), 48 I. L. T. 89.—**IR.**

PART XIV. SECT. 8, SUB-SECT. 4.—E.

3021 i. *Whether a reasonable cause.*]—MILLAR *v.* REFUGE ASSURANCE CO., LTD., [1912] S. C. 37.—**SCOT.**

3021 ii. ——.]—ELLIS *v.* FAIRFIELD SHIPBUILDING & ENGINEERING CO., LTD., [1913] S. C. 217; 50 Sc. L. R. 137; [1912] 2 S. L. T. 485; 6 B. W. C. C. 308.—**SCOT.**

3021 iii. ——.]—RANKINE *v.* FIFE COAL CO., LTD. (1915), 8 B. W. C. C. 401.—**SCOT.**

reappeared & he was incapacitated by a small hernia. Upon an application by the workman for compensation under Workmen's Compensation Act, 1906 (c. 58), the employers admitted that the injury was due to accident arising out of & in the course of the man's employment, & waived any question as to notice:—*Held:* the failure to make a claim for compensation within six months from the accident was occasioned by reasonable cause within Workmen's Compensation Act, 1906 (c. 58), s. 2 (1) (*b*).—COULSON *v.* SOUTH MOOR COLLIERY CO., LTD. (1915), 84 L. J. K. B. 508; 112 L. T. 901; 31 T. L. R. 207; 8 B. W. C. C. 253, C. A.

F. Election of Workman to Remain in Employment.

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

3026. Whether a reasonable cause.]—DOBSON *v.* ANGLO-SAXON PETROLEUM CO., LTD., No. 2047, *ante*.

3027. ——.]—LINGLEY *v.* FIRTH (THOMAS) & SONS, No. 3035, *post*.

3028. ——.]—A workman hit a chisel with a hammer, while he was engaged at work on Apr. 12, 1921. A piece of the chisel flew off & struck him in the eye. He told the foreman, but did not think the result would be very serious, although he was suffering pain at the time He went to a hospital, where he saw a nurse, & returned to work the next day. He was on "short time" during the first fortnight after the accident, not because of his eye but for economic reasons. He returned on Apr. 20 to full work, & worked until July 2. He then left work & attended hospital for some time, after which he resumed work on Nov. 8. His sight then failed & he was operated on for cataract on Dec. 2. According to the medical evidence the cataract was due to the piece of steel which had entered the lens of his eye. No claim was made until Dec. 10, more than six months after the accident. The county ct. judge found that the failure on the part of the workman to make a claim before was due to reasonable cause. In making an award in favour of the workman the judge said: "It is quite clear to me that appct. had never realised the very serious condition of his eye until the operation was made in Dec. Immediately after that operation the notice of claim was given; & therefore I find that there was a reasonable cause for the delay." The employers appealed:—*Held:* it was impossible to say from the evidence that appct. did not realise that he had suffered a serious accident & there was no evidence of any cause, reasonable or otherwise, for the workman not having made a claim within six months. The workman's right to compensation was therefore barred.—GIBBARD *v.* TYRER (THOMAS) & CO., LTD. (1922), 15 B. W. C. C. 236, C. A.

3029. ——.]—In Sept. 1920, a plumber, in the course of his employment, was struck over the left eye by a heavy spanner. He told the charge hand, & the latter sent him to hospital, where the eye was bandaged. This was accepted as sufficient notice of the accident. He resumed work with resps. on the following day. A week afterwards he was, with others, dismissed, owing to slackness of trade. He drew unemployment pay until Dec. 1920. After that time until Feb. 1922, he worked whenever he could get work. The eye was always more or less painful & he could only do special kinds of work because of it. In Feb. 1922, owing to the pain in his eye having become acute, an operation was performed. It was stated on behalf of the employers, that, after leaving their employment in Oct. 1920, they had heard nothing of him until Aug. 1922, when he claimed compensation. The county ct. judge made an award in favour of resps., on the ground that appct. had not satisfied him that his failure to make a claim within six months was occasioned by some reasonable cause within Workmen's Compensation Act, 1906 (c. 58), s. 2 (1) (*b*). Appct. appealed:—*Held:* there was no misdirection.—JOHNSON *v.* HARLAND & WOLFF, LTD. (1923), 16 B. W. C. C. 164, C. A.

3030. ——.]—On Jan. 30, 1924, the workman, whilst employed as a collier by applts., was injured by a fall of coal which cut his knee. He went to the man in charge of the colliery ambulance, who dressed the wound then & for the next fortnight, when the cut healed. Six weeks after the accident, as his knee was painful, he saw a doctor, who told him there was a loose cartilage & advised an operation, but, being unable to afford the expense, he continued his work. The knee gave him continual pain & was so bad, the workman said, that the slightest knock would cause him to fall. He worked until Jan. 8, 1926, when his knee became so painful that he was obliged to give up work. On Feb. 15, 1926, he for the first time claimed compensation, & in his evidence at the hearing said that he never thought that the injury was serious. The county ct. judge held that sufficient notice had been given of the accident, & that there was reasonable cause within Workmen's Compensation Act, 1906 (c. 58), s. 2 (1) (*b*), for not making a claim for compensation within six months after the accident, & awarded compensation:—*Held:* the making of a claim within six months was of substantial importance & not a mere technicality, & there was no evidence to justify the finding of the county ct. judge that there was reasonable cause for the delay in making the claim.—ATHERTON *v.* CHORLEY COLLIERY CO., LTD. (1926), 135 L. T. 660; 19 B. W. C. C. 314, C. A.

3031. ——.]—The workman, after an accident on Mar. 13, 1924, was in hospital for five months & then rested for nearly two months, when he resumed work with his employer at his old wages. While in hospital & resting afterwards he received from his employer sums of money which, however, were not equal in amount to compensation under Workmen's Compensation Act, 1906 (c. 58). Though suffering from stiffness he continued work for a year, when, the job being at an end, he had to leave in Sept. 1925. In Oct. 1925, he gave notice of a claim for compensation from the date of the accident for partial incapacity, alleging that he had been dismissed. He said he knew he could have made a claim for compensation, but had preferred to do the work offered to him. The county ct. judge found that he had not been dismissed, but that his employment came to an end, & held that his claim was out of time & that there was no reasonable cause for his delay in making the claim within Workmen's Compensation Act, 1906 (c. 58), s. 2 (1) (*b*):—*Held:* there was evidence to support this finding & no misdirection.—AITKEN *v.* HEMSLEY (1926), 19 B. W. C. C. 88, C. A.

3026 l. *Whether a reasonable cause.*]—BAIRD & CO., LTD. *v.* DEMPSTER, [1909] S. C. 127; 46 Sc. L. R. 119; 16 S. L. T. 470; 2 B. W. C. C. 144.—SCOT.

Sect. 8.—The claim for compensation: Sub-sect. 4, G. Sect. 9: Sub-sects. 1, 2 & 3.]

G. Other Causes.

See Workmen's Compensation Act, 1925 (c. 84), ss. 14, 15.

Ignorance of statutory rights.]—*See* Nos. 3003–3005, *ante*.

3032. Employer not prejudiced—Onus of proof on workman.]—TIBBS *v.* WATTS, BLAKE, BEARNE & CO., LTD., No. 2031, *ante*.

3033. Expectation of recovery.]—A collier had suffered from nystagmus for years. He had been advised by his doctor that if he gave up work underground he would get better. In the middle of 1910 his eyesight was getting worse, but, as a strike was threatening which was likely to last long, & he hoped that the spell above ground would cure him, he refrained from claiming compensation or getting a certificate of disablement. He did his full work until the strike, which began on Sept. 3, 1910, & lasted till after the hearing of this case. His eyesight did not get better, & ultimately, on Mar. 7, 1911, he obtained a certificate, which fixed the date of disablement as Sept. 3, 1910. He then gave notice of accident & brought proceedings; the employers objected that notice & claim had not been given & made in accordance with Workmen's Compensation Act, 1906 (c. 58). The county ct. judge held that the delay in claim was not due to reasonable cause, & awarded for the employers:—*Held:* the delay was due to reasonable cause, & the case must be remitted for assessment of compensation.

The only question for us is a question of law, whether the failure to make the claim within the period mentioned was occasioned by reasonable cause (FARWELL, L.J.).—MOORE *v.* NAVAL COLLIERY CO., LTD., [1912] 1 K. B. 28; 81 L. J. K. B. 149; 105 L. T. 838; 56 Sol. Jo. 70; 5 B. W. C. C. 87, C. A.

Annotations:—**Consd.** Ellis *v.* Fairfield Shipbuilding & Engineering Co. (1912), 6 B. W. C. C. 308; Sanderson *v.* Parkinson (1913), 6 B. W. C. C. 648; Luckie *v.* Merry (1915), 84 L. J. K. B. 1388. **Reld.** Egerton *v.* Moore, [1912] 2 K. B. 308; Birks *v.* Stafford Coal & Iron Co., [1913] 3 K. B. 686; Webster *v.* Cohen (1913), 108 L. T. 197; Harper *v.* Harper, [1916] 2 K. B. 811; Herbert *v.* Fox, [1916] 1 A. C. 405. **Mentd.** Longhurst *v.* Stewart (1913), Ltd. (1916), 9 B. W. C. C. 605.

3034. Election to pursue other remedy.] —The admission of liability by an employer under Workmen's Compensation Act, 1906 (c. 58), which the employee has refused to accept, is not a "reasonable cause" for the employee's not making a claim under the Act within six months of the accident.

On Aug. 24, 1918, appct., a factory hand, met with an accident in her employment, the first fingers of both hands being injured in a press machine. On Sept. 2, 1918, she claimed compensation under Employers' Liability Act, 1880 (c. 42), or at common law. On Sept. 5, the employers refused to admit liability except under Workmen's Compensation Act, 1906 (c. 58). On Sept. 11, appct. stated that her claim was not under that Act. On Sept. 14 the employers offered to pay compensation under that Act, & again refused to admit liability under Employers' Liability Act, 1880 (c. 42), or at common law. On Feb. 28, 1919, for the first time appct. claimed compensation under Workmen's Compensation Act, 1906 (c. 58), & on Mar. 17, 1919, took proceedings under that Act. The employers pleaded that the proceedings were not maintainable, as the claim had not been made within six months of the accident:—*Held:* that there was no "reasonable cause" for the delay within Workmen's Compensation Act, 1906 (c. 58), s. 2 (1) (*b*), & the proceedings were therefore not maintainable.—ABEL *v.* ESTLER BROTHERS (1919), 89 L. J. K. B. 164; 121 L. T. 299; 12 B. W. C. C. 184, C. A.

Annotation:—**Reld.** Stafford *v.* Pettit (1926), 19 B. W. C. C. 185.

3035. Want of advice.]—Appct. was employed by resps. as a munition worker. In Aug. 1917, while at her work she was injured by a shell falling on her toe. She went to resps.' ambulance room for treatment, & particulars of the accident were duly noted in resps.' accident book. The toe then became septic, but she continued at work, although in pain, until Dec. 1918, when the firm closed down & she was discharged. For the last twelve months of her employment, owing to promotion, she received higher wages than before the accident, & tried to hide from the foreman the fact that she was in pain from the injured toe, because she was afraid she would lose her job. After her discharge she drew unemployment pay for about three months. The injured toe became gradually worse, & was twice operated on, & was subsequently amputated on Feb. 24, 1920. She made a claim for compensation on Feb. 26, 1920. Resps. resisted this on the ground that the claim was not made within six months of the accident. Appct. gave two reasons for the delay in making the claim, that she did not consider the accident to be serious, & that her husband was away & she had no one to advise her. The county ct. judge held that there was "reasonable cause" for not having made the claim within six months, & that being so, further delay in making a claim was no bar to the proceedings:—*Held:* (1) there was no evidence of any reasonable cause for the delay of more than six months in making a claim; (2) once reasonable cause for six months' delay is established then the question of whether further delay in making a claim is or is not reasonable does not arise.—LINGLEY *v.* FIRTH (THOMAS) & SONS, [1921] 1 K. B. 655; 90 L. J. K. B. 290; 124 L. T. 442; 37 T. L. R. 149; 65 Sol. Jo. 172; 13 B. W. C. C. 307, C. A.

Annotations:—*As to* (1) **Folld.** Johnson *v.* Harland & Wolff (1922), 16 B. W. C. C. 164; Aitken *v.* Hemsley (1926), 19 B. W. C. C. 88; Atherton *v.* Chorley Colliery Co. (1926), 135 L. T. 660.

3036. Unfitness to transact business.]—MAUND *v.* BARTON, No. 3005, *ante*.

3037. ——.]—A workman was injured by accident & four months after the accident the man had to go to hospital. Eight months from the accident he had his arm amputated & remained in hospital for a year, after which he made a claim. The county ct. judge found, after hearing medical evidence, that there was reasonable cause for the claim not having been made during the latter period of the six months in which a claim must be made, owing to the mental inertia of the workman's condition while in hospital:—*Held:* there being no obligation on the workman to make his claim as soon as practicable, the reasonable cause during the latter period of six months was sufficient to support the finding that the failure to make a claim within six months was occasioned by reasonable cause.—HILL *v.* HOLLIDAY (L. B.) & CO. (1926), 95 L. J. K. B. 897; 19 B. W. C. C. 177, C. A.

q. *Infancy.*]—GREEN *v.* HANSEN & YUNCKEN, [1923] V. L. R. 688.—AUS.

3038. Conflicting medical advice—Knowledge of workman.]—ALDRIDGE *v.* WARWICKSHIRE COAL CO., LTD., No. 3006, *ante*.

SECT. 9.—**ARBITRATION TRIBUNALS.**

SUB-SECT. 1.—REPRESENTATIVE COMMITTEE.

See Workmen's Compensation Act, 1925 (c. 84), sched. I., (1), (2), s. 28.

3039. Jurisdiction to decide disputes under Workmen's Compensation Act, 1906 (c. 58)—Subject to right of objection—Express agreement with workman not necessary.]—(1) Where there exists under para. 1, sched. II. of above Act, a committee representative of an employer & his workmen with power to settle matters under above Act, which means with the function as incident to its constitution of settling matters under above Act, that is the tribunal to which for the purpose of settling any matter which under above Act is to be settled by arbn. the parties are to resort, subject to the right of either party by notice in writing within the time prescribed by above Act to object; it is not necessary that each individual workman should upon entering the employment have expressly or impliedly agreed to refer any dispute under above Act to such committee.

(2) *Semble:* the award of such committee upon any matter within its jurisdiction is binding on an infant.

(3) Where the award of such committee relates to a matter required by above Act to be settled by arbn. it is the duty of the registrar of the county ct. on being satisfied as to its genuineness to record it, & the judge has no jurisdiction to review it; but where the award is outside the jurisdiction of the committee there is no obligation to record it.

(4) There is no jurisdiction under above Act to award a lump sum to a workman who is incapacitated by an accident except under par. 17 of sched. I., which is limited to the case where a weekly payment has been continued for not less than six months.

Where, therefore, a workman, who was a minor, met with an accident whereby he lost two fingers, &, after his employers had paid him a weekly sum for five months & had taken him back to work, referred the question of compensation in respect of his permanent injury to a committee representative of the employers & their workmen, & the committee awarded him a lump sum & paid the money into the county ct.:—*Held:* the county ct. judge was not bound to record a memorandum of the award & the money paid into ct. ought to be paid out to the employers.

The county ct. judge is not a ct. of appeal from the committee. He has no jurisdiction of that kind at all. He is not entitled to treat an award of the committee as though it was simply an agreement between the workman & his employers which he might review under above Act (COZENS-HARDY, M.R.).—MULLHOLLAND *v.* WHITEHAVEN COLLIERY CO., [1910] 2 K. B. 278; 79 L. J. K. B. 987; 102 L. T. 663; 26 T. L. R. 462; 3 B. W. C. C. 317, C. A.

Annotations:—*As to* (1) **Reld.** R. *v.* Templer, *Ex p.* Howarth, [1912] 1 K. B. 351. *As to* (4) **Consd.** R. *v.* Templer, *Ex p.* Howarth, [1912] 1 K. B. 351. *Generally*, **Reld.** Russell *v.* Rudd, [1923] A. C. 309.

3040. Award of committee—Whether binding on infant.]—MULLHOLLAND *v.* WHITEHAVEN COLLIERY CO., No. 3039, *ante*.

3041. —— Whether county court judge can review.]—MULLHOLLAND *v.* WHITEHAVEN COLLIERY CO., No. 3039, *ante*.

3042. —— ——.]—A county ct. judge has no jurisdiction either under Workmen's Compensation Rules, 1913–1917, r. 85, or any provision of Workmen's Compensation Act, 1906 (c. 58), to set aside an award made by a committee appointed by the Secretary of State under Workmen's Compensation Act, 1906 (c. 58), sched. II., clause 16.—BLAKEY *v.* SAMUELSON & CO., [1920] 3 K. B. 508; 89 L. J. K. B. 422; 123 L. T. 126; 13 B. W. C. C. 21, C. A.

3043. —— Whether memorandum bound to be recorded—When outside jurisdiction of committee.]—MULLHOLLAND *v.* WHITEHAVEN COLLIERY CO., No. 3039, *ante*.

Jurisdiction of committee under scheme.]—*See* Sect. 21, sub-sect. 1, B., *post*.

SUB-SECT. 2.—AGREED ARBITRATOR.

See Workmen's Compensation Act, 1925 (c. 84), sched. I. (2).

SUB-SECT. 3.—COUNTY COURT JUDGE.

See Workmen's Compensation Act, 1925 (c. 84), s. 27; Schedule I., (2), (4).

3044. Position of judge—Sits as arbitrator.]—A county ct. judge sitting to hear an application for compensation under Workmen's Compensation Act, 1897 (c. 37), is acting as an arbitrator only, & has no jurisdiction to grant a new trial.—MOUNTAIN *v.* PARR, [1899] 1 Q. B. 805; 68 L. J. Q. B. 447; 80 L. T. 342; 47 W. R. 353; 15 T. L. R. 262; 43 Sol. Jo. 331; 1 W. C. C. 110, C. A.

Annotations:—**Folld.** Sutton *v.* G. N. Ry., [1909] 2 K. B. 791. **Apld.** Taylor *v.* Cripps, [1914] 3 K. B. 989. **Consd.** Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169. **Reld.** Bailey *v.* Plant (1900), 2 W. C. C. 160.

3045. —— ——.]—A county ct. judge sitting to hear an application for compensation under

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PART XIV. SECT. 9, SUB-SECT. 1.

r. *Jurisdiction to decide disputes under the Act.*]—MURPHY *v.* CITY OF TORONTO (1918), 41 O. L. R. 156.—**CAN.**

t. ——.]—*Re* WORKMEN'S COMPENSATION ACT (B. C.), [1919] 3 W. W. R. 426.—**CAN.**

a. ——.]—CANADIAN NORTHERN RY. CO. *v.* WILSON, GIVENS' CASE (Man.), [1919] 3 W. W. R. 742.—**CAN.**

b. ——.]—WALPOLE *v.* CANADIAN NORTHERN RY. CO., [1921] 1 W. W. R. 1232.—**CAN.**

c. ——.]—The Board is the only tribunal competent to decide whether or not a common law action can be maintained by a workman against his employer in respect to personal injury sustained in the course of his employment.—DOMINION CANNERS, LTD. *v.* COSTANZA, [1923] 1 D. L. R. 551; [1923] S. C. R. 46.—**CAN.**

d. ——.]—Under Workmen's Compensation Act the Workmen's Compensation Board has exclusive jurisdiction to decide whether or not in the case in question the workman who has been injured is one coming within the Act.—NORMANDIN *v.* EDMONTON, DUNVEGAN & BRITISH COLUMBIAN RY. CO. & CENTRAL CANADA RY. CO. (Alta.), [1923] 2 D. L. R. 1073; [1923] 2 W. W. R. 411.—**CAN.**

e. ——.]—WORKMEN'S COMPENSATION BOARD *v.* BATHURST LUMBER CO., [1924] 2 D. L. R. 338; [1924] S. C. R. 216.—**CAN.**

f. ——.]—PETER *v.* YORKSHIRE ESTATE CO., LTD., [1925] 2 D. L. R. 1213; [1925] 2 W. W. R. 78.—**CAN.**

g. *Status of Board.*]—MCCOLL *v.* CANADIAN PACIFIC RY. CO., [1920] 2 W. W. R. 24; 51 D. L. R. 480.—**CAN.**

h. *Award of Board—Whether conclusive.*]—A finding of the Board made upon application of an employer & without notice to the administrator of a deceased workman or to any one else representing his estate or family is not conclusive as to whether such workmen's employment was within the scope of Workmen's Compensation Act, 1918.—MCFAYDEN *v.* CANADIAN NORTHERN RY. CO. (Alta.), [1921] 3 W. W. R. 807; 62 D. L. R. 632.—**CAN.**

Sect. 9.—Arbitration tribunals: Sub-sects. 3, 4 & 5.]

Workmen's Compensation Act, 1906 (c. 58), is acting as an arbitrator only, & has no jurisdiction to make an order for discovery before hearing either by affidavit of documents or by interrogatories.—SUTTON *v.* GREAT NORTHERN RY. CO., [1909] 2 K. B. 791; 79 L. J. K. B. 81; 101 L. T. 175; 2 B. W. C. C. 428, C. A.

Annotations:—**Apld.** Taylor *v.* Cripps, [1914] 3 K. B. 989. **Consd.** Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169. **Reld.** Kursell *v.* Timber Operators & Contractors, [1923] 2 K. B. 202.

3046. —— ——.]—TAYLOR *v.* CRIPPS, No. 3151, *post.*

3047. —— ——.]—Proceedings under Workmen's Compensation Act, 1906 (c. 58), were started in a county ct. by a workman who alleged that he had been injured by an accident arising out of & in the course of his employment. The application was dismissed. Resps. thereupon asked for costs against his approved society on the ground that in truth & in fact the proceedings were not taken by the workman but by the society. The judge ordered the society to pay the costs. The society moved before a judge in chambers for a writ of prohibition, alleging on various grounds that the arbitrator had no jurisdiction to order them to pay the costs:—*Held:* a county ct. judge when sitting & adjudicating under Workmen's Compensation Act, 1906 (c. 58), is sitting merely as an arbitrator, & inasmuch as the Act provides one remedy only for an error in an award of a judge sitting as an arbitrator under that Act, namely an appeal to the Ct. of Appeal, a writ of prohibition would not lie.—TURNER *v.* KINGSBURY COLLIERIES, LTD., [1921] 3 K. B. 169; 90 L. J. K. B. 1132; 125 L. T. 625; 37 T. L. R. 713; 14 B. W. C. C. 249.

3048. —— —— **But not in individual capacity.**]—Where a judge of the county ct. sits as arbitrator under the Workmen's Compensation Act, 1906 (c. 58), he sits in his official capacity as the judge of the county ct. & not in his individual capacity, & a hearing by a deputy ct. judge is the same thing as a hearing by the judge himself. Therefore a matter which has been heard & adjudicated upon by a deputy county ct. judge may be dealt with by the county ct. judge if ordered to be reheard by the Ct. of Appeal.

Appct. had filed a request for arbn., claiming compensation in respect of the death of her son, a lad of seventeen, in the employment of resps. The matter came before the deputy judge at Lambeth county ct. The deputy judge made an award in favour of the employers. The Ct. of Appeal made an order directing that the award of the deputy judge be wholly set aside & that a new trial be had between the parties. The matter then came before the county ct. judge himself, & he took the view that the Ct. of Appeal had no power to order a new trial & that they could not order him to rehear an arbn. which had been heard by another arbitrator. He offered to hear a new arbn., if the parties consented, but as the resps. refused consent, he declined jurisdiction on the ground that he had no power, as county ct. judge, to act:—*Held:* the Ct. of Appeal had power to send the matter down to the county ct. for a "rehearing" & the order would be amended by substituting that word for "new trial" & the original order would stand subject to that alteration, & the county ct. judge himself was competent to rehear & adjudicate on the matter, notwithstanding the fact that the claim had been heard & an award made by the deputy judge, such award now being wholly set aside.—HUNTER *v.* SIMNER, [1922] 2 K. B. 170; 91 L. J. K. B. 581; 127 L. T. 342; 66 Sol. Jo. 487; 15 B. W. C. C. 91, C. A.

3049. —— **Court of limited jurisdiction.**]—STANDING *v.* EASTWOOD & CO., No. 2058, *ante.*

Powers & duties of judge.]—*See* Sect. 20, sub-sect. 6, *post.*

SUB-SECT. 4.—ARBITRATOR APPOINTED BY COUNTY COURT JUDGE.

See Workmen's Compensation Act, 1925 (c. 84), Sched. I., (3) (8); Workmen's Compensation Rules, 1926, 31–34.

3050. Duty of arbitrator—To decide questions of fact.]—An arbitrator appointed by a county ct. judge decided that the structure was not a scaffolding & refused to make an award of compensation, but referred the matter to the county ct. judge, who reversed the decision of the arbitrator & awarded the compensation provisionally settled by the arbitrator:—*Held:* the question whether the structure was a scaffolding or not was a question of fact for the arbitrator.—FERGUSON *v.* GREEN, [1901] 1 K. B. 25; 70 L. J. Q. B. 21; 83 L. T. 461; 64 J. P. 819; 49 W. R. 105; 17 T. L. R. 41; 45 Sol. Jo. 58; 3 W. C. C. 113, C. A.

Annotation:—**Apprvd.** Hoddinott *v.* Newton, Chambers, [1901] A. C. 49.

SUB-SECT. 5.—MEDICAL REFEREE.

See Workmen's Compensation Act, 1925 (c. 84), ss. 12, 19.

3051. Jurisdiction of medical referee—No power to consider.]—TURTON *v.* EAST BARNSLEY COLLIERY, LTD., No. 3828, *post.*

3052. Right of parties to copy of referee's report—Liability of employer.]—(1) The parties, other than the injured man, should not be allowed to attend the examination by a medical referee appointed by an arbitrator under Workmen's Compensation Act, 1897 (c. 37), sched. II. (13).

(2) The report of such a referee is intended for the use of the arbitrator only, but it is in the discretion of the arbitrator to allow the parties to see the report & to take a copy of it.—BOWDEN *v.* BARROW BROTHERS (1901), 3 W. C. C. 215.

3053. Whether certificate conclusive.]—Employers applied to review payments under a registered agreement, putting in a certificate of a medical referee, obtained in accordance with Workmen's Compensation Act, 1906 (c. 58),

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PART XIV. SECT. 9, SUB-SECT. 5.

3053 i. *Whether certificate conclusive.*]—*Held:* where the county ct. judge under Workmen's Compensation Act, 1906, Sched. II. (15), submits to a medical referee for report any matter which seems material to any question arising in the arbitration, the judge is not bound by the referee's report, but should exercise an independent judgment.—QUINN *v.* FLYNN (1910), 44 I. L. T. 183; 3 B. W. C. C. 594.—IR.

3053 ii. ——.]—M'AVAN *v.* BOASE SPINNING CO., LTD. (1901), 3 F. (Ct. of Sess.) 1048; 38 Sc. L. R. 772; 9 S. L. T. 152.—SCOT.

3053 iii. ——.]—FERRIER *v.* GOURLAY (1902), 4 F. (Ct. of Sess.) 711.—SCOT.

3053 iv. ——.]—BRYCE *v.* CONNOR (1904), 7 F. (Ct. of Sess.) 193.—SCOT.

3053 v. ——.]—JOHNSTONE *v.* COCHRAN & CO. (1904), 6 F. (Ct. of Sess.) 854.—SCOT.

3053 vi. ——.]—MCNAUGHTON & SINCLAIR *v.* CUNNINGHAM, CUNNINGHAM *v.* MCNAUGHTON & SINCLAIR, [1910] S. C. 980.—SCOT.

3053 vii. ——.]—KING *v.* UNITED COLLIERIES, LTD., [1910] S. C. 42.—SCOT.

3053 viii. ——.]—ARNOTT *v.* FIFE

sched. I. (15), as proof that the workman was fit to work. The man tendered medical evidence in contradiction, but the county ct. judge rejected it, on the ground that the certificate was conclusive:—*Held:* the evidence was rightly rejected, the certificate being conclusive.—SAPCOTE & SONS *v.* HANCOCK (1911), 4 B. W. C. C. 184, C. A.

3054. ——.]—A dispute arose as to whether a workman with an injured eye was fit for work. Arbn. proceedings were commenced, & then the parties agreed in writing to submit the question to a medical referee, & abide by his decision. On receiving the report the workman was dissatisfied, & applied to the judge, who dismissed the case on the report of the medical referee, & refused to hear medical evidence tendered by the workman:—*Held:* the application had been properly dismissed.—RENSHALL *v.* SPENCER (1917), 10 B. W. C. C. 164, C. A.

3055. ——.]—The workman suffered an accident on Mar. 14, 1924, & was paid compensation until the employers obtained a medical certificate that he had completely recovered. The workman then obtained a medical certificate to the effect that he was still incapacitated. Following the provisions of Workmen's Compensation Act, 1923 (c. 42), s. 14 (*c*), the employers applied for the appointment of a medical referee, who on Sept. 24, 1924, certified that the incapacity of the workman was not due to the accident. In arbn. proceedings instituted by the workman the employers objected to medical evidence being given, contradicting the findings in the medical referee's certificate; but the county ct. judge admitted & accepted such evidence & awarded compensation:—*Held:* the certificate of the medical referee was final & conclusive, evidence to contradict it ought not to have been admitted, & the award must be set aside.—CREWE *v.* JOHN RHODES, LTD. (1925), 133 L. T. 650; 18 B. W. C. C. 303, C. A.

Annotation:—**Refd.** Rhodes *v.* Digby Colliery Co. (1926), 70 Sol. Jo. 796.

3056. —— **As to matter of cure.**]—EARL FITZWILLIAM'S COLLIERIES *v.* CROSSLEY, No. 2815, *ante*.

3057. Ambiguous report—Duty of judge to clear.]—On a disputed medical point the parties agreed to place the matter before an expert & abide by his report. At the hearing before the county ct. judge the report was read, but appeared to be ambiguous. The county ct. judge refused the employers' request to communicate with the medical expert, so that the ambiguity might be removed, & adjourned the case *sine die*. The employers appealed. The Ct. of Appeal communicated with the medical expert with result that his answer completely cleared the ambiguity, & showed that the employers were entitled to an award, & judgment was accordingly entered:—*Held:* the county ct. judge should himself have taken steps to clear the ambiguity, & the employers were entitled to appeal.—TOWLER *v.* BRITISH DYE STUFFS CORPN. (BLACKLEY), LTD. (1921), 14 B. W. C. C. 34, C. A.

3058. Reference under Workmen's Compensation Act, 1925 (c. 84), s. 12—Jurisdiction of judge to order—When s. 19 (2) not complied with by employer—Though waiver of objection by consent.]—The workman had been employed by resps. as ladleman at their works & whilst so employed on Feb. 20, 1922, had sustained injury to his head by an accident arising out of & in the course of his employment, & under an agreement dated Feb. 27, 1922, & recorded on Apr. 1, 1922, he was paid 35*s.* per week as compensation as from Feb. 20, 1922, to continue during his total or partial incapacity for work resulting from the accident or until the same should be diminished, increased, or redeemed. Resps., adopting the course prescribed under Workmen's Compensation Act, 1923 (c. 42), s. 14 (*c*), on Oct. 21, 1924, had the workman examined by their doctor who certified he was fit to resume his old work & they gave notice dated Nov. 3, 1924, of that report & of their intention to end the weekly payment. This notice was not given within six days of the doctor's report as required by Workmen's Compensation Act, 1906 (c. 58), s. 14, & sched. I., para. 15, but a medical certificate by the workman's doctor disagreeing with the medical report already given was put in, it was alleged, in order to protect the rights of the workman who denied that resps. could proceed as they stated they would under sect. 14 to refer the matter to a medical referee on the ground that that sect. only applied to payment of compensation made otherwise than under an award or a recorded agreement. The application to refer the matter to a medical referee pursuant to Workmen's Compensation Act, 1906 (c. 58), sched. I., para. 15, was then made to the registrar under Workmen's Compensation Act, 1923 (c. 42), s. 11 (1), it being admitted by both parties that the formalities prescribed by Workmen's Compensation Act, 1923 (c. 42), s. 14, should be waived & the registrar decided that having regard to the words "apart from this sect." in proviso (iii.) of sect. 14 there were no grounds for differentiating between a recorded & unrecorded agreement for the purposes of that sect., & that decision on appeal was upheld by the county ct. judge, & an order for reference to a medical referee was accordingly made:—*Held:* as sect. 14 of itself gave no right to obtain a certificate or refer to a medical referee, the machinery for that being already provided by Workmen's Compensation Act, 1906 (c. 58), sched. I., para. 15, as amended by Workmen's Compensation Act, 1923 (c. 42), s. 11 (1), & the waiver of the formalities required by that paragraph being merely for the purpose of getting a decision of the question raised under Workmen's Compensation Act, 1923 (c. 42), s. 14, such waiver could give no jurisdiction to the ct. to decide a matter not in fact before it, & notice of the doctor's report not having been given within the six days as required by Workmen's Compensation Act, 1906 (c. 58), Sched. I., para. 15, the appeal must be allowed.—JAMES *v.* GROVESEND STEEL & TINPLATE CO., LTD. (1925), 133 L. T. 744; 18 B. W. C. C. 405, C. A.

Annotation:—**Consd.** Gillett *v.* Fowler (Leeds) (1926), 19 B. W. C. C. 267.

3059. —— **Duty of employer to apply.**]—Workmen's Compensation Act, 1923 (c. 42), s. 14, does not merely provide machinery whereby an employer may end or diminish weekly payments in cases of incapacity, but has introduced a new

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COAL CO., LTD., [1911] S. C. 1029.—**SCOT.**

3053 ix. ——.]—M'GHEE *v.* SUMMERLEE IRON CO., LTD., [1911] S. C. 870.—**SCOT.**

3053 x. ——.]—JACKSON *v.* SCOTSTOUN ESTATE CO., [1911] S. C. 564.—**SCOT.**

3053 xi. ——.]—GRAY *v.* SHOTTS IRON CO., LTD., [1912] S. C. 1267; 49 Sc. L. R. 906; [1912] 2 S. L. T. 146; 6 B. W. C. C. 287.—**SCOT.**

3053 xii. ——.]—CRUDEN *v.* WEMYSS COAL CO., LTD., [1913] S. C. 534; 50 Sc. L. R. 344; [1913] 1 S. L. T. 100.—**SCOT.**

3053 xiii. ——.]—In a stated case under Workmen's Compensation Act the opinion of a medical assessor ought not to be included as a finding in fact. The arbitrator, however, is entitled to rely upon that opinion in arriving at a conclusion as to the cause of disablement or death.—CONNELLY *v.* CROSS & SONS, LTD., [1917] S. C. 164.—**SCOT.**

3053 xiv. ——.]—WALKER *v.* CADZOW COAL CO., LTD., [1925] S. C. 395.—**SCOT.**

Sect. 9.—Arbitration tribunals: Sub-sect. 5. Sect. 10: Sub-sect. 1.]

liability upon the employer to the advantage of a workman.

An employer who under sect. 14 (*c*) has served a workman with a ten days' notice of his intention to end the weekly payments together with a copy of the medical certificate that the workman has wholly recovered, & has within the ten days received a counter report from the workman's medical practitioner disputing the employer's certificate, must proceed under the sect. to obtain the certificate of a medical referee, & in the meantime may safeguard himself by paying the weekly payments into ct. to abide the result of the certificate of the medical referee or the decision of the judge. If the employer fails to proceed under the sect. after receipt of the workman's counter report, but stops payment & does nothing more, & the workman then goes to arbn., the workman, in spite of the fact that the judge finds that he had wholly recovered at the time of the service of the ten days' notice, will be entitled to recover from the employer the weekly payments as from that date down to the date of the award.

Workmen's Compensation Act, 1923 (c. 42), s. 14, does not say in terms who is to appoint the medical referee, but in practice, it seems to me that it clearly throws that upon the employer, because unless the step of making the application is taken by some one or other, then, under the very words of the sect., the employer has to continue (or may not end or diminish) the weekly payments (SARGANT, L.J.).—DAVIES *v.* GLYNCORRWG COLLIERY CO., [1925] 2 K. B. 339; 95 L. J. K. B. 42; 133 L. T. 221; 18 B. W. C. C. 86, C. A.

Annotations:—**Consd.** Hulmston *v.* Birkenhead Union (1925), 133 L. T. 757; Gillett *v.* Fowler (Leeds) (1926), 19 B. W. C. C. 267; Ocean Coal Co. *v.* Davies (1926), 43 T. L. R. 108. **Reld.** Feeney *v.* Firbeck Main Collieries, [1926] 2 K. B. 218; Rhodes *v.* Digby Colliery Co. (1926), 70 Sol. Jo. 796.

3060. —— How far certificate conclusive.]—CREWE *v.* JOHN RHODES, LTD., No. 3055, *ante*.

3061. —— ——.]—In Sept. 1917, the workman was certified to be suffering from miner's nystagmus & received full compensation until Mar. 1918, when he worked on the surface & was paid on the basis of partial incapacity. In July, 1924, the employers proceeded under Workmen's Compensation Act, 1923 (c. 42), s. 14 (*c*), & the matter was referred to a medical referee, who on Aug. 18, 1924, certified that the workman was not then suffering from miner's nystagmus. The employers stopped payment of compensation, & in Dec. 1924, the workman filed a request for arbn. On the hearing in Mar. 1925, the county ct. judge at the request of the parties referred the matter to another medical referee, to whom certain questions agreed upon were put, & he reported on Apr. 15, 1925, that the workman was then suffering from nystagmus, & was thereby incapacitated for work underground, & that his condition was an increased susceptibility to nystagmus & was a continuation of the attack from which he had suffered in Sept. 1917. On the further hearing in Aug. 1925, the county ct. judge was satisfied that though the certificate of Aug. 18, 1924, established that at that time the workman was not actively suffering from nystagmus, yet he was then & at all other material times affected with a proneness to recurrence of the disease, owing to having suffered from it in 1917, & at the date of the hearing & of the certificate of Apr. 15, 1925, he was suffering from the disease in this sense, & awarded compensation:—*Held:* the certificate given on Aug. 18, 1924, was conclusive only of the matters referred to in it at that time, & was not *res judicata* between the parties, & therefore the county ct. judge was justified on the certificate of Apr. 15, 1925, in finding that there existed a special susceptibility to the disease & had rightly awarded compensation.—PRENDERGAST *v.* LANCASTER'S STEAM COAL COLLIERIES, LTD. (1925), 134 L. T. 166; 18 B. W. C. C. 494, C. A.

Annotations:—**Folld.** Scahill *v.* Evan (1926), 19 B. W. C. C. 112. **Reld.** Rhodes *v.* Digby Colliery Co. (1926), 70 Sol. Jo. 796.

3062. —— Duties of referee.]—A workman, who had been injured by an accident & who was in receipt of a weekly payment for partial incapacity, was examined by a medical practitioner provided by the employers, who certified that the workman had wholly recovered. The workman, within ten days, sent to the employers the report of a medical practitioner disagreeing with the certificate served by the employers. The matter was referred to a medical referee, who, after orally examining the workman & his wife, reported that the workman still suffered from considerable disability, but referred to matters relating to the workman's incapacity that were not mentioned in either of the other medical reports, & stated that certain kinds of work would be beneficial. The employers terminated the weekly payments:—*Held:* the medical referee is not restricted to differences of opinion between the employers' doctor, but should examine the workman independently of them, & as his report in this case stated that incapacity still continued, employers were wrong in stopping compensation & the workman was entitled to have it continued.—LACEY *v.* WALLIS & SONS, LTD. (1926), 19 B. W. C. C. 43, C. A.

Power of judge to refer to.]—*See* Sect. 11, sub-sect. 6, B., *post*.

SECT. 10.—THE ARBITRATION.

SUB-SECT. 1.—IN GENERAL.

See Workmen's Compensation Act, 1925 (c. 84), s. 21 (1), Sched. I.

3063. Whether a judicial proceeding.] — An arbn. before a county ct. judge to settle a question of compensation under Workmen's Compensation Act, 1906 (c. 58), is a judicial proceeding & therefore an indictment for perjury will lie in respect of false evidence given on oath in a material particular in the course of the arbn.—R. *v.* CROSSLEY, [1909] 1 K. B. 411; 78 L. J. K. B. 299; 100 L. T. 463; 73 J. P. 119; 25 T. L. R. 225; 53 Sol. Jo. 214; 2 B. W. C. C. 451; 22 Cox, C. C. 40; 2 Cr. App. Rep. 8, C. C. A.

3064. Condition precedent to arbitration—Question must have arisen.]—JONES *v.* GREAT CENTRAL RY. CO., No. 3595, *post*.

3065. —— ——.]—A workman was injured. The employers admitted liability & paid him the maximum compensation under Workmen's Compensation Act, 1906 (c. 58), namely, £1 per week, together with the 5*s.* per week under Workmen's Compensation (War Addition) Act, 1917 (c. 42). While this £1 5*s.* per week was still being paid by the employers, the workman sent to the Registrar to be recorded, under Workmen's Compensation

3063 1. *Whether a judicial proceeding.*]—*Re* CESSARINI & HAZELL (1914), 28 W. L. R. 662; 6 W. W. R. 649; 16 D. L. R. 738; 7 Alta. L. R. 134.—CAN.

Act, 1906 (c. 58), Sched. 11 (9), a memorandum to the effect that the workman agreed to accept, & the employers agreed to pay, the sum of £1 5*s.* weekly during total incapacity, & to pay thereafter during partial incapacity, such weekly sum as may be, failing agreement, settled by arbn. The employers gave notice of objection to the recording of the memorandum on the ground that in fact no such agreement had been entered into. The workman, on Sept. 9, 1919, gave the employers notice that he withdrew the application to record the memorandum & that he would file a request for arbn. On Sept. 11 a request for arbn. was accordingly filed. On Sept. 12 the employers' insurance co. wrote stating that they had no objection to "a memorandum of agreement being filed in suitable terms." The employers objected to the arbn. on the ground that no question had arisen for arbn. The deputy county ct. judge held that a question had arisen & that therefore he had jurisdiction:—*Held:* there was evidence to support the decision & no misdirection.—GOODE *v.* SENTINEL WAGGON WORKS, LTD. (1920), 13 B. W. C. C. 12, C. A.

3066. —— —— **As to liability for or amount or duration of compensation.**]—Where, a workman having been incapacitated for work by an accident arising out of & in the course of his employment, his employers had, since the second week after the accident, paid to him, by way of compensation, weekly payments of the full amount mentioned in Workmen's Compensation Act, 1897 (c. 37), Sched. I., s. 1 (*b*), & promised to continue to do so during the period of his incapacity; but the workman, nevertheless, filed a request for arbn. in the county ct., & the county ct. judge made an award for compensation in his favour:—*Held:* under Workmen's Compensation Act, 1897 (c. 37), s. 1 (3), it was a condition precedent to the jurisdiction of the county ct. judge that a question should have arisen as to the liability to pay, or as to the amount or duration of, compensation under the Act, &, no such question having arisen, the county ct. judge had no jurisdiction to make an award.—FIELD *v.* LONGDEN & SONS, [1902] 1 K. B. 47; 71 L. J. K. B. 120; 85 L. T. 571; 66 J. P. 291; 50 W. R. 212; 18 T. L. R. 65; 46 Sol. Jo. 66; 4 W. C. C. 20, C. A.

Annotations:—**Follod.** Jones *v.* G. C. Ry. (1901), 4 W. C. C. 23. **Consd.** Thompson *v.* North Eastern Marine Engineering Co., [1903] 1 K. B. 428. **Distd.** Barron *v.* Carmichael (1912), 5 B. W. C. C. 436. **Reld.** Oliver *v.* Nautilus S.S. Co. (1903), 89 L. T. 318; Payne *v.* Fortescue, [1912] 3 K. B. 346; Tyne Tees Shipping Co. *v.* Whilock, [1913] 3 K. B. 642; Rooney *v.* Hurlock (1918), 11 B. W. C. C. 117. **Mentd.** Smith *v.* Abbey Park Steam Laundry Co. (1909), 2 B. W. C. C. 142.

3067. —— —— ——.]—An employer having agreed with a workman to pay him compensation refused to sign a form of agreement. The registrar of the county ct. refused to register a memorandum of agreement having regard to the terms of Workmen's Compensation Rules (1908), r. 42*a* (4) which was an addition to the Rules of 1907. This new rule was in force at the time of the decision of this case, but was afterwards revised & altered. The workman then applied for an arbn. under the Act, & at the hearing the county ct. judge found that, in consequence of the employer's refusal to sign, there was no agreement, & made an award in the workman's favour in the terms of the agreement:—*Held:* there was no jurisdiction to make an award, as no "question" had arisen as to the liability to pay compensation or as to the amount or duration within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 1 (3).—MERCER *v.* HILTON (1909), 3 B. W. C. C. 6, C. A.

3068. —— —— ——.]—A workman having met with an accident in the course of his employment which for the time being caused total incapacity for work, his employers paid him regularly from the date of the accident 17*s.* 6*d.* a week, being one half of his average weekly earnings. The workman applied under Workmen's Compensation Act, 1906 (c. 58), to have registered a memorandum of an agreement by the employers admitting their liability, & agreeing to pay him 17*s.* 6*d.* a week. The employers opposed on the ground that they had only agreed to pay so long as their own doctor should certify that the workman was wholly incapacitated. The county ct. judge held that the compensation had not been settled by agreement. The workman then applied to have the compensation settled by the judge as arbitrator under the Act:—*Held:* no question had arisen as to the amount or duration of the compensation which could give jurisdiction to arbitrate, though such a question might arise hereafter if & when the employers claimed to discontinue or diminish their payments.—PAYNE *v.* FORTESCUE (N.) & SONS, LTD., [1912] 3 K. B. 346; 81 L. J. K. B. 1191; 107 L. T. 136; 57 Sol. Jo. 80; 5 B. W. C. C. 634, C. A.

Annotations:—**Consd.** Summerlee Iron Co. *v.* Freeland, [1913] A. C. 221. **Follod.** Bedwell *v.* L. Elec. Ry. (1914), 7 B. W. C. C. 685; Sampson *v.* General Steam Navigation Co. (1914), 7 B. W. C. C. 107. **Distd.** Cooper *v.* Wales, [1915] 3 K. B. 210; Shaddick *v.* Palmer's Shipbuilding & Iron Co. (1917), 86 L. J. K. B. 1017. **Reld.** Tyne Tees Shipping Co. *v.* Whilock (1913), 82 L. J. K. B. 1091.

3069. —— —— ——.]—BALDWIN *v.* ELECTRIC & ORDNANCE ACCESSORIES CO., LTD., No. 3088, *post.*

3070. When proceedings barred—Existence of effective agreement.]—JONES *v.* GREAT CENTRAL RY. CO., No. 3595, *post.*

3071. —— ——.]—In Jan. 1908, a workman met with an accident, & eventually became totally

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3066 i. *Condition precedent to arbitration—Question must have arisen—As to liability for or amount or duration of compensation.*]—GOURLAY *v.* SWEENEY (1906), 8 F. (Ct. of Sess.) 965.—**SCOT.**

3066 ii. ——.]—At the date when the petition was presented no dispute had arisen between the parties as to compensation, & the compensation was not in arrears:—*Held:* the conditions precedent to an arbitration were wanting, & the petition for arbitration was incompetent.—CALEDON SHIPBUILDING, ETC., CO., LTD. *v.* KENNEDY (1906), 8 F. (Ct. of Sess.) 960; 43 Sc. L. R. 687; 14 S. L. T. 133.—**SCOT.**

3066 iii. —— —— ——.]—ELLIS *v.* LOCHGELLY IRON & COAL CO., LTD., [1909] S. C. 1278; 46 Sc. L. R. 960; [1909] 2 S. L. T. 224; 2 B. W. C. C. 136.—**SCOT.**

3066 iv. —— —— ——.]—CRONE *v.* DONALDSON LINE, [1916] S. C. 532; 53 Sc. L. R. 540; [1916] 1 S. L. T. 373.—**SCOT.**

3066 v. —— —— ——.]—WELSH *v.* FIFE COAL CO., LTD., [1926] S. C. 807.—**SCOT.**

k. —— *Determination of application to record memorandum of agreement.*]—A workman presented an application for warrant to record a memorandum of agreement. While the application was pending he initiated arbitration proceedings in respect of the same accident:—*Held:* the arbitration should be sisted until the application for the warrant had been determined.—KING *v.* ARMISTON COAL CO., LTD., [1913] S. C. 892.—**SCOT.**

3070 i. *When proceedings barred—Existence of effective agreement.*]—*Held:* the parties having come to an agreement, procedure by arbn. was excluded.—DUNLOP *v.* RANKIN & BLACKMORE (1901), 4 F. (Ct. of Sess.) 203; 39 Sc. L. R. 146.—**SCOT.**

3070 ii. —— ——.]—DEMPSTER *v.* BAIRD & CO., LTD., [1908] S. C. 722.—**SCOT.**

3070 iii. —— ——.]—KANE *v.* STEIN (JOHN G.) & CO., LTD. (1915), 52 Sc. L. R. 689.—**SCOT.**

3070 iv. —— ——.]—MACELHINNEY *v.* PORTLAND FORGE CO., LTD. (1922), 16 B. W. C. C. 292.—**SCOT.**

l. —— —— *What amounts to effective agreement.*]—As the agreement had not been submitted for the assent of the registrar:—*Held:* it could not operate as a bar to proceedings for the ascertainment of compensation.—

Sect. 10.—*The arbitration: Sub-sects.* 1 & 2, *A. & B.*]

incapacitated. He demanded compensation from his employers. Negotiations ensued, in which the employers set up several answers to his claim, but expressed their readiness to pay somewhat less than the half wages, by way of compromise. On the advice of his solrs., the workman accepted this, & a formal agreement was made in May, 1909. A memorandum of this agreement was at once sent to the registrar for record. Some delay occurred, but early in 1910 the registrar refused to record the agreement on the ground that he was not satisfied as to its genuineness. In Apr. 1910, the workman commenced proceedings for compensation. In May, 1910, the employers applied to the judge for an order to record the memorandum of agreement. In Nov. 1910, the judge gave his decision thereon, refusing the order, on the ground that the agreement was not "genuine." Subsequently, the workman's application for compensation was heard, & in Jan. 1911, the judge awarded half wages as compensation. The employers then appealed from the decisions of Nov. 1910, & Jan. 1911:—*Held:* (1) there was no evidence on which the judge could find that the agreement was not genuine, & the memorandum ought, therefore, to be recorded; consequently all questions had been settled by agreement, & there was no jurisdiction to hear the application for compensation; (2) the two decisions of Nov. 1910, & Jan. 1911, were part of one & the same proceedings, & the employers were entitled to appeal from both by notice of appeal entered within twenty-one days after the later decision. —FOX *v.* BATTERSEA BOROUGH COUNCIL (1911), 4 B. W. C. C. 261, C. A.

Annotations:—*As to* (1) **Consd.** Russell *v.* Rudd, [1923] A. C. 309. **Refd.** Hudson *v.* Camberwell B. C. (1917), 86 L. J. K. B. 558.

3072. ——— ———.]—A workman brought proceedings for compensation. The employers objected that all questions between the parties had been settled by agreement; the county ct. judge ruled that this was not so, & the case was adjourned for the employers to appeal:—*Held:* on construction of the correspondence relied on by the employers, there was no agreement, there was therefore a question between the parties, & the county ct. judge had jurisdiction.—BROOKS *v.* KNOWLES (ANDREW) & SONS, LTD. (1911), 5 B. W. C. C. 15, C. A.

3073. ——— ———.]—SHADDICK *v.* PALMER'S SHIPBUILDING & IRON CO., No. 3100, *post.*

3074. ——— ———.]—A workman, a driller, was injured at work. The employers admitted liability, & paid half wages, 17*s.* 1*d.*, as compensation for some time. The workman then filed an original request for arbn., alleging that he was entitled to a higher sum as compensation in view of the fact that he was under a concurrent contract of service at the time of the accident, & also that wages had been increased since. He stated in his particulars that liability had been admitted & compensation at 17*s.* 1*d.* had been paid. The employers filed an answer stating that they were "willing to continue payment of 17*s.* 1*d.* a week under Workmen's Compensation Act, 1906 (c. 58), as to which no question has arisen." The county ct. judge dismissed the application on the ground that the parties had come to an agreement as to the amount of compensation & liability to pay same under the terms of the Act, & therefore all questions had been settled:—*Held:* there was evidence to support the judge's finding that all questions had been settled by agreement, & therefore this being an original application & not an application to review, the judge was right in dismissing same.—SMITH *v.* REDPATH, BROWN & CO., LTD. (1917), 10 B. W. C. C. 663, C. A.

3075. ——— ———.]—MOAKES *v.* BLACKWELL COLLIERY CO., LTD., No. 3090, *post.*

3076. ——— ———.]—Applt. met with an accident while employed in a factory at a weekly wage of £1 4*s.* 9*d.* The employers admitted liability & paid 15*s* 6*d.* a week compensation for eight months on the basis of total incapacity, which sum was in fact made up of 12*s.* 5*d.* half wages, plus 3*s.* 1*d.* war addition. Applt. then applied to the ct. for increased compensation. The judge found that an agreement had been come to under which resp. paid full compensation & that no question to arbitrate upon had arisen between the parties. He therefore dismissed the application:—*Held:* there was evidence to support the finding.—WRIGHT *v.* MINISTER OF MUNITIONS (1919), 12 B. W. C. C. 103, C. A.

3077. ——— **Workman satisfied with voluntary payments.**]—PLANT *v.* OLDNALL COLLIERY CO. (1903), 114 L. T. Jo. 284.

Annotation:—**Refd.** Tyne Tees Shipping Co. *v.* Whilock (1913), 82 L. J. K. B. 1091.

3078. ——— **Res judicata.**]—A county ct. judge made an award in favour of a workman, whom he found capable & willing to do certain light work, in the following terms: "That the employers do forthwith provide appct., for the period of four weeks, light employment at £1 a week." No objection was taken to this award. The workman was so employed, & was then offered his old work which he refused. On the employers refusing to keep him at the light work or pay compensation, the man commenced entirely new proceedings, in which he claimed for incapacity resulting from the original accident. The county ct. judge dismissed the application on the ground that the questions raised had been dealt with, & finally decided in the first arbitration proceedings: —*Held:* the second application was properly dismissed, the only proceedings open to the workman being by way of review.—WATTS *v.* LOGAN & HEMINGWAY (1914), 7 B. W. C. C. 82, C. A.

Annotation:—**Consd.** Beamish *v.* Wagon Repairs (1925), 133 L. T. 406.

3079. ——— ———.]—PELLETT *v.* HOVE CORPN., No. 3958, *post.*

3080. ——— ———.]—HAYDOCK *v.* GOODIER, No. 3587, *post.*

3081. ——— **Certificate of recovery served by employer on workman—Failure of workman to send certificate in disagreement.**]—In each case the workman met with an accident & received full compensation from his employers, but the weekly payments were not made under an award or recorded agreement. Subsequently the employers received a certificate from a doctor instructed by them that the workman was fit for work. They then served the workman with a copy of the certificate & notice to end the weekly payment within ten days, in accordance with Workmen's Compensation Act, 1923 (c. 42), s. 44. The workman failed to comply with that sect., & sent no certificate disagreeing with the employers' certificate. The employers therefore ended the

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VINE *v.* NORTH COAST STEAM NAVIGATION CO. (1921), 22 S. R. N. S. W. 1; 38 N. S. W. W. N. 227.—**AUS.**

m. *Arbitrator's fees.*]—The sched. to Arbn. Act does not apply to arbitrations under Workmen's Compensation Act, & the arbitrator's fee must be dealt with by a practice analogous to that prevailing prior to Arbn. Act on a reference directed by the ct.—CHISHOLM *v.* CENTRE STAR MINING CO. (1906), 12 B. C. R. 16.—**CAN.**

weekly payments. The workman instituted arbn. proceedings for compensation under Workmen's Compensation Act, 1906 (c. 58), & the employers took the preliminary objection that the workman's right to arbn. was barred. The objection was allowed in the first case but overruled in the second:—*Held:* (1) the fact that the workman did not exercise the right given to him by that sect. did not deprive him of his ordinary right under the Workmen's Compensation Act, 1906 (c. 58), to commence arbn. proceedings for compensation; (2) the sect. applies to weekly payments being made in discharge of liability to pay compensation under Workmen's Compensation Act, 1906 (c. 58), though made voluntarily & not under any award or recorded memorandum of agreement.—PUDNEY *v.* FRANCE (WILLIAM), FENWICK & CO., SMITH *v.* LEACH & CO., [1925] 1 K. B. 346; 94 L. J. K. B. 513; 132 L. T. 430; 41 T. L. R. 83; 69 Sol. Jo. 139; 17 B. W. C. C. 241, C. A.

Annotations:—*As to* (1) **Consd.** Crewe *v.* Rhodes (1925), 133 L. T. 650; Davies *v.* Glyncorrwg Colliery Co., [1925] 2 K. B. 339. **Distd.** Rhodes *v.* Digby Colliery Co. (1926), 70 Sol. Jo. 796. **Reid.** Davies *v.* Midland Ry. Carriage & Waggon Co. (1926), 19 B. W. C. C. 69. *As to* (2) **Reid.** Lindsay *v.* Glasgow Iron & Steel Co. (1925), 18 B. W. C. C. 600; Feeney *v.* Firbeck Main Collieries, [1926] 2 K. B. 218; Lacey *v.* Wallis (1926), 19 B. W. C. C. 43; Ocean Coal Co. *v.* Davies (1926), 135 L. T. 498.

See Workmen's Compensation Act, 1925 (c. 84), s. 12 (3).

—— **Workman electing to proceed by action.**]—*See* Sect. 25, *post.*

—— **Workman contracting out of Act.**]—*See* Sect. 26, sub-sect. 1, B., *post.*

3082. Discretion of judge to refuse to hear claim—Proceedings taken in undue haste.]—ROONEY *v.* HURLOCK, No. 3087, *post.*

3083. —— ——.]—BALDWIN *v.* ELECTRIC & ORDNANCE ACCESSORIES CO., LTD., No. 3088, *post.*

SUB-SECT. 2.—WHAT IS QUESTION ARISING.

A. In General.

3084. Must exist at time of application.]—A workman was injured. & asked for compensation. His employer wrote offering 10*s.* per week during total incapacity, but the workman insisted that he should agree to pay this sum during total & partial incapacity. The employer refused, & the workman brought proceedings, claiming 12*s.* 6*d.* per week. The employer by his answer admitted liability, & present total incapacity, & submitted to an award for 10*s.* per week during total incapacity, the amount to be paid during partial incapacity to be settled thereafter. Before the hearing the compensation was agreed at 10*s.* per week. The county ct. judge held that no question had arisen, & dismissed the application:—*Held:* as a dispute was in existence at the time of the application, a question had arisen within Workmen's Compensation Act, 1906 (c. 58), s. 1 (3), & the application must be heard.—HIGGINS *v.* POULSON (1911), 5 B. W. C. C. 66, C. A.; *subsequent proceedings*, [1912] 2 K. B. 292, C. A.

3085. ——.]—A workman met with an accident, & was paid compensation on the basis of total incapacity. While such payments were being made his solr. made a request for arbn., alleging that certain questions had arisen which had not been settled by agreement. The county ct. judge dismissed the application on the ground that there were no questions to settle. On appeal, an attempt was made to formulate a case from the correspondence, which had not been raised before the county ct. judge:—*Held:* the appeal must be dismissed.

Except in case of review, the question must have arisen at the time (SWINFEN EADY, L.J.).—WOODER *v.* LUSH (1914), 7 B. W. C. C. 673, C. A.

3086. May be raised by employer's answer.]—An injured workman gave notice of accident & asked for compensation. The employer replied that compensation would be paid so long as the works' doctor certified incapacity. The workman objected to this limitation. He received no compensation, & neither asked for nor was refused it, further than appears from these facts. He brought proceedings. The employer's answer denied the injuries & the incapacity, & set out the circumstances under which they had offered compensation as above, & the fact that the workman had never applied for compensation. The employer at the hearing raised the point that there was no jurisdiction to hear the application as no question had arisen:—*Held:* the employer's answer raised a dispute, & the employer could not thereon say there was no question. Had the answer first raised the point that no question had arisen, & then without prejudice thereto denied incapacity, etc., the employer could have raised the point, & he would have been entitled to succeed on that point.—BARRON *v.* CARMICHAEL (1912), 5 B. W. C. C. 436, C. A.

Annotations:—**Consd.** Rooney *v.* Hurlock (1918), 11 B. W. C. C. 117. **Reid.** Hogg *v.* Vickers (1921), 14 B. W. C. C. 229.

B. Liability for Compensation.

3087. Refusal of employer to admit liability.]—(1) A workman while engaged on her employer's business was knocked down & killed by a motor omnibus. The parents of the woman alleged that they were partially dependent on her earnings, & therefore proceedings in respect of the loss caused by the death of their daughter could be instituted under the Workmen's Compensation Act. In the course of an informal conversation between the solrs. acting for the parents & deceased girl's employer, the latter definitely stated that, if proceedings to recover compensation were taken against his client, he should deny that the parents were partially dependent on deceased girl's earnings at all, & suggested that the parents ought to proceed against the motor omnibus co. at common law for damages. Shortly afterwards a letter was received by him stating that the parents had decided to institute proceedings for compensation against the employer, & on the day that letter was received a request for arbn. was filed. The county ct. judge struck out the claim on the ground that no question had arisen, & therefore he had no jurisdiction to hear the claim. He came to that decision as he thought an agreement might have been come to had a reasonable time been given the employer to consider his liability under the Act:—*Held:* a question had arisen, & the case must be reinstated for hearing.

(2) Where proceedings are taken in undue haste, even though a question may have arisen which had not been settled, & therefore technically it could not be said that proceedings could not properly be brought, it is nevertheless in the discretion of the judge to refuse to hear the claim if he considers the proceedings to have been taken unreasonably (SWINFEN EADY, L.J.).—ROONEY *v.* HURLOCK (1918), 11 B. W. C. C. 117, C. A.

Annotation:—*As to* (2) **Dtd.** Baldwin *v.* Electric & Ordnance Accessories Co. (1919), 122 L. T. 147.

Sect. 10.—The arbitration: Sub-sect. 2, B., C. & D.]

3088. —— Suggested agreement to accept lump sum.]—An injured workman received compensation for some time. He resumed work & compensation was stopped. He then had to cease work altogether owing to his injury, & negotiations were entered into with regard to a settlement. The employers alleged that he agreed to accept £100. On May 1 the workman's solr. wrote, referring to the incapacity & the compensation to which the man was entitled, & also to the "suggested" settlement for £100, & asking for further information to advise upon. This letter was merely acknowledged on May 2 by the employers, & a full reply was not sent until May 9, stating that the workman had "agreed to accept the sum of £100 in final settlement." This crossed a letter from the workman's solr. of the same date to the effect that, as he had not heard further, proceedings would be commenced. On May 13 he wrote in answer to the employers' letter of May 9, insisting on the workman's right to compensation, & asking whether the employers were prepared to pay a weekly sum, or offer a larger sum than £100. Proceedings were commenced on the same, or next, day before any answer was received from the employers. The county ct. judge awarded compensation. On appeal the employers took the points, (*a*) that no question had arisen giving the judge jurisdiction to hear the case, & (*b*) if a question had arisen he should have refused to hear it in accordance with the dictum of SWINFEN EADY, L.J., in *Rooney* v. *Hurlock*, No. 3087, *ante*, to the effect that where proceedings are taken in undue haste, even though there is a question between the parties at the time, the judge has discretion to refuse to hear the case:—*Held:* a question arose when the workman, having asserted his right to weekly compensation, as he did in the letter of May 1, was met by the employers' assertion that their liability to make such payment had been settled by an agreement to take £100. There was jurisdiction to hear the arbn. & make the award.—BALDWIN *v.* ELECTRIC & ORDNANCE ACCESSORIES CO., LTD. (1919), 122 L. T. 147; 12 B. W. C. C. 305, C. A.

3089. —— Reference to insurance company.]—On Feb. 1, 1924, a workman, when in the employment of resps., was struck on the head by an iron "bloater," whilst engaged in packing aeroplanes. He was absent from his work for several weeks, suffering from traumatic neurasthenia & received compensation. He returned to work on Mar. 17, after which date he ceased to receive compensation. On Mar. 20, he left resps. for the second time, finding that he could work no longer owing to tremblings in the body, legs & arms, & to pains in the head. Ten days later he asked for compensation & was referred by resps. to the insurance co. Having received no communication from the insurance co. he commenced arbn. proceedings in the county ct. Resps., the employers, contended that no question had arisen between the parties. On behalf of appct. it was contended that a question had arisen as the act of referring him to the insurance co. was a refusal to pay compensation. The county ct. judge held that no question had arisen between the parties to the arbn. & dismissed the application:—*Held:* a question had arisen, & the case must be sent back to the county ct. judge for his decision.—TOOMBES *v.* HANDLEY PAGE & CO., LTD. (1924), 17 B. W. C. C. 208, C. A.

C. Amount of Compensation.

3090. Under recorded agreement—Computation of amount.]—Appct., while under twenty-one, met with an accident while working in resp.'s colliery in 1907. Liability was admitted & compensation paid till 1911, in which year appct. attained twenty-one. In that year an agreement was made between the workman & his father & the employers, & duly recorded, whereby the employers agreed to find the workman light employment & pay him weekly what he could earn by working pit time at such employment, & in addition half the difference between that sum & what he would have earned at the current wages in the pit if he had remained uninjured. Compensation was paid under this agreement for five years. In 1916 disputes arose between the workman & his employers as to the amount which the workman could earn in the employment provided. The workman applied for a fresh arbn. The county ct. judge dismissed the application, holding that he could not grant a fresh arbn. while there was a recorded agreement on the file, & that the workman's remedy was to apply for leave to issue execution. The workman appealed:—*Held:* (1) no fresh arbn. could be entered upon while the agreement was on the file; & Workman's Compensation Rules, r. 82, enabled the judge to decide, on the application to issue execution, the question what sum was payable under the agreement; (2) the case was not one for an application to review, as there was no change of circumstance, & the workman did not desire to alter the agreement.—MOAKES *v.* BLACKWELL COLLIERY CO., LTD., [1917] 1 K. B. 565; 86 L. J. K. B. 454; 116 L. T. 197; 33 T. L. R. 162; 61 Sol. Jo. 217; 10 B. W. C. C. 166, C. A.

Annotation:—As to (1) **Consd.** Beamish *v.* Wagon Repairs (1925), 133 L. T. 406.

3091. —— Amount not fixed.]—A workman filed with the registrar of the county ct. a form of memorandum stating that in the event of his being thereafter "totally or partially incapacitated from work as a result of his said injuries" he should be entitled to compensation under Workmen's Compensation Act, 1906 (c. 55), the amount of such compensation to be ascertained "failing agreement between the parties by arbn. under the said Act." He subsequently lodged a request for arbn. The employers raised the objection that up to the time of the lodging of the request for arbn. no question had arisen as to the amount or duration of the compensation payable:—*Held:* (1) on the agreement, two questions had arisen, (*a*) as to the extent of the incapacity, & (*b*) as to the amount of the compensation, both of which questions might fairly be settled by arbn.; (2) the words "failing agreement" contained in the memorandum did not mean that there must be some attempt to agree which had proved unsuccessful, but they meant "if not settled by agreement."—HOGG *v.* VICKERS, LTD. (1921), 14 B. W. C. C. 229, C. A.

Annotation:—As to (1) **Apld.** Beamish *v.* Wagon Repairs (1925), 133 L. T. 406.

3092. —— ——.]—On July 18, 1923, the workman suffered an injury to his eye while in the

employment of resps., & was paid compensation until Sept. 27, 1923, when he returned to do lighter work. On Oct. 26, 1923, an agreement was made declaring the employers liable to pay compensation in the event of the workman sustaining loss in consequence of the accident; the amount, failing agreement, to be fixed in accordance with Workmen's Compensation Act, 1906 (c. 58). A memorandum of this agreement was duly recorded on Nov. 10, 1923. The workman was subsequently only intermittently employed & on Oct. 7, 1924, he commenced original arbn. proceedings claiming compensation. Resps. in their answer made no objection to the form of procedure, but at the hearing took the preliminary objection that the proceedings ought to have been by way of review, & that the county ct. judge had no jurisdiction to hear arbn. proceedings. The county ct. judge dismissed the application & declined to treat the proceedings as a review:—*Held:* the agreement did not fix a definite weekly sum but left open questions proper to be decided by original arbn. proceedings & the workman was entitled to institute such proceedings. In any case, having regard to the fact that no objection to the procedure was taken by resps. in their answer, they should have been taken to have acquiesced in the form of proceedings instituted by the workman's case remitted.—BEAMISH *v.* WAGON REPAIRS, LTD. (1925), 133 L. T. 406; 18 B. W. C. C. 156, C. A.

3093. Tender of full amount—Demand for costs of notice of arbitration.]—An injured workman was in receipt of half wages when it was discovered that she was a minor, entitled under Workmen's Compensation Act, 1906 (c. 58), sched. I. (*b*), to have more than 50 per cent. of her average wages, & then a demand for arbn. was served on resps.

Resps. almost immediately tendered the money, which was not accepted as costs alleged to be due were not also tendered. After hearing the case the arbitrator made an award of costs against resps. Against this resps. appealed:—*Held:* there was no dispute, & therefore no power to order costs.—SMITH *v.* ABBEY PARK STEAM LAUNDRY CO., LTD. (1909), 2 B. W. C. C. 142, C. A.

Annotation:—**Mentd.** Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169.

D. Duration of Compensation.

3094. Conditional admission of liability—Dependent on medical certificate.]—PAYNE *v.* FORTESCUE (N.) & SONS, LTD., No. 3068, *ante*.

3095. Admission of liability to date of payment only—Future liability to be determined when application made.]—The employers of a workman, who had been totally incapacitated by an accident, admitted liability under Workmen's Compensation Act, 1906 (c. 58), tendered the amount of compensation due, as to which there was no dispute, & requested the workman to sign a receipt which contained this clause: "At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week, when application is made for payment." The workman objected to this clause on the ground that he was entitled to have an unqualified admission of liability, such as he could embody in a memorandum of agreement for the purpose of recording, & he refused to sign the receipt & initiated arbn. proceedings:—*Held:* a question had arisen between the parties as to the duration of compensation, & the arbn. was competent.—SUMMERLEE IRON CO., LTD. *v.* FREELAND, [1913] A. C. 221; 82 L. J. P. C. 102; 108 L. T. 465; 29 T. L. R. 277; 57 Sol. Jo. 281; 6 B. W. C. C. 255, H. L.

Annotations:—**Consd.** Babcock & Wilcox *v.* Pearson (1913), 6 B. W. C. C. 841. **Distd.** Bedwell *v.* L. Elec. Ry. (1914), 7 B. W. C. C. 685; Sampson *v.* General Steam Navigation Co. (1914), 7 B. W. C. C. 107. **Apld.** Cooper *v.* Wales, [1915] 3 K. B. 210. **Consd.** Shaddick *v.* Palmer's Shipbuilding & Iron Co. (1917), 86 L. J. K. B. 1017. **Refd.** Tyne Tees Shipping Co. *v.* Whilock, [1913] 3 K. B. 642; Brown *v.* Baird (1923), 17 B. W. C. C. 289; Russell *v.* Rudd, [1923] A. C. 309; Lindsay *v.* Glasgow Iron & Steel Co. (1925), 18 B. W. C. C. 600.

3096. Admission of liability during total incapacity only.]—A workman was incapacitated by accident. His employers admitted liability & were willing to record a memorandum agreeing to pay "during total disablement, the amount of payment for partial disablement, to be settled hereafter." The workman refused to allow this to be recorded & applied to record a memorandum in general terms of agreement to pay compensation during incapacity. The county ct. judge dismissed the application on the ground that no question had arisen. The workman appealed, alleging that there was the question of "duration":—*Held:* no question had arisen.—SAMPSON *v.* GENERAL STEAM NAVIGATION CO., LTD. (1914), 7 B. W. C. C. 107, C. A.

Annotations:—**Consd.** Cooper *v.* Wales, [1915] 3 K. B. 210. **Refd.** Shaddick *v.* Palmer's Shipbuilding & Iron Co. (1917), 86 L. J. K. B. 1017.

3097. ——.]—A workman, whilst employed by resps., met with a severe accident to his left hand which caused for the time total incapacity. Resps. offered to pay full compensation during total incapacity. This was declined on the ground that the workman was not prepared to accept an admission limited to total incapacity only. The result was that the compensation offered was not accepted by the workman, & he applied to have the compensation fixed by arbn.:—*Held:* a question had arisen within Workmen's Compensation Act, 1906 (c. 58), s. 1 (3), & there was jurisdiction to entertain the application.—COOPER *v.* WALES, LTD., [1915] 3 K. B. 210; 84 L. J. K. B. 1321; 113 L. T. 637; 31 T. L. R. 506; 59 Sol. Jo. 578; 8 B. W. C. C. 595, C. A.

Annotations:—**Consd.** Round *v.* Wathen (1916), 86 L. J. K. B. 1011. **Apld.** Shaddick *v.* Palmer's Shipbuilding & & Iron Co. (1917), 86 L. J. K. B. 1017.

3098. ——.]—A work girl was injured while working for applts. The employers at once admitted liability to pay her full compensation under Workmen's Compensation Act, 1906 (c. 58), & they paid her 6*s.* a week, being half her average wages. Correspondence with regard to recording a memorandum of agreement then took place between the solrs. for the parties, with the result that the employers stated that they would consent to a memorandum being filed in the following terms: "The said J. Wathen & Son admit their liability to pay to the said Lily Round the compensation to which she may at any time be entitled under Workmen's Compensation Act, 1906 (c. 58), in respect of the said injury, & during total incapacity the said J. Wathen & Son admit liability to pay at the rate of 6*s.* per week as from the date of the accident, but the amount of compensation payable during partial incapacity is not now capable of agreement, & must be settled by agreement or by arbn. in accordance with the Act,

2 S. L. T. 396; 9 B. W. C. C. 682.—SCOT.

p. —— ——.] — MURPHY *v.* FARME COAL CO., [1918] S. C. 659; 55 Sc. L. R. 557; [1918] 2 S. L. T. 8.—SCOT.

q. —— ——.] — BAIRD & CO., LTD. *v.* MURPHY (1921), 58 Sc. L. R. 611.—SCOT.

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when total incapacity ceases." Appct. refused to agree to this memorandum being recorded, & applied for arbn., desiring a memorandum or award showing the 6*s.* to be paid until "ended or diminished or redeemed" in accordance with the Act. The county ct. judge held that a question had arisen between the parties within Workmen's Compensation Act, 1906 (c. 58), s. 1 (3), & that he had jurisdiction to hear the application. Accordingly he made an award for appct. of 6*s.* a week in accordance with Form 24 in the Appendix to the Workmen's Compensation Rules, 1907, "to continue during the total or partial incapacity of appct. for work, or until the same shall be ended, diminished, increased, or redeemed in accordance with the provisions of the Act":—*Held:* a question had arisen, & the award was *intra vires*.—ROUND *v.* WATHEN & SON (1916), 86 L. J. K. B. 1011; 116 L. T. 97; 10 B. W. C. C. 35, C. A.

3099. Refusal to enter into agreement.]—A workman was totally incapacitated by an accident while at work. The employers admitted liability & paid full compensation weekly. The workman asked the employers to enter into an agreement to continue to make the weekly payment during incapacity, so that he might record a memorandum thereof. This they refused to do, & the workman thereupon applied for an award:—*Held:* no question had arisen.—BELL *v.* LONDON ELECTRIC RY. CO. (1914), 7 B. W. C. C. 685, C. A.

Annotations:—**Consd.** Cooper *v.* Wales, [1915] 3 K. B. 210; Shaddick *v.* Palmer's Shipbuilding & Iron Co. (1917), 86 L. J. K. B. 1017.

3100. ——.]—A workman was totally incapacited by an accident during work. The employers admitted liability & told the man he would be paid £1 a week, the maximum compensation he could claim, week by week, at their pay office. The workman declined to take any money until the employers signed a form showing an agreement to pay compensation in the terms of Workmen's Compensation Act, 1906 (c. 58), until the same should be ended, diminished, or redeemed, so that a memorandum to that effect could be recorded. The employers refused to admit such an agreement or to sign the form. All they would say was, "We have admitted liability & there is no question." The workman thereupon applied for an award. The county ct. judge awarded for the workman in terms similar to those to which the employers had been asked to agree. The employers contended that the county ct. judge had no jurisdiction as no question had arisen:—*Held:* though the employers were not compelled to sign any particular form of agreement, the admission of liability made by them did not cover an injured workman's full rights under Workmen's Compensation Act, 1906 (c. 58), & a question had arisen which gave the county ct. judge jurisdiction.—SHADDICK *v.* PALMER'S SHIPBUILDING & IRON CO. (1917), 86 L. J. K. B. 1017; 117 L. T. 259; 61 Sol. Jo. 545; 10 B. W. C. C. 364, C. A.

SECT. 11.—PROCEDURE IN THE ARBITRATION.

SUB-SECT. 1.—JURISDICTION AS TO PLACE.

See Workmen's Compensation Act, 1925 (c. 84), s. 27; Workmen's Compensation Rules, 1926, rr. 88–90.

3101. Jurisdiction of court of district where accident happened—Accident in England—Employer resident in Ireland.]—HADDOCK *v.* FISHER & SONS (1900), 2 W. C. C. 43, C. A.

Annotation:—**Refd.** Hunter *v.* Städtische Hochseefischerei Gemeinnützige Gesellschaft (1925), 133 L. T. 488.

3102. —— —— **Employer resident in Scotland.**]—When a workman resident in England is injured by an accident occurring in England, but his employer resides in Scotland, proceedings for compensation under Workmen's Compensation Act, 1897 (c. 37), may be taken in the county ct. of the district in which the accident occurred, & service of the necessary notices may be effected by registered post.—R. *v.* OWEN, [1902] 2 K. B. 436; 71 L. J. K. B. 770; 51 W. R. 168; 18 T. L. R. 701; 46 Sol. Jo. 617; 4 W. C. C. 150; *sub nom.* R. *v.* NEWPORT COUNTY COURT JUDGE, 87 L. T. 298, D. C.

Annotation:—**Consd.** Hunter *v.* Städtische Hochseefischerei Gesellschaft, [1925] 2 K. B. 493.

3103. —— —— **Foreign employer.**]—HUNTER *v.* STÄDTISCHE HOCHSEEFISCHEREI GESELLSCHAFT, No. 2232, *ante*.

SUB-SECT. 2.—PARTIES.

See Workmen's Compensation Rules, 1926, rr. 2–7.

3104. Right to bring proceedings in name of workman—Approved society—National Insurance Act, 1911 (c. 55), s. 11 (2)—What constitutes neglect or refusal.]—The above sub-sect. enacts that where an insured person appears to be entitled to compensation under Workmen's Compensation Act, 1906 (c. 58), & "unreasonably refuses or neglects" to take proceedings to enforce such claim, his approved society may take proceedings in his name & on his behalf. A workman who was injured by an accident & subsequently incapacitated omitted to take proceedings for compensation by reason of his belief that the incapacity was not occasioned by the accident:—*Held:* by reason of his omission, on good grounds, to take proceedings, the workman did not unreasonably refuse or neglect to take proceedings so as to entitle his approved society to do so in his name.—RUSHTON *v.* SKEY (GEORGE) & CO., LTD., [1914] 3 K. B. 706; 83 L. J. K. B. 1503; 111 L. T. 700; 30 T. L. R. 601; 58 Sol. Jo. 685; 7 B. W. C. C. 508, C. A.

Annotations:—**Refd.** Allen *v.* Francis, [1914] 3 K. B. 1065; Skelton *v.* Baxter, [1916] 1 K. B. 321. **Mentd.** Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169.

3105. —— —— ——.]—ALLEN *v.* FRANCIS, No. 3177, *post*.

3106. —— —— ——.]—A workman having met with an accident, two letters dated Apr. 23, 1914, & May 2, 1914, were written on behalf of an approved society stating that it was purposing to take proceedings for the workman against the employer to obtain compensation under Workmen's Compensation Act, 1906 (c. 58). Proceedings were then brought & at the hearing the secretary of the local branch of the approved society, who was called to give expert evidence, said, in answer to questions put in cross-examination, that his society was an approved society & had taken these proceedings in the name of the workman. He also said that the workman had not refused to take proceedings, but, though anxious to do so, had not the necessary money. The county ct. judge thereupon dismissed the application on the ground that under National Insurance Act, 1911 (c. 55), s. 11 (2), an approved

society was not entitled to bring proceedings in a workman's name unless he had unreasonably neglected or refused to take them himself. On appeal it was alleged on the workman's behalf that he was not an insured member of the approved society, but was merely a member of it as a trade union, & it was contended that in these circumstances National Insurance Act, 1911 (c. 55), s. 11 (2), had no application & that the proceedings were maintainable :—*Held :* on the evidence as it stood, the county ct. judge was entitled to draw the inference that the workman was insured in the society under National Insurance Act, 1911 (c. 55), & as no case of surprise had been made, & county ct. judge's decision must stand.—BURNHAM *v.* HARDY (1915), 84 L. J. K. B. 714 ; 112 L. T. 837 ; 8 B. W. C. C. 57, C. A.

Annotation :—**Mentd.** Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169.

3107. —— —— ——.]—A boy, who was insured in an approved society, having met with an accident, instructed a solr. & commenced proceedings by his mother as next friend. The solr., however, declined to continue without certain costs being paid. The case was consequently adjourned, whereupon the local agent of his approved society offered the society's help, which was given. The society instructed another solr. to appear on the boy's behalf, but no notice of change of solr. was given. Upon the case coming on for hearing, resps. objected that the solr. had no *locus standi*, & also that the application had now become that of the approved society. The county ct. judge without hearing any evidence, upheld this contention, dismissed the workman's application, & ordered the approved society to pay the costs :—*Held :* the case must be remitted to be properly heard. There was no evidence to support the course taken by the judge, & his order must be discharged.

The provision in the National Insurance Act, 1911 (c. 55), is . . . facultative & additional & enable in certain cases the insurance society to sue in the name of the assured against his will, subject to the society's liability to pay costs (PHILLIMORE, L.J.).—DOUGHTY *v.* ALTHAM COLLIERY CO., LTD. (1916), 9 B. W. C. C. 298, C. A.

Annotation :—**Refd.** Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169.

3108. —— Trade union.]—A trade union may help a workman but must not initiate proceedings in his name (*per* CUR.).—BOBBEY *v.* CROSBIE & CO. (1915), 84 L. J. K. B. 856 ; 112 L. T. 900 ; 8 B. W. C. C. 236, C. A. ; *revsd.* on other grounds, 85 L. J. K. B. 239, H. L.

3109. By whom proceedings brought—Question for judge.]—BURNHAM *v.* HARDY, No. 3106, *ante*.

3110. —— ——.]—Where the issue in the county ct. in proceedings for compensation under Workman's Compensation Act, 1906 (c. 58), is whether the insured person's claim has been properly taken by him, or has been taken in his name & on his behalf by the approved society, the issue must be determined as between the workman & his employer & the circumstance that the claim had been " maintained " by the approved society does not *ipso facto* afford a defence to the claim.

In this case the insured person had signed a retainer for the solr., chosen by the approved society, to act for her & had written letters to the effect that she wished her case to be taken up &, though the approved society gave a partial indemnity as to costs & actually found the money for the expenses of proving her case, the county ct. judge found as a fact that the application was made by the insured person herself :—*Held :* there was evidence to support the finding & no misdirection.—SKELTON *v.* BAXTER, [1916] 1 K. B. 321 ; 85 L. J. K. B. 181 ; 114 L. T. 56 ; 32 T. L. R. 130 ; 60 Sol. Jo. 120 ; 9 B. W. C. C. 97, C. A.

Annotations :—**Refd.** Mackey *v.* Monks (Preston), [1918] A. C. 59. **Mentd.** Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169.

Proceedings by dependants & personal representative of dependants.]—*See* Sect. 2, sub-sect. 2.

SUB-SECT. 3.—CLAIM AND ANSWER.

See Workmen's Compensation Rules, 1926, 8–18, 20, 25, 28.

3111. Time for filing notice of claim.]—POWELL *v.* MAIN COLLIERY CO., No. 2971, *ante*.

3112. —— Public Authorities Protection Act, 1893 (c. 61), not applicable.]—FRY *v.* CHELTENHAM CORPN., No. 2933, *ante*.

3113. —— Party claiming indemnity.]—Where undertakers as defined by Workmen's Compensation Act, 1897 (c. 37), & a contractor with them are both made resps. to arbn. proceedings under the Act, the undertakers, if they desire to make a claim in the proceedings to indemnity against the contractor, must, five clear days before the day fixed for proceeding with the arbn., file a notice of their claim as provided by Workmen's Compensation Rules, 1898, r. 19.—APPLEBY *v.* HORSELEY CO., LTD., [1899] 2 Q. B. 521 ; 68 L. J. Q. B. 894 ; 80 L. T. 855 ; 47 W. R. 614 ; 15 T. L. R. 410 ; 43 Sol. Jo. 568 ; 1 W. C. C. 103, C. A.

Annotations :—**Folld.** Howard *v.* Driver (1903), 5 W. C. C. 153. **Refd.** Gill *v.* Fortescue (1913), 6 B. W. C. C. 577 ; Warburton *v.* Co-op. Wholesale Soc., [1916] 1 K. B. 906.

3114. Service of notices—Registered post—Employer residing out of jurisdiction.]—R. *v.* OWEN, No. 3102, *ante*.

3115. —— —— ——.]—HUNTER *v.* STÄDTISCHE HOCHSEEFISCHEREI GESELLSCHAFT, No. 2232, *ante*.

3116. Particulars—Contents of—Nature of injury only need be stated.]—A workman stated in his particulars that the effect of an accident was a rupture on the left side. The judge, sitting with a medical assessor, found that he never had been ruptured but that there had been disabling effects of the accident of which no mention had been made in the particulars & which bore no relation to rupture. The workman then applied for leave to amend his particulars to include these effects. The judge refused & made an award in favour of resps. :—*Held :* the workman is only required to state the nature of his injury & not its effects ; this was a mere misdescription of the effects, & no amendment was therefore needed.—SIDNEY *v.* COLLINS, SON & CO. (1910), 3 B. W. C. C. 433, C. A.

Annotations :—**Consd.** Westminster Brymbo Coal & Coke Co. *v.* Evans (1916), 86 L. J. K. B. 47. **Refd.** Stevens *v.* Thorne, [1916] 2 K. B. 69 ; Temperton *v.* Fletcher & Fearnall (1924), 132 L. T. 135.

3117. —— —— ——.]—TEMPERTON *v.* FLETCHER, SON & FEARNALL, LTD., No. 3990, *post*.

3118. —— Amendment of—When permissible.]—A workman sustained injury to his thumb. Liability was admitted, & weekly payments were made. The employers then asked him to undergo a course of massage at their expense ; he agreed, & went to the hospital, where, however, he refused to submit to the breaking down of the adhesions under an anæsthetic, which was a necessary preparation for the massage. Later, the employers applied for termination of the weekly payments on the ground that the man had unreasonably refused to have the top joint of his thumb amputated, which they alleged had been advised by his doctors.

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The only refusal that might have been unreasonable, which was proved, was that the workman had refused to have the adhesions broken down under an anæsthetic preparatory to the massage, which was the actual advice given by his doctors. The county ct. judge stated that he thought this refusal was covered by the employers' application, but that to prevent any doubt on this point he would amend the particulars; he then found that the refusal was unreasonable, & terminated the compensation:—*Held:* the employers having failed to prove the only refusal alleged (amputation) as unreasonable in their particulars, their application failed; they were debarred from raising the question of the other refusal (massage), as it was a distinct issue which had not been raised on the particulars given to the workman, & which was too serious to be imported into the case by amendment at the hearing.—HAYS WHARF PROPRIETORS *v.* BROWN (1909), 3 B. W. C. C. 84, C. A.

Annotation:—**Distd.** Miles *v.* Dawe (1915), 8 B. W. C. C. 225.

3119. ——— Power of judge to refuse—Where no dispute.]—STEVENS *v.* THORNE & CO., No. 3904, *post.*

3120. Answer — Contents of — Employer not bound to allege malingering.]—A workman received compensation for the loss of the little finger of the right hand. Compensation was stopped, on the advice of the employers' doctor. The workman applied for it to be continued, & the employers, by their answer, stated that they had offered him suitable work, which he had refused, but they did not say that the workman's conduct was unreasonable. The county ct. judge found that the refusal was unreasonable, & dismissed the application. The workman appealed on the ground that, as the answer had not raised the question of unreasonableness, the judge had no power to give a decision upon it:—*Held:* the appeal must be dismissed; the employer is not bound specifically to allege in his answer that a workman is a malingerer.—POTTS *v.* GUILDFORD SYNDICATE (1914), 7 B. W. C. C. 675, C. A.

3121. —— —— Whether general denial of incapacity sufficient—To raise question of fitness for light work.]—A sailor, who had met with an injury by accident, was paid full compensation at the rate of 17*s.* 6*d.* a week for a period of nearly three years, when the payments stopped on Jan. 9, 1917. The workman then applied for full compensation, & the employers filed an answer stating that the man was not incapacitated & had not been since Jan. 9, 1917, & alternatively, if incapacitated, such incapacity was not the result of the accident. At the hearing medical evidence was given to the effect that the man's incapacity was partly due to his having abstained from doing any work. Appct. admitted that his doctor had advised him to go to work, & there was evidence that he could, had he tried, have found suitable work. The county ct. judge took this evidence into consideration & reduced the amount of compensation to 10*s.* a week, on the ground that appct.'s partial incapacity was in part but not wholly due to his own conduct. Against so much of the award as reduced the compensation the workman appealed, contending that the question of being fit to do light work was not raised by the employers' answer, & the judge had no jurisdiction to consider any such evidence:—*Held:* the answer filed sufficiently raised the question, & there was ample evidence to support the award & no misdirection.—ROUSE *v.* HUTCHINSON (1917), 10 B. W. C. C. 523, C. A.

3122. —— Effect of failure to file—Discretion of judge to admit evidence or adjourn.]—Where a resp. to an arbn. in the county ct., having failed to file an answer, desires to produce evidence which is not consented to by appct., the judge may, on such terms as he shall think fit, either proceed with the arbn. & allow resp. to avail himself of such evidence, or adjourn the arbn. to enable resp. to file such answer.—SILVESTER *v.* CUDE (1899), 15 T. L. R. 434: 1 W. C. C. 120, C. A.

3123. —— —— Admission of particulars.]—CHAPMAN *v.* SMITH, No. 3411, *post.*

3124. —— —— Workman—Duty of judge to adjourn.]—A boy of fourteen severely injured his hand, losing two fingers & a thumb. After payments had been made for six months the employers applied for a review on the ground that he was able to do light work, which they were ready to offer him. Owing to his having changed his solrs., the workman was not ready with his answer, & asked for an adjournment. The county ct. judge would not adjourn the case, but reduced the compensation by the amount of the wages for the light work offered:—*Held:* the order of the county ct. should be discharged, & the case remitted for review at a future date, the workman, in the meantime, undertaking to attempt to do the work offered to him.—THORNBER & SONS, LTD. *v.* DURKIN (1914), 7 B. W. C. C. 548, C. A.

3125. —— Amendment of—Not for purpose of denying admission.]—BUCKLEY *v.* MARCHINGTON & CO., No. 2841, *ante.*

3126. Effect of neglect of workman to proceed—Right of employer to apply to have question settled.]—POWELL *v.* MAIN COLLIERY CO., No. 2971, *ante.*

SUB-SECT. 4.—APPEARANCE OF PARTIES.

See Workmen's Compensation Rules, 1926, r. 35.

3127. Right of audience—Solicitor's managing clerk—Discretion of judge.]—At the hearing of an interlocutory application by the employer for the order that the workman should give particulars of incapacity, the workman was represented by the managing clerk of the solr. on the record, himself an admitted solr. The county ct. judge refused to hear him, as not being the proper person to appear in ct.:—*Held:* the refusal was within the discretion of the judge; for this purpose there is no distinction between interlocutory & final matters.—ROGERS *v.* HOLBORN METROPOLITAN BOROUGH (1914), 7 B. W. C. C. 432, C. A.

SUB-SECT. 5.—EVIDENCE.

3128. Admissibility — Statement of deceased workman.]—HEWITT *v.* STANLEY BROTHERS, LTD., No. 2684, *ante.*

3129. ——.]—BEARE *v.* GARROD, No. 2324, *ante.*

3130. ——— Made in course of duty.]—FINN *v.* SHELTON IRON, STEEL & COAL CO., LTD., No. 2545, *ante.*

—— —— As to bodily feelings.]—*See* EVIDENCE, Vol. XXII., pp. 70, 71, Nos. 415–417.

—— Finding of coroner's inquisition.]—*See,*

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r. *Remission to amend stated case—Power of arbitrator to hear further evidence.*]—PARK *v.* COLTNESS IRON CO., LTD., [1913] S. C. 1163; 50 Sc. L. R. 926; [1913] 2 S. L. T. 232; 6 B. W. C. C. 892.—SCOT.

generally, CORONERS, Vol. XIII., pp. 259, 260, Nos. 402–410.

—— **Certificate of death.**]—*See, generally*, EVIDENCE, Vol. XXII., p. 323, Nos. 3173–3179.

3131. —— Information given between trial & judgment.]—MCCARTHY *v.* MELITA (OWNERS), No. 2776, *ante*.

3132. —— Evidence of allegation raised late in proceedings—Discretion of judge.]—LEIVERS *v.* BARBER, WALKER & CO., No. 2496, *ante*.

3133. —— Medical opinion of non-medical witness—Student in toxicology.]—NIGHTINGALE *v.* BIFFEN, HEWITT *v.* BIFFEN, No. 2737, *ante*.

—— **Medical text books.**]—*See* EVIDENCE, Vol. XXII., p. 386, No. 3959.

3134. At what stage of proceedings admitted—Whether after judgment.]—Arbn. proceedings were closed & the county ct. judge pronounced in favour of appct. Certain arguments were then addressed to the judge, & in consequence he recalled appct. & then altered his verbal award in respect to the duration of the compensation awarded, & made payments terminable as from the date of the arbn. The award was then drawn up in this form & signed:—*Held:* the award as corrected was valid.—HEATH *v.* HACKNEY MARSHES NATIONAL PROJECTILE FACTORY (1917), 10 B. W. C. C. 361, C. A.

—— —— —.]—*See, generally*, EVIDENCE, Vol. XXII., pp. 477–479, Nos. 5029–5050.

3135. What amounts to admission of liability—Allegations not traversed.]—The particulars of an application for arbn. filed by a workman alleged the circumstances of an accident, & that certain payments of compensation had been made by the employers. The employers' answer left everything admitted, except the extent of incapacity & the amount of compensation to be paid. The county ct. judge dismissed the workman's application on the ground that there was not sufficient evidence of accident:—*Held:* the allegations as to accident not having been traversed by the employers' answer, they must be taken to have been admitted, & therefore there was no necessity for the workman to call evidence on this point.—RUDGE *v.* YOUNG & SON (1914), 7 B. W. C. C. 406, C. A.

3136. —— Letter from insurance company.]—An insurance co. who were contesting a workmen's compensation case as agents for the employer, had written a letter to appct. admitting liability. The letter, however, had not been acted upon, & the county ct. judge decided against the workman on the merits of the case:—*Held:* without hearing the merits, the letter was an admission of liability binding on the employer.—FRASER *v.* DRISCOLL (1916), 9 B. W. C. C. 264, C. A.

Annotations:—**Dbtd.** Dutton *v.* Sneyd Bycars Co., [1920] 1 K. B. 414. **Distd.** Maloney *v.* Pink (1923), 130 L. T. 500.

3137. —— ——.]—MALONEY *v.* PINK (E. & T.), LTD., No. 2753, *ante*.

3138. —— Letter to parent of workman—Offer to continue voluntary payments.]—A boy received an injury by accident in the course of his employment. His employer, without fully inquiring into the facts, paid compensation for five weeks, & wrote a letter to the boy's father offering, on certain conditions, to continue the payments. At the hearing the county ct. judge found that the accident did not arise out of the employment, but that, in the circumstances, the employer was estopped by his conduct from denying liability:—*Held:* neither the letter nor the payment of compensation amounted to an estoppel.—HARRISON *v.* FEATHERSTONE (1916), 10 B. W. C. C. 54, C. A.

3139. —— Voluntary payment of compensation.]—HARRISON *v.* FEATHERSTONE, No. 3138, *ante*.

3140. —— —— Signature of special receipt forms.]—Appct. was employed by a co., whose undertaking was controlled by the Ministry of Munitions during the war, to manufacture poison gas, & he was incapacitated by gas poisoning on July 5, 1916. At first he continued to receive his full wages, but after about eight weeks he was paid £1 7*s.* 11*d.* a week until Mar. 1917, when he sufficiently recovered to do light work for a colliery co., & he received in addition to his wages in that employment, half the difference between his wages before he was disabled & his then wages. In July, 1918, he again became incapacitated as the result of the poisoning, & he was again paid £1 7*s.* 11*d.* a week until Jan. 8, 1919. Since then he had been paid only 10*s.* a week. On the hearing of a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), the employers denied liability on the ground that appct. was suffering from a disease admittedly resulting from his employment, but one not covered by Sched. III. to the Act. It was contended in answer that the employers by their conduct were estopped from denying the case came within the Act, because during the man's incapacity they had required him from time to time to sign a declaration form known as the Munitions Finance Form W.C.A. 3, & he had given receipts on a form issued by the Ministry known as W.C.A. 4; & that payments corresponded in amount to payments recoverable under the Act. The county ct. judge held that the only inference from the above evidence was that the payments were made to appct. as payments due & payable under the Act, & that the co. were estopped from denying that appct. was entitled to an award:—*Held:* there was no estoppel; it was not competent for master & servant by conduct or agreement to give jurisdiction to the county ct. judge to award compensation otherwise than in accordance with Workmen's Compensation Act, 1906 (c. 58); a disease not mentioned as an industrial disease in Workmen's Compensation Act, 1906 (c. 58), Sched. III., or in the orders extending the operation of that Sched. could not therefore be brought within the limits of that jurisdiction either by agreement or estoppel.—DUTTON *v.* SNEYD BYCARS CO., LTD., [1920] 1 K. B. 414; 89 L. J. K. B. 85; 122 L. T. 333; 36 T. L. R. 54; 64 Sol. Jo. 99; 12 B. W. C. C. 345, C. A.

Annotations:—**Consd.** Williams *v.* Guest, Keen & Nettlefolds (1925), 133 L. T. 111. **Reld.** Maloney *v.* Pink (1923), 130 L. T. 500.

—— **Failure to file answer.**]—*See* Sub-sect. 3, *ante*.

SUB-SECT. 6.—POWERS OF JUDGE OR ARBITRATOR.

A. In General.

See Workmen's Compensation Act, 1925 (c. 84), sched. I. (4), (6).

3141. Limited to jurisdiction under the Act—Cannot be enlarged by agreement or estoppel.]—STANDING *v.* EASTWOOD & CO., No. 2058, *ante*.

PART XIV. SECT. 11, SUB-SECT. 6.—A.

t. Power to make prospective award.]—HALL (R. & H.), LTD. *v.* BRADY (1913), 47 I. L. T. 211.—IR.

a. Power to order evidence on commission.]—A judge acting as an arbitrator has power to direct the issue of a commission to take the evidence of witnesses in order that the evidence so taken may be used before him as part of the evidence on which to base his

Sect. 11.—*Procedure in the arbitration: Sub-sect.* 6, *A., B. & C.*]

3142. —— ——.]—DUTTON *v.* SNEYD BYCARS CO., LTD., No. 3140, *ante.*

3143. Power to grant new trial.]—MOUNTAIN *v.* PARR, No. 3044, *ante.*

3144. ——.]—A workman made a claim upon his employer for compensation for an injury which he said he had sustained in his employment. The employer denied liability. On the matter coming on for hearing before the county ct. judge, some communications passed between counsel & a settlement was arrived at whereby it was agreed the employer should pay to the workman £50, & costs. The judge made an award "by consent," giving effect to the agreement. After the award was drawn up & signed by the judge, the employers paid the £50 into ct. & paid the agreed costs. Afterwards the workman applied to the judge to set aside the award & order a new trial, on the ground of the inadequacy of the lump sum, & on the ground of a communication made to him by his counsel. The judge ordered that the award be set aside, & that appct. have a new trial:—*Held:* the judge, after his award had been drawn up & signed, had no power to set it aside.—BROWN *v.* WHITEHEAD (1920), 13 B. W. C. C. 18, C. A.

3145. ——.]—At the trial of an action for compensation for injury the county ct. judge gave judgment for deft. Appct. subsequently applied to the same judge for a new trial, on the ground that he had been taken by surprise, & that he had two witnesses who would give fresh evidence. The judge made an order for a new trial. Deft. appealed:—*Held:* the defence was sufficiently explicit, & appct. could not impugn it because an issue correctly stated was presented to him in a form which he did not anticipate; he must show not only that he was surprised, but that the surprise had led to an erroneous decision; it was a matter of public importance that litigants should not be encouraged to keep on applying for new trials, & the application should only have been granted on authoritative proof (*a*) that the evidence would be available, & of a satisfactory character; (*b*) it would be not merely a contradiction of evidence given before, but of a weighty nature, & such that its absence might presumably have caused a miscarriage of justice; (*c*) it could not with reasonable diligence have been called at the trial; these features having been lacking at the application, the order must be set aside.—GUEST *v.* IBBOTSON (1922), 91 L. J. K. B. 558; 126 L. T. 738; 38 T. L. R. 325; 66 Sol. Jo. 298; 15 B. W. C. C. 43, C. A.

3146. Power to alter award—Not after award signed & sealed—Unless accidental slip or omission.]—A county ct. judge has no power to alter his award after it has been signed & sealed unless there has been an accidental slip or omission within Workmen's Compensation Rules, 1907–1911, r. 28 (2).

A workman having sustained personal injury by accident arising out of & in the course of his employment, an agreement for compensation by his employers was recorded. The employers having applied for the review, termination, or diminution of the weekly sum payable to the workman, the county ct. judge reduced the compensation & directed that the employers should pay the costs. After the ct. rose he added a note that on further consideration he directed the award to be without costs, & his signature was placed after that note. In the award as drawn up no costs were awarded to either party. The workman applied that the award might be corrected under Workmen's Compensation Rules, 1907–1911, r. 28 (2), by awarding costs to him, on the ground that the award as drawn up differed from that made by the judge at the hearing:—*Held:* the judge had power to alter his award until it was signed & sealed within Workmen's Compensation Rules, 1907–1911, r. 28 (1), but not afterwards.—MOWLEM (JOHN) & CO. *v.* DUNNE, [1912] 2 K. B. 136; 81 L. J. K. B. 777; 106 L. T. 611; 5 B. W. C. C. 382, C. A.

Annotation:—**Folld.** Brown *v.* Whitehead (1920), 13 B. W. C. C. 18.

3147. —— **To rectify mistake.**]—A workman employed in a colliery ruptured himself while twisting a tub with the object of getting it on to the rails. He obtained an award of full compensation up to a certain date, & a declaration of liability was inserted in the award by mistake. Correspondence ensued between the parties with a view to the rectification of the mistake. In the course of the correspondence the workman notified the employers that he had never been asked for a declaration of liability. The question how the costs of the rectification should be borne being in dispute, the employers appealed, asking for an order that so much of the award as ordered that a declaration of liability of the employers to pay compensation be recorded might be set aside & for an order that the workman should pay the costs of the appeal:—*Held:* there had evidently been a mistake & the matter might have been put right without recourse being had to the Ct. of Appeal.—WEST *v.* STAVELEY COAL & IRON CO., LTD. (1922), 15 B. W. C. C. 174, C. A.

3148. Power to grant discovery or interrogatories.]—SUTTON *v.* GREAT NORTHERN RY. CO., No. 3045, *ante.*

3149. Power to make prospective award—Smaller payments after fixed time.]—BAKER *v.* JEWELL, No. 3513, *post.*

3150. —— **Payments varying with earnings.**]—On an application to review, the county ct. judge awarded to a partially incapacitated workman 10*s.* per week, of two-thirds of the difference between £1 & his actual earnings, whichever sum should be the less:—*Held:* there was no jurisdiction to make such an award.

The county ct. judge has exceeded his jurisdiction in making his award on the sliding scale (COZENS-HARDY, M.R.).—NEWHOUSE & CO. *v.* JOHNSON (1911), 5 B. W. C. C. 137, C. A.

3151. Power to order evidence on commission.]—In a claim under Workmen's Compensation Act, 1906 (c. 58), it appeared that appct. was employed by resp. as an errand boy & was injured by an

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award.—*Re* BODNER & WEST CANADIAN COLLIERIES (1912), 22 W. L. R. 765; 3 W. W. R. 529; 8 D. L. R. 462; 5 Alta. L. R. 163.—**CAN.**

b. *Power to amend pleadings.*]—An arbitrator has the same powers as to amendments of pleadings in proceedings before him as a judge has in a civil action.—MOORE *v.* CROW'S NEST PASS COAL CO., LTD. (1910), 15 B. C. R. 391.—**CAN.**

c. *Whether power to state case to judge—After award made.*]—An arbitrator has no power, after he has made his award, to submit a question to a judge.—*Re* LEWIS & GRAND TRUNK PACIFIC RY. CO. (1913), 25 W. L. R. 118; 4 W. W. R. 1246; 13 D. L. R. 152; 18 B. C. R. 329.—**CAN.**

d. —— *Question of law.*]—HOBBS & SAMUELS *v.* BRADLEY (1900), 2 F. (Ct. of Sess.) 744.—**SCOT.**

e. —— ——.]—MONTGOMERY *v.* NIDDRIE & BENHAR COAL CO., LTD., [1918] S. C. 181.—**SCOT.**

f. *Power to decide status of dependant — Illegitimate child.*]—Whether an alleged dependant occupies the status of an illegitimate child, should be considered & decided in an arbn.—JOHNSTONE *v.* SPENCER (JAMES) & CO., [1908] S. C. 1015; 45 Sc. L. R. 802; 16 S. L. T. 182; 1 B. W. C. C. 302.—**SCOT.**

g. —— *Widow.*]—FIFE COAL CO., LTD. *v.* WALLACE, [1909] S. C. 682;

accident as a result of which his leg had to be amputated. He filed a request for arbn. & applied for an order that he should be examined forthwith before an officer of the ct. at the hospital in which he was being treated. The county ct. judge made an order that he should be examined before the registrar on notice to resp., & that a copy of the examination should be used as evidence at the trial of the arbn. The examination was taken accordingly, but, owing to a misunderstanding, resp. was not represented at it:—*Held:* the Ct. of Appeal had jurisdiction to entertain an appeal from the order; the judge was sitting as arbitrator & had not all the powers which he exercised as county ct. judge; & he had no power to order evidence to be taken by commission.—TAYLOR *v.* CRIPPS, [1914] 3 K. B. 989; 83 L. J. K. B. 1538; 111 L. T. 780; 30 T. L. R. 616; 7 B. W. C. C. 623, C. A.

Annotation:—**Reid.** Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169.

3152. Power to suspend proceedings.]—SMITH *v.* DAVIS (D.) & SONS, LTD., No. 2956, *ante*.

3153. Power to award lump sum—By consent.]—HAYDOCK *v.* GOODIER No. 3587, *post*.

Power to amend particulars or answer.]—*See* Sub-sect. 3, *ante*.

B. To Refer to Medical Referee.

See Workmen's Compensation Act, 1925 (c. 84), sched. I. (11).

3154. Power to refer to medical referee—Where evidence conflicting.]—A seaman was injured, & claimed compensation. The medical evidence being conflicting, the county ct. judge referred the matter to a medical referee for report under Workmen's Compensation Act, 1906 (c. 58), sched. II. (15). He certified that the man was fit for light work if he wore a truss, but not fit for work as a seaman, or for lifting. On this certificate the county ct. judge awarded compensation on the basis of total incapacity:—*Held:* the judge was entitled under the regulations so to refer the matter to a referee, & on the latter's tificate was entitled to make the award.—HENRICKSEN *v.* SWANHILDA (OWNERS) (1911), 4 B. W. C. C. 233, C. A.

3155. —— Where death results from injury.]—The power conferred upon a county ct. judge by Workmen's Compensation Act, 1906 (c. 58), sched. II., para. 15, to refer to a medical referee extends to a case where death has resulted from the injury in respect of which compensation is claimed.—CAROLAN *v.* HARRINGTON & SON, [1911] 2 K. B. 733; 80 L. J. K. B. 1153; 105 L. T. 271; 4 B. W. C. C. 253: *sub nom.* CARROLAN *v.* HARRINGTON, 27 T. L. R. 486, C. A.

3156. When reference may be made—Not before opening of case.]—Upon an application by the employers to review, a consent adjournment was applied for. The county ct. judge, without the case being opened, or any evidence being given, granted an adjournment & ordered a reference to the medical referee, who happened to be in ct., so that he might report as to the workman's condition:—*Held:* there was no jurisdiction to order such reference at this stage of the proceedings.—PEILL & SONS *v.* PAYNE (1915), 8 B. W. C. C. 111, C. A.

3157. Report of referee—For use of arbitrator only—Discretion to allow parties to see.]—BOWDEN *v.* BARROW BROTHERS, No. 3052, *ante*.

3158. Examination by referee—Parties not entitled to attend.]—BOWDEN *v.* BARROW BROTHERS, No. 3052, *ante*.

Medical referee or arbitration tribunal.]—*See* Sect. 9, sub-sect. 5, *ante*.

C. To Appoint Medical Assessor.

See Workmen's Compensation Act, 1925 (c. 84), sched. I. (5).

3159. Who may be appointed assessor—Not doctor who has already given opinion.]—A medical referee appointed under Workmen's Compensation Act, 1906 (c. 58), having given a certificate that a workman was suffering from a scheduled industrial disease at a certain date, with the addition that he had completely recovered at the date of the certificate, the workman commenced proceedings which raised the same issue as that on which the opinion had been given:—*Held:* the county ct. judge was not entitled to appoint as his assessor the same doctor who had already given his opinion on the question.—WALLIS *v.* SOUTTER (ANDREW G.) & CO., LTD. (1915), 59 Sol. Jo. 285; 8 B. W. C. C. 130, C. A.

3160. Right to act on advice of assessor—After examination of workman.]—Conflicting medical evidence was given in an arbn. before a judge sitting with a medical assessor. The judge directed the medical assessor to examine the workman in his private room. On his return, the assessor communicated his opinion privately to the judge, who then said he adopted the view the assessor had advised & found in favour of the employer.

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46 Sc. L. R. 727; [1909] 1 S. L. T. 509; 2 B. W. C. C. 264.—**SCOT.**

h. *Power to determine validity of discharge—On application to record memorandum.*]—HANLEY *v.* NIDDRIE & BENHAR COAL CO., LTD., [1910] S. C. 875.—**SCOT.**

PART XIV. SECT. 11, SUB-SECT. 6. —B.

3154 i. *Power to refer to medical referee—Where evidence conflicting.*]—CARROLL *v.* GRAY & SON, [1910] S. C. 700; 47 Sc. L. R. 646; [1910] 1 S. L. T. 373; 3 B. W. C. C. 572.—**SCOT.**

3154 ii. —— ——.]—GRACIE *v.* CLYDE SPINNING CO., LTD. (1915), 8 B. W. C. C. 630.—**SCOT.**

k. —— *Notwithstanding employer's refusal to admit accident.*]—MACLEOD *v.* GLASGOW IRON & STEEL CO., LTD., [1925] S. C. 59.—**SCOT.**

l. —— ——.]—Where the employers of a workman applied for a reference to a medical referee:—*Held:* such a reference was not rendered incompetent by the fact that the employers did not admit the accident & made their application without prejudice to their right to dispute its occurrence.—M'GEECHAN *v.* GLASGOW IRON & STEEL CO., LTD., [1926] S. C. 4.—**SCOT.**

m. —— *Though matters of fact not wholly medical involved.*]—A medical referee in deciding a question as to a workman's condition & fitness for employment must necessarily have regard to facts which are not wholly medical.—M'NAUGHT *v.* GARRALLAN COAL CO., LTD., [1926] S. C. 351.—**SCOT.**

n. *When reference may be made.*]—MACLEOD *v.* GLASGOW IRON & STEEL CO., LTD. (1925), 18 B. W. C. C. 566.—**SCOT.**

o. —— *Necessity for previous disposal of application by sheriff-clerk.*]—CONNELLY *v.* MANOR POWIS COAL CO., [1926] S. C. 67.—**SCOT.**

p. *Power of further reference—Ambiguous certificate.*]—A medical referee's certificate was not clear to the mind of the arbitrator, who held he had no power to ask for an explanation:—*Held:* an arbitrator is entitled to send back to the medical referee for explanation a certificate which is ambiguous, unintelligible or open to different constructions.—KENNEDY *v.* DIXON (WILLIAM), LTD., [1913] S. C. 659; 50 Sc. L. R. 453; [1913] 1 S. L. T. 253; 6 B. W. C. C. 434.—**SCOT.**

q. —— *Certificate incomplete.*]—GILHOOLEY *v.* WATSON (JOHN), LTD., [1924] S. C. 794.—**SCOT.**

r. —— ——.]—READ *v.* ANCHOR DONALDSON, LTD., [1926] S. C. 132.—**SCOT.**

t. *Necessity for unambiguous medical report—For submission to medical referee.*]—*Held:* as the medical report obtained by the employers contained no clear & unambiguous statement as to the workman's condition, it did not justify a reference to a medical referee.—CRAMSIE *v.* WILSONS & CLYDE COAL CO., LTD., [1925] S. C. 364.—**SCOT.**

a. —— ——.]—HOWES *v.* MOUNT VERNON COLLIERY CO., LTD. (1925), 18 B. W. C. C. 672.—**SCOT.**

Sect. 11.—*Procedure in the arbitration: Sub-sect.* 6, *C., D. & E.; sub-sect.* 7, *A.* (*a*) *&* (*b*).]

No objection was taken on behalf of the workman to the examination:—*Held:* there was no misdirection, & in any event, as no objection had been raised at the hearing, the point was not open to be taken on appeal.—SMITH *v.* FOSTER (1913), 6 B. W. C. C. 498, C. A.

3161. —— Where conflicting medical evidence.]—An apparently perfectly healthy dock labourer of fifty-one years of age was injured in the course of his employment by being struck by a heavy piece of timber on the lower part of the back. He was incapacitated for some three months. He then returned to work for six months, but was never again strong & healthy. He complained of increasing kidney trouble, & was taken to the hospital & operated on for cancer of the kidney. He ultimately died from a clot of blood in his lungs, being the after-effects of a subsequent operation performed in order to heal more effectively the scar caused by the first. There was some conflict of medical evidence as to the possible origin of the cancer. The county ct. judge, sitting with a medical assessor, found that death resulted from the injury by accident:—*Held:* there was evidence to support the finding; a judge is justified in relying upon the medical opinion of the assessor.—LEWIS *v.* PORT OF LONDON AUTHORITY (1914), 111 L. T. 776; 58 Sol. Jo. 686; 7 B. W. C. C. 577, C. A.

Annotations:—**Refd.** Jones *v.* Guest, Keen & Nettlefolds (1915), 60 Sol. Jo. 75; Cross *v.* Connelly (1916), 10 B. W. C. C. 436; Earwicker *v.* London Graving Dock Co., [1916] 1 K. B. 970.

3162. — — ——.]—A workman was injured by accident & was paid compensation for some ten years. The employers then applied to terminate the payments. The application came before the county ct. judge sitting with a medical assessor. There was a conflict of medical opinion between the doctors called for the opposing sides, but the learned judge, after consultation with the medical assessor, accepted the evidence of the employers' doctor, that the man had fully recovered from the effects of the accident, & terminated the payments:—*Held:* the question was purely one of fact. There was evidence to support the finding, & no misdirection.—FLETCHER & SONS & FEARNELL, LTD. *v.* COCKELL (1920), 13 B. W. C. C. 314, C. A.

3163. — — **When opposed to medical evidence.**]—WOODS *v.* WILSON SONS & CO., LTD., No. 2323, *ante*.

3164. — — — ——.]—BOOTH *v.* CARTER, No. 2761, *ante*.

3165. —— ——.]—A county ct. judge, who is sitting with a medical referee as assessor in an arbitration under Workmen's Compensation Act, 1906 (c. 58), is at liberty either to accept or to reject, as he thinks fit, the medical opinion of the assessor, even though directly adverse to that of the doctors who have been called as witnesses, the assessor being entitled to express his medical opinion upon the facts as they have been given in evidence at the hearing of the arbn. & the judge having accepted that opinion is justified in acting upon it.—CARPENTER *v.* WANDSWORTH CORPN. (1917), 117 L. T. 183; 10 B. W. C. C. 340, C. A.

3166. Liberty to reject advice of assessor.]—CARPENTER *v.* WANDSWORTH CORPN., No. 3165, *ante*.

3167. ——.]—PURSEY *v.* GWYNNES, LTD., No. 3220, *post*.

3168. Duty of assessor—To assist with medical knowledge—Not to cross-examine witnesses—Nor act as advocate.]—EARWICKER *v.* LONDON GRAVING DOCK CO., LTD., No. 3192, *post*.

D. To Adjourn.

3169. Discretion to adjourn—All matters must be taken into consideration.]—A county ct. judge sitting as arbitrator under Workmen's Compensation Act, 1906 (c. 58), is not acting within his judicial discretion in refusing, without reason assigned, to grant an adjournment for the production of relevant evidence. In such a case a new trial will be ordered.

The question whether there shall be an adjournment of the proceedings in cases arising under Workmen's Compensation Act, 1906 (c. 58), is one which is within the discretion of the county ct. judge before whom such proceedings are pending, & although the Ct. of Appeal has power to interfere with the judge's decision in regard to the granting of an adjournment, it will refrain from doing so unless it appears to them that such discretion has been exercised in a way which shows that all necessary matters have not been taken into consideration, notwithstanding that they may not agree with the judge's decision.—JONES *v.* S. R. ANTHRACITE COLLIERIES, LTD. (1920), 90 L. J. K. B. 1315; 124 L. T. 462; 13 B. W. C. C. 346, C. A.

3170. —— **Failure to file answer—Tender of evidence.**]—SILVESTER *v.* CUDE, No. 3122, *ante*.

3171. —— **Tender of evidence prejudicial to employers.**]—A miner contracted nystagmus at work, & soon after became insane. He was paid compensation for nystgamus under an award. Later the employers applied to review & diminish the payments on the ground that total incapacity had ceased. The workman simply stated in his answer that the application would be resisted on the ground that there had been no change of circumstances since the award. The county ct. judge at the hearing refused to admit evidence tendered on behalf of the workman to show that the man's insanity was the result of nystagmus. The judge stated that this could not be given in the evidence as the employers had had no notice that such a point was going to be raised. He reduced compensation accordingly:—*Held:* (1) the judge should have admitted the evidence; (2) or, if prejudicial to the employers to have done so then, he should have adjourned the case at the workman's expense, so that the evidence might be given at a later date when the employers had had an opportunity to prepare to meet it.—WESTMINSTER BRYMBO COAL & COKE CO., LTD. *v.* EVANS (1916), 86 L. J. K. B. 47; 115 L. T. 365; 9 B. W. C. C. 512, C. A.

3172. ——**For further evidence.**]—In an application for arbn., by the dependant of a deceased workman, medical evidence was given, after the close of appct.'s case, on behalf of the employers, to the effect that a person whose vitality had been lowered was not more susceptible to influenza than a person whose vitality was normal. The county ct. judge expressed his surprise at this evidence & adjourned the case in order that each side might have an opportunity of adducing further evidence on that point. At the adjourned hearing medical evidence was called on behalf of appct. to prove the contrary. This was accepted by the judge, who awarded for appct.:—*Held:* while it was undesirable for a county ct. judge to express his opinion before the completion of a case, yet if he thought that he could not dispose of a case without more evidence it was a matter of discretion for him to adjourn the case for the purpose of obtaining further evidence. In the present case it could not be said that he did not exercise his discretion judicially &, as there was evidence to support his finding, the finding could

not be interfered with.—MORGAN *v.* SPEEDWELL (OWNERS) (1921), 14 B. W. C. C. 226, C. A.

E. To Grant Declaration of Liability.

3173. Power to grant—Though not asked for by either party.]—ASHRODY *v.* CITY OF EDINBURGH (OWNERS), No. 2063, *ante.*

3174. —— On application of either party—Time for application—Before evidence called.]—MARSHALL *v.* CLAYTON & SHUTTLEWORTH, No. 3543, *post.*

3175. Discretion to refuse.]—MARSHALL *v.* CLAYTON & SHUTTLEWORTH, No. 3543, *post.*

SUB-SECT. 7.—DUTIES OF JUDGE OR ARBITRATOR.

A. On Hearing of Application.

(a) In General.

3176. Duty to hear evidence—Whether indirect evidence sufficient.]—Although when acting as arbitrator in cases arising under Workmen's Compensation Act, 1906 (c. 58), a county ct. judge may, & in many cases ought, to proceed without any direct evidence, & although he may, & in many cases ought to, proceed upon indirect evidence which justifies his drawing an inference, yet there is nothing to justify him in doing that which is merely a balancing of probabilities.—PARRY *v.* OCEAN COAL CO., LTD. (1912), 106 L. T. 713, C. A.

3177. —— Before dismissing application.]—(1) On Sept. 5, 1913, a workman met with an accident & applied for sickness benefit to his approved society. The society thought the workman to be entitled to recover compensation from his employer under Workmen's Compensation Act, 1906 (c. 58), & on Jan. 31, 1914, their solr. wrote to the employer & threatened proceedings. The employer denied liability, & thereupon the society instructed their local solrs. to investigate the case. These solrs. wrote to the employer on Feb. 11, 1914, that they were instructed to act for the workman, & the workman was in fact informed by the society that, if he wished, these solrs. would act for him free of charge in taking proceedings for compensation. On Mar. 26, 1914, the workman signed a retainer of the solrs., & on Mar. 31, 1914, arbn. proceedings were commenced in his name. Before the county ct. judge the point was taken that the proceedings were in fact brought by the society in the workman's name & were not maintainable, as the workman had not unreasonably refused or neglected to take proceedings within National Insurance Act, 1911 (c. 55), s. 11 (2). The county ct. judge then asked counsel for appct. for whom it was that he actually appeared, &, on his refusal to answer the question except by producing the retainer, dismissed the application with costs:—*Held:* the case must go back to be heard. The county ct. judge ought to have heard the evidence & fully ascertained the facts, & ought only to have dismissed the application if he then came to the conclusion that the application was really being brought by the society.

(2) A workman desiring to make a claim against his employer may be helped by his trade union or by his club or approved society (LORD COZENS-HARDY, M.R.).—ALLEN *v.* FRANCIS, [1914] 3 K. B. 1065; 83 L. J. K. B. 1814; 112 L. T. 62; 30 T. L. R. 695; 58 Sol. Jo. 753; 7 B. W. C. C. 779, C. A.

Annotations:—As to (1) **Refd.** Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169. *As to* (2) **Consd.** Burnham *v.* Hardy (1915), 84 L. J. K. B. 714. **Refd.** Bobbey *v.* Crosbie (1915), 84 L. J. K. B. 856.

3178. —— ——.]—DOUGHTY *v.* ALTHAM COLLIERY CO., LTD., No. 3107, *ante.*

3179. —— Case not to be tried on particulars of claim only.]—The workman, who had been struck by a fellow workman, causing him to fall & injure himself, stated those facts in his particulars of claim for compensation; & his counsel, when asked by the county ct. judge, said he did not desire to add anything to those particulars, whereupon the judge held that no compensation was payable, as the accident did not arise out of the employment. The Ct. of Appeal, when informed that the case had been tried on the particulars of claim only:—*Held:* the case must be remitted to the county ct. for re-hearing, the costs of the first hearing to abide the result of the re-hearing, as it was quite unsatisfactory for a case, especially of this kind, to be tried on the particulars contained in the claim only, & there would be no costs of the appeal. —LEPPER *v.* BURNELL & CO. (1924), 132 L. T. 232; 68 Sol. Jo. 882, C. A.

3180. Right to apply personal knowledge.]—CALICO PRINTERS ASSOCN. LTD. *v.* BOOTH, No. 3795, *post.*

3181. ——.]—SILCOCK & SONS *v.* GOLIGHTLY, No. 3296, *post.*

3182. ——.]—LOCK *v.* CHATHAM EDUCATION COMMITTEE, No. 3107, *post.*

3183. ——.]—A workman who was suffering from miner's nystagmus & also from cataract, the latter being due to a mishap for which his employers were not responsible, obtained an award on the basis of total incapacity. On appeal the case was remitted to the county ct. judge to assess compensation on the basis of partial incapacity. The county ct. judge awarded the sum of 5*s.* per week, & in answer to an inquiry by the Ct. of Appeal, intimated that although he had no evidence pointing to the sum of 5*s.* a week, he arrived at that figure by his knowledge of local conditions:—*Held:* the county ct. judge was entitled to act upon his general knowledge of the labour market, conditions of trade, & similar circumstances, & the figure so assessed could not be interfered with on appeal.—MIDDLETON *v.* WHARNCLIFFE WOODMOOR COLLIERY CO., LTD. (1923), 16 B. W. C. C. 125, C. A.

Annotation:—**Refd.** Hamilton *v.* Shelton Iron, Steel & Coal Co., Leigh *v.* Same, Timmis *v.* Same (1926), 43 T. L. R. 97.

3184. ——.]—PEART *v.* BOLCKOW, VAUGHAN & CO., No. 2118, *ante.*

3185. Duty to look at all matters without presumption.]—LOCHGELLY IRON & COAL CO., LTD. *v.* KIRK, No. 2897, *ante.*

(b) To Take Notes.

See Workmen's Compensation Rules, 1926, r. 36.

3186. Duty to take notes.]—A county ct. judge must take a proper note of the proceedings in an arbn. under Workmen's Compensation Act, 1906 (c. 58). Where it does not appear from the note of any county ct. judge how he arrived at his decision, the ct. of appeal will order a new trial.—GRIFFITHS *v.* WYNNSTAY COLLIERIES (1909), 2 B. W. C. C. 450, C. A.

PART XIV. SECT. 11, SUB-SECT. 7. —A. (a).

b. *Where workman fit for light work—Duty to determine extent of wage earning capacity.*]—SMITH *v.* PETRIE (1913), 50 Sc. L. R. 749.—**SCOT.**

PART XIV. SECT. 11, SUB-SECT. 7. —A. (b).

3186 i. *Duty to take notes.*]—The Ct. of Appeal remitted to the county ct. judge to be re-heard by him a case in which the county ct. judge's note of the evidence, required to be taken by statute, did not contain material findings of fact necessary to enable the ct. to do justice between the parties. —WALSH *v.* SCANLAN (1914), 48 I. L. T. 234; 8 B. W. C. C. 414.—**IR.**

Sect. 11.—*Procedure in the arbitration: Sub-sect.* 7, *A.* (*b*), *& B.* (*a*) *&* (*b*); *sub-sect.* 8. *Sect.* 12: *Sub-sects.* 1 *& 2.*]

3187. ——.]—TOMLINSON *v.* GARRATT'S, LTD., No. 2518, *ante.*

3188. ——.]—(1) It is the duty of a county ct. judge, under Workmen's Compensation Rules, r. 36, to make a proper note of the evidence given at the hearing of any arbn. proceedings under Workmen's Compensation Act, 1906 (c. 58).

(2) A collier met with an accident arising out of & in the course of his employment, & was paid compensation by his employers under Workmen's Compensation Act, 1906 (c. 58), for over a year. They then stopped paying it, & he thereupon commenced proceedings for compensation; but the employers denied liability on the ground that, if the incapacity still continued, it was owing to the man's unreasonable refusal to undergo medical treatment provided & paid for by them. A few months before the employers stopped the payments the man had been advised to undergo the Weir-Mitchell treatment for neurasthenia. The employers agreed to provide it, & the man's solrs., in writing to say that he agreed to submit himself to it, suggested that as he was also advised to have massage for some injury to his back this should be given him at the same time. The employers agreed to this, & the man entered a home for treatment, but on an attempt being made to massage him he left the home. The medical evidence was apparently all in favour of massage, but no note of the evidence was taken by the county ct. judge, who dismissed the application on the ground that the continued incapacity was due to the man's unreasonable refusal to submit to massage:—*Held:* on the correspondence & admitted facts, there was evidence to support the judge's decision, but as it was not certain that massage would cure the incapacity, there ought to be a suspensory award of a 1*d.* a week.—WRIGHT *v.* SNEYD COLLIERIES, LTD. (1915), 84 L. J. K. B. 1332; 113 L. T. 633; 8 B. W. C. C. 537, C. A.

3189. —— **Whether requested to do so or not.**]—BRINE *v.* CORRY & SON, No. 3933, *post.*

3190. ——.]—Having regard to the provisions of Workmen's Compensation Rules, 1907, r. 34, it is the imperative duty of the county ct. judge to take notes of the evidence in every case arising under Workmen's Compensation Act, 1906 (c. 58), whether or not there is a request so to do by either party to the proceedings, so that in the event of the case subsequently coming before the Ct. of Appeal that ct. may be able to do justice to the parties.—RAYMAN *v.* FIELDS (1910), 102 L. T. 154; 26 T. L. R. 274; 3 B. W. C. C. 119, C. A.

Annotation:—**Consd.** Taylor *v.* Ward (Worcester) (1914), 7 B. W. C. C. 441.

3191. —— ——.]—TURNER *v.* MILLER & RICHARDS, No. 2103, *ante.*

3192. —— —— **Where question of law raised.**]—(1) In proceedings under Workmen's Compensation Act, 1906 (c. 58), the duty of the judge under Consolidated Workmen's Compensation Rules, r. 36, where a question of law is raised, to make a note thereof & of the facts in evidence in relation thereto is imperative & independent of any request by the parties.

(2) He is not exempted from the performance of that duty by the fact that in any particular ct. it is the practice for an official shorthand writer to attend & take a note of the proceedings, a transcript of which may be obtained by the parties on payment of the cost thereof. With the consent of the parties, however, the shorthand writer's note may be signed, certified, & adopted by the judge as his own note.

(3) A medical referee, summoned by the judge to sit with him as assessor, is not within his functions in cross-examining witnesses & acting as advocate for one side or the other. His duty is merely to assist the judge as an expert in deciding points upon which the judge cannot be assumed to have knowledge without such assistance.—EARWICKER *v.* LONDON GRAVING DOCK CO., LTD., [1916] 1 K. B. 970; 85 L. J. K. B. 905; 114 L. T. 821; 32 T. L. R. 377; 9 B. W. C. C. 336, C. A.

3193. Power to adopt shorthand note—With consent of parties.]—EARWICKER *v.* LONDON GRAVING DOCK CO., LTD., No. 3192, *ante.*

B. As to Award.

(*a*) *In General.*

See Workmen's Compensation Rules, 1926, r. 30.

3194. Duty to state reasons.]—An injured collier, after receiving compensation for some time, returned to full work, suffering from flat foot, which, he claimed, was due to the accident. The employers applied for termination of the weekly payments, & tendered evidence that the workman was fit for full work. The workman tendered evidence that flat foot was a disability to a collier. The county ct. judge terminated the payments, without any grounds for his decision:—*Held:* there was evidence to support the decision. The county ct. judge should state the grounds of his award.—JONES *v.* TIRDONKIN COLLIERY CO. (1911), 5 B. W. C. C. 3, C. A.

3195. ——.]—GRIGGS *v.* GAMECOCK (OWNERS), No. 2525, *ante.*

3196. ——.]—MARSHALL *v.* PRICE, WILLS & REEVES, No. 2769, *ante.*

3197. ——.]—A workman was in receipt of weekly payments under an award. The employers applied for a review & termination, on the ground that the workman had recovered from the effects of the accident. The workman alleged that he was only fit for light work. Evidence was given that for some months since the accident the workman had earned, at light work, from £2 to £3 5*s.* per week. The county ct. judge, without giving any reason, diminished the payments from £1 to 15*s.* per week:—*Held:* the judge should have stated his findings, but as there was sufficient evidence to support his award the appeal must be dismissed.—ATLANTIC TRANSPORT CO., LTD. *v.* LYNCH (1921), 14 B. W. C. C. 77, C. A.

3198. Duty to state findings—Of fact.]—HEATHCOTE *v.* HAUNCHWOOD COLLIERIES, No. 3230, *post.*

3199. —— **Of law & fact.**]—(1) It is the duty of the arbitrator to set out his findings upon all the material issues raised in an arbn. under Workmen's Compensation Act, 1906 (c. 58), whether of fact or law, although he need not give his reasons for them.

(2) *Semble:* the findings need not appear on the face of the award, but should be set out in the arbitrator's reasons for his award.

(3) There is no rule that where a new trial is ordered & the case is remitted it must be sent to another arbitrator.—SLATER *v.* MACONOCHIE BROTHERS, LTD. (1920), 89 L. J. K. B. 1238; 123 L. T. 185; 13 B. W. C. C. 34, C. A.

3200. —— ——.]—Medical evidence showed that a sawyer who had lost the little finger of his left hand, for which he had received compensation for some time, was able to do his old work & that his earning capacity had not been affected. There

was some evidence that the man's hand had been slightly injured by a previous accident. The county ct. judge refused to make an award for the compensation to continue, & dismissed the application without making specific findings of fact. The workman appealed on the ground that the judge had not found that the workman was able to earn wages as before the accident in the open market:—*Held:* the question whether appct. could earn in the open market the same wages as before the accident must have been present to the mind of the judge. It was unfortunate that he had not made a note of the facts found by him, but in the circumstances the ct. would not interfere with his award.

I agree entirely with what was said by LORD ATKINSON in *King* v. *Port of London Authority*, No. 3548, *post*, that in these cases it is very much more satisfactory & very much to be desired that this ct. should have before it the findings of the county ct. judge, the actual findings of fact. . . . If a point of law be raised then there should be a note of the decision on the point of law (LORD STERNDALE, M.R.).—HARRISON v. MATTHEWS (ERNEST) & Co. (1920), 13 B. W. C. C. 109, C. A.

Annotation:—**Refd.** Slater v. Maconochie (1920), 89 L. J. K. B. 1238.

3201. Duty to distinguish between findings of law & fact.]—HERBERT v. FOX (SAMUEL) & Co., LTD., No. 2494, *ante*.

3202. ——.]—HUTCHISON v. M'KINNON, No. 2614, *ante*.

3203. ——.]—KING v. PORT OF LONDON AUTHORITY, No. 3548, *post*.

3204. Reasons for findings not necessary.]—SLATER v. MACONOCHIE BROTHERS, LTD., No. 3199, *ante*.

3205. Whether findings should appear on face of award.]—HUTCHISON v. M'KINNON, No. 2614, *ante*.

3206. ——.]—KING v. PORT OF LONDON AUTHORITY, No. 3548, *post*.

3207. ——.]—SLATER v. MACONOCHIE BROTHERS, LTD., No. 3199, *ante*.

(*b*) *Form of Award.*

See Workmen's Compensation Rules, 1926, r. 30.

3208. Form 24 not ultra vires.]—In all ordinary cases under Workmen's Compensation Act, 1906 (c. 58), where a workman has sustained an injury by accident arising out of & in the course of his employment, resulting in his total incapacity for the time being, & entitling him to a weekly payment by way of compensation, the arbitrator ought to make his award in accordance with Form 24 in the Appendix to Workmen's Compensation Rules, 1907, ordering the weekly payments to continue during the total or partial incapacity of claimant for work, or until the payments shall be ended, diminished, increased, or redeemed in accordance with the Act. Form 24 is *intra vires* & entirely consistent with the policy of the Act.—HIGGINS v. POULSON, [1912] 2 K. B. 292; 81 L. J. K. B. 690; 106 L. T. 518; 28 T. L. R. 323; 5 B. W. C. C. 340, C. A.

Annotation:—**Follo.** Round v. Wathen (1917), 86 L. J. K. B. 1011.

3209. ——.]—ROUND v. WATHEN & SON, No. 3098, *ante*.

3210. Effect of death of judge before signature.]—PELLETT v. HOVE CORPN., No. 3958, *post*.

SUB-SECT. 8.—MAINTENANCE OF WORKMAN.

3211. Who may help workman—Approved society.]—ALLEN v. FRANCIS, No. 3177, *ante*.

3212. ——.]—SKELTON v. BAXTER, No. 3110, *ante*.

3213. —— **Trade union.**]—ALLEN v. FRANCIS, No. 3177, *ante*.

3214. ——.]—BOBBEY v. CROSBIE & Co., No. 3108, *ante*.

SECT. 12.—INCAPACITY AND COMPENSATION THEREFOR.

SUB-SECT 1.—IN GENERAL.

See, generally, Workmen's Compensation Act, 1925 (c. 84), s. 9.

3215. Judge must decide question of capacity—Statutory duty.]—On an application by the employer for a review of an award, the county ct. judge found that the workman honestly believed & acted upon advice given him by two competent doctors, whose *bona fides* was unimpeached, that he was unfit to do the work offered to him by the employer. The employer's doctors said he could do the work. The judge stated that owing to the conflict of medical testimony, he was unable to come to a satisfactory opinion as to whether or not the workman was or was not able to do this offered work, & made his award in favour of the workman:—*Held:* the case must be remitted to the judge to decide the question of the workman's capacity, this being his statutory duty.—COWAN v. SIMPSON (1909), 3 B. W. C. C. 4, C. A.

Annotation:—**Mentd.** Jones v. Guest, Keen & Nettlefold (1915), 9 B. W. C. C. 113.

Must be result of accident.]—*See* Sect. 5, sub-sect. 1, *ante*.

Not confined to inability to do work done at time of accident.]—*See* Sub-sect. 7, A., *post*.

SUB-SECT. 2.—QUESTION OF FACT.

3216. General rule.]—A collier was injured in 1903, & after five months' absence returned to work: some of the work he then did was heavier than his work before the accident. He was dismissed in 1909, & claimed compensation on the ground that the consequences of his injury prevented him from obtaining work. The medical evidence was conflicting, & the case was referred to a medical referee, who reported that the man was fit for full work, but more liable to strains than before the accident. The county ct. judge, on this report, made an award of a penny a week:—*Held:* the matter was a pure question of fact, & there was evidence to justify the county ct. judge's award.—WELLS v. CARDIFF STEAM COAL COLLIERIES CO., LTD. (1909), 3 B. W. C. C. 104, C. A.

3217. ——.]—A workman's hand was injured on Dec. 2, 1907. His employers agreed to pay compensation, & a memorandum of this agreement was recorded in May, 1908. After several operations for blood poisoning his little finger was amputated. In Jan. 1910, an application was made by the employers to reduce the weekly payments: the grounds of the application were that the workman had wholly or partially recovered

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PART XIV. SECT. 12, SUB-SECT. 1.

c. Offer by employer to retain workman at same wages—Refusal by workman—Whether excludes right to compensation.]—FRASER v. GREAT NORTH OF SCOTLAND RY. (1901), 3 F. (Ct. of Sess.) 908.—**SCOT.**

PART XIV. SECT. 12, SUB-SECT. 2.

3216 *i. General rule.*]—Earning capacity is a question of fact from which there is no appeal.—ARNOTT v. FIFE COAL CO., LTD. (No. 2), [1912] S. C. 1262; 49 Sc. L. R. 902; [1912] 2 S. L. T. 143; 6 B. W. C. C. 281.—**SCOT.**

Sect. 12.—*Incapacity and compensation therefor: Sub-sects.* 2 & 3.]

from the injury, & was then able to work & earn wages. The judge dismissed the application, holding that there was still some incapacity:—*Held:* on the evidence the decision was correct.—LEEDS & LIVERPOOL CANAL CO. *v.* HESKETH (1910), 3 B. W. C. C. 301, C. A.

3218. ——.]—An apprentice boilersmith lost his right eye. After an interval, during which he was in receipt of full compensation, the employers offered to put him on his original work. He refused, & the employers discontinued payments. He commenced proceedings, in the course of which other light work was offered. At the time he was still attending hospital as an out-patient. The county ct. judge awarded the full amount claimed on a basis of total incapacity:—*Held:* there was evidence to support the finding.—BARRON *v.* BLAIR & Co., LTD. (1915), 8 B. W. C. C. 501, C. A.

3219. ——.]—A workman met with an accident which cut off the top of a great toe. He was paid full compensation for some three months until able to return to work. He worked for four weeks at 31*s.* a week, & then working longer hours, returned to his original rate of wages, 42*s.* 9*d.* He then filed an application claiming the difference in wages for the first four weeks, & also a declaration of liability, on the ground that, though the injury to the toe had healed, the stump might become painful, & prevent him from working when cold weather set in later in the year. The county ct. judge refused the application, saying that he was not satisfied appct. had made out his case:—*Held:* it was a question of fact, & there was no ground for altering the award.—WARDELL *v.* CARGO FLEET IRON CO., LTD. (1916), 10 B. W. C. C. 124, C. A.

3220. ——.]—While working for resps. on May 7, 1916, appct. was injured by a bar of steel falling on his foot. He continued to work for two days, when the foot became so painful that he had to give it up. On a claim for compensation, the employers admitted liability. In Mar. 1917, the man was found a light job, at which he earned some 17*s.* more a week than his average earnings before the accident. He continued at this work for about six months, when the foot again gave him such great pain that he gave the work up. Before the arbitrator he contended that he was wholly incapacitated from work; while the employers' case was that he had quite recovered. The medical assessor gave his opinion that the condition of the foot was such that the man could well do the work which he had been engaged on since the accident, & that it was suitable work for him. The evidence of appct.'s doctor did not directly rebut this, but he stated that the painful condition of the foot was referable to the accident. The arbitrator on these facts awarded appct. 13*s.* 6*d.* on the basis of partial incapacity:—*Held:* there was evidence upon which the award could be supported, & no misdirection.—PURSEY *v.* GWYNNES, LTD. (1918), 11 B. W. C. C. 124, C. A.

3221. — —.]—A workman was seriously injured by an accident on July 7, 1916, & compensation was paid him to Jan. 29, 1917, when payments were stopped, the employers offering to find the man light work at his old wages. A request for arbn. was then made, but for various reasons the hearing was delayed & it was not until Dec. 1918, that the case was heard in the county ct.

The county ct. judge was of opinion that, if appct. would try to work the incapacity which he found to be total, would gradually decrease, & acting on that suggestion the workman agreed t try & the employers to find him suitable work a his old rate of wages. Thereupon the county c judge made an award on the basis of total incapacit to the time the man commenced this work & penny a week so long as he was being paid fu wages. The employers appealed from the awar so far as it found total incapacity:—*Held:* ther was evidence to support the finding & no mi direction.—GRIFFIN *v.* WHITE (SAMUEL) & Co LTD. (1919), 12 B. W. C. C. 113, C. A.

3222. ——.]—A workman met with injury b accident to his knee, causing sinovitis, &, later o rheumatoid arthritis. He was paid compensatio for some nine months, & then was offered light wor at full wages, which he tried for two days, but gav up, saying he was unable to do it. He then filed a application for compensation on the basis of tota incapacity. The employers submitted to a declara tion of liability, but alleged the workman wa perfectly capable of doing light work, & suggeste malingering. After hearing a great deal of medica evidence the county ct. judge awarded 15*s.* week, & gave appct. his costs:—*Held:* the orde was properly made, notwithstanding that afte making the award the judge made remarks whic suggested that he considered the employers ha won on the whole.—DONOVAN *v.* NICHOLSON' WHARVES, LTD. (1919), 12 B. W. C. C. 256, C. A.

3223. ——.]—In Feb. 1920, a painter was injure through falling off a ladder. The employer pai him compensation on the basis of total incapacit for a time, & then applied for a review on th ground that the workman was then only partiall incapacitated. Medical evidence was given tha the workman could do the ordinary work of a painter, "with limitations, if he could find som one to employ him with such limitations." H could work on the flat, walk on a platform, & g up ladders, but it might not be safe for hi to stand on a ladder for any length of time. Ther was also evidence that the man had tried to fin work as a painter, but failed, & that he ha ceased, since June, 1922, to make efforts to fin employment. The county ct. judge found tha the workman was only partially incapacitated, & ordered a diminution of the weekly payment o compensation:—*Held:* it was a question of fact upon which there was evidence to support th finding, & there was no misdirection.—FOWLER *v.* MINTON (1923), 16 B. W. C. C. 97, C. A.

3224. ——.]—In Dec. 1922, a miner, fifty-two years of age, was certified as being incapacitated by miner's nystagmus. Full compensation was paid until July, 1923. In arbn. proceedings medical evidence was given to the effect that there were many jobs the man was capable of doing, & that they would be beneficial for him. The county ct. judge made an award on the basis of partial incapacity. The workman appealed, on the ground that the county ct. judge had misdirected himself in holding that he was not totally incapacitated:—*Held:* it was a question of fact upon which there was evidence to support the finding, &, the county ct. judge having correctly applied the principles laid down in *Foster* v. *Wharncliffe Woodmoor Colliery Co.*, No. 3559, *post*, there was no misdirection.—WILMOT *v.* ASKERN COAL & IRON CO., LTD. (1924), 17 B. W. C. C. 17, C. A.

3225. ——.]—The workman, in 1916, suffered an injury to his left eye while working as a miner, for which compensation was received for twelve months, when he was able to return to his work underground. In 1921 he suffered slight injuries to his right eye. In 1923 he gave up his old work

on account of nystagmus, but did work as surface man & received compensation. In Aug. 1924, he ceased work on account of trouble with his eyes. On a claim made by him for compensation for the original injury to his left eye, the county ct. judge said he believed appct.'s account of his working under difficulty for years as a consequence of the injury to his left eye, & found that the defect in that eye still existed, & was of a nature to prevent his doing work underground, particularly since the injuries received by his right eye prevented that eye from adequately substituting or helping the other, & made an award on the footing of partial incapacity:—*Held:* it was a question of fact, & there was evidence to support the finding & no misdirection.—SPEAKMAN *v.* EVANS (RICHARD) & Co., LTD. (1925), 18 B. W. C. C. 201, C. A.

3226. ——.]—ROBERTS *v.* VICKERS, LTD., No. 3390, *post.*

3227. Necessity for evidence to support judge's finding.]—A boy, employed as a printer, met with injury by accident to his finger, causing incapacity, for which the employers paid him compensation for some weeks. A month after payments had ceased he applied for an award, alleging continuing incapacity. There was uncontradicted medical evidence that he had completely recovered, & was fit to work. The county ct. judge, however, found that incapacity was still continuing, & made an award in the boy's favour. A fortnight after the award the boy secured work at higher wages than he had previously earned:—*Held:* there was no evidence to support the finding.—BINNS *v.* KEARLEY & TONGE, LTD. (1913), 6 B. W. C. C. 608, C. A.

Functions of medical assessor.]—*See* Sect. 9, sub-sect. 5, *ante.*

SUB-SECT. 3.—INCLUDES INABILITY TO OBTAIN WORK.

3228. General rule.]—(1) The provisions of Workmen's Compensation Act, 1906 (c. 58), sched. I., as to the scale & conditions of compensation do not cut down the right to compensation conferred by sect. 1 (1) of the Act.

(2) "Incapacity for work" in para. 1 (*b*) of Schedule I. means loss or diminution of wage-earning capacity & includes inability to get work as the result of the injury which the workman has sustained.

A workman lost the sight of his left eye through an accident, but continued to work at his old rate of wages. Many years afterwards he met with a second accident to his left eye which necessitated its removal. On his recovery from the operation he was unable to obtain work in his employment in consequence of his being manifestly a one-eyed man, though his ability to work remained exactly as it was before:—*Held:* he was entitled to compensation.

(3) Construction of the Acts (*see* No. 2039, *ante*).—BALL *v.* HUNT (WILLIAM) & SONS, LTD., [1912] A. C. 496; 81 L. J. K. B. 782; 106 L. T. 911; 28 T. L. R. 428; 56 Sol. Jo. 550; 5 B. W. C. C. 459, H. L.

Annotations:—As to (1) **Consd.** Harwood *v.* Wyken Colliery Co., [1913] 2 K. B. 158. **Reld.** Macdonald (or Duris) *v.* Wilsons & Clyde Coal Co., [1912] A. C. 513. *As to* (2) **Consd.** Gray *v.* Shotts Iron Co. (1912), 6 B. W. C. C. 287; Harwood *v.* Wyken Colliery Co., [1913] 2 K. B. 158; Jackson *v.* Hunslet Engine Co., [1916] 2 K. B. 8. **Apld.** Denholm *v.* Jackson (1926), 19 B. W. C. C. 92. **Rstd.** Macdonald (or Duris) *v.* Wilsons & Clyde Coal Co., [1912] A. C. 513; Dempsey *v.* Caldwell (1913), 7 B. W. C. C. 823; Green *v.* Cammell, Laird, [1913] 3 K. B. 665; Purdie *v.* Colville (1923), 16 B. W. C. C. 307; M'Clure *v.* M'Neil (1924), 18 B. W. C. C. 585; Hamilton *v.* Shelton Iron, Steel & Coal Co., Leigh *v.* Same, Timmis *v.* Same (1926), 43 T. L. R. 97. *As to* (3) **Consd.** Harwood *v.* Wyken Colliery Co., [1913] 2 K. B. 158.

3229. ——.]—A claim was made by an injured collier against an indemnity co. on the liquidation of the employers. The employers had paid compensation up to the date of the liquidation. The indemnity co. contested the claim on the ground that the man's incapacity, if any, was due to his having done no work since the accident. The county ct. judge held, on the medical evidence, that the man had been for some time capable of light work, &, if he had been able to obtain it, his incapacity would have been greatly reduced, if not entirely cured. He found however, that, though the man had honestly tried to find suitable work, he had been unable to do so, & ordered compensation to be paid:—*Held:* there was evidence to support the finding, & no misdirection.—BONSALL *v.* MIDLAND COLLIERY OWNERS MUTUAL INDEMNITY CO., LTD. (1914), 7 B. W. C. C. 613, C. A.

3230. ——.]—For the purpose of assessing compensation under Workmen's Compensation Act, 1906 (c. 58), in a case of partial incapacity, where the injured workman is actually employed in some suitable employment, *primâ facie* the amount which he earns in that employment is the measure of what he is able to earn.

A collier, in Sept. 1915, earned 35*s.* a week, & he met with an accident whereby he lost the sight of his left eye. He returned to work in Dec. 1915, with his old employers, but being unable to work underground was given work as a packer & loader, & was paid his old wages until Feb. 1916, when he was discharged for reasons unconnected with the accident. Thereupon he entered the service of another employer as a horse driver at 30*s.* a week, & applied for compensation under the Act. The county ct. judge found that as a packer & loader he might have been earning, owing to the rise in wages due to shortage of labour caused by the war, more than his old wages of 35*s.* a week, & that such work was suitable employment, but he nevertheless awarded him as compensation the whole difference of 5*s.* between what he was actually earning (30*s.*) & his old wages of 35*s.*:—*Held:* in addition to finding that at a specified suitable employment an injured man was physically able to earn certain wages, it was also necessary to find that he had reasonable opportunities of obtaining such employment. In this case the county ct. judge had made no such finding. If this had been done intentionally, with the view that the man in fact had no reasonable opportunity of obtaining such employment, then the judge was, in his discretion, perfectly justified in awarding the full difference of 5*s.* Though the matter was not clear from the award, yet the award could not be upset, when upon the face of it it was correct, merely upon the assumption that the judge had proceeded on a mistaken understanding of the law.—HEATHCOTE *v.* HAUNCHWOOD COLLIERIES,

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PART XIV. SECT. 12, SUB-SECT. 3.

3228 i. *General rule.*]—OSBORNE *v.* TRALEE & DINGLE RY. (1913), 47 I. L. T. 141; 6 B. W. C. C. 913.—IR.

3228 ii. ——.]—The workman proved that he had been refused work by three different firms in G. because he was a one-eyed man, while the employers proved that three other large engineering firms in that city had in their employment several one-eyed engineers at full wages:—*Held:* the arbitrator was not entitled to hold on these facts that the workman's wage-earning capacity had not been diminished by the accident.—M'CLURE *v.* M'NEIL (WILLIAM) & Co., LTD., [1925] S.C. 135.—SCOT.

Sect. 12.—*Incapacity and compensation therefor: Sub-secs.* 2 & 3.]

from the injury, & was then able to work & earn wages. The judge dismissed the application, holding that there was still some incapacity:—*Held:* on the evidence the decision was correct.—LEEDS & LIVERPOOL CANAL CO. *v.* HESKETH (1910), 3 B. W. C. C. 301, C. A.

3218. ——.]—An apprentice boilersmith lost his right eye. After an interval, during which he was in receipt of full compensation, the employers offered to put him on his original work. He refused, & the employers discontinued payments. He commenced proceedings, in the course of which other light work was offered. At the time he was still attending hospital as an out-patient. The county ct. judge awarded the full amount claimed on a basis of total incapacity:—*Held:* there was evidence to support the finding.—BARRON *v.* BLAIR & CO., LTD. (1915), 8 B. W. C. C. 501, C. A.

3219. ——.]—A workman met with an accident which cut off the top of a great toe. He was paid full compensation for some three months until able to return to work. He worked for four weeks at 31*s.* a week, & then working longer hours, returned to his original rate of wages, 42*s.* 9*d.* He then filed an application claiming the difference in wages for the first four weeks, & also a declaration of liability, on the ground that, though the injury to the toe had healed, the stump might become painful, & prevent him from working when cold weather set in later in the year. The county ct. judge refused the application, saying that he was not satisfied appct. had made out his case:—*Held:* it was a question of fact, & there was no ground for altering the award.—WARDELL *v.* CARGO FLEET IRON CO., LTD. (1916), 10 B. W. C. C. 124, C. A.

3220. ——.]—While working for resps. on May 7, 1916, appct. was injured by a bar of steel falling on his foot. He continued to work for two days, when the foot became so painful that he had to give it up. On a claim for compensation, the employers admitted liability. In Mar. 1917, the man was found a light job, at which he earned some 17*s.* more a week than his average earnings before the accident. He continued at this work for about six months, when the foot again gave him such great pain that he gave the work up. Before the arbitrator he contended that he was wholly incapacitated from work; while the employers' case was that he had quite recovered. The medical assessor gave his opinion that the condition of the foot was such that the man could well do the work which he had been engaged on since the accident, & that it was suitable work for him. The evidence of appct.'s doctor did not directly rebut this, but he stated that the painful condition of the foot was referable to the accident. The arbitrator on these facts awarded appct. 13*s.* 6*d.* on the basis of partial incapacity:—*Held:* there was evidence upon which the award could be supported, & no misdirection.—PURSEY *v.* GWYNNES, LTD. (1918), 11 B. W. C. C. 124, C. A.

3221. ——.]—A workman was seriously injured by an accident on July 7, 1916, & compensation was paid him to Jan. 29, 1917, when payments were stopped, the employers offering to find the man light work at his old wages. A request for arbn. was then made, but for various reasons the hearing was delayed & it was not until Dec. 1918, that the case was heard in the county ct.

The county ct. judge was of opinion that, if appct. would try to work the incapacity which he found to be total, would gradually decrease, & acting on that suggestion the workman agreed to try & the employers to find him suitable work at his old rate of wages. Thereupon the county ct. judge made an award on the basis of total incapacity to the time the man commenced this work & a penny a week so long as he was being paid full wages. The employers appealed from the award so far as it found total incapacity:—*Held:* there was evidence to support the finding & no misdirection.—GRIFFIN *v.* WHITE (SAMUEL) & CO., LTD. (1919), 12 B. W. C. C. 113, C. A.

3222. ——.]—A workman met with injury by accident to his knee, causing sinovitis, &, later on, rheumatoid arthritis. He was paid compensation for some nine months, & then was offered light work at full wages, which he tried for two days, but gave up, saying he was unable to do it. He then filed an application for compensation on the basis of total incapacity. The employers submitted to a declaration of liability, but alleged the workman was perfectly capable of doing light work, & suggested malingering. After hearing a great deal of medical evidence the county ct. judge awarded 15*s.* a week, & gave appct. his costs:—*Held:* the order was properly made, notwithstanding that after making the award the judge made remarks which suggested that he considered the employers had won on the whole.—DONOVAN *v.* NICHOLSON'S WHARVES, LTD. (1919), 12 B. W. C. C. 256, C. A.

3223. ——.]—In Feb. 1920, a painter was injured through falling off a ladder. The employer paid him compensation on the basis of total incapacity for a time, & then applied for a review on the ground that the workman was then only partially incapacitated. Medical evidence was given that the workman could do the ordinary work of a painter, "with limitations, if he could find some one to employ him with such limitations." He could work on the flat, walk on a platform, & go up ladders, but it might not be safe for him to stand on a ladder for any length of time. There was also evidence that the man had tried to find work as a painter, but failed, & that he had ceased, since June, 1922, to make efforts to find employment. The county ct. judge found that the workman was only partially incapacitated, & ordered a diminution of the weekly payment of compensation:—*Held:* it was a question of fact, upon which there was evidence to support the finding, & there was no misdirection.—FOWLER *v.* MINTON (1923), 16 B. W. C. C. 97, C. A.

3224. ——.]—In Dec. 1922, a miner, fifty-two years of age, was certified as being incapacitated by miner's nystagmus. Full compensation was paid until July, 1923. In arbn. proceedings medical evidence was given to the effect that there were many jobs the man was capable of doing, & that they would be beneficial for him. The county ct. judge made an award on the basis of partial incapacity. The workman appealed, on the ground that the county ct. judge had misdirected himself in holding that he was not totally incapacitated:—*Held:* it was a question of fact upon which there was evidence to support the finding, &, the county ct. judge having correctly applied the principles laid down in *Foster* v. *Wharncliffe Woodmoor Colliery Co.*, No. 3559, *post*, there was no misdirection.—WILMOT *v.* ASKERN COAL & IRON CO., LTD. (1924), 17 B. W. C. C. 17, C. A.

3225. ——.]—The workman, in 1916, suffered an injury to his left eye while working as a miner, for which compensation was received for twelve months, when he was able to return to his work underground. In 1921 he suffered slight injuries to his right eye. In 1923 he gave up his old work

on account of nystagmus, but did work as surface man & received compensation. In Aug. 1924, he ceased work on account of trouble with his eyes. On a claim made by him for compensation for the original injury to his left eye, the county ct. judge said he believed appct.'s account of his working under difficulty for years as a consequence of the injury to his left eye, & found that the defect in that eye still existed, & was of a nature to prevent his doing work underground, particularly since the injuries received by his right eye prevented that eye from adequately substituting or helping the other, & made an award on the footing of partial incapacity:—*Held:* it was a question of fact, & there was evidence to support the finding & no misdirection.—SPEAKMAN *v.* EVANS (RICHARD) & Co., LTD. (1925), 18 B. W. C. C. 201, C. A.

3226. ——.]—ROBERTS *v.* VICKERS, LTD., No. 3390, *post.*

3227. Necessity for evidence to support judge's finding.]—A boy, employed as a printer, met with injury by accident to his finger, causing incapacity, for which the employers paid him compensation for some weeks. A month after payments had ceased he applied for an award, alleging continuing incapacity. There was uncontradicted medical evidence that he had completely recovered, & was fit to work. The county ct. judge, however, found that incapacity was still continuing, & made an award in the boy's favour. A fortnight after the award the boy secured work at higher wages than he had previously earned:—*Held:* there was no evidence to support the finding.—BINNS *v.* KEARLEY & TONGE, LTD. (1913), 6 B. W. C. C. 608, C. A.

Functions of medical assessor.]—*See* Sect. 9, sub-sect. 5, *ante.*

SUB-SECT. 3.—INCLUDES INABILITY TO OBTAIN WORK.

3228. General rule.]—(1) The provisions of Workmen's Compensation Act, 1906 (c. 58), sched. I., as to the scale & conditions of compensation do not cut down the right to compensation conferred by sect. 1 (1) of the Act.

(2) "Incapacity for work" in para. 1 (*b*) of Schedule I. means loss or diminution of wage-earning capacity & includes inability to get work as the result of the injury which the workman has sustained.

A workman lost the sight of his left eye through an accident, but continued to work at his old rate of wages. Many years afterwards he met with a second accident to his left eye which necessitated its removal. On his recovery from the operation he was unable to obtain work in his employment in consequence of his being manifestly a one-eyed man, though his ability to work remained exactly as it was before:—*Held:* he was entitled to compensation.

(3) Construction of the Acts (*see* No. 2039, *ante*).—BALL *v.* HUNT (WILLIAM) & SONS, LTD., [1912] A. C. 496; 81 L. J. K. B. 782; 106 L. T. 911; 28 T. L. R. 428; 56 Sol. Jo. 550; 5 B. W. C. C. 459, H. L.

Annotations:—*As to* (1) **Consd.** Harwood *v.* Wyken Colliery Co., [1913] 2 K. B. 158. **Reld.** Macdonald (or Duris) *v.* Wilsons & Clyde Coal Co., [1912] A. C. 513. *As to* (2) **Consd.** Gray *v.* Shotts Iron Co. (1912), 6 B. W. C. C. 287; Harwood *v.* Wyken Colliery Co., [1913] 2 K. B. 158; Jackson *v.* Hunslet Engine Co., [1916] 2 K. B. 8. **Apld.** Denholm *v.* Jackson (1926), 19 B. W. C. C. 92. **R3td.** Macdonald (or Duris) *v.* Wilsons & Clyde Coal Co., [1912] A. C. 513; Dempsey *v.* Caldwell (1913), 7 B. W. C. C. 823; Green *v.* Cammell, Laird, [1913] 3 K. B. 665; Purdie *v.* Colville (1923), 16 B. W. C. C. 307; M'Clure *v.* M'Neil (1924), 18 B. W. C. C. 585; Hamilton *v.* Shelton Iron, Steel & Coal Co., Leigh *v.* Same, Timmis *v.* Same (1926), 43 T. L. R. 97. *As to* (3) **Consd.** Harwood *v.* Wyken Colliery Co., [1913] 2 K. B. 158.

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PART XIV. SECT. 12, SUB-SECT. 3.

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Sect. 12.—*Incapacity and compensation therefor: Sub-sects.* 3, 4 & 5.]

[1918] A. C. 52; 87 L. J. K. B. 226; 117 L. T. 677; 62 Sol. Jo. 53; 10 B. W. C. C. 647, H. L.

Annotations:—**Refd.** Williams *v.* Oakwood Colliery Co. (1919), 88 L. J. K. B. 878; Ling *v.* De Dion Bouton, [1920] 1 K. B. 88. **Mentd.** Port of London Authority *v.* Gray, [1919] 1 K. B. 65.

3231. ——.]—As the result of an accident in 1908 arising out of & in the course of his employment, a workman was injured in such a way as to cause a dislocation of the vertebræ of the neck, with the result that there was pressure on the spinal cord. His condition was such that he had to have a special apparatus to keep his head still as a sudden movement would probably be fatal. By an agreement entered into in June, 1909, the employers agreed to pay to the workman compensation at the rate of £1 a week, so long as he was totally or partially incapacitated for work. Subsequently, in 1915, he was given, from motives of charity, some very light work at a laundry, the proprietor of which was a friend of the workman, & he was paid a weekly wage of 15*s.* but there were no specified duties of fixed hours attached to the position. In 1924 the employers, who alleged that the workman had recovered partial capacity, applied for an order for redemption of the weekly payments of £1, the workman then sought to obtain the additons to weekly payments provided by the Workmen's Compensation (War Addition) Act, 1917 (c. 42), & 1919 (c. 83). In these proceedings the arbitrator found that the workman had since the date of the original accident, *i.e.*, Oct. 1908, been totally incapacitated for work with no earning capacity in the labour market & was therefore entitled to the war additions:—*Held:* there was evidence to support the finding of total incapacity, & no misdirection, & the war additions were accordingly payable.—DENHOLM (JOHN) & CO., LTD. *v.* JACKSON (1926), 19 B. W. C. C. 92, H. L.

3232. In district where workman lives.]—A workman partially incapacitated by accident was found light work by his employers, & under an agreement received certain compensation. Eighteen months afterwards the employers dismissed him as they were cutting down the number of their employees. The man was unable, on account of his partial incapacity, to find work in the district, & applied for a review on that ground. The sheriff-substitute held that this was no ground for review, & his decision was affirmed by the Ct. of Sessions:—*Held:* "incapacity for work" included inability to obtain employment in the district where the workman lived, & the occurrence of this inability to obtain work was a relevant change of circumstances entitling the workman to a review.—MACDONALD (OR DURIS) *v.* WILSONS & CLYDE COAL CO., [1912] A. C. 513; 81 L. J. P. C. 188; 106 L. T. 905; 28 T. L. R. 431; 56 Sol. Jo. 550; 5 B. W. C. C. 478, H. L.

Annotations:—**Consd.** Gray *v.* Shotts Iron Co. (1912), 6 B. W. C. C. 287; Dyer *v.* Wilsons & Clyde Coal Co. (1914), 8 B. W. C. C. 367. **Refd.** Ball *v.* Hunt, [1912] A. C. 496; Dempsey *v.* Caldwell (1913), 7 B. W. C. C. 823; M'Allinden *v.* Nimmo, [1920] A. C. 39; Hamilton *v.* Shelton Iron, Steel & Coal Co., Leigh *v.* Same, Timmis *v.* Same (1926), 43 T. L. R. 97. **Mentd.** Darroll *v.* Glasgow Iron & Steel Co. (1912), 6 B. W. C. C. 354.

3233. —— Workman unable to walk to former place of employment.]—A pipe moulder fractured his ankle in 1907. He received £1 a week compensation until 1912 when, on compensation being reduced to 10*s.* a week, he made application for compensation to be increased to the full amount. He complained of pain in his ankle & foot, which prevented him from walking any distance, &, as the place where he had formerly worked was two miles from his home, it was impossible for him to walk there. He was otherwise healthy, & offered to resume his old work if his employers would convey him to & fro, which they refused to do. Medical evidence went to show that the foot was still painful but would improve with use. There was no evidence of the possibility of obtaining work closer home & some evidence of the impossibility of obtaining work at all under the circumstances. The county ct. judge found that the man was totally incapacitated:—*Held:* there was evidence to support the finding.—BEDDARD *v.* STANTON IRONWORKS CO., LTD. (1913), 6 B. W. C. C. 627, C. A.

Annotation:—**Refd.** Pearson *v.* Russell (1916), 9 B. W. C. C. 706.

3234. ——.]—COTSON *v.* RICHARDSON, WESTGATE & CO., LTD. (1919), 12 B. W. C. C. 243, C. A.

Inability to earn due to state of labour market.]—*See* Sub-sect. 4, *post*.

Opportunity of obtaining employment narrowed.]—*See* Sub-sect. 7, B., *post*.

See, also, Sub-sect. 8, A., *post*.

SUB-SECT. 4.—INABILITY TO EARN DUE TO STATE OF LABOUR MARKET.

3235. Whether incapacity within the Acts—Slackness of trade.]—An injured workman in receipt of part wages & reduced compensation was dismissed by his employer owing to slackness of work. He then applied for a restoration of full half wages which were given him by the arbitrator:—*Held:* the test of simple inability to get work on account of the labour market is wrong, the right test being inability to get work on account of the disability.—DOBBY *v.* WILSON PEASE & CO. (1909), 2 B. W. C. C. 370, C. A.

Annotations:—**Consd.** Cardiff Corpn. *v.* Hall, [1911] 1 K. B. 1009. **Refd.** Woodhouse *v.* Mid. Ry. (1914), 7 B. W. C. C. 690.

3236. —— Reduction of number of workmen.]—MACDONALD (OR DURIS) *v.* WILSONS & CLYDE COAL CO., No. 3232, *ante*.

3237. —— Strike.]—WOODHOUSE *v.* MIDLAND RY. CO., No. 3370, *post*.

3238. —— ——.]—In each case appct. had been injured some years previously by accident arising out of his employment & was partially incapacitated. In Mar. 1921, each was earning higher wages than at the date of the injury, & was therefore disentitled to compensation. On Apr. 1, 1921, a strike was declared whereby appcts. were prevented from earning anything. After the strike was over the men tried to get work at resps.' pits & several other pits, but failed. The county ct. judge awarded compensation for partial incapacity both during the period that the strike subsisted & subsequently:—*Held:* (1) since no compensation would have been payable in the absence of the strike the loss of earning capacity during the strike was not attributable to the injury & no compensation was payable for this period; (2) whether the loss of earning capacity subsequent to the strike was due to the injury or the disorganised state of the labour

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PART XIV. SECT. 12, SUB-SECT. 4.

d. *Whether incapacity due to state of labour market—When arbitrator may rely on his own knowledge.*]—In the absence of direct evidence, the arbitrator is entitled to use his knowledge of the labour market in determining the earning capacity of the workman since the accident.—SALMI *v.* PUBLIC WORKS UNDER SECRETARY (1923), 23 S. R. N. S. W. 515; 40 N. S. W. W. N. 126.—AUS.

e. —— ——.]—DYER *v.* WILSONS & CLYDE COAL CO., LTD. (1914), 8 B. W. C. C. 367.—SCOT.

market, or partly to both, was a question of fact upon which there was some evidence to support the finding of partial incapacity for this period, & there was no misdirection.—BROMLEY *v.* STAVELEY COAL & IRON CO., LTD., DREW *v.* STAVELEY COAL & IRON CO., LTD. (1923), 129 L. T. 620; 16 B. W. C. C. 77, C. A.

Annotation :—As to (2) **Distd.** Hamilton *v.* Shelton Iron, Steel & Coal Co., Leigh *v.* Same, Timmis *v.* Same (1926), 43 T. L. R. 97.

3239. —— ——.]—Resps., who were employed by applts., a mining co., met with accidents arising out of & in the course of their employment & were paid compensation by applts., & afterwards, having partially recovered, were given light work at wages at least equal to what they had been earning before the accidents, but in consequence of the coal strike of 1926 applts. were obliged to discontinue employing resps. On claims by resps. for compensation the county ct. judge awarded compensation for partial disablement :—*Held :* although but for the strike resps. would have continued to earn substantial sums, yet, as their loss of the opportunity of light work was caused not by their own act but by that of the workmen who went on strike, the judge's award must be affirmed.—HAMILTON *v.* SHELTON IRON, STEEL & COAL CO., LTD., LEIGH *v.* SHELTON IRON, STEEL & COAL CO., LTD., TIMMIS *v.* SHELTON IRON, STEEL & COAL CO., LTD. (1926), 43 T. L. R. 97; 70 Sol. Jo. 1241, C. A.

3240. —— **Threat of strike.**]—In a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), it appeared that claimant was employed as a wire stripper at 21*s.* 6*d.* a week, & about fifteen months before the accident he & some other labourers were selected to take charge of some new machines. He worked at a particular machine, showed that he was throughly competent to manage it, & earned 37*s.* 6*d.* a week till he met with an accident & lost two fingers of his right hand. He received compensation during incapacity & then wished to return to his employment at the machine which his employers were willing to restore to him. In the meantime the trade union of the wire workers had interfered & insisted that the employers should remove from the machines all workmen who were only labourers, & not skilled workmen & members of the union. The labourers who had been selected to work the machines were therefore relegated to their former positions & wages, & claimant was unable to return to work at his machine :—*Held :* on a claim by him for compensation, he was not entitled to compensation on the basis of his earning 37*s.* 6*d.* a week, for the fall in his wages was due to the action of the trade union & not to the accident; & in the circumstances & in the absence of evidence of his present position the ct. could do no more than make a declaration of the employers' liability.—THOMPSON *v.* JOHNSON (RICHARD) & NEPHEW, LTD., [1914] 3 K. B. 694; 84 L. J. K. B. 158; 111 L. T. 734; 7 B. W. C. C. 479, C. A.

Annotation :—**Apld.** Williams *v.* Oakwood Colliery Co. (1919), 88 L. J. K. B. 878.

3241. —— ——.]—A workman, who had been injured by accident & partially incapacitated, was paid full compensation for four years, & then was given light work by his employers at higher wages than he had previously earned. That employment continued for fourteen months. The trade union to which the workman belonged then objected to his being so employed, & the employers were forced, by the threat of a strike, to dismiss him. After his dismissal he did not try for any other work. He claimed compensation under Workmen's Compensation Act, 1906 (c. 58) :—*Held :* upon the facts there was no evidence by which to estimate the loss of earnings through partial incapacity, as provided by clause 3 of Schedule I. to the Act. The workman had earned higher wages since the accident, & his incapacity to continue to earn them was due to the action of the trade union, & not to the injury sustained. There was no liability upon the employers to pay for such an incapacity, & only a suspensory award could be made.—WILLIAMS *v.* OAKWOOD COLLIERY CO., LTD. (1919), 88 L. J. K. B. 878; 121 L. T. 202; 12 B. W. C. C. 151, C. A.

Annotation :—**Reld.** Hamilton *v.* Shelton Iron, Steel & Coal Co., Leigh *v.* Same, Timmis *v.* Same (1926), 43 T. L. R. 97.

3242. ——.]—In 1917 the workman, sixty-six years of age, was certified to be suffering from miner's nystagmus, & was thereby prevented from earning full wages. Full compensation was paid until 1922, when, compensation having been stopped, the man applied for arbitration, alleging he was totally incapacitated by nystagmus. In the course of the arbitration proceedings evidence was given that he had been struck in the right eye in 1916 by a piece of coal, & subsequently suffered from cataract in that eye which caused some incapacity. Evidence was also given to the effect that there was no connection between the cataract & the nystagmus. Further, it was admitted that the man was able to do work on the surface, & that the employers had in fact employed the man for some time on a farm & he had done other work. It was also admitted that the man could work at the coal face, but it was said that this work was unsuitable as likely to make the nystagmus worse. The deputy county ct. judge did not differentiate between incapacity due to the cataract, for which the employers were not responsible, & incapacity if any due to nystagmus for which they were. He further found that the workman was an "odd lot" in the labour market, & made an award on the basis of total incapacity :—*Held :* the deputy county ct. judge had misapprehended the meaning of the phrase "odd lot," & the case was sent back for assessment of compensation on a proper basis. It was necessary to discriminate very carefully between loss attributable to the "accident," loss attributable to the cataract which had nothing to do with the "accident," & also loss attributable to the conditions of the labour market.

It would be most unjust that employers, whenever a man is injured &, in consequence of the labour market, does not afterwards obtain work as readily as he would if he had not been injured, should have to pay because the state of the labour market prevents him getting employment (LORD STERNDALE, M.R.).—MIDDLETON *v.* WHARNCLIFFE WOODMOOR COLLIERY CO., LTD. (1922), 15 B. W. C. C. 166, C. A.

Annotations :—**Reld.** Jones *v.* Wharncliffe Woodmoor Colliery Co. (1922), 15 B. W. C. C. 172; Purdie *v.* Colville (1923), 16 B. W. C. C. 307; Ray *v.* Vickers (1923), 16 B. W. C. C. 200; Hamilton *v.* Shelton Iron, Steel & Coal Co., Leigh *v.* Same, Timmis *v.* Same (1926), 43 T. L. R. 97.

3243. ——.]—CAFFNEY *v.* CHORLEY COLLIERY CO., No. 3295, *post.*

3244. Whether incapacity due to state of labour market—Question of fact.]—BROMLEY *v.* STAVELEY COAL & IRON CO., LTD., DREW *v.* STAVELEY COAL & IRON CO., LTD., No. 3238, *ante.*

SUB-SECT. 5.—NERVOUS CONDITION AS EFFECT OF ACCIDENT.

3245. Incapacity within the Act.]—On an application by an employer under Workmen's

Sect. 12.—*Incapacity and compensation therefor: Sub-sects.* 5, 6 & 7, *A.*]

Compensation Act, 1906 (c. 58), Sched. I. (16), to have the weekly payments reviewed, the nervous & mental as well as the physical condition of the injured workman must be taken into consideration in estimating the extent of his recovery & consequent earning capacity. It is not sufficient for the employer to show that the muscular & physical mischief caused by the accident has come to an end.—EAVES *v.* BLAENCLYDACH COLLIERY CO., LTD., [1909] 2 K. B. 73; 78 L. J. K. B. 809; 100 L. T. 751; 2 B. W. C. C. 329, C. A.

Annotations:—**Refd.** Turner *v.* Brooks & Doxey (1909), 3 B. W. C. C. 22; Yates *v.* South Kirby, etc., Collieries, [1910] 2 K. B. 538; Wall *v.* Steel (1915), 84 L. J. K. B. 1599; Withers *v.* L. B. & S. C. Ry. (1916), 9 B. W. C. C. 616.

3246. ——.]—The county ct. judge found that an injured workman, after returning to his employment of eighteen months, had refused to continue it, partly from nervousness but partly from reasons unconnected with his physical condition. The judge further found (*a*) that the refusal to continue work was due to nervousness, which an average reasonable man could overcome; & (*b*) that the nervousness was the result of the accident:—*Held*: looking at the whole of the judgment, the judge meant to find that the man was able to work, & therefore the decision in *Eaves* v. *Blaenclydach Colliery Co., Ltd.*, No. 3245, *ante*, had no application to the case.

It is impossible for us upon these findings to allow this appeal. But I say again, that the nervous & mental as well as the physical condition must be taken into consideration (COZENS-HARDY, M.R.).—TURNER *v.* BROOKS & DOXEY, LTD. (1909), 3 B. W. C. C. 22, C. A.

Annotations:—**Refd.** Yates *v.* South Kirkby, Featherstone & Hemsworth Collieries (1910), 103 L. T. 170; David *v.* Windsor Steam Coal Co. (1911), 4 B. W. C. C. 177; Higgs & Hill *v.* Unicume, [1913] 1 K. B. 595.

3247. ——.]—A blacksmith's striker sustained serious injury by accident to his back & legs. After the physical injuries had subsided, he was found to be suffering from a form of nervous paralysis of the legs, known as "functional paraplegia." Upon medical evidence that, if the workman could only make a sufficient effort of will to attempt to do some work, he would be able to do so, & would gradually recover, the county ct. judge reduced the compensation from 13*s.* to 10*s.* a week as an "incentive." Upon a further application by the employers a year later, when the evidence showed that the man's condition was, if anything, worse, on the ground that the incapacity, was due to the man's own unreasonable conduct, reduced it to a nominal award. There was no evidence that the man could get or do any work:—*Held*: on the medical evidence there was total incapacity, for any kind of work from paralysis & no evidence of malingering. The workman was entitled to full compensation. Loss of will power may be just as much the result of an accident as injury with objective symptoms.—STRIDE *v.* SOUTHAMPTON GAS, LIGHT & COKE CO., LTD. (1916), 85 L. J. K. B. 1449; 32 T. L. R. 680; *sub nom.* SOUTHAMPTON GAS, LIGHT & COKE CO. *v.* STRIDE, 155 L. T. 498; 9 B. W. C. C. 555, C. A.

Annotation:—**Refd.** Withers *v.* L. B. & S. C. Ry., [1916] 2 K. B. 772.

3248. Neurasthenia.]—A collier met with an accident in 1905, from which he recovered & did light work, & a further accident in 1908. After an interval he was again able to do light work, but from 1912 professed to be unable to do any work, & applied to review & increase the weekly payments, which had been reduced to a penny a week. The evidence for the workman was that he was suffering from traumatic neurasthenia, but the employers' doctor said he was a malingerer. The county ct. judge dismissed the workman's application:—*Held*: he was justified in so doing.—OGDEN *v.* SOUTH KIRKBY, FEARTHERSTONE & HEMSWORTH COLLIERIES, LTD. (1913), 6 B. W. C. C. 573, C. A.

3249. ——.]—A workman injured his back by falling 16 feet. He went to the hospital for a week & then did light work for five weeks. He left this according to his own evidence, because he was unable to continue through pain, & went to an infirmary for three months. Upon discharge he still complained of pain though there was no visible physical injury. The employers admitted that he was incapable of working, though they denied that this was the result of the accident. The county ct. judge found that he was incapacitated from neurasthenia, as a result of the accident:—*Held*: there was evidence to support the finding.—MORRIS *v.* TURFORD & SOUTHWARD (1913), 6 B. W. C. C. 606, C. A.

3250. —— **Honest belief in incapacity.**]—In Mar. 1913, a workman suffered an injury to his head. The wound was completely healed by July, 1913. He was in receipt of compensation for total incapacity from his employers. In Sept. 1914, the employers applied to review on the ground that the man was capable of light work, which they had offered & he had refused. The medical evidence was conflicting. The medical assessor reported that the man could do light work on the level, but that he genuinely believed that he was unable to work. There were no actual physical effects. The county ct. judge found that the man honestly believed that he was incapable of work, & that his condition was due to neurasthenia resulting from the accident, but said that he ought to try & get work, & dismissed the application:—*Held*: there was evidence to justify the finding of the county ct. judge.—CHARLES WALL, LTD. *v.* STEEL (1915), 84 L. J. K. B. 1599; 112 L. T. 846; 8 B. W. C. C. 136, C. A.

3251. —— **From brooding over effects of accident —Necessity for evidence in support of such finding.**]—MARSHALL *v.* CLAYTON & SHUTTLEWORTH, No. 3543, *post*.

3252. Deficiency of will power due to brooding over accident.]—On an application to review & increase a nominal award, the two medical referees of the ct. reported that the workman, who had been injured by an admitted accident, was, as regards his physical condition, able to resume his usual occupation as a moulder. As to his mental condition, they reported that he had brooded so much over his accident that his mind would not allow him to summon up courage to persevere at his usual work:—*Held*: the county ct. judge was right in finding that the man was not suffering from any incapacity from work which resulted from the injury, but that his inability to work was caused by brooding over the effects of the accident, & that this was not incapacity within the Act.—HOLT *v.* YATES & THOM (1909), 3 B. W. C. C. 75, C. A.

Annotation:—**Refd.** Beech *v.* Bradford Corpn. (1911), 4 B. W. C. C. 236.

3248 1. *Neurasthenia.*]—CAMPBELL *v.* UNION S.S. CO. OF NEW ZEALAND, LTD., [1920] N. Z. L. R. 436.—N.Z.

SUB-SECT. 6.—MISCONDUCT.

3253. Disentitles workman to substantial award.]—HILL *v.* OCEAN COAL CO., LTD., No. 3560, *post.*

3254. —— Right to compensation not gone for ever.]—By an accident a workman lost the use of his left eye. His employers, under a registered agreement, paid him 10*s.* 6*d.* a week during incapacity. He resumed work at his former rate of wages, but was subsequently dismissed for alleged misconduct. On application by the employers to review the agreement, the county ct. judge reduced the weekly payments to one penny, on the ground that the workman had brought about his own dismissal:—*Held:* though, when a workman employed at an adequate wage vacated his position by reason of his own misconduct, he is not entitled at once to call upon his employer for compensation, yet one act of misconduct does not necessarily deprive him for ever of the right to compensation.—WHITE (W.) & SONS *v.* HARRIS (1910), 4 B. W. C. C. 39, C. A.

3255. What amounts to misconduct—Question of fact.]—A workman injured his hand & four months after said he was still incapacitated. The county ct. judge found the man was shamming:—*Held:* there was evidence to support his decision, which was on a question of fact.—ROBERTS *v.* BENHAM (1910), 3 B. W. C. C. 430, C. A.

3256. —— Long continued & unnecessary idleness.]—The judge, who sat with a medical assessor, came to the conclusion that if the workman had taken proper steps to obtain exercise which he ought to have taken more than a year before the hearing, he would have recovered from any disability, & that his present state was due only to want of condition arising from long-continued & unnecessary idleness. On appeal it was contended that there was no evidence before the county ct. judge to support his decision:—*Held:* that there was such evidence.—UPPER FOREST & WORCESTER STEEL & TINPLATE CO., LTD. *v.* GREY (1910), 3 B. W. C. C. 424, C. A.

3257. —— Unreasonable refusal to resume work—Undergoing operation instead of breaking down adhesions by resuming work.]—A workman had the tip of his little finger amputated, after an accident. The wound healed, leaving slight adhesions. After paying compensation for some time, the employers applied for a review. It was admitted that three days before the application to review was heard, another piece of his finger was, under medical advice, amputated. The employers contended that the man would have been fit for work, & that the persistence of the adhesions was due to his unreasonable refusal to resume work, which would have soon broken them down. The county ct. judge upheld these contentions, & reduced the payments to 1*d.* per week:—*Held:* there was no evidence to support the findings of the county ct. judge.—BURGESS & CO., LTD. *v.* JEWELL (1911), 4 B. W. C. C. 145, C. A.

3258. —— —— Following advice of doctor.]—A workman having met with an accident in the course of his employment, his employers agreed to make him weekly payments by way of compensation. Subsequently they applied under the Workmen's Compensation Act, 1906, for the diminution or termination of the compensation on the ground that he had sufficiently recovered to do suitable work & that he had refused to do it. It appeared that his refusal was based on his doctor's advice, but the medical evidence before the county court judge as to his capacity for work was conflicting. The judge held that, acting on unwise medical advice & the domination of his wife, the workman had behaved in an unreasonable way, although he was not a malingerer; & he terminated the agreement for compensation:—*Held:* on the findings of fact, that the workman's present condition was not the result of the accident; that he might be acting unreasonably although he was following the advice of his doctor; & that an appeal from the judge must be dismissed.

The county ct. judge ought to have reduced the compensation to 1*d.* a week, so as to allow the conflicting opinions of the doctors to be subjected to the test of actual experiment (COZENS-HARDY, M.R.).—HIGGS & HILL, LTD. *v.* UNICUME, [1913] 1 K. B. 595; 82 L. J. K. B. 369; 108 L. T. 169; 6 B. W. C. C. 205, C. A.

3259. —— Muscles softened by loafing.]—A collier was injured in 1907, & received compensation till 1910. His employers then stopped payment. He took proceedings, & the county ct. judge found that he was unfit for the heavy work of a collier, but that his incapacity was due not to the accident, but to his prolonged idleness, his muscles having become soft & unfit for hard work. He accordingly awarded in favour of the employers:—*Held:* there was evidence upon which the judge could so find.—DAVID *v.* WINDSOR STEAM COAL CO., LTD. (1911), 4 B. W. C. C. 177, C. A.

3260. —— Employment left by own accord—Clumsiness due to accident causing complaints.]—A waitress had an injury to her finger, which, becoming stiff, prevented her from working as efficiently as before. She received compensation for some time, & then returned to her old work at her old wages. She could not work as well as before, & her employers complained of her clumsiness. She left this work of her own accord, &, without any attempt to find other work, claimed compensation. The county ct. judge found that she could not work as well as before, & that she was therefore partially incapacitated. He awarded her compensation:—*Held:* there was evidence to support this finding.—WARD *v.* MILES (1911), 4 B. W. C. C. 182, C. A.

SUB-SECT. 7.—PARTIAL INCAPACITY.

A. Inability to do Former Work.

3261. Opportunity of obtaining employment narrowed.]—A gasworks coal porter in the employment of a gas co. was, in Dec. 1899, injured by an accident, which resulted in the loss of four fingers of his left hand. His weekly wages were 41*s.* 9*d.*, & the co. agreed to pay him £1 a week compensation under Workmen's Compensation Act, 1897 (c. 37). In Jan. 1901, the co. offered him employment as a gateman & timekeeper at weekly wages of 27*s.*, which he refused. In Apr. 1901, at the instance of the co., the county ct. judge made an award reducing the weekly amount of compensation to 14*s.* 9*d.* Subsequently the workman accepted the employment which he had previously refused, but in consequence of his refusing to note down the times of arrival of the workmen he was dismissed. The workman thereupon made an application to the county ct. judge to increase the

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PART XIV. SECT. 12, SUB-SECT. 6.

1. Whether deprives workman of right to compensation.]—RIPKA *v.* GEORGETOWN COLLIERIES, LTD. (Alta.), [1918] 1 W. W. R. 757; 39 D. L. R. 593.—CAN.

g. ——.]—DEVLIN *v.* CHAPEL COAL CO., LTD., [1915] S. C. 71; 52 Sc. L. R. 83; [1914] 2 S. L. T. 320; 8 B. W. C. C. 357.—SCOT.

Sect. 12.—Incapacity and compensation therefor: Sub-sect. 7, A. & B.: sub-sect. 8, A.]

weekly payment of 14*s.* 9*d.*, which was refused. More than a year later a further application was made to increase the weekly payment, when the judge found that the workman had not since the accident been capable of earning wages as a gas-works porter, that he was capable of earning wages as a gatekeeper, timekeeper, watchman, or in any similar work, & that he had made reasonable efforts but had been unable to get such employment. The judge accordingly held that the workman was entitled to have the £1 weekly compensation restored:—*Held:* the county ct. judge was entitled to find that the workman's opportunity of finding employment had been narrowed in consequence of the accident, & the weekly payment of £1 should be restored.—CLARK *v.* GAS LIGHT & COKE CO. (1905), 21 T. L. R. 184; 7 W. C. C. 119, C. A.

Annotations:—**Expld.** Radcliffe *v.* Pacific Steam Navigation Co., [1910] 1 K. B. 685. **Consd.** Cardiff Corpn. *v.* Hall, [1911] 1 K. B. 1009. **Expld.** Thomas *v.* Nixon's Navigation Co., Tarr *v.* Cory, Hopkins *v.* Cory (1917), 117 L. T. 513. **Refd.** Ball *v.* Hunt, [1912] A. C. 496; Kear *v.* Shelton Iron, Steel, & Coal Co. (1921), 14 B. W. C. C. 121; M'Clure *v.* M'Neil (1924), 18 B. W. C. C. 585.

3262. ——.]—An injured unskilled workman, though able to do other work, could not do his former work, & claimed he was entitled to compensation as long as he was disabled from doing his former work:—*Held:* an unskilled labourer is able to earn when he is capable of working, & the work need not be his former work.

What [the judge] ought to have considered was how far the capacity of the workman to earn wages was impaired by reason of the accident (COZENS-HARDY, M.R.).—CAMMELL, LAIRD & CO., LTD. *v.* PLATT (1908), 2 B. W. C. C. 368, C. A.

3263. ——.]—WARD *v.* MILES, No. 3260, *ante.*

3264. —— **Inability to work at war-time occupation followed at time of accident—Able to follow previous occupation.**]—Applt., who had been a cook-housekeeper, entered the employment of resps. as a lathe-hand at munition work, & she injured her thumb, with the permanent result that she could not do munition work. She therefore obtained another situation as a cook, & had no intention of returning to munition work:—*Held:* the compensation to which applt. was entitled should be based on the difference between her earnings at the time of the accident & her subsequent earnings, & not on the difference between her original earnings as a cook-housekeeper & her earnings as a cook after the accident.—LING *v.* DE DION BOUTON, [1920] 1 K. B. 88; 88 L. J. K. B. 1312; 121 L. T. 623; 35 T. L. R. 640; 63 Sol. Jo. 723; 12 B. W. C. C. 229, C. A.

Annotations:—**Refd.** Buckley *v.* Marchington (1921), 14 B. W. C. C. 169; Donn *v.* British Oil & Cake Mills (1923), 129 L. T. 680; Hamilton *v.* Shelton Iron, Steel & Coal Co., Leigh *v.* Same, Timmis *v.* Same (1926), 43 T. L. R. 97.

3265. —— —— **Place occupied by disabled soldier.**]—BUCKLEY *v.* MARCHINGTON & CO., No. 2841, *ante.*

3266. —— **Inability to work at trade given up some time previous to accident.**]—DONN *v.* BRITISH OIL & CAKE MILLS, LTD., No. 3564, *post.*

3267. —— ——.]—SUMMERS *v.* GENESE & YOUNG, No. 3563, *post.*

—— **So restricted as to amount to total incapacity.**]—*See* Sub-sect. 8, B., *post.*

3268. —— **Application to unskilled labour.**]—CAMMELL, LAIRD & CO., LTD. *v.* PLATT, No. 3262, *ante.*

3269. —— ——.]—ROBERTS *v.* VICKERS, LTD., No. 3390, *post.*

3270. Loss of top joint of thumb—Carrying heavy baskets rendered impossible.]—A workman of sixty-seven years of age lost the top joint of his thumb. After some months' total incapacity he was given light work for six months. He was then asked to resume his former work, which included carrying heavy baskets over his shoulders by ropes. He refused, on the ground, that, owing to the accident, he was unable to grip the ropes. The county ct. judge found he was still partially incapacitated:—*Held:* there was evidence to support the finding.—CURRY *v.* DOXFORD & SONS, LTD. (1915), 8 B. W. C. C. 19, C. A.

See, also, Sub-sect. 3, *ante.*

B. Light Work.

3271. Ability to do light work—Question of fact.]—A workman was injured in a colliery & drew compensation for about four years. It was then alleged he was fit for light work, but he said he could not do it on account of pain. The arbitrator found, as a fact, that the workman was exaggerating, & that he could do light work:—*Held:* there was evidence upon which the arbitrator could so find.—PRICE *v.* BURNYEAT, BROWN & CO. (1907), 2 B. W. C. C. 337, C. A.

3272. —— ——.]—An injured workman, in receipt of compensation, was examined jointly by his own & the employers' doctors, who reported that he was fit for light work. His employers then offered him light work, but he refused, thinking that the work offered involved some heavy labour. The employers then applied for a review, & the county ct. judge, finding that the man was fit for light work, & that the offer made it perfectly clear that the man would not have to do any heavy labour, reduced the payments to 1*d.* per week:—*Held:* there was evidence to support the decision.—M'NAMARA & CO., LTD. *v.* BURTT (1911), 4 B. W. C. C. 151, C. A.

Annotation:—**Refd.** Hamilton *v.* Shelton Iron, Steel & Coal Co., Leigh *v.* Same, Timmis *v.* Same (1926), 43 T. L. R. 97.

3273. —— —— ——.]—A workman, employed in engineering works, met with an accident by which he lost the sight of an eye, which was removed. After recovery from the operation his employers offered him work of a lighter character, at which he was able to earn approximately the same wages as before. He tried this for a week, but then abandoned it, because he said it was unsuitable to a one-eyed man as he was afraid of losing the sight of the other eye. The county ct. judge, on an application by the employers, terminated the compensation being paid to him, & made a declaration of liability:—*Held:* that he was justified in so doing.—HOWARDS *v.* WHARTON (1913), 6 B. W. C. C. 614, C. A.

3274. —— ——.]—A workman had been receiving compensation for some time for a severe compound fracture of both legs, when the employers offered him light work. He tried this for ten days, but alleged that his injuries caused him pain & prevented him from doing it. The employers thereupon stopped compensation & the man applied for an award. He called no medical evidence but relied upon his own statements in the box as to his inability to work. The employers

3271 *b. Ability to do light work—Question of fact.*]—ELLIOTT *v.* CURRY & DODD (1912), 46 I. L. T. 72; 5 B. W. C. C. 584.—IR.

contended the man was able to work, & called two doctors in support of this view. The judge believed the man & awarded compensation:—*Held:* this was a pure question of fact, & the man's own evidence was sufficient to support the award.—JARMAN *v.* LEEDS FORGE CO., LTD. (1917), 10 B. W. C. C. 545, C. A.

3275. Light work must be suitable.]—A workman, in receipt of full compensation, had so far recovered that the employers offered him light work. He refused this as being unsuitable, & the employers applied to review & diminish the payments. The county ct. judge stopped the case before the question of the evidence as to the suitability of the employment offered was complete, & dismissed the employers' application:—*Held:* the county ct. judge stopped the case too soon, & there must be a new trial.—ASHMORE, BENSON, PEASE & CO. *v.* LILLIE (1915), 8 B. W. C. C. 89, C. A.

3276. Duty of workman—To try the work offered.]— An injured workman was paid compensation for sixty-one weeks by his employers. Subsequently the employers offered the workman light work, which he refused without attempting to do it. The county ct. judge held that the workman had acted unreasonably in refusing to go & see what the work offered was, & that, if he had accepted the offer & returned to work, by the date of the arbn. he would have been under no disability. He therefore stopped compensation, but made a declaration of liability:—*Held:* the decision was on a question of fact, & there was evidence to support it.—FURNESS, WITHY & CO. *v.* BENNETT (1910), 3 B. W. C. C. 195, C. A.

3277. —— To attempt to obtain light work.]—On an application by employers to review, it was proved that the workman was fit for light work, but no evidence was given that the man had been offered or could get light work. It was admitted that he had not attempted to get it. The county ct. judge reduced the payments from 15*s.* to 10*s.* per week:—*Held:* there was evidence on which the reduction could be made.—ANGLO-AUSTRALIAN STEAM NAVIGATION CO., LTD. *v.* RICHARDS (1911), 4 B. W. C. C. 247, C. A.

Annotations:—**Consd.** Silcock *v.* Golightly, [1915] 1 K. B. 748. **Refd.** Pearson *v.* Russell (1916), 9 B. W. C. C. 706; Purdie *v.* Colville (1923), 16 B. W. C. C. 307.

3278. —— ——.]—A miner, suffering from nystagmus & receiving compensation so far recovered that the employers considered him fit for light work above ground. They gave him certain work, but after he had tried it for forty minutes his blindness returned & he had to give it up. Subsequently they applied for a review & reduction of compensation. The county ct. judge found that the man was fit for light work but had made no attempt to obtain it. He consequently reduced the compensation from 11*s.* 8*d.* to 8*s.* 4*d.* a week:—*Held:* there was no misdirection.—WILLIAMS *v.* RUABON COAL & COKE CO., LTD. (1914), 7 B. W. C. C. 202, C. A.

Annotation:—**Refd.** Purdie *v.* Colville (1923), 16 B. W. C. C. 307.

3279. —— ——.]—SILCOCK & SONS *v.* GOLIGHTLY, No. 3296, *post.*

Ability to do only certain exceptional forms of light work—"Odd lot."]—*See* Sub-sect. 8, B., *post.*

SUB-SECT. 8.—TOTAL INCAPACITY.

A. In General.

3280. Inability to obtain work—Bonâ fide efforts made.]—CLARK *v.* GAS LIGHT & COKE CO., No. 3261, *ante.*

3281. Advised by doctor not to resume former work—Ability to earn at any other work.]—A collier having ruptured himself tried to continue work with a truss, but could not. His doctor advised him to undergo an operation as soon as there was a bed ready for him in the hospital, & until then not to continue his work. The man did no work at all during that time, & claimed compensation in respect thereof. The county ct. judge found that the man acted reasonably upon the advice of his doctor, & awarded full compensation:—*Held:* the case must go back to decide what the man was able to earn at any other work.—EVANS *v.* CORY BROTHERS & CO., LTD. (1912), 5 B. W. C. C. 272, C. A.

Annotation:—**Refd.** Heathcote *v.* Haunchwood Collieries (1916), 116 L. T. 100.

3282. ——.]—A workman, injured in 1911, received weekly compensation for partial incapacity, & after the passing of Workmen's Compensation (War Addition) Acts of 1917 (c. 42) & 1919 (c. 83), was paid the extra percentages authorised by those Acts in cases of total incapacity. At the end of 1919 he rested from work for some time on the advice of his doctor. In Dec. 1919, the weekly payments were redeemed by payment of a lump sum, & no further compensation was paid to him. He claimed that as his resting on the advice of his doctor showed him to be totally incapacitated during the period of such resting, he was entitled to the extra payments authorised by the Acts of 1917 & 1919, which, by sect. 1 of the former Act, are to continue in cases of total incapacity, notwithstanding that the weekly payments have been redeemed. The county ct. judge found that the workman was not totally incapacitated during the period of resting, & made an award in favour of the employers:—*Held:* it could not be said that a man's resting, upon the advice of his doctor, necessarily implied total incapacity. It was a question of fact for the county ct. judge, in the circumstances of the case, & as there was evidence upon which he could find as he had done, the appeal must be dismissed.—KIRKBY *v.* HOWLEY PARK COAL & CANNEL CO. (1920), 89 L. J. K. B. 1070; 124 L. T. 43; 13 B. W. C. C. 168, C. A.

Annotation—**Refd.** Purdie *v.* Colville (1923), 16 B. W. C. C. 307.

3283. Inability to resume work due to old age & ill health.]—Appct., who was considerably over sixty years of age, was employed in resps.' collieries. He met with an "accident arising out of & in the course of" his employment within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 1. Some rock from the roof of the coal mine in which he was working at the time fell down upon him & three of his ribs were broken. The accident totally incapacitated him for work for a while, & he claimed compensation from his employers in respect of the injury, which was followed in due course by a request for arbitration. He was a workman who had been somewhat irregular in his attendance at his work owing to his chronic ill health. He was absent for considerable intervals from time to time. He suffered from various complaints, kidney troubles & others. At the date when the request for arbitration came on to be heard, which was some months after the accident, appct. had recovered in so far as the immediate injury to his ribs was concerned, the bones having reunited. But the effects of the shock & other results thereof had not entirely disappeared. At that date, however, appct. was not totally incapacitated for work by reason of the accident alone. It was decided by the

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county ct. judge that, having regard to appct.'s advanced age & to his previous history, he was at the date of the application still totally incapacitated for work; but that his incapacity was not then wholly due to the accident, the incapacity being partially due to other causes, namely, the state of his health, including his age. Appct. appealed: —*Held:* the county ct. judge was not bound to say that because there were some indications or remnants of the effects of the admitted accident, appct. must still be treated as being totally incapacitated for work; & the judge could not be regarded as having wrongly attempted to say that he would not treat appct. as totally incapacitated by reason of the accident, because had there been no accident he would still have been incapacitated through his ill health & advanced age.—LEWIS *v.* WREXHAM & ACTON COLLIERIES, LTD. (1916), 85 L. J. K. B. 1456; 115 L. T. 367; 9 B. W. C. C. 518, C. A.

B. Only Fit for Light Work of Exceptional Character—"Odd Lot."

(a) In General.

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 9 (4).

3284. The definition.]—Where, upon an application by employers for a reduction of the compensation awarded to a driver in their employ on the footing of total incapacity, it was proved that the workman, though unable to resume his occupation of driver, was able to do any form of light work, & that he had applied for various forms of light work without success:—*Held:* it was competent to the county ct. judge to find that the circumstances had so altered as to justify a reduction.

Inability to earn, for the purposes of Workmen's Compensation Act, 1906 (c. 58), Sched. I., para. 3, is inability to get employment owing to some incapacity for work personal to the workman, to the exclusion of inability to get employment owing to the state of the labour market, & this construction applies to an application to review as well as to an original application for compensation. Consequently, proof that a workman has made repeated & unsuccessful efforts to obtain suitable employment does not of itself establish a right to compensation on the basis of total incapacity (BUCKLEY, L.J.).

If I might be allowed to use such an undignified phrase I should say that if the accident leaves the workman's labour in the position of an "odd lot" in the labour market, the employer must show that a customer can be found who will take it. For in such a case we are not in truth dealing with fluctuations of the labour market at all. We are dealing with the chance of some one being found who can & will avail himself of the special residue of powers which has been left in the workman, & seeing that it is the result of the accident that the workman has been made dependent on the finding of such a special employer, it is right that those who are liable to pay to him compensation for his loss of earning power should only be allowed to take credit for his partial capacity for work if they can show that it can actually be made productive of remuneration to him (FLETCHER MOULTON, L.J.).—CARDIFF CORPN. *v.* HALL, [1911] 1 K. B. 1009; 80 L. J. K. B. 644; 104 L. T. 467; 27 T. L. R. 339; 4 B. W. C. C. 159, C. A.

Annotations:—**Consd.** Carlin *v.* Stephen (1911), 5 B. W. C. C. 486. **Apld.** Guest, Keen & Nettlefolds *v.* Winsper (1911), 4 B. W. C. C. 289. **Consd.** Silcock *v.* Golightly, [1915] 1 K. B. 748. **Apld.** Ball *v.* Coulthard (1919), 122 L. T. 164. **Expld.** Kirkby *v.* Howley Park Coal & Cannel Co. (1920), 89 L. J. K. B. 1070. **Apld.** Kear *v.* Shelton Iron, Steel & Coal Co. (1921), 14 B. W. C. C. 121; Yates & Thom *v.* Duxbury (1921), 14 B. W. C. C. 80; Gaffney *v.* Chorley Colliery Co. (1922), 92 L. J. K. B. 1. **Consd.** Cook *v.* Severn Canal Carrying Co. (1922), 15 B. W. C. C. 286; Foster *v.* Wharncliffe Woodmoor Colliery Co., [1922] 2 K. B. 701; Middleton *v.* Wharncliffe Woodmoor Colliery Co. (1922), 15 B. W. C. C. 166; Purdie *v.* Colville (1923), 16 B. W. C. C. 307. **Apld.** Harris *v.* Bellamy's Wharf & Dock (1924), 17 B. W. C. C. 93. **Expld.** Palmer *v.* Crawshay (Cyfarthfa) (1926), 135 L. T. 355. **Refd.** Ball *v.* Hunt, [1912] A. C. 496; Walton *v.* South Kirkby, Featherstone & Hemsworth Colliery (1912), 107 L. T. 337; James *v.* Mordey, Carney (1913), 109 L. T. 377; Osborne *v.* Tralee & Dingle Ry. (1913), 6 B. W. C. C. 913; Thompson *v.* Newton (1914), 7 B. W. C. C. 703; Jenkinson *v.* Steiner (1916), 9 B. W. C. C. 571; Pearson *v.* Russell (1916), 9 B. W. C. C. 706; Clay *v.* Sherwood Colliery Co. (1922), 92 L. J. K. B. 169; Secretary of State for War *v.* Willoughby (1922), 15 B. W. C. C. 120; Sage *v.* Stothert (1923), 129 L. T. 602; Wilmot *v.* Askern Coal & Iron Co. (1924), 17 B. W. C. C. 17; Higgs *v.* Sloan & Davidson (1925), 95 L. J. K. B. 662; United Steel Cos. *v.* Clarke (1925), 95 L. J. K. B. 684.

3285. "Odd lot"—Term to be avoided—Arbitrator should state his findings.]—A collier was struck on the back by a piece of rock falling from the roof of his working, & informed the deputy, but not in such a way as to constitute verbal notice of an accident within Workmen's Compensation Act, 1906 (c. 58). He was able to work for two or three days, suffering considerable pain, & was then laid up. He consulted a doctor six days after the accident; but the latter thought the workman was suffering from lumbago, & treated him for it for some four months. Eventually, upon his going to a hospital, it was discovered that he had an injury in his back, which would account for his symptoms. No written notice of the accident was given, & no claim for compensation was made within six months. The county ct. judge found that no notice of the accident was given, & that the employers were prejudiced in their defence by the want of such notice, but that appct., for reasons given by him, had reasonable cause for his failure to give notice. He found that appct. was an "odd lot" in the labour market, & awarded him compensation for total incapacity:—*Held:* there was no evidence to support the finding that appct. had reasonable cause for failing to give notice. The only reasons which could be inferred from his evidence were that he thought he had given sufficient notice to the deputy, & until he consulted the doctor, he thought he would get better & the effect of the accident would pass off, & these reasons were a quite insufficient cause for his failure to give notice.

The expression "odd lot" is a metaphorical expression, the use of which in workmen's compensation cases is to be deprecated. In any case it should never be used by an arbitrator without explaining exactly what he means by it, & stating the findings of fact upon which its use is based.—CLAY *v.* SHERWOOD COLLIERY CO., LTD. (1922), 92 L. J. K. B. 169; 128 L. T. 232; 15 B. W. C. C. 203, C. A.

3286. Effect of Workmen's Compensation Act, 1923 (c. 42), s. 16.]—The workman in an accident arising out of & in the course of the employment suffered an injury to his foot & was paid full compensation for a year. On an application by the employers to review the weekly payment the workman by his answer stated that if he had so far recovered as to do light work, which was not admitted, he had failed to obtain it owing mainly or wholly to his injuries, & was therefore entitled to continue to be paid on the basis of total incapacity, relying on the provisions of above sect. It was admitted he had taken reasonable

steps to obtain light employment & was only able to do light work & he walked with a limp. On the question whether he had failed to obtain light employment as a consequence wholly or mainly of his injuries the county ct. judge's note was silent, but he ordered a continuance of full compensation:—*Held:* the county ct. judge must be presumed to have found that the inability to secure suitable employment was due wholly or mainly to the injury, & it was a question of fact as to which there was evidence to support the finding.

I think [above sect.] was not intended to deal with "odd lot" cases (POLLOCK, M.R.).—CROSSLEY BROTHERS, LTD. *v.* BRUNYEE (1925), 133 L. T. 609; 18 B. W. C. C. 320, C. A.

Annotation:—**Reld.** Clarke *v.* United Steel Cos. (1925), 18 B. W. C. C. 525.

3287. ——.]—The workman, a coal miner, was injured as the result of an accident in Sept. 1921, by which a condition of arthritis in his left knee already existing was aggravated. The employers paid compensation as for total incapacity from the date of the accident, until July 9, 1925, when they applied for diminution on the ground that the workman was fit for work. The county ct. judge found that the workman was fit for employment of a certain kind, & had been so for more than two years, & that he had made no real attempt to obtain it. He held that the effect of above sect. was to shift the *onus* from the employers to the workman in cases where some physical earning capacity exists, of proving that he has taken all reasonable steps to obtain employment & did away with considerations as to whether or not the workman's labour was an "odd lot." He accordingly made an award reducing the compensation to twenty shillings per week:—*Held:* the effect of above sect. did not exclude the doctrine of the "odd lot," the county ct. judge had misdirected himself as to the effect of the sect. & the case must go back for a rehearing.

[Above sect.] was intended for the relief of workmen, & was not intended to take away a view of the law which was operating in their favour (ATKIN, L.J.).—UNITED STEEL COS., LTD. *v.* CLARKE (1925), 95 L. J. K. B. 684; 134 L. T. 456; *sub nom.* CLARKE *v.* UNITED STEEL COS., LTD., 18 B. W. C. C. 525, C. A.

Annotation:—**Reld.** Meade *v.* United National Collieries (1926), 19 B. W. C. C. 339.

3288. ——.]—Above sect. does not operate so as to throw on a workman who is an "odd lot" the *onus* of proving that "he has taken all reasonable steps to obtain & has failed to obtain" employment of a certain kind. Where the county ct. judge had treated the workman as coming within above sect. without, apparently, considering whether he was an "odd lot":—*Held:* the case must be sent back to the county ct. judge for the latter question to be determined.—HIGGS *v.* SLOAN & DAVIDSON (1925), 95 L. J. K. B. 662; 18 B. W. C. C. 449, C. A.

Annotation:—**Reld.** Clarke *v.* United Steel Cos. (1925), 18 B. W. C. C. 525.

See Workmen's Compensation Act, 1925 (c. 84), s. 9 (4).

(*b*) *Findings within Definition.*

3289. Great difficulty in finding any employment.]—A workman who was employed as a ship's painter & scaler sustained injury to his left eye, caused by a blow from a rivet. Accordingly he claimed compensation from his employers under Workmen's Compensation Act, 1906 (c. 58). The county ct. judge having heard medical evidence on both sides as to the workman's physical state was not satisfied therewith. He therefore sent the case to the medical referee to report whether the workman was or was not still incapacitated by reason of the condition of his left eye from doing the work of a ship's painter. The report of the medical referee was that there was nothing abnormal in the eye to account for the great defect of vision complained of; that he was inclined to think that the workman had better vision than he would own to; that if the workman's statements were true, the case must be regarded as one of hysterical blindness or his left eye must always have been a defective one; but that if his sight was as he said it was, he was not fit to do his work as a ship's painter, but he could do ordinary painting when he had not to stand on a scaffolding. On this report the county ct. judge found as a fact that the workman was by reason of the accident incapacitated from doing the work of a ship's painter, & that he would have great difficulty in obtaining any employment. Therefore he gave the workman compensation for total incapacity for work on the footing of his average weekly earnings being 45*s.*:—*Held:* (1) there was sufficient evidence upon which the county ct. judge might arrive at the view at which he did; assuming that the defective vision in the workman's left eye was due to the accident thereto & he was not able to do work involving painting on a scaffolding or on a ladder, it was a case in which the workman was an "odd lot man"; & therefore the decision in *Proctor & Sons* v. *Robinson*, No. 3302, *post*, applied, & not that in *Cardiff Corpn.* v. *Hall*, No. 3284, *ante*.

(2) Although the ct. did not require mathematical accuracy in calculating the average weekly earnings of a workman who had been injured by "accident arising out of & in the course of" his employment, within Workmen's Compensation Act, 1906 (c. 58), s. 1, a small mistake in the ascertained amount not being sufficient to upset an award, yet where there is a substantial mistake the case must go back to the county ct. judge to assess the compensation to which the workman is entitled.—JAMES *v.* MORDEY, CARNEY & CO., LTD. (1913), 109 L. T. 377; 6 B. W. C. C. 680, C. A.

3290. Had not the capacity of an ordinary labourer.]—A miner was certified as being incapacitated by miners' nystagmus. After some time his employers gave him light work on the surface, it being admitted that work below ground was unsuitable for him by reason of his nystagmus, but that otherwise he could have obtained such employment. He did this work for about a year & received differences between his then earnings & his earnings before the incapacity, by way of compensation. He was then dismissed, with many other men in no way incapacitated, on account of slackness of trade. There was evidence that he had tried to obtain labouring work elsewhere but had failed. The county ct. judge found that he was in fact capable of doing "quite a number of labouring jobs but not capable of doing any labouring job that might be open," & that this was the result of nystagmus. He thereupon awarded compensation for total incapacity:—*Held:* the judge had in effect found that the man had not "the capacity of an ordinary labourer" by reason of nystagmus & was therefore an "odd lot." This was a question of fact, &, there being no misdirection, the appeal failed.—KEAR *v.* SHELTON IRON, STEEL & COAL CO. (1921), 14 B. W. C. C. 121, C. A.

Annotations:—**Consd.** Cook *v.* Severn Canal Carrying Co (1922), 15 B. W. C. C. 286. **Expld.** Foster *v.* Wharncliffe

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Woodmoor Colliery Co., [1922] 2 K. B. 701; Gaffney *v.* Chorley Colliery Co. (1922), 92 L. J. K. B. 1; Middleton *v.* Wharncliffe Woodmoor Colliery Co. (1922), 15 B. W. C. C. 166. **Refd.** Clay *v.* Sherwood Colliery Co. (1922), 92 L. J. K. B. 169; Purdie *v.* Colville (1923), 16 B. W. C. C. 307; Palmer *v.* Crawshay (Cyfarthfa) (1926), 135 L. T. 355.

3291. Driven into lower scale of employment—In which there was no work.]—Appct., an apprentice, had his right thumb injured by accident arising out of & in the course of his employment on Sept. 12, 1916. His employers paid him compensation for four months. They then gave him work of a less skilled character than that which he did before the accident. In 1917 he joined the army, & was demobilised in 1919. In 1920 he obtained work with another firm, but in Mar. 1921, he was suspended owing to slackness of work. He then filed a request for arbn. & claimed compensation on the basis of partial incapacity. At the hearing, the county ct. judge gave leave to amend the claim & treated it as being made on the basis of total incapacity on the ground that appct., in consequence of the accident, was driven into a lower scale of employment in which there was no work for him. He found on the evidence that he was totally incapacitated, & made his award on that basis. In the Ct. of Appeal the employers took the point that the county ct judge had no power to allow the claim to be amended or to make an award on any other basis than that of partial incapacity, on which basis the claim was originally made:—*Held:* the point was not open to the employers in the Ct. of Appeal as they did not take it in the county ct.; & on the evidence the county ct. judge was justified in coming to the conclusion that appct. was an "odd lot," & therefore totally incapacitated.—MILLIGAN *v.* KERR, STUART & Co. (1921), 14 B. W. C. C. 203, C. A.

(*c*) *Findings not within Definition.*

3292. Skilled workman—Fields of labour not open owing to want of skill in other jobs.]—A workman, in the course of his employment as a boat captain with a canal carrying co., received an injury to one of his legs. The county ct. judge made an award in his favour on the basis of total incapacity, on the ground that his labour was an "odd lot," as "he had not fields of labour open to him owing to his not being skilled in other jobs." The employers appealed:—*Held:* although it might have been possible for the county ct. judge to arrive at the same conclusion upon a proper direction, his decision could not stand, as the definition of the term "odd lot" upon which his decision was founded was not in accordance with the dictum of FLETCHER MOULTON, L.J., in *Cardiff Corpn.* v. *Hall*, No. 3284, *ante*.—COOK *v.* SEVERN CANAL CARRYING CO., LTD. (1922), 15 B. W. C. C. 286, C. A.

3293. Ability to do light work—Light work generally.]—CARDIFF CORPN. *v.* HALL, No. 3284, *ante*.

3294. ——.]—In 1919, a workman, while engaged in painting a fanlight, fell into guttering 15–20 feet below, breaking both bones of his left leg. An award was made by the deputy county ct. judge on Jan. 15, 1921, on the basis of total incapacity. An application to review & diminish the payments was made by the employer in Oct. 1921. The county ct. judge came to the conclusion that the workman was not an "odd lot" & that he was fit for light work. He reduced the compensation to 15*s.* a week & gave the employers the costs. He also rejected the evidence of an undertaker to the effect that he had refused to take the workman into his employment when he was in search of light work. The workman appealed:—*Held:* (1) the county ct. judge had evidence before him which justified him in finding that the workman was not an "odd lot"; (2) even if the refusal to admit the evidence of the undertaker was a wrongful refusal, no miscarriage of justice had been caused; & (3) the county ct. judge had acted within his discretion as to costs.—SECRETARY OF STATE FOR WAR *v.* WILLOUGHBY (1922), 15 B. W. C. C. 120, C. A.

3295. —— ——.]—Appct., a miner, suffered injury to his hand by accident in resps. colliery in 1912, which resulted in the loss of two fingers. He filed a request for arbitration under Workmen's Compensation Act, 1906 (c. 58), but, as the employers found him work in their haulage department, his claim to compensation stood over, & he obtained an order giving him liberty to apply if necessary. From 1913 to 1921 he received better wages than he earned before the accident. In 1921, when the miners' strike took place, he voluntarily left his work to join the strikers. When the strike was over he applied to be reinstated, but resps. were unable to reinstate him, because, owing to the strike & the withdrawal of the safety men from the pits, some of resps.' pits were flooded, causing curtailment of work. On an application for compensation, the county ct. judge found that appct. was an "odd lot" & awarded him compensation on the basis of total incapacity:—*Held:* on the evidence, appct. was able to do light work, & was not an "odd lot," & the case must go back to the county ct. judge to assess the compensation on the basis of partial incapacity, having regard only to appct.'s loss of earning power brought about by his present physical condition, due to the accident, & not to the present condition of the labour market.—GAFFNEY *v.* CHORLEY COLLIERY Co. (1922), 92 L. J. K. B. 1; 15 B. W. C. C. 158, C. A.

Annotations:—**Expld.** Murray *v.* Portland Colliery Co. (1922), 15 B. W. C. C. 362. **Apld.** Bromley *v.* Staveley Coal & Iron Co., Drew *v.* Staveley Coal & Iron Co. (1923), 129 L. T. 620. **Folld.** Newlan *v.* Meredith & Shephard (1923), 128 L. T. 784. **Refd.** Foster *v.* Wharncliffe Woodmoor Colliery Co., Farmery *v.* Same, Bateman *v.* Same, Goodliffe *v.* Same, Parry *v.* Same (1922), 92 L. J. K. B. 5; Middleton *v.* Wharncliffe Woodmoor Colliery Co. (1922), 15 B. W. C. C. 166; Purdie *v.* Colville (1923), 16 B. W. C. C. 307; Palmer *v.* Crawshay (Cyfarthfa) (1926), 135 L. T. 355.

3296. —— **With certain exceptions—Field of employment open though a restricted one.**]—In 1909 a workman lost his right arm in consequence of an accident arising out of & in the course of his employment & received compensation from his employers under Workmen's Compensation Act, 1906 (c. 58), by way of a weekly payment. In 1914 the employers applied for a review of the weekly payment on the ground that the man was able to do light work. Apart from the loss of his arm he was a strong healthy man & not totally incapacitated from earning wages. He had applied once, in 1909, to his employers for light work, which they were unable to give him, & he had since made no effort to get work of any kind. The employers did not adduce any evidence to show what particular kind of light work he could do, nor that he could get work, but that they suggested various kinds of work which were open to him in the place where he lived. The county ct. judge, acting upon his own experience & knowledge of the locality, came to the conclusion that there was open to the man a field of employment, though a restricted one, & that he could get

work if he tried; he accordingly reduced the weekly payment:—*Held:* the county ct. judge was right.—SILCOCK & SONS *v.* GOLIGHTLY, [1915] 1 K. B. 748; 84 L. J. K. B. 499; 112 L. T. 800; 8 B. W. C. C. 48, C. A.

Annotations:—**Refd.** Pearson *v.* Russell (1916), 9 B. W. C. C. 706; Purdie *v.* Colville (1923), 16 B. W. C. C 307.

3297. —— ——.]—On Dec. 29, 1921, a shipwright in the course of his employment, while at work, fell thirty feet from a staging & sustained severe injuries to his pelvis & spine, from which, however, he made a remarkable recovery. In arbitration proceedings commenced by him in the county ct., medical evidence was given to the effect that he was likely to be unable to do heavy work for about three years from the date of the accident. Another witness said that he was capable of doing "labouring work." The county ct. judge held that he was "partially incapacitated for work only, being capable of doing light work other than such as involves stooping, lifting, or jarring. Even though the whole field of light work is not open to appct., I am of opinion that there are still open to him fields of employment, other than those specially adapted only to quite exceptional cases, dependent on quite exceptional employers, his failure to obtain work in which is due to circumstances unconnected with the accident." The workman appealed:—*Held:* the county ct. judge was justified, on the evidence, in his decision; it was clear that he had the distinction to be found in *Cardiff Corpn.* v. *Hall*, No. 3281, *ante*, clearly in his mind.—SAGE *v.* STOTHERT (G. K.) & Co., LTD. (1923), 129 L. T. 602; 16 B. W. C. C. 74, C. A.

3298. Inability to obtain work.]—In Oct. 1916, appct., a munition worker, was injured by accident. In Aug. 1917, a declaration of liability was recorded, & appct. returned to her old work for some time, until munition work ceased after the armistice. Subsequently the employers offered her work as a lift attendant. She did that & then gave it up, as she said it was unsuitable for her. On Feb. 27, 1919, she filed a request for arbitration. The judge found that the lift work was unsuitable, & gave an award dated Apr. 28, 1919, for the payment of a weekly sum of 10*s.* 4*d.* full compensation for total incapacity. On Jan. 12, 1921, the employers applied for review of the weekly payment. It was proved that since the award on Apr. 28, 1919, she had done no work. There was some dispute as to what efforts she had made to find employment & whether she had been registered at the Labour Exchange. The county ct. judge found that having regard to appct.'s physical condition & to the condition of the labour market, she was an "odd lot" in the labour market, & stated that he was satisfied that he ought not to terminate or diminish the compensation paid to her:—*Held:* there was evidence to support the finding & no misdirection.—YATES & THOM, LTD. *v.* DUXBURY (1921), 14 B. W. C. C. 80, C. A.

Annotation:—**Refd.** Purdie *v.* Colville (1923), 16 B. W. C. C. 307.

3299. —— **Must be result of accident—State of labour market.**]—MIDDLETON *v.* WHARNCLIFFE WOODMOOR COLLIERY CO., LTD., No. 3242, *ante*.

3300. —— —— **Supervening disease.**] — A workman was in 1917 certified to be suffering from miner's nystagmus & received full compensation until Aug. 1921. In the proceedings before the county ct. judge for compensation to be continued there was evidence that certain symptoms of dizziness & vomiting of which the workman complained were inconsistent with the continuance of nystagmus, but might be due to gastric trouble. The reasons given by the deputy county ct. judge for his finding in favour of appct. were as follows: "I came to the conclusion on the whole of the evidence that this man is still suffering from the secondary effects of nystagmus, even if he is cured of the disease, which is doubtful, & there being no offer of work made to him by resps., & having regard to the fact that he cannot obtain work at any other colliery by reason of the fact that he has suffered from nystagmus, I hold that his incapacity is total, &, therefore, I awarded him 19*s.* per week, being half his average wages when he was certified as suffering from nystagmus":—*Held:* the deputy county ct. judge had misdirected himself, & the case must be sent back for proper assessment of compensation on the same basis as that ordered in *Middleton* v. *Wharncliffe Woodmoor Colliery Co., Ltd.*, No. 3242, *ante*.—JONES *v.* WHARNCLIFFE WOODMOOR COLLIERY CO., LTD. (1922), 15 B. W. C. C. 172, C. A.

Annotation:—**Consd.** Palmer *v.* Crawshay (Cyfarthfa) (1926), 135 L. T. 355.

—— ——.]—*See, also*, Sub-sect. 4, *ante*.

3301. Inability to resume old work—No other offer of work.]—Appct., now resp., was employed as an unskilled labourer by applts. & on Feb. 2, 1922, met with an accident arising out of & in the course of that employment causing injury to his right eye. He was taking nails out of logs of wood & his chisel broke & a piece of steel entered his eye. In Apr. his right eye had to be removed. Applts. paid him compensation from the date of the accident until the July 28, 1922, when they considered from the doctor's report he was fit for work & offered him his old work which he refused & made a claim for compensation. The county ct. judge sitting with a medical referee found that the old work was too risky for appct. to do & that no other work except that had been offered him &, that not being suitable, made an award on the ground of total incapacity:—*Held:* there being no evidence to support the finding of total incapacity the case must go back not for a rehearing but for further hearing for compensation to be assessed on the ground of partial incapacity &, if partia incapacity found, compensation to be assessed in the same manner as pointed out in *Gaffney* v. *Chorley Colliery Company, Ltd.*, No. 3295, *ante*. — NEWLAN *v.* MEREDITH & SHEPHARD, LTD. (1923), 128 L. T. 784; 16 B. W. C. C. 15, C. A.

(*d*) *Onus of Proof on Employer.*

3302. Particular light work workman able to do —Chance of obtaining such work.]—Where, upon an application by employers to reduce the weekly compensation payable to a workman under Workmen's Compensation Act, 1906 (c. 58), on the footing of total incapacity, it was proved that the man was prevented by the accident from doing the full work of an ordinary labourer, but that he could do some light work if he could obtain it, & there was no evidence that he could obtain any suitable employment:—*Held:* it was incumbent on the employers to show what particular light work the workman could do, & to give some evidence that he had a chance of obtaining that particular kind of work, & in the absence of that evidence reduction ought to be refused.—PROCTOR & SONS *v.* ROBINSON, [1911] 1 K. B. 1004; 80 L. J. K. B. 641; 3 B. W. C. C. 41, C. A.

Annotations:—**Distd.** Cardiff Corpn. *v.* Hall, [1911] 1 K. B. 1009; Carlin *v.* Stephen (1911), 5 B. W. C. C. 486. **Apld.** James *v.* Mordey, Carney (1913), 109 L. T. 377. **Dbtd.** Pearson *v.* Russell (1916), 9 B. W. C. C. 706; Purdie *v.* Colville (1923), 16 B. W. C. C. 307. **Refd.** Walton *v.* South Kirkby, Featherstone & Hemsworth Colliery (1912), 107 L. T. 337; Osborne *v.* Tralee & Dingle Ry,

Sect. 12.—Incapacity and compensation therefor: Sub-sect. 8, B. (d); sub-sect. 9, A. & B.]

(1913), 6 B. W. C. C. 913; Silcock *v.* Golightly, [1915] 1 K. B. 748; Kear *v.* Shelton Iron, Steel & Coal Co. (1921), 14 B. W. C. C. 121.

3303. Effect of failure to discharge onus.]—Up to Oct. 1917, appct., a girl under twenty-one years of age, was working as a weaver at a mill, but the mill was then closed, & she entered the employment of resps. at their munition factory. On Apr. 10, 1918, appct. met with "personal injury caused by accident arising out of & in the course of" her employment within Workmen's Compensation Act, 1906 (c. 58), s. 1. She was cutting rifle rods to length when a piece of steel flew off & alighted in her right eye. The result of the accident was that appct. completely lost the sight of that eye. She had been operated on for squint in her left eye some time before the accident, & she had therefore not only lost the sight of one eye, but found the other imperfect. Appct. was paid compensation by resps. up to Sept. 3, 1918, & she was engaged on the work of gauging shells at their munition factory up to Dec. 21, 1918, when she was discharged therefrom in consequence of the demand for munitions having ceased as the result of the armistice. On being thus discharged, she applied for & received unemployment pay. After Christmas, 1918, appct. went back to work at the mill, which had recommenced to run. She failed, however, to do her work as a weaver, as she was suffering from pain in the left eye & head, & that eye filled with water. It was decided by the county ct. judge that appct. had made genuine attempts to do her work as a weaver; that he accepted the evidence that her left eye filled with water & that she suffered the pain which she described; & that therefore she was no more than an "odd lot" in the labour market, as was described by FLETCHER MOULTON, L.J., in *Cardiff Corpn.* v. *Hall*, No. 3284, *ante*, she being unable to obtain any employment in any recognised sphere of occupation; & therefore an award must be made in her favour on the footing that she was totally incapacitated for work:—*Held:* the county ct. judge had evidence upon which he could come to the conclusion at which he did; & he was therefore quite right in making an award for the full amount of the compensation to which appct. was entitled by reason of her total incapacity for work.—BALL *v.* COULTHARD (T.) & Co., LTD. (1919), 122 L. T. 164; 12 B. W. C. C. 312, C. A.

Annotation:—**Refd.** Purdie *v.* Colville (1923), 16 B. W. C. C. 307.

3304. Employer must discharge onus—Workman abstaining from trying to work.]—Appct. was injured by accident arising out of & in the course of his employment. The evidence was that he could not stand or stoop for any length of time without considerable pain, but that he could do some special jobs if they were found for him. The county ct. judge found that he was incapacitated for his old employment & was unable to compete on equal terms in the labour market, but added that he considered appct. had deliberately abstained from trying to work & made an award on the basis of partial incapacity only:—*Held:* on the evidence appct.'s labour was an "odd lot" in the labour market; the *onus*, therefore, of proving that the man could actually obtain work was on the employers, & that *onus* had not been discharged. The award must be on the basis of total incapacity.—HARRIS *v.* BELLAMY'S WHARF & DOCK, LTD. (1924), 17 B. W. C. C. 93, C. A.

Annotation:—**Refd.** Palmer *v.* Crawshay (Cyfarthfa) (1926), 42 T. L. R. 490.

3305. —— Of proving special work obtainable.]—When a workman, owing to injuries from an accident, comes into the category of what has been called an "odd lot," fluctuations in, or the state of, the labour market cannot be taken into consideration in assessing compensation, & if the employer does not show that there is special work which in spite of his incapacity he can get, the proper finding is that the man is totally incapacitated by the accident, & the award should proceed on the basis of such total incapacity.—PALMER *v.* CRAWSHAY BROTHERS (CYFARTHFA), LTD. (1926), 135 L. T. 355; 42 T. L. R. 490; 19 B. W. C. C. 164, C. A.

3306. Effect of Workmen's Compensation Act, 1923 (c. 42), s. 16.]—HIGGS *v.* SLOAN & DAVIDSON, No. 3288, *ante*.

SUB-SECT. 9.—PROOF OF RECOVERY.

A. In General.

3307. Recovery a question of fact.]—On an application by employers to review, evidence was given that the workman's incapacity had entirely ceased, & that there was no likelihood of recurrence of any condition which would cause incapacity. The man's finger was still slightly bent as a result of the injury. The county ct. judge terminated the payments:—*Held:* there was evidence on which he could do so.—EDMONDSONS, LTD. *v.* PARKER (1911), 5 B. W. C. C. 70, C. A.

3308. What must be proved—Now able to perform former work.]—An application was made by employers under sect. 16 of schedule I. to the Workmen's Compensation Act, 1906 (c. 58), to review a weekly payment payable to a workman who was a miner & who had been injured by "accident arising out of & in the course of" his employment. The issue which the employers came to prove was that the workman had entirely recovered from the effects of the injury, & that his incapacity for work by reason of the accident had ceased:—*Held:* the employers had not affirmatively discharged the *onus* of proof, which admittedly lay on them, of establishing conclusively their right to a review of the weekly payment, no direct evidence being adduced by them to show that the workman was now able to perform that which was his work at the time of the accident, viz., the hard work of a miner, which was very distinguishable from the light work that he had subsequently been doing.—NEW MONCKTON COLLIERIES CO. *v.* TOONE (1913), 109 L. T. 374; 57 Sol. Jo. 753; 6 B. W. C. C. 660, C. A.

3309. —— Fit to do his ordinary work.]—A workman was injured by spilling acid on his hand. Compensation was paid until the employers considered the incapacity to have ceased when it was stopped. The man applied for arbn., & at the hearing admitted that he had not tried to get a job, but stated that his hand was still painful. Four doctors were called, but the county ct. judge took no notice of their evidence. He dismissed

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PART XIV. SECT. 12, SUB-SECT. 9.—A.

3307 i. *Recovery a question of fact.]*—MCNAUGHTON & SINCLAIR *v.* CUNNINGHAM, CUNNINGHAM *v.* MCNAUGHTON & SINCLAIR, [1910] S. C. 980; 47 Sc. L. R. 781; [1910] 2 S. L. T. 167; 3 B. W. C. C. 577.—**SCOT.**

h. *Susceptibility to recurrence of disease—Onus of proof—Lies on workman.]*—*Held:* as the workman had recovered from the original attack & as he had failed to discharge the *onus* which lay on him of proving that his susceptibility to recurrence of the disease was due to that attack, the

the application for compensation. The Ct. of Appeal directed a letter to be sent to the judge for a fuller explanation of the reasons for his award, to which the judge replied that he had had a discussion with the doctors, & came to the conclusion that he ought to accept & act on the opinions of two of the doctors, which was "that the workman was fit to do this ordinary work":—*Held:* the only course open, after the reply given by the county ct. judge, was to dismiss the appeal.—CREIGHTON *v.* LOWRY (1915), 8 B. W. C. C. 250, C. A.

3310. —— —— Subject to some danger.]—An engine driver in a colliery earning £2 a week met with an accident which caused the first finger of his left hand to become permanently stiff. He was paid compensation during total incapacity. Payment was stopped, & he brought proceedings, & was awarded 7*s.* 6*d.* a week on the grounds that although his former employment was too dangerous for him to resume, he was fit for some light work. He tried to obtain light work, but failed & applied for compensation to be increased. The employers submitted to an award of £1 a week. They then offered him different work, but at his old wages. The workman refused this unless the employers would guarantee to pay him his old wages for whatever work they might put him to. They refused to do this & applied to have the payments terminated on the ground that the man could do his full old work. The county ct. judge found that the man could do the old work, but that it would be dangerous for him; & that it was not suitable employment. He declined to reduce the compensation:—*Held:* there was evidence to support the finding.—DINNINGTON MAIN COAL CO., LTD. *v.* BRUINS (1912), 5 B. W. C. C. 367, C. A.

3311. Possibility of incapacity—Injured eye may affect other.]—A workman lost the sight of one eye by accident. After recovery he was offered his old work, which he refused, as he did not wish to run the risk of losing the other eye. On application by the employers to terminate, the county ct. judge found that the only future incapacity that might arise from the accident was a possible loss of the other eye from suppuration from the eye, & that this could be avoided by the dead eye being removed by operation. He terminated the payments & refused a declaration of liability:—*Held:* there was evidence on which the judge could terminate the payments, but the workman was entitled to a declaration of liability.—BRAITHWAITE & KIRK *v.* COX (1911), 5 B. W. C. C. 77, C. A.

3312. Onus of proof—Lies on employer.]—NEW MONCKTON COLLIERIES CO. *v.* TOONE, No. 3308, *ante*.

3313. —— —— Not discharged by showing workman earning same or greater wages.]—CORY BROTHERS & CO., LTD. *v.* HUGHES, No. 3321, *post*.

B. Ability to Earn Same or Higher Wages.

3314. Sole test of right to substantial weekly payment.]—The sole test of the right of a workman to a weekly payment under Sched. I., clause (*b*), of Workmen's Compensation Act, 1897 (c. 37), in respect of partial incapacity for work, is his wage-earning capacity after the accident which caused the injury in respect of which compensation is sought. Where therefore a workman, although put to a different class of work after the accident, receives from his employers the same wages that he previously received from them, he is not entitled to a weekly payment in respect of partial incapacity after his return to work, his right to compensation being limited to a weekly payment in respect of total incapacity, after the second week, during his absence from work occasioned by the accident.

The Act does not give compensation in respect of pain & suffering.—IRONS *v.* DAVIS & TIMMINS, LTD., [1899] 2 Q. B. 330; 68 L. J. Q. B. 673; 80 L. T. 673; 47 W. R. 616; 1 W. C. C. 26, C. A.

Annotations:—**Apld.** Pomphrey *v.* Southwark Press, [1901] 1 K. B. 86. **Refd.** Jones *v.* L. & N. W. Ry. (1901), 4 W. C. C. 140; Nicholson *v.* Piper (1906), 76 L. J. K. B. 230.

3315. ——.]—A workman injured his eye. He earned £1 10*s.* a week before the accident plus £1 in commission & tips. After the accident he could only earn £1. He claimed £1 as compensation. The county ct. judge disregarded the commission & tips & awarded 10*s.* a week compensation, being the difference between £1 10*s.* earned before the accident & £1 earned afterwards. Soon after this the man was able to earn at similar employment £2 a week, whereupon the employers applied to review & terminate the payments. The county ct. judge, however, awarded 5*s.* a week compensation:—*Held:* as the man was earning more than his average weekly earnings before the accident, as found in the original application, it was not competent to award any compensation. A declaration of liability was recorded by consent.

The judge said he could not take tips & commission into consideration. . . . That the judge was wrong in saying he could not take into consideration the tips does not render his finding any less an estoppel (COZENS-HARDY, M.R.).—HAINS & STRANGE *v.* CORBET (1912), 5 B. W. C. C. 372, C. A.

3316. Not conclusive as to absence of incapacity—Loss of earning capacity in open labour market considered.]—Where a workman is injured by accident arising out of & in the course of his employment & compensation under Workmen's Compensation Act, 1906 (c. 58), has been paid to him by his employers & an application is made to the county ct. judge to terminate the weekly payment on the ground that the workman is able to earn as good wages as he was before the accident, the question is not whether his employers are paying him the same wages as he received before the accident, but whether he is left in such a position that in the open labour market his earning capacity may in the future be less than it was before the accident as the result of the accident.—BIRMINGHAM CABINET MANUFACTURING CO. *v.* DUDLEY (1910), 102 L. T. 619; 3 B. W. C. C. 169, C. A.

Annotations:—**Apld.** Braithwaite & Kirk *v.* Cox (1911), 5 B. W. C. C. 77. **Refd.** Jackson *v.* Hunslet Engine Co. (1915), 84 L. J. K. B. 1361.

3317. —— ——.]—The workman in 1913, while employed by applts., received an injury by accident, & lost a portion of the index finger of his left hand. The employers paid him compensation until July, 1913, when he again entered their

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compensation fell to be ended.—DARROLL *v.* GLASGOW IRON & STEEL CO., LTD., [1913] S. C. 387; 50 Sc. L. R. 226; [1912] 2 S. L. T. 506.—**SCOT.**

PART XIV. SECT. 12, SUB-SECT. 9.—B.

3316 i. *Not conclusive as to absence of incapacity—Loss of earning capacity in open labour market considered.*]—FREELAND *v.* MACFARLANE (1900), 2 F. (Ct. of Sess.) 832.—**SCOT.**

3316 ii. —— ——.]—PATERSON *v.* MOORE & CO., [1910] S. C. 29; 47 Sc. L. R. 30; [1910] 2 S. L. T. 291; 3 B. W. C. C. 541.—**SCOT.**

3316 iii. —— ——.]—*Held:* the fact that the workman had received from his employers as high wages as he had earned prior to the accident did not prove that his incapacity had ceased.—KILPATRICK *v.* WEMYSS COAL CO., LTD., [1922] S. C. 71.—**SCOT.**

Sect. 12.—*Incapacity and compensation therefor: Sub-sect.* 9, *B.; sub-sect.* 10. *Sect.* 13: *Sub-sect.* 1, *A. & B.* (*a*).]

employment, & continued working for them until June, 1922, but was then discharged owing to the slackness of business. His average weekly earnings in 1913, at the time of the accident, were £1 5*s.*, but when discharged in 1922, they amounted to £3 8*s.* 7*d.* per week. On a claim now made by him for compensation, the county ct. judge having found that he was partially disabled, awarded him 10*s.* a week:—*Held:* there was evidence of a loss of earning capacity, & the quantum of the award could not be disturbed on appeal.—RAY *v.* VICKERS, LTD. (1923), 16 B. W. C. C. 200, C. A.

Annotation:—**Refd.** Hamilton *v.* Shelton Iron, Steel & Coal Co., Leigh *v.* Same, Timmis *v.* Same (1926), 43 T. L. R. 97.

3318. —— —— Revival of right to compensation on fall of wages.]—PORTLAND COLLIERY CO. *v.* MURRAY, WATSON (J.), LTD. *v.* QUINN, DIXON (W.), LTD. *v.* MADDEN, No. 3737, *post.*

3319. —— Earnings larger after accident.]—The fact that a workman is earning more after the accident than he was before does not entitle the employer to have the payment of compensation ended.—WILSON *v.* JACKSON'S STORES, LTD. (1905), 7 W. C. C. 122, C. A.

3320. —— Full wages paid.]—A workman lost a finger by reason of an accident. Under an agreement he was paid 16*s.* a week as compensation. On his recovering the partial use of his hand the compensation was reduced to 5*s.* a week. A month later the employers offered him a job at full wages which he accepted, & it lasted for seven months. The employers then applied for a termination on the ground that the man had recovered his full wage-earning capacity. The county ct. judge found that the man was permanently partially incapacitated & refused to alter his former award of 5*s.* a week: *Held:* there was evidence to support the finding.—WARWICK S.S. CO. *v.* CALLAGHAN (1912), 5 B. W. C. C. 283, C. A.

Annotation:—**Refd.** Hamilton *v.* Shelton Iron, Steel & Coal Co., Leigh *v.* Same, Timmis *v.* Same (1926), 43 T. L. R. 97.

3321. —— Onus of proof.]—A collier in Jan. 1906, met with an accident which caused permanent injury to his right hand. His employers admitted liability, & by agreement paid him half-wages until Aug. 1908, when they found him light work in the colliery at wages somewhat higher than his old wages. He was first employed as a watchman on the surface, & afterwards as a signalman underground. He had to walk up a high hill to get to the pit, & in Apr. 1910, he gave up work because he was suffering from heart disease & could not walk uphill. In Jan. 1911, he obtained registration of the agreement for compensation. His employers thereupon applied under Schedule I., clause 12, of Workmen's Compensation Act, 1897 (c. 37), for a review & termination of the weekly payments as from Apr. 1910. It was proved that the heart disease was not caused by the accident & that the man's hand was useless except for some special kind of light work. The county ct. judge declined to terminate the agreement, but slightly reduced the weekly payments:—*Held:* the burden was on the employers to prove that the workman was not now under any incapacity by reason of the accident, & that burden was not discharged by showing that since the accident he was earning wages equal to or greater than his old wages.—CORY BROTHERS & CO., LTD. *v.* HUGHES, [1911] 2 K. B. 738; 80 L. J. K. B. 1307; 105 L. T. 274; 27 T. L. R. 498; 4 B. W. C. C. 291, C. A.

Annotations:—**Refd.** McNally *v.* Furness, Withy (1913), 109 L. T. 270; Woodhouse *v.* Mid. Ry., [1914] 3 K. B. 1034; Hamilton *v.* Shelton Iron, Steel & Coal Co., Leigh *v.* Same, Timmis *v.* Same (1926), 43 T. L. R. 97.

SUB-SECT. 10.—AMOUNT OF COMPENSATION.

See Sect. 13, *post.*

SECT. 13.—AMOUNT OF COMPENSATION.

SUB-SECT. 1.—IN CASE OF DEATH.

A. In General.

See Workmen's Compensation Act, 1925 (c. 84), s. 8.

3322. Judge must find total or partial dependency.]—The county ct. judge awarded a dependant £300 compensation without finding whether dependant was totally or partially dependent:—*Held:* the case must be remitted for this to be found.—CHEVERTON *v.* OCEANIC STEAM NAVIGATION CO., LTD. (1913), 6 B. W. C. C. 253, C. A.

Annotation:—**Refd.** Healy *v.* Reilly (1917), 10 B. W. C. C. 744.

3323. Measure of injury—Prospective loss to be included.]—PEART *v.* BOLCKOW, VAUGHAN & CO., No. 2118, *ante.*

3324. Effect of waiver of share by widow—Right of children to whole amount.]—GILL *v.* FORTESCUE (N.) & SONS, LTD., No. 3477, *post.*

B. Total Dependency.

(*a*) *In General.*

See Workmen's Compensation Act, 1925 (c. 84), s. 8 (2) (i) & (ii).

What amounts to dependency.]—*See* Sect. 2, sub-sect. 2, C., *ante.*

3325. General rule.]—On Mar. 10, 1916, a miner who had for many years been in the employment of resps., met with "personal injury by accident arising out of & in the course of his employment" which proved fatal. Up to June 30, 1915, he was employed on the terms of a conciliation board agreement made between the masters & the trade union representatives of the men, but on that date the agreement was terminated by previous notice. The workman continued to work as usual for fourteen days more, & then, together with the other workmen in the mine, ceased work, & went on strike for one week. The strike was settled by agreement, & the men returned to work on July 22, 1915, at an increased rate of wages:—*Held:* (1) the strike caused no break in the continuity of the employment by the same employer during the three years preceding the injury, & his absence from work during the week in question was not due to any unavoidable cause; (2) the compensation payable to his dependants was the totality of the earnings during such three years, & not the average weekly wages earned since July 22, 1915, multiplied by 156.—PRICE *v.* GUEST, KEEN & NETTLEFOLDS, [1918] A. C. 760; 87 L. J. K. B. 801; 119 L. T. 345; 34 T. L. R. 494; 62 Sol. Jo. 619; 11 B. W. C. C. 154, H. L.

3318 1. —— —— *Revival of right to compensation on fall of wages.*]—MERRY & CUNINGHAME, LTD. *v.* BLACK, [1909] S. C. 1150; 46 Sc. L. R. 812; [1909] 2 S. L. T. 16; 2 B. W. C. C. 372.—SCOT.

3326. Where less than three years' employment.] —A workman met with an accident which incapacitated him from work for eleven months; he then went back to work with the same master, being employed on a different class of work & at lower wages. About eighteen months after resuming work he met with a fatal accident arising out of & in the course of his employment: —*Held:* in ascertaining the workman's average weekly earnings for the purpose of assessing the compensation payable to his dependants under Sched. I., clause 1 (*a*) (i), of Workmen's Compensation Act, 1897 (c. 37), regard could only be had to the period of employment between his return to work & the date of the accident, & that, this period being less than three years, the amount of compensation was one hundred & fifty-six times his average weekly earnings during that period.—APPLEBY *v.* HORSELEY CO., LTD., [1899] 2 Q. B. 521; 68 L. J. Q. B. 892; 80 L. T. 853; 47 W. R. 614; 15 T. L. R. 410; 43 Sol. Jo. 568; 1 W. C. C. 103, C. A.

Annotations:—**Refd.** Gill *v.* Fortescue (1913), 6 B. W. C. C. 577; Warburton *v.* Co-op. Wholesale Soc., [1916] 116 L. T. 107. **Mentd.** Howard *v.* Driver (1903), 5 W. C. C. 153.

3327. —— Application of statutory minimum.]—LYSONS *v.* KNOWLES (ANDREW) & SONS, LTD., STUART *v.* NIXON & BRUCE, No. 3433, *post.*

3328. Where break in employment—Latest period of employment only to be regarded—Workman returning to work after accident.]—APPLEBY *v.* HORSELEY CO., LTD., No. 3326, *ante.*

3329. —— —— ——.]—(1) In estimating the average weekly earnings under s. 2 (*a*) of Sched. I. of Workmen's Compensation Act, 1906 (c. 58), the object should be to arrive at the normal rate of remuneration of the injured man at the date of the accident; & where exact computation is impracticable, the ct. for its guidance may have regard to the average weekly amount earned during the previous twelve months by a person in the same grade employed by the same employer, or, failing that, in the same class of employment in the same district.

(2) "Grade" refers to the particular rank in the industrial hierarchy occupied by the workman, & not to his greater or less excellence in that rank; it is a question of fact whether there is a grade to which the workman belongs.

(3) The ct., having found that the workman has a grade, is not bound to adopt the average wages in that grade as the basis of compensation, but may take into consideration the personal capacity of the workman.

(4) In an ordinary case the average weekly earnings are to be calculated by dividing the total earnings of the workman during the relevant period, not by the number of weeks in that period, but by the number of weeks actually worked within that period.

(5) Days in which no work is done & no wages are earned are to be disregarded. But this principle does not apply to cases under s. 1 (*a*) (i) of Sched. I.

(6) The principle does not apply to cases where the limitation upon the time worked arises from the nature of the employment itself, *e.g.*, the case of a charwoman, where a certain amount of discontinuity is an incident of the employment.

(7) In determining whether there has been any change of employment, "employment by the same employer," for the purpose of Schedule I. means employment in the same grade, & any step up or down from one grade to another is to be regarded as constituting a fresh employment.

(8) In calculating any of the periods mentioned in s. 1 of the Schedule absence due to illness or to causes beyond the control of the workman is to be disregarded; & the employment is to be reckoned as continuous.

(9) A collier, who had partially recovered from an accident for which he was receiving compensation, was offered & accepted light employment under a registered agreement with his employers upon the terms of his submitting to a reduction in the rate of compensation. Six months later he met with a fatal accident in the course of such employment. Upon an application by the widow for compensation under Workmen's Compensation Act, 1906 (c. 58):—*Held:* compensation ought to be calculated solely on the basis of the earnings of deceased from the light employment without taking into account the compensation he received under the agreement.—PERRY *v.* WRIGHT, CAIN *v.* LEYLAND & CO. (1900), LTD., BAILEY *v.* KENWORTHY, LTD., GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LTD., [1908] 1 K. B. 441; 77 L. J. K. B. 236; 98 L. T. 327; 24 T. L. R. 186; 52 Sol. Jo. 146; 1 B. W. C. C. 351, C. A.

Annotations:—*As to* (1) **Consd.** Edge *v.* Gorton, [1912] 3 K. B. 360; Barnett *v.* Port of London Authority, Priestley *v.* Port of London Authority, [1913] 2 K. B. 115; Godden *v.* Cowlin, [1913] 1 K. B. 590. **Apld.** Cox *v.* Trollope, [1916] 2 K. B. 682; Calver *v.* Groom & Symonds (1918), 88 L. J. K. B. 129; Twidale *v.* L. & N. E. Ry., [1925] 2 K. B. 455. **Refd.** Snell *v.* British Corpn., [1914] 2 K. B. 291; Roper *v.* Hussey-Freke (1915), 113 L. T. 635; Williams *v.* Maritime (Owners) (1915), 84 L. J. K. B. 633. *As to* (2) **Consd.** Jury *v.* S.S. Atlanta, [1912] 3 K. B. 366; Barnett *v.* Port of London Authority, Priestley *v.* Port of London Authority, [1913] 2 K. B. 115; Dalgleish *v.* Edinburgh Roperie & Sailcloth Co. (1913), 6 B. W. C. C. 867. *As to* (3) **Refd.** Dobson *v.* British Oil & Cake Mills (1912), 106 L. T. 922. *As to* (4) **Apld.** Anslow *v.* Cannock Chase Colliery Co., [1909] 1 K. B. 352. **Consd.** Gill *v.* Grainger (1917), 10 B. W. C. C. 515. **Refd.** Brandy *v.* S.S. Raphael (1910), 80 L. J. K. B. 217. *As to* (5) **Apld.** White *v.* Wiseman, [1912] 3 K. B. 352. **Refd.** Anslow *v.* Cannock Chase Colliery Co., [1909] 1 K. B. 352. *As to* (7) **Folld.** Babcock & Wilcox *v.* Young (1911), 4 B. W. C. C. 367. *As to* (8) **Dbtd.** Greenwood *v.* Nall, [1917] A. C. 1. **Refd.** Price *v.* Guest, Keen & Nettlefolds, [1917] 1 K. B. 780. *Generally,* **Refd.** Cue *v.* Port of London Authority, [1914] 3 K. B. 892. **Mentd.** Hill *v.* Begg (1908), 99 L. T. 104.

3330. —— —— Absence from illness or accidental injury.]—Employment by the same employer, as defined by para. 2 (*c*) of Schedule I. of Workmen's Compensation Act, 1906 (c. 58), means employment in the same grade, which is not interrupted by absence from work due to illness or any other unavoidable cause.

A workman who died from an injury by accident arising out of & in the course of his employment entered into the employment of a firm as a carter more than three years before the injury, but during those three years he was absent from work from time to time for an aggregate period of six months. His absence for the greater part of the period was due to illness or to accidental injury:—*Held:* upon the construction of para. 1 (*a*) (i) & para. 2 (*c*) of Schedule I., he was not in the employment of the same employer during the three years next preceding the injury from which he died, &, therefore, the compensation payable to his dependants was to be calculated, not upon the basis of his actual earnings during the three years, but upon the basis of his average weekly earnings during the period of his actual employment since the last unavoidable interruption.—GREENWOOD

PART XIV. SECT. 13, SUB-SECT. 1.—B. (a).

3327 i. *Where less than three years' employment—Application of statutory minimum.*]—FORRESTER *v.* M'CULLAM (1901), 3 F. (Ct. of Sess.) 650.—**SCOT.**

3327 ii. —— —— ——.]—LEONARD *v.* BAIRD (1901), 3 F. (Ct. of Sess.) 890.—**SCOT.**

Sect. 13 —*Amount of compensation: Sub-sect.* 1, *B.* (*a*) *&* (*b*), *& C.* (*a*) *&* (*b*).]

v. JOSEPH NALL & CO., LTD., [1917] A. C. 1; 86 L. J. K. B. 17; 115 L. T. 723; 33 T. L. R. 43; 61 Sol. Jo. 54; 10 B. W. C. C. 9, H. L.

Annotation :—**Folld.** Price *v.* Guest, Keen & Nettlefolds, [1917] 1 K. B. 780.

3331. What may be taken into account—Not compensation paid for partial incapacity—In respect of previous accident.]—PERRY *v.* WRIGHT, CAIN *v.* LEYLAND & CO. (1900), LTD., BAILEY *v.* KENWORTHY, LTD., GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LTD., No. 3329, *ante*.

3332. —— Not earnings under concurrent contract of service.]—In estimating the compensation to which the dependants of a workman killed by accident are entitled when such workman has worked continuously for three years for the same employer, no account can be taken of the wages earned by him under concurrent contracts with other employers.—BUCKLEY *v.* LONDON & INDIA DOCKS (1909), 2 B. W. C. C. 327, C. A.

3333. —— ——.]—(1) The provision in Workmen's Compensation Act, 1906 (c. 58), Sched. I., clause 2 (*a*), that for the purpose of assessing compensation in respect of an accident to a workman "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated" means that they are to be computed in the manner best calculated to give the rate of his remuneration under the employer for whom he was working when the accident happened.

(2) A casual labourer who is employed casually by two or more different employers is not employed under concurrent contracts of service within the meaning of Schedule I., clause 2 (*b*), of the Act.

A workman who was employed by resps. as a casual corn porter met with an accident in the course of his employment. He had been employed by them casually during the three years preceding the accident, & during the year preceding the accident he had also been employed by a shipping firm at such a high rate of pay that his combined earnings for the year averaged over £2 5*s.* a week. The average earnings of a corn porter in the employment of resps. was 30*s.* a week:—*Held:* the workman's average weekly earnings must be computed by regard to the average weekly earnings of a workman in the same grade under the same employer, but regard must also be had to the man's personal qualification as shown by his high wages with the shipping co. In any case, however, the average weekly earnings could not be computed at more than the maximum sum earned by a man in the same grade under the same employer.—CUE *v.* PORT OF LONDON AUTHORITY, [1914] 3 K. B. 892; 83 L. J. K. B. 1445; 111 L. T. 736; 7 B. W. C. C. 447, C. A.

Annotations :—*As to* (1) **Consd.** Cox *v.* Trollope, [1916] 2 K. B. 682; Twidale *v.* L. & N. E. Ry., [1925] 2 K. B. 455. *As to* (2) **Alpd.** Underwood *v.* Perry (No. 2) (1922), 15 B. W. C. C. 257.

(*b*) *Deductions.*

See Workmen's Compensation Act, 1925 (c. 84), s. 8 (2) (iii).

3334. What may be deducted—Compensation paid to workman between accident & death.]—O'KEEFE *v.* LOVATT, No. 2092, *ante*.

3335. —— ——.]—A workman in receipt of compensation from his employers in respect of a serious personal injury after a time returned to his work. Nothing was said as to a continuance of the compensation, & for a time the workman earned rather more than he had done before his accident, though at a different class of work. The workman subsequently died from the effects of the injury. The widow claimed compensation in respect of the death:—*Held:* (1) the return of the injured workman to his work did not, under the circumstances, warrant the inference of an implied agreement between him & his employers that the compensation should finally cease; (2) the right of the dependants is a separate & independent right given by the statute itself, & which would not be lost by any such arrangement as suggested in the case between the injured workman & the employers, though the compensation received by the workman, either as weekly payments, or as redemption of weekly payments, would have to be deducted.—WILLIAMS *v.* VAUXHALL COLLIERY CO., LTD., [1907] 2 K. B. 433; 76 L. J. K. B. 854; 97 L. T. 559; 23 T. L. R. 591; 51 Sol. Jo. 552; 9 W. C. C. 120, C. A.

Annotations :—*As to* (2) **Consd.** Howell *v.* Bradford (1911), 104 L. T. 433; Robinson *v.* Consett Iron Co., [1916] 1 K. B. 856. **Folld.** Manton *v.* Cantwell (1918), 12 B. W. C. C. 484.

3336. —— Sum paid in redemption.]—WILLIAMS *v.* VAUXHALL COLLIERY CO., LTD., No. 3335, *ante*.

3337. —— ——.]—HOWELL *v.* BRADFORD & CO., No. 2088, *ante*.

3338. —— Not war additions.]—A miner sustained injuries during his employment which subsequently resulted in his death. At the time of his death he was receiving compensation for his injuries in the form of weekly payments which included the statutory war additions:—*Held:* these weekly war additions did not fall to be deducted from the sum payable to the miner's dependants on his death.—HUTTON *v.* COLTNESS IRON CO., LTD. (1922), 15 B. W. C. C. 349.

3339. From what sum deducted—Maximum compensation payable—Not total amount of wages.]—A workman met with an accident, as a result of which he died, & his widow applied for compensation. His earnings for the three years next preceding the accident amounted to £365 6*s.*, & before his death he had received weekly payments of compensation amounting to £63 13*s.* 8*d.* Appct. was wholly dependent on his earnings. She claimed to be entitled under Workmen's Compensation Act, 1906 (c. 58), Sched. I., para. 1 (*a*) (i), to £300 on the ground that the £63 13*s.* 8*d.* compensation ought to be deducted from the total amount of his wages £365 6*s.* received during the last preceding three years, & not from £300 the maximum allowed, the result being that she would receive £300 instead of £236 6*s.* 4*d.* as claimed by the employers:—*Held:* the words "such sum" from which the compensation already received was to be deducted meant the maximum sum which was payable by the employers, namely the £300, & the widow was entitled to recover £236 6*s.* 4*d.*—ROBINSON *v.* CONSETT IRON CO., LTD., [1916] 1 K. B. 856; 85 L. J. K. B. 1272; 114 L. T. 814; 9 B. W. C. C. 266, C. A.

3340. Application of statutory minimum—Workmen's Compensation Act, 1923 (c. 42), s. 24 (2)—Not retrospective.]—In Oct. 1920, the workman met with an accident, the injuries received from which caused his death on Apr. 12, 1924. The employers paid him compensation at the full rate from the date of the accident to the date of death, a total sum of £204 5*s.* The employers claimed to be entitled to deduct that sum from the sum of £300 payable at death, but the dependants claimed to be entitled, under above sect. to the minimum sum of £200, & the county ct. judge made an award for that amount:—*Held:* above sect. did

not apply to accidents happening before that Act came into force, & the employers were entitled to deduct the full amount of the weekly payments made.—MOAKES *v.* BLACKWELL COLLIERY CO., LTD., [1925] 2 K. B. 64; 94 L. J. K. B. 723; 132 L. T. 819; 41 T. L. R. 296; 69 Sol. Jo. 396; 18 B. W. C. C. 100, C. A.

Annotations:—**Folld.** Briggs *v.* Drydon, Talbot *v.* Vickers, [1925] 2 K. B. 667. **Apld.** Wood *v.* Wentworth Silkstone Colliery Co. (1925), 133 L. T. 656. **Apprvd.** Clement *v.* Davis (1926), 43 T. L. R. 10.

3341. —— —— ——.] —Above sub-sect., which abolishes the right of the employer to deduct weekly payments made to an injured workman during his lifetime from compensation payable to his dependants upon his death so as to reduce the sum payable to the children of the workman under above Act, sect. 2, or to reduce the amount payable under the principal Act below £200 does not apply to a case where the accident happened before Jan. 1, 1924, when above Act came into force.—CLEMENT *v.* DAVIS (D.) & SONS, LTD. (1926), 43 T. L. R. 10; 70 Sol. Jo. 1240, H. L.

C. Partial Dependency.

(a) In General.

See Workmen's Compensation Act, 1925 (c. 84), s. 8 (2) (iv).

3342. Question for county court judge—Quantum of compensation.]—A workman earned 29*s.* a week & paid 20*s.* a week to his mother. The benefit to the mother from other sources of income, viz. from her other sons, was 6*s.* per week, net. The judge, in arriving at what sum was reasonable & proportionate to the injury to the mother by the death of her son, calculated the son's earnings upon a three years' basis at 29*s.* a week & deducted the 6*s.* a week on a like basis:—*Held:* the amount due to partial dependants is a question of fact in each case.—LITTLEFORD *v.* CONNELL (1909), 3 B. W. C. C. 1, C. A.

3343. — — ——.]—In claims for compensation under the Workmen's Compensation Act, 1906 (c. 58), it is for the county ct. judge to find the *quantum* of compensation to be awarded, & the Ct. of Appeal will not interfere with his award unless there has been misdirection or no proper exercise of his judicial discretion.—CHEVERTON *v.* OCEANIC STEAM NAVIGATION CO., LTD. (1913), 29 T. L. R. 658; 6 B. W. C. C. 574, C. A.

Annotation: —**Apld.** Healy *v.* Reilly (1917), 10 B. W. C. C. 744.

3344. ——.]—RENNOLDSON *v.* ELLERMAN WILSON LINE, No. 3353, *post*.

3345. Power to award maximum.]—HODGSON *v.* WEST STANLEY COLLIERY, No. 2161, *ante*.

3346. ——.]—CHEVERTON *v.* OCEANIC STEAM NAVIGATION CO., LTD., No. 3343, *ante*.

3347. —— **Not more than amount claimed—On basis of total dependency.**]—LLOYD *v.* POWELL DUFFRYN STEAM COAL CO., LTD., No. 2083, *ante*.

(b) How Calculated.

3348. What may be taken into account—Funeral expenses.]—The arbitrator, in assessing the amount payable as compensation under Workmen's Compensation Act, 1897 (c. 37), Sched. I., s. 1 (*a*) (ii), to a person in part dependent upon the earnings of a deceased workman, is entitled to take into consideration expenses in respect of the workman's funeral.—BEVAN *v.* CRAWSHAY BROTHERS (CYFARTHA), LTD., [1902] 1 K. B. 25; 71 L. J. K. B. 49; 85 L. T. 496; 50 W. R. 98; 4 W. C. C. 110; *sub nom.* BEAVAN *v.* CRAWSHAY BROTHERS (CYFARTHFA), LTD., 18 T. L. R. 17; 46 Sol. Jo. 29, C. A.

Annotations:—**Refd.** McLean *v.* Moss Bay Iron & Steel Co., [1909] 2 K. B. 521; Hodgson *v.* West Stanley Colliery, [1910] A. C. 229; Healy *v.* Reilly (1917), 10 B. W. C. C. 744.

3349. —— **Cost of maintenance of workman if alive.**]—The widow of deceased workman, who met his death through an accident arising out of & in the course of his employment, was mainly dependent upon her husband's earnings at the time of his death, but was earning about 2*s.* a week herself. Deceased workman did not appear to have had any source of income other than his wages. The widow claiming compensation under Workmen's Compensation Act, 1897 (c. 37), against the employers of deceased, a county ct. judge awarded her the sum of £150, being £5 less than the amount of deceased workman's earnings in the same employment during the three years prior to the accident. The employers appealed against the award, on the ground that, in assessing the compensation, the county ct. judge had not complied with Workmen's Compensation Act, 1897 (c. 37), sched. I., s. 1 (*a*) (ii), which provides that, in cases of partial dependency, the compensation shall be such a sum as may be determined to be reasonable & proportionate to the injury to the dependants, because he had not taken into account the amount which the maintenance of the workman, if alive, would have cost, by way of reduction of the compensation, & that he had therefore misdirected himself:—*Held:* it was not shown that the county ct. judge had proceeded otherwise than in accordance with the provisions of Workmen's Compensation Act, 1897 (c. 37), sched. I., s. 1 (*a*) (ii), & therefore his award was good.—OSMOND *v.* CAMPBELL & HARRISON, LTD., [1905] 2 K. B. 852; 75 L. J. K. B. 1; 93 L. T. 724; 54 W. R. 117; 22 T. L. R. 4; 50 Sol. Jo. 12; 8 W. C. C. 95, C. A.

Annotations:—**Overd.** Tamworth Colliery Co. *v.* Hall, [1911] A. C. 665. **Refd.** Littleford *v.* Connell (1909), 3 B. W. C. C. 1; Peart *v.* Bolckow, Vaughan, [1925] 1 K. B. 399.

3350. — — — —.]—The question how far a member of the family of deceased workman was dependent on his earnings within the meaning of Workmen's Compensation Act, 1906 (c. 58), is a question of fact to be determined by the county ct. judge upon a consideration of all the circumstances of the case.

Upon an application by a father, who claimed compensation under the Act on a footing of partial dependency in respect of the death of a son from an accident at resps.' colliery, it appeared that the son, who lived at his father's house, assisted the father in his trade as a barber. The

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PART XIV. SECT. 13, SUB-SECT. 1.—C. (a).

3344 i. *Question for county court judge.*]—The Ct. of Appeal cannot inquire into the amount of the award when the county ct. judge has awarded a sum within the maximum provided by the statute.—HEALY *v.* REILLY (1917), 10 B. W. C. C. 744.—**IR.**

PART XIV. SECT. 13, SUB-SECT. 1.—C. (b).

3348 i. *What may be taken into account—Funeral expenses.*]—An arbitrator in fixing compensation for the death of a workman in a claim by partial dependants may competently take into account the outlays which claimants have incurred in medical & funeral expenses.—HUGHES *v.* SUMMERLEE & MOSSEND IRON & STEEL CO. (1903), 5 F. (Ct. of Sess.) 784; 40 Sc. L. R. 602; 11 S. L. T. 61.—**SCOT.**

3348 ii. —— ——.]—GOURLAY *v.* MURRAY, [1908] S. C. 769; 15 S. L. T. 1029.—**SCOT.**

3348 iii. — — ——.]—SMITH *v.* S. A. SCALE CO., LTD., [1923] C. P. D. 394.—**S. AF.**

3349 i. —— *Cost of maintenance of workman if alive.*]—The county ct. judge, in estimating compensation to the dependant, is entitled to take into consideration the amount of the workman's former earnings, & the proportion thereof expended on his maintenance.—O'NEILL *v.* BANSHA CO-OPERATIVE AGRICULTURAL & DAIRY SOCIETY, [1910] 2 I. R. 324.—**IR.**

Sect. 13.—*Amount of compensation: Sub-sect.* 1, *C.* (*b*), *& D.; sub-sect.* 2, *A.*]

county ct. judge having found that the son's earnings at the colliery were not more than sufficient for the cost of his maintenance, & that consequently the father was not a dependant, the Ct. of Appeal set aside the award & remitted the matter to the county ct. judge to award compensation on the basis that he was not entitled to deduct from the son's earnings the cost of his maintenance:—*Held:* the county ct. judge was not precluded by law from deducting from the son's earnings the cost of his maintenance; or from taking into account as against the cost of maintenance the pecuniary value of the services rendered by the son to the father in the latter's trade as a barber; & the cause was remitted to the county ct. judge with these instructions.

Osmond v. *Campbell & Harrison, Ltd.*, No. 3349, *ante*, if & so far as it holds that upon a question of partial dependency the county ct. judge is not entitled to deduct from the earnings of deceased the cost of his maintenance, overd.—TAMWORTH COLLIERY CO., LTD. *v.* HALL, [1911] A. C. 665; 81 L. J. K. B. 159; 105 L. T. 449; 55 Sol. Jo. 615; 4 B. W. C. C. 313, H. L.; *varying* S. C. *sub nom.* HALL *v.* TAMWORTH COLLIERY CO., LTD., [1911] 1 K. B. 341, C. A.

Annotations:—**Consd.** Young *v.* Londonderry Collieries (1924), 17 B. W. C. C. 215; Peart *v.* Bolckow, Vaughan, [1925] 1 K. B. 399. **Refd.** Ford *v.* Oakdale Colliery Co. (1915), 8 B. W. C. C. 127; Healy *v.* Reilly (1917), 10 B. W. C. C. 744; Sheldon *v.* Butterley Co., [1919] 2 K. B. 600; Nash *v.* McAlpine (1925), 133 L. T. 647.

3351. —— Value of workman's service in father's business.]—TAMWORTH COLLIERY CO., LTD. *v.* HALL, No. 3350, *ante*.

3352. —— Compensation paid between accident & death.]—A workman lived for two years after an injury, though totally incapacitated. He then died as the result of the injury. During the period of incapacity he was paid by the employers compensation amounting to £74. He left his father partially dependent. On an assessment of the compensation due to the father, the county ct. judge, in dealing with the amount already paid by the employers, held that he must deduct this amount from the sum of the three years' earnings before the accident in order to arrive at a maximum, & then award such sum as he considered reasonable & proportionate. The three years' earnings less the sum paid amounted to £153, & the judge awarded £75. The employers contended that the £74 paid should be deducted from the £75 awarded:—*Held:* the method of assessment adopted by the county ct. judge was correct & there was no misdirection.—WHITTAKER *v.* JOICEY (JAMES) & CO., LTD. (1915), 9 B. W. C. C. 21, C. A.

3353. —— Probable increase of earnings.]—A youth of eighteen years of age shipped on a steamer as assistant cook at £6 a month, & was drowned owing to the vessel being torpedoed. He had previously earned as much as £2 a week at home, & had handed over the bulk of his earnings to his mother for the support of the family, including himself, the others being partly dependent thereon. In assessing a claim on the ground of partial dependency, the county ct. judge took into consideration the probability of a prospective increase of earnings, if the workman had lived, & awarded £115:—*Held:* this was a reasonable sum, & the award could not be disturbed. No hard & fast line could be drawn in such a case, & the judge was entitled to take into consideration a probable increase of earnings.—RENNOLDSON *v.* ELLERMAN WILSON LINE (1918), 11 B. W. C. C. 70, C. A.

Annotations:—**Folld.** Sheldon *v.* Butterley Co., [1919] 2 K. B. 600. **Consd.** Peart *v.* Bolckow, Vaughan, [1925] 1 K. B. 399.

3354. —— ——.]—A pit boy of fifteen years of age, while working at a colliery, met with a fatal accident. His mother, who had been a widow for eleven years, claimed compensation as being partly dependent on the boy's earnings.

For the twelve months previous to his death he had earned £49 7*s.* 2*d.* Latterly he had been earning 26*s.* a week, which he gave to her, & she herself earned about 17*s.* 6*d.* a week. She paid no rent for the cottage in which they lived alone. The widow was being cross-examined with a view of ascertaining the cost of maintaining the boy, when the county ct. judge stated that he was not being helped much by the cross-examination on that point. An admission was made that the probable earnings of deceased boy, if he had then been alive, would have been about 56*s.* The county ct. judge, in making his award, said that the best he could do in order to arrive at what sum was in the circumstances reasonable & proportionate to the injury was to consider what would have happened in the next few years, & having regard to the admission, & looking to the future, he came to the conclusion that appet. was entitled to £150:—*Held:* (1) the question was one of fact. There was evidence to support the award & no misdirection.

(2) The county ct. judge's intimation during cross-examination did not amount to exclusion of evidence. The point was not so taken at the hearing, & therefore could not be raised on appeal.—SHELDON *v.* BUTTERLEY CO., LTD., [1919] 2 K. B. 600; 88 L. J. K. B. 1305; 121 L. T. 351; 12 B. W. C. C. 248, C. A.

Annotation:—*As to* (1) **Refd.** Peart *v.* Bolckow, Vaughan, [1925] 1 K. B. 399.

3355. —— ——.]—A boy, aged fourteen, was killed while working at a colliery. His father claimed compensation as a partial dependant. The father was earning £1 a week; there was a son aged seventeen, who was earning £1 7*s.* 5*d.* a week; & deceased was earning 11*s.* 10*d.* per week, making a total of £2 19*s.* 3*d.* as the total wages of the family. There were also in the family a mother & sister who did not make any contributions. The county ct. judge came to the conclusion that having regard to all the circumstances dependency had not been established, & made an award in favour of resps.:—*Held:* it was a question of fact upon which there was evidence to support the finding, & there was no misdirection.

I am not sure that the county ct. judge is entitled

3353 i. —— *Probable increase of earnings.*]—In a claim by the parents of a deceased boy for compensation as partial dependants, the sheriff-substitute excluded evidence tendered by appets. as to the possible earnings of the deceased subsequent to the accident:—*Held:* such evidence was admissible & should be considered in assessing compensation.—FRASER *v.* FAIRFIELD SHIPBUILDING & ENGINEERING CO., LTD., [1919] S. C. 279; 56 Sc. L. R. 138; [1919] 1 S. L. T. 63; 12 B. W. C. C. 447.—**SCOT.**

3353 ii. —— ——.]—GRIESSEL *v.* EAST RAND PROPRIETARY MINES, [1910] T. P. D. 1054.—**S. AF.**

k. —— *Loss of old age pension—Occasioned by award.*]—NORTH CORINTHIAN GOLD MINES, LTD. *v.* EGAN (1915), 17 W. A. L. R. 122.—**AUS.**

l. —— *Property left by deceased to dependant.*]—The fact that deceased left property devolving upon his widow & son should not be taken into account.—ZURAVINSKY *v.* CANADIAN NATIONAL RYS. (Alta.), [1924] 2 W. W. R. 203.—**CAN.**

m. *Right of child to nominal damages—Where cared for by relatives.*]—A child of a workman, killed in an accident, is entitled only to nominal damages, when it is shown that the child has been cared for by relatives

to consider the probable increase in the amount of deceased's contribution when at the time of the death there is no net balance in favour of dependant. . . . My present view is that it is not admissible (SCRUTTON, L.J.).—YOUNG *v.* LONDONDERRY COLLIERIES (1924), 17 B. W. C. C. 215, C. A.; *sub nom.* PEART *v.* BOLCKOW, VAUGHAN & Co., YOUNG *v.* LONDONDERRY COLLIERIES, 94 L. J. K. B. 497; 69 Sol. Jo. 123, C. A.

Annotation :—**Refd.** Kennedy *v.* Horden Collieries, Bamford *v.* Charlaw & Sacristan Collieries, Bevan *v.* Joicey, [1925] 2 K. B. 438.

3356. Death of dependant before compensation assessed—Amount payable to personal representative—Limited to loss of dependant during life.]—A workman died from injuries received in the course of his employment, in circumstances which gave rise to a liability to make compensation to his dependants. He had two dependants, his widow & a daughter, Lily, aged thirteen. At the time of his death, the widow was seriously ill, & died within four weeks after the death of her husband. A claim was put forward on the basis of partial dependency, by deceased widow's step-daughter, Agnes, as personal representative, for £250 in respect of the dependency of the widow, one moiety of this, *i.e.* £125, to go to Agnes, & one moiety, £125, to Lily, & a further £50 to Lily as dependant. The judge awarded £250 as compensation, but did not state what sum was to go to Lily. The two sisters agreed that £230 of this sum should be treated as being due to Agnes as personal representative, & should be divided equally between Agnes & Lily, & that Lily should also have £20 as a dependant. An award was then drawn up purporting to give effect to this arrangement by giving Agnes £230 & Lily £20 :—*Held :* (1) as the widow, being only partially dependant, had died four weeks after the death of her husband & before compensation was assessed, all that the judge could award to her personal representatives was a sum equal to her loss during the four weeks she was live; (2) in awarding so small a sum as £20 to Lily, the judge had obviously had regard to the fact that she was to share in the award of £230 to Agnes. The case was therefore remitted for reassessment of compensation on the basis of the actual loss to the widow during her life, & the true estimated loss to the daughter, Lily.—PHILLIPS *v.* KERSHAW, LEESE & Co., [1920] 3 K. B. 297; 89 L. J. K. B. 1016; 124 L. T. 11; 36 T. L. R. 710; 64 Sol. Jo. 584; 13 B. W. C. C. 211, C. A.

D. Children's Allowance.

See Workmen's Compensation Act, 1925 (c. 84), s. 8 (1) (3).

3357. Who is a "child" for purpose of increased compensation — Illegitimate grandchild.] — An illegitimate grandchild, under the age of fifteen, of a workman who meets with a fatal accident in the course of or arising out of his employment is a "child" within the meaning of Workmen's Compensation Act, 1923 (c. 42), s. 2, so as to make increased compensation under the sect. payable when such illegitimate grandchild is left wholly or partially dependent upon the workman's earnings.—PRITCHARD *v.* BETTISFIELD COLLIERY, LTD., [1925] 2 K. B. 284; 95 L. J. K. B. 49; 133 L. T. 448; 41 T. L. R. 551; 69 Sol. Jo. 640; 18 B. W. C. C. 204, C. A.

Annotations :—**Distd.** Scott *v.* L. & N. E. Ry., [1926] 2 K. B. 204. **Apld.** Faulkner *v.* Sutton (Owners), [1927] 1 K. B. 207.

3358. —— Illegitimate children of widow—Of whom deceased not father.]—SCOTT *v.* LONDON & NORTH EASTERN RY. CO., No. 2086, *ante*.

3359. —— Sister under fifteen.]—FAULKNER *v.* SUTTON (OWNERS), No. 2167, *ante*.

SUB-SECT. 2.—IN CASE OF DISABLEMENT.

A. In General.

See Workmen's Compensation Act, 1925 (c. 84), s. 9.

3360. General object of Act—Compensation for loss of earnings.]—For several years a workman had been employed during the malting season, usually from Oct. to Mar., by resps. at a wage of £2 a week. For the rest of the year he was employed elsewhere as a farm labourer at 25*s.* a week, with harvest money, about £10. During the malting season of 1917–1918 he was employed by resps., but had only been working for about three weeks when he met with an accident which caused total incapacity.

The county ct. judge decided that the best way of estimating the compensation payable to applt. was to ascertain his total earnings for the year, which he found to be £78, & he awarded him 15*s* a week, plus 25 per cent. war bonus, making a total of 18*s.* 9*d.* a week. Applt. appealed & asked that the compensation should be on the basis of £2 a week & contended that there was nothing to justify the judge taking into account what he received as a farm labourer, because he was not under any concurrent contract of service with another employer :—*Held :* the dominant object of the Act was to compensate an injured workman for the loss of what he would otherwise have earned but for the accident. Where the terms of the employment made it impracticable to compute the rate of remuneration, an estimate could be made of what he would have received. The award being made on that basis the ct. would not interfere with it.—CALVER *v.* GROOM & SYMONDS (1918), 88 L. J. K. B. 129; 120 L. T. 151; 63 Sol. Jo. 68; 11 B. W. C. C. 228, C. A.

3361. —— Not compensation for pain & suffering.]—IRONS *v.* DAVIS & TIMMINS, LTD., No. 3314, *ante*.

3362. Amount in discretion of arbitrator.]—The amount of compensation is in the discretion of the arbitrator subject to the express limitations in sched. I. (1) to the provisions of sched. I. (2).

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for some time & the indications are of the probable continuance of that situation.—WESTERN TRUST CO. *v.* WILLOUGHBY & DUNCAN (1914), 29 W. L. R. 818; 7 W. W. R. 569.—**CAN.**

n. *Right of dependant to minimum damages—Though in excess of loss sustained.*]—A dependant is entitled to the minimum damages even though such amount is in excess of the loss sustained by the dependant.—ADAIR *v.* CANADIAN PACIFIC OCEAN SERVICES, LTD. (1920), 47 N. B. R. 213; 52 D. L. R. 589.—**CAN.**

o. *Basis of calculation.*]—M'ARTHUR *v.* FIFE COAL CO., LTD., [1926] S. C. 727.—**SCOT.**

PART XIV. SECT. 13, SUB-SECT. 2. —A.

3362 l. *Amount in discretion of arbitrator.*]—SUTTON *v.* SUTTON (1924), 25 S. R. N. S. W. 35; 42 N. S. W. W. N. 5.—**AUS.**

p. *Basis of assessment.*] — SIMMONS *v.* BRITISH BROKEN HILL PROPRIETARY (1922), 22 S. R. N. S. W. 477; 38 N. S. W. W. N. 228.—**AUS.**

q. ——.] — HENRY *v.* MALCOLM (1908), 39 N. B. R. 74.—**CAN.**

r. ——.]—UHLENBURGH *v.* PRINCE ALBERT LUMBER CO. (1913), 23 W. L. R. 539; 3 W. W. R. 1146; 9 D. L. R. 639; 6 Sask. L. R. 270.—**CAN.**

t. ——.] — MARSHALL *v.* NEW ZEALAND COAL & OIL CO., LTD. (No. 2), [1920] N. Z. L. R. 644.—**N.Z.**

a. ——.]—TOMPKINS *v.* NORTHERN S.S. CO., [1925] N. Z. L. R. 465.—**N.Z.**

b. ——.] — A workman was engaged for a fixed weekly wage. He entered upon his work on a Saturday, & worked for the whole of the following calendar week, at the end of which

Sect. 13.—*Amount of compensation: Sub-sect.* 2, *A., B. & C.* (*a*).]

Where a man earns something but not enough when added to the compensation payable to equal what he was earning before the injury, an arbitrator is not bound to reduce the payments so that the actual loss to the workman shall be borne equally by him & his employer.—ELLIS *v.* KNOTT (1900), 2 W. C. C. 116, C. A.

B. Total Incapacity.

See Workmen's Compensation Act, 1925 (c. 84), s. 9 (2).

3363. Arbitrator not bound to award maximum.]—(1) A man engaged as a casual grain porter met with an accident while employed by a corpn. He was preferentially employed as an able & reliable man by some firms, but not by the corpn. He obtained an average weekly wage of £2 whereas the average weekly wage of casual grain porters was £1 5*s.* The county ct. judge found that there was no grade of preferred casual grain porters & that the man was only entitled to 12*s.* 6*d.* a week compensation, half the average earnings of his grade of casual grain porters:—*Held:* the county ct. judge ought to have had regard to the personal qualifications & actual earnings of the man as well as the average earnings of his grade, & he was entitled to compensation at £1 a week.

(2) An arbitrator is not bound to award the full half of his average weekly earnings to a workman as compensation for total incapacity, although he cannot give more.—SNELL *v.* BRISTOL CORPN., [1914] 2 K. B. 291; 83 L. J. K. B. 353; 110 L. T. 563; 7 B. W. C. C. 236, C. A.

Annotations:—*As to* (1) **Consd.** Cue *v.* Port of London Authority, [1914] 3 K. B. 892. **Reld.** Twidale *v.* L. & N. E. Ry., [1925] 2 K. B. 455.

C. Partial Incapacity.

(a) In General.

See Workmen's Compensation Act, 1925 (c. 84), s. 9 (3).

3364. Discretion of county court judge.]—A workman employed as a haulier at a colliery was, by an accident arising out of & in the course of his employment, totally incapacitated for work. Compensation was, by arrangement, paid him by his employers at the maximum rate under Workmen's Compensation Act, 1897 (c. 37), namely 17*s.* per week, that being 50 per cent. of £1 14*s.*, the amount of his average weekly earnings before the accident. He subsequently so far recovered from the effects of the accident as to be capable of light work, & his employers took him back into their service as a lampman at wages of £1 9*s.* 5*d.* per week, & ceased to pay him compensation. At that time the rate of wages paid to hauliers in the colliery had fallen to £1 9*s.* 5*d.* per week. The workman having filed a request for arbn. in the county ct. to assess compensation under the Act, the county ct. judge refused to award him compensation, giving reasons for so doing which indicated that he might have acted on the view that the amount of the average weekly earnings to be taken as the basis for determining the amount of compensation was subject to variation in accordance with the fluctuations in the rate of wages in the employment subsequent to the accident:—*Held:* the amount of the workman's average weekly earnings as originally ascertained for the purpose of fixing the maximum compensation was not subject to variation by reason of the fall in the rate of wages paid to hauliers since the accident; & it was a matter for the discretion of the county ct. judge whether he would award to the workman any substantial amount, &, if so, what proportion of the difference between the amount of his average weekly earnings before, & the average amount which he was able to earn after the accident; & the case must therefore be remitted to the county ct. judge for reconsideration.—JAMES *v.* OCEAN COAL CO., [1904] 2 K. B. 213; 73 L. J. K. B. 915; 90 L. T. 834; 68 J. P. 431; 52 W. R. 497; 20 T. L. R. 483; 6 W. C. C. 128, C. A.

Annotations:—**Distd.** Bevan *v.* Energlyn Colliery Co., [1912] 1 K. B. 63; Woodilee Coal & Coke Co. *v.* M'Neill, [1918] A. C. 43.

3365. —— Must be exercised with regard to particular circumstances.]—In awarding compensation under Workmen's Compensation Act, 1897 (c. 37), Sched. I., clauses 1 (*b*), 2, to workmen partially incapacitated for work, a county ct. judge cannot lay down any general rule as to the amount of compensation which he will award. The judge must exercise his discretion with regard to the circumstances of the particular case.—WEBSTER *v.* SHARP & CO., LTD., [1905] A. C. 284; 74 L. J. K. B. 776; 92 L. T. 373; 7 W. C. C. 118, H. L.

3366. —— Regard must be had to extraneous circumstances.]—In awarding compensation to a workman for partial incapacity under Workmen's Compensation Act, 1906 (c. 58), Sched. I., clause 3, the ct. will have regard to extraneous circumstances not personal to the workman.

In 1907 a collier sustained injuries through an accident, & was paid compensation by his employers until Feb. 1911. In Aug. 1911, he commenced proceedings to recover compensation for partial incapacity. Before the accident his average weekly earnings were £2 19*s.* 1*d.*, but now he was only earning £1 12*s.* 7*d.* a week. There was evidence, however, that apart from any accident he would not have been able to earn as much as he was doing in 1907, because colliers' earnings had fallen universally owing to the passing of the Coal Mines Regulation Act, 1908 (c. 57), which reduced the working hours of miners to eight hours a day:—*Held:* the fall in wages was a circumstance to which the ct. must have regard in awarding compensation for partial incapacity under Workmen's Compensation Act, 1906 (c. 58), Sched. I., clause 3.—BEVAN *v.* ENERGLYN COLLIERY CO., [1912] 1 K. B. 63; 81 L. J. K. B. 172; 105 L. T. 654; 28 T. L. R. 27; 5 B. W. C. C. 169, C. A.

Annotations:—**Consd.** Heathcote *v.* Haunchwood Collieries, [1917] 1 K. B. 450. **Apld.** Tarr *v.* Cory, [1917] 2 K. B. 774. **Apprvd.** Woodilee Coal & Coke Co. *v.* M'Neill, [1918] A. C. 43. **Consd.** Port of London Authority *v.* Gray, [1919] 1 K. B. 65; Wood *v.* Wentworth Silkstone Colliery Co. (1925), 133 L. T. 656. **Reld.** M'Dowell *v.* M'Gladdery (1916), 9 B. W. C. C. 638; Ling *v.* De Dion Bouton, [1920] 1 K. B. 88.

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his employment was terminated by his employers in consequence of an injury resulting in total incapacity, & entitling him to compensation:—*Held:* the fixed weekly wage was the basis for determining the amount of the weekly payment due to the workman as compensation.—BROWN *v.* CUNNINGHAM, LTD. (1904), 6 F. (Ct. of Sess.) 997.—**SCOT.**

PART XIV. SECT. 13, SUB-SECT. 2. —B.

c. What should be considered — Prospective right to pension.]—The compensation payable should be determined without regard to the prospective right of appet. to a pension.—BARRY *v.* VICTORIAN RAILWAY COMRS., [1916] V. L. R. 686.—**AUS.**

d. —— General fall of wages since accident.]—JAMIESON *v.* FIFE COAL CO. (1903), 5 F. (Ct. of Sess.) 958.—**SCOT.**

e. Total incapacity by second accident—Suspension of compensation in respect of first accident.]—M'KINSTREY *v.* AUCHINLEA COAL CO., LTD. (1919), 57 Sc. L. R. 80.—**SCOT.**

3367. —— Not bound to reduce payments—Where loss of workman not shared equally by employer.]—ELLIS *v.* KNOTT, No. 3362, *ante*.

3368. —— Not bound to award maximum.]—An injured workman who had previously earned 32*s.* 6*d.* per week, earned 25*s.* per week after the accident. He claimed 7*s.* 6*d.* per week, & the judge awarded him 3*s.* 9*d.* :—*Held :* there was no misdirection, & the judge not being compelled to give the full difference between the earnings before & after the accident, his discretion could not be interfered with.—HUMPHREYS *v.* CITY OF LONDON ELECTRIC LIGHTING CO. (1911), 4 B. W. C. C. 275, C. A.

3369. —— —— Where proof of ability of workman to earn more.]—PORT OF LONDON AUTHORITY *v.* GRAY, No. 3384, *post*.

3370. —— To disregard trivial amounts.]—A railway goods porter, employed at a harbour, was injured by accident, &, after some months' total incapacity, was employed by the day by the same employers at light work as a porters' mess room attendant. He was paid the same wages as previously. Owing to a strike in Dublin causing diminution of traffic, he was out of work on four days, but not consecutively. He made no attempt to obtain work elsewhere on those days & applied for 7*s.* 10*d.* compensation in respect of them, saying that his injury prevented him earning wages elsewhere during this period. The county ct. judge refused to award any compensation & merely granted a declaration of liability :—*Held :* without deciding whether or not the man was entitled to compensation during this period, & assuming everything in his favour, he would only be entitled to the difference between his average weekly earnings before & after the accident, & the effect of so short a time upon the calculation of his average weekly earnings after the accident was so trivial that the award of the county ct. judge was justified. His non-employment did not arise from incapacity to work owing to his injuries from the accident & he was consequently not entitled to compensation.

Average weekly earnings do not mean a full week of six days as compared with a week of five days. You must take an average of twelve months, if you can (LORD COZENS-HARDY, M.R.). —WOODHOUSE *v.* MIDLAND RY. CO., [1914] 3 K. B. 1034 ; 83 L. J. K. B. 1810 ; 111 L. T. 1084 ; 30 T. L. R. 653 ; 7 B. W. C. C. 690, C. A.

Annotation :—**Apld.** Webster *v.* Harrison, Townsend (1920), 89 L. J. K. B. 1077.

3371. What should be considered—General fall of wages.]—BEVAN *v.* ENERGLYN COLLIERY CO., No. 3366, *ante*.

3372. —— General rise of wages.]—HEATHCOTE *v.* HAUNCHWOOD COLLIERIES, No. 3230, *ante*.

3373. —— ——.]—In reviewing the amount of compensation payable under para. 3 of Schedule I. to the Workmen's Compensation Act, 1906 (c. 58), in the case of partial incapacity, the arbitrator is entitled to take into consideration a general rise of wages, provided that he keeps within the limits fixed by that para. as those within which compensation may be given.—WOODILEE COAL & COKE CO. *v.* M'NEILL, [1918] A. C. 43 ; 87 L. J. P. C. 17 ; 117 L. T. 674 ; 34 T. L. R. 10 ; 62 Sol. Jo. 7 ; 10 B. W. C. C. 637, H. L.

Annotations :—**Consd.** Ling *v.* De Dion Bouton, [1920] 1 K. B. 88. **Refd.** G. W. Ry. *v.* Helps, [1918] A. C. 141 ; Heathcote *v.* Haunchwood Collieries, [1918] A. C. 52 ; Port of London Authority *v.* Gray (1918), 88 L. J. K. B. 107 ; Fallens *v.* Dixon (1923), 17 B. W. C. C. 314.

3374. —— Offer of suitable work.]—Where an offer is made by an employer, during the course of arbn. proceedings by an injured workman for the purposes of obtaining compensation under Workmen's Compensation Act, 1906 (c. 58), to take the workman back & find him suitable work, the nature of which should be specified, at his old rate of wages, it is a matter that, notwithstanding that it is declined, ought to be considered & taken into account by the county ct. judge when fixing the weekly payment payable to the workman, it being a saving of expense that it should be so considered inasmuch as, although it may entail an adjournment of the case, the judge has power over the costs & can order the party to pay the costs which were occasioned or necessitated by the adjournment.

In Apr. 1917, appct. met with an accident that seriously affected the sight of his left eye. After he had substantially recovered resps., his employers, in Aug. 1917, took him back to work. The work that he was given to do was that of mixing lime, & making mortar with lime. The effect of the work was that after four or five days appct. found that it began seriously to affect his sound right eye, & he discontinued the work. Thereupon appct. claimed compensation against resps. that was followed in due course by a request for arbn. under Workman's Compensation Act, 1906 (c. 58).

At the hearing before the county ct. judge in Oct. 1916, after the evidence was completed but before the judge delivered his judgment, resps. offered to take appct. back at his old rate of wages & to find him suitable occupation. That offer was not however taken into account by the judge when he made an award in favour of appct. :—*Held :* in these circumstances the case must go back to be reconsidered.—CROSS *v.* WHITEHEAD AIRCRAFT CO., LTD. (1918), 87 L. J. K. B. 702 ; 118 L. T. 790 ; 11 B. W. C. C. 1, C. A.

3375. —— ——.]—A workman met with an accident to the fingers of his left hand. He was paid compensation, & when he recovered was given work as a lavatory attendant. He worked as an attendant for a year, & then it became necessary for him to work overtime. He drew overtime pay for a short while & then asked that his overtime should be paid at the rate of time & a half, the union rate of pay. This was refused. He then declined to work overtime at all & was discharged. The county ct. judge held that in the open market his earning capacity was only 10*s.* a week, & he awarded him compensation on the basis of partial incapacity :—*Held :* the material questions whether the work at which he had been employed since the accident was suitable employment, whether the work was still open for him, & whether there was ever an agreement by the employers to pay for overtime had not been considered, & there must be a new trial in order to have those questions decided.—LEACH *v.* DICK, KERR & CO., LTD. (1921), 14 B. W. C. C. 135, C. A.

—— —— On review of weekly payments—Offer made in court.]—*See* No. 3768, *post*.

3376. Maximum amount—Application of maximum for total incapacity.]—Sched. I., clause 2, of Workmen's Compensation Act, 1897 (c. 37),

PART XIV. SECT. 13, SUB-SECT. 2.—C. (a).

3371 i. *What should be considered—General fall of wages.*]—PERRY & CUNINGHAME, LTD. *v.* BLACK, [1909] S. C. 1150.—**SCOT.**

3372 i. —— *General rise of wages.*]—*Held :* the fact that there had been a general rise in wages between the date of the agreement & the date of the application did not *per se* entitle the workman to an increase.—MALCOLM *v.* SPOWART (THOMAS) & CO., LTD., [1913] S. C. 1024 ; 50 Sc. L. R. 823 ; [1913] 2 S. L. T. 141.—**SCOT.**

Sect. 13.—*Amount of compensation: Sub-sect.* 2, *C.* (*a*), (*b*) & (*c*).]

which provides that in fixing the amount of a weekly payment regard is to be had to the difference between the average weekly earnings of the workman before the accident & the average amount which he is able to earn after the accident, does not operate so as necessarily to cut down the maximum rate of compensation allowed by clause 1 (*b*) of the Sched.—ILLINGWORTH *v.* WALMSLEY, [1900] 2 Q. B. 142; 69 L. J. Q. B. 519; 82 L. T. 647; 16 T. L. R. 281; 2 W. C. C. 118, C. A.

Annotation:—**Consd.** Webster *v.* Sharp, [1904] 1 K. B. 218.

3377. —— Whether limited to difference between earnings before & after accident.]—The amount of compensation recoverable is not limited to half the difference between the earnings before & after the accident.—JONES *v.* LONDON & NORTH-WESTERN RY. CO. (1901), 4 W. C. C. 140, C. A.

Annotations:—**Refd.** Edwards *v.* Alyn Steel Tinplate Co. (1910), 3 B. W. C. C. 141.

(*b*) *Average Amount of Earnings after Accident.*

See Workmen's Compensation Act, 1925 (c. 84), s. 9 (3).

3378. How calculated—Average over twelve months.]—WOODHOUSE *v.* MIDLAND RY. CO., No. 3370, *ante*.

3379. —— Average over whole period.]—A workman commenced work, dealing with acids in the lithographic trade, in Mar. 1918. He became incapacitated from excemetous ulceration & the date when disability commenced was certified as Dec. 6, 1918. He was totally incapacitated from that date until Apr. 1919, when he restarted lighter work & continued until Aug. 1919, when he was again away for a month totally incapacitated. He started work again in Sept. 1919, & continued working. He received full compensation during the periods of total incapacity & claimed compensation during partial incapacity. When he started work in Mar. 1918, the minimum wage was £3 4*s.* 0*d.*; in Apr. it was raised to £3 11*s.* 6*d.*, & in Oct. to £3 19*s.* 0*d.* The workman contended that at the time of disablement his average weekly earnings were therefore £3 19*s.* 0*d.*, but the county ct. judge took the average over the whole period & assessed it at £3 8*s.* 7*d.* When the man restarted work he earned from Apr. 1919, to Aug. about £3 a week; from Aug. to Sept. nothing; from Sept. to Jan. 1920, £3 15*s.* 0*d.*, & from Jan. £1 2*s.* 6*d.* The workman contended that from Apr. 1919, to Aug. he should be compensated on the basis of the difference between £3 & his pre-accident earnings; but the county ct. judge again took the average over the whole period Apr. 1919, to the time proceedings were commenced in Feb. 1920, excluding the month of total incapacity, & found the average to be £3 9*s.* 6*d.* Upon this he held that no compensation was due, & dismissed the application with costs. The employers had submitted to a declaration of liability at the opening of the hearing when it had first been asked for by appct.:—*Held*: there was no misdirection in the method adopted by the learned county ct. judge in assessing the average weekly earnings either before or after the accident, & the order as to costs was within his judicial discretion.—WEBSTER *v.* HARRISON, TOWNSEND & CO., LTD. (1920), 89 L. J. K. B. 1077; 124 L. T. 4; 13 B. W. C. C. 195.

3380. Earnings in independent business included.]—Resp., a workman, met with an accident, & was awarded a weekly payment as compensation under Workmen's Compensation Act, 1897 (c. 37). Upon an application by his former employers to review the weekly payment, the county ct. judge refused to take into consideration the earnings of resp. in a business that he had started after the accident. On appeal:—*Held*: the expression "the average amount which he is able to earn after the accident," in para. 2 of Sched. I. to the Act, is not restricted to earnings in the service of an employer, but includes earnings in an independent business.—NORMAN & BURT *v.* WALDER, [1904] 2 K. B. 27; 73 L. J. K. B. 461; 90 L. T. 531; 68 J. P. 401; 52 W. R. 402; 20 T. L. R. 427; 48 Sol. Jo. 395; 6 W. C. C. 124, C. A.

Annotations:—**Expld.** Calico Printers' Assocn. *v.* Higham, [1912] 1 K. B. 93. **Consd.** Duberley *v.* Mace (1913), 6 B. W. C. C. 82; Port of London Authority *v.* Gray, [1919] 1 K. B. 65.

3381. —— How value computed.]—CALICO PRINTERS' ASSOCN., LTD. *v.* HIGHAM, No. 3781, *post*.

3382. —— ——.]—A farm teamster was receiving 5*s.* a week compensation for the loss of his left thumb under a recorded memorandum of an agreement to pay the 5*s.* so long as he was not earning more than 10*s.* a week, in which event the amount was to be settled by arbitration. He subsequently left his employment & took a farm of his own of 54 acres, at a rent of £95 *per annum*, he had (*inter alia*) eight bullocks & two horses, & employed his father at 13*s.* a week & board & lodging & also a lad. He himself, with his wife as housekeeper to another employer, received free board & lodging at a clergyman's house. On an application by his old employers to diminish the payments, the county ct. judge found he was earning more than 10*s.* a week, & reduced the compensation to 1*d.* a week:—*Held*: there was evidence to support the finding.

When a man is a master, it is very difficult to say what he is capable of earning. All one can say is that, considering the man as doing what he did, what would he have had to pay somebody else for doing that.

The judge must bring with him into court some knowledge of the general course of business dealing with farms large & small (COZENS-HARDY, M.R.).—DUBERLEY *v.* MACE (1913), 6 B. W. C. C. 82, C.A.

3383. What is amount workman able to earn—Primâ facie actual earnings.]—HEATHCOTE *v.* HAUNCHWOOD COLLIERIES, No. 3230, *ante*.

3377 i. *Maximum amount—Whether limited to difference between earnings before & after accident.*]—In estimating damages, the inability of the injured workman to earn an income equal to that which he has earned in the past must be taken into consideration, & the measure of such damages is the difference between what the workman might have earned if he had not been injured & what he might earn in his injured state.—KERR *v.* BENELL (1914), 29 W. L. R. 383; 7 W. W. R. 15; 7 Sask. L. R. 78.—**CAN.**

3377 ii. ——.]—GEARY *v.* DIXON (1902), 4 F. (Ct. of Sess.) 1143.—**SCOT.**

3377 iii. —— ——.]—PARKER *v.* DIXON (1902), 4 F. (Ct. of Sess.) 1147.—**SCOT.**

3377 iv. —— ——.]—CORBET *v.* GLASGOW IRON & STEEL CO. (1903), 5 F. (Ct. of Sess.) 782.—**SCOT.**

3377 v. ——.]—BRYSON *v.* DUNN & STEPHEN, LTD. (1905), 8 F. (Ct. of Sess.) 226; 43 Sc. L. R. 236; 13 S. L. T. 697.—**SCOT.**

3377 vi. —— ——.]—PEARSON *v.* RUSSELL (ARCHIBALD), LTD., [1916] S. C. 536; 53 Sc. L. R. 377.—**SCOT.**

i. —— *Chances of employment lessened.*]—In estimating compensation for the loss of a thumb, consideration must be given to the fact that while claimant is not thereby entirely prevented from carrying on his occupation, his chances of employment in competition with others are lessened, & his earning power consequently reduced.—ROYLANCE *v.* CANADIAN PACIFIC RY. CO. (1908), 14 B. C. R. 20.—**CAN.**

(c) What is Suitable Employment.

3384. Only arises in estimating possible earnings.]—A workman who had met with an accident & received full compensation for four years, enlisted in the Army under the Derby Scheme, & in 1916 was called up for active service whilst still partially incapacitated. He remained over two years in the Army, from which he was ultimately discharged as medically unfit. Much of his time had been spent in hospital, & his original disability had in fact been aggravated :—*Held :* in assessing the compensation payable to him during the period he was in the Army, the pay received by him, the cash value of his ration allowance, & the separation allowance paid to his wife must all be treated as weekly earnings, & be deducted from his average weekly earnings before the accident.

The difference between the workman's average weekly earnings before the accident & the amount he is actually earning, in cases of partial incapacity, represents a maximum, which may be reduced if it is proved that he would be able in some suitable employment to earn more than he is in fact earning. The expression " suitable employment " is only used in reference to estimating possible earnings (SWINFEN EADY, M.R.).—PORT OF LONDON AUTHORITY *v.* GRAY, [1919] 1 K. B. 65 ; 88 L. J. K. B. 107 ; 120 L. T. 11 ; 35 T. L. R. 49 ; 63 Sol. Jo. 54 ; 11 B. W. C. C. 206, C. A.

3385. Question of fact.]—A coal miner whilst employed getting coal at the coal face in a colliery met with an accident. A piece of coal flew into his left eye, which became permanently injured. The sight was not destroyed, but the miner was rendered less fitted for his particular work than a one-eyed man. The colliery co. after having paid him compensation for several months, offered him work at the coal face at his old wages. On his declining the offer they ceased their payments, & he thereupon filed a request for arbitration for the determination of the question whether the work offered to him was suitable employment within Workmen's Compensation Act, 1906 (c. 58), Sched. I., para. 3. The county ct. judge on the medical evidence found that there was an appreciable increase of peril of injury to the remaining eye, & of injury generally, in working at the face with one only available eye. He was therefore of opinion that the work offered was not quite suitable employment, & awarded compensation :—*Held :* " suitable employment " was a question of fact ; the finding of the county ct. judge meant that the employment was not suitable, although nearly so, thus negativing suitability, & there was evidence to justify the finding, & therefore it could not be interfered with.—EYRE *v.* HOUGHTON MAIN COLLIERY CO., LTD., [1910] 1 K. B. 695 ; 79 L. J. K. B. 698 ; 102 L. T. 385 ; 26 T. L. R. 302 ; 54 Sol. Jo. 304 ; 3 B. W. C. C. 250, C. A.

Annotations :—**Consd.** Jackson *v.* Hunslet Engine Co., [1916] 2 K. B. 8. **Refd.** Dinnington Main Coal Co. *v.* Bruins (1912), 5 B. W. C. C. 367 ; Howards *v.* Wharton (1913), 6 B. W. C. C. 614 ; Law *v.* Baird (1914), 7 B. W. C. C. 846. **Mentd.** Elliott *v.* Curry & Dodd (1912), 5 B. W. C. C. 584.

3386. ——.]—A lad injured his eye at work necessitating its immediate removal. After an interval he returned to his old employers & was given work, but he had again to go to an eye hospital by reason of the other eye becoming affected. He attributed this to the dusty nature of the work he was doing. He was treated at the hospital & given glasses. He was then offered work stoking a furnace, but this he refused as being unsuitable. The county ct. judge, on an application for compensation, supported this view, & awarded full compensation :—*Held :* there was evidence to support the finding.—THOMPSON *v.* NEWTON (JOHN) & CO. (1914), 7 B. W. C. C. 703, C. A.

3387. ——.]—A workman, who had lost one eye by accident at his employment, was offered his old work as a toolsmith by his employers. He tried to do this but gave it up on the ground that he could not stand the noise of the workshop & the work was not suitable for him. The employers applied to reduce the compensation being paid to the man. The county ct. judge accepted the man's evidence that he could not do the work & refused to reduce :—*Held :* there was no ground for altering the award.—PENMAN *v.* SMITH'S DRY DOCKS CO., LTD. (1915), 8 B. W. C. C. 487, C. A.

3388. ——.]—A steel fettler, twenty-three years of age, met with an accident resulting in the loss of sight to one eye. His employers admitted liability & paid him compensation for a certain period, after which they terminated payment on the ground that he was able to resume his former occupation. The man admitted that he could do his old work, but said that men engaged in this occupation were so liable to be hit in the eye by a piece of flying steel that, having lost one eye already, he ought not to run a risk of losing the sight of his remaining eye, which would render him totally blind. The county ct. judge found as a fact that the work of a steel fettler offered him was suitable work & dismissed the application :—*Held :* there was no ground for altering the award.—HOUSLEY *v.* HADFIELDS, LTD. (1915), 8 B. W. C. C. 497, C. A.

Annotation :—**Consd.** Jackson *v.* Hunslet Engine Co., [1916] 2 K. B. 8.

3389. ——.]—The employers of a man who had lost an eye by accident arising out of & in the course of his employment in their service alleged that his incapacity had terminated, & they ceased to pay compensation to him. He applied for compensation, & the employers offered a suspensory award. The county ct. judge was of opinion that the incapacity had terminated & refused to make any award. The Ct. of Appeal sent the matter back to the judge to make an award & to consider for this purpose whether the work offered to appct. by the employers was suitable. The judge held, on the ground (*inter alia*) of the unusual risk which would be run by a one-eyed man, that the offered employment was not suitable & awarded full compensation :—*Held :* on appeal, suitability was a question of fact ; there was sufficient evidence to justify the finding that the work was not suitable without reference to the extra risk ; & *semble*, under the direction given in the first appeal the learned judge was right in taking the extra risk run by a one-eyed man into consideration ; the award ought to stand ; the ct. could not interfere with it unless there had been a plain misdirection ; & that was not the case.

When several reasons are given for deciding in reference to a question of fact & some of those reasons are indisputable, I do not think we ought to be astute in upsetting the award, even if we think that one of the reasons which the judge assigned may be open to question (LORD COZENS-HARDY, M.R.).—JACKSON *v.* HUNSLET ENGINE

Sect. 13.—*Amount of compensation: Sub-sect.* 2, *C.* (*c*), *& D.*]

Co., LTD., [1916] 2 K. B. 8; 85 L. J. K. B. 1213; 114 L. T. 584; 60 Sol. Jo. 386; 9 B. W. C. C. 269, C. A.

Annotations:—**Reld.** Jenkinson *v.* Steiner (1916), 9 B. W. C. C. 571. **Mentd.** Neilson *v.* Farme Coal Co. (1915), Ltd. (1915), 12 B. W. C. C. 456; Hart *v.* Cory, [1916] 1 K. B. 172.

3390. ——.]—The workman while in the employment of applts. as a riveter early in Dec. 1924, met with an accident whereby he lost five-sixths of the vision of one eye & received full compensation until the beginning of Feb. 1925. He was then examined by the doctor of applts., who said that though his eye was thus blurred by the loss of five-sixths of the vision he was nevertheless quite able to do the work of a riveter. The employers offered the man his old work as a riveter &, when he refused it, stopped compensation. Thereupon the workman, who admitted he was able to do a labourer's work made a request for arbn. & claimed the difference between the amount he would earn as a labourer & the amount payable to a riveter. The county ct. judge said he attached no weight to evidence that other one-eyed men were doing the work of a riveter, & found as a fact that such work was not suitable for appct., & awarded compensation accordingly: —*Held:* it was a question of fact as to which there was evidence to support the finding & there was no misdirection.—ROBERTS *v.* VICKERS, LTD. (1925), 18 B. W. C. C. 318, C. A.

3391. What must be considered—Exceptional risks.]—EYRE *v.* HOUGHTON MAIN COLLIERY CO., LTD., No. 3385, *ante*.

3392. —— —— **One-eyed man.**]—JACKSON *v.* HUNSLET ENGINE CO., LTD., No. 3389, *ante*.

D. What is Payment, Allowance or Benefit.

See Workmen's Compensation Act, 1925 (c. 84), s. 9 (1) (*b*).

3393. Must be assessable in money.]—A miner was injured by accident arising out of his employment in 1920, & he was paid full compensation under an agreement until the end of 1924, when the employers found him light work at wages less by 10*s.* 6*d.* a week than the wages he would then have been earning if he had returned to his former occupation, wages in which had been reduced. The employers, therefore paid 5*s.* 3*d.* a week compensation. The workman thereupon applied for arbn., & the employers submitted to an award of 5*s.* 3*d.* a week, which they said was the full measure of their liability. The workman sought to take advantage of an agreement made in Oct. 1923, between the workmen's union & two employers' assocns., providing that subject to disputed claims being referred to arbn. between the agents of the men's union & the insurance co., the employers would, as far as possible, provide light work for men who had been injured in their employment, & would pay compensation on the scale provided in the Bill then before Parliament [afterwards passed into law as Workmen's Compensation Act, 1923 (c. 42)].

The county ct. judge made an award of the amount submitted to be paid by the employers, & gave them the costs of the arbn. He held that the agreement applied to the case & brought in the provisions of Workmen's Compensation Act, 1923 (c. 42), & also that the opportunity of employment provided by the agreement amounted to a "payment, allowance, or benefit" within Workmen's Compensation Act, 1906 (c. 58), sched. I. (3), the value of which must be taken into consideration in fixing the compensation:—*Held:* (1) the case must be remitted to the county ct. judge to be reheard. The agreement not having been recorded was invalid, & could not apply the scale of Workmen's Compensation Act, 1923 (c. 42), to the compensation payable in respect of an injury happening to a workman before that Act came into operation, & was not a "payment, allowance, or benefit" within Workmen's Compensation Act, 1906 (c. 88), sched. I. (3), those words referring only to money, or something capable of being exactly assessed in money value; (2) a mere promise to provide work was incapable of exact valuation; (3) the agreement did not apply to disputed cases, & was an attempt to contract out of the terms of the Workmen's Compensation Act, 1906 (c. 58).—WOOD *v.* WENTWORTH SILKSTONE COLLIERY CO., LTD. (1925), 133 L. T. 656; 18 B. W. C. C. 278, C. A.

3394. Sum paid in settlement of claim—Registration of agreement refused.]—The employers after paying compensation for some months gave appct. £10 in full settlement. The county ct. judge refused to register a memorandum of this agreement, & on a subsequent application for compensation, refused to take into account the £10 so paid:—*Held:* the county ct. judge should have taken into account the £10 received from the employers.—HORSMAN *v.* GLASGOW NAVIGATION CO., LTD. (1909), 3 B. W. C. C. 27, C. A.

3395. Benefits to seaman—Voluntary payments.]—A seaman sustained serious injuries. He was conveyed to a hospital whilst unconscious, & remained there after his discharge from the ship for fifteen weeks. The shipowners made payments for his maintenance during that period equal to the full weekly compensation for which they were liable. They were not legally compellable to make these payments under M. S. Act, 1894 (c. 60):—*Held:* such payments were a benefit which the workman received from the employers during the period of his incapacity, within Workmen's Compensation Act, 1906 (c. 58), sched. I. (3), & regard must be had to them in fixing the amount of compensation.—KEMPSON *v.* MOSS ROSE (OWNERS) (1910), 4 B. W. C. C. 101, C. A.

3396. —— **Not compulsory payments—Under Merchant Shipping Acts.**]—By Workmen's Compensation Act, 1906 (c. 58), s. 7 (1), the Act is applied to seamen subject to certain modifications including (*e*), which provides that the weekly payment shall not be payable in respect of the period during which the shipowner is under the M. S. Acts liable to defray the expenses of maintenance of the injured seaman.

In fixing the amount of the weekly payment par. 3 of Schedule I. enacts that "regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity. . . ."

3392 i. *What must be considered—Exceptional risks—One-eyed man.*]—LAW *v.* BAIRD (WILLIAM) & CO., LTD. (1914), 7 B. W. C. C. 846.—**SCOT.**

3392 ii. —— —— ——.]—BURT *v.* FIFE COAL CO., LTD. (1914), 8 B. W. C. C. 350.—**SCOT.**

g. —— *Suitability having regard to workman's health.*]—THOMSON *v.* WATSON, LTD., [1916] S. C. 23; 53 Sc. L. R. 55; [1916] 2 S. L. T. 246; 9 B. W. C. C. 428.—**SCOT.**

h. Employment involving Sunday work.]—SMITH *v.* BEARDMORE & CO., LTD., [1922] S. C. 131; 59 Sc. L. R. 94; [1922] S. L. T. 58; 15 B. W. C. C. 389.—**SCOT.**

PART XIV. SECT. 13, SUB-SECT. 2. —D.

k. Benefits to seaman — Payment of hospital charges by employer.]—A seaman, injured by accident arising out of & in the course of his employment, went to a hospital where he received maintenance & medical treatment, which was subsequently paid

The words "any payment, allowance, or benefit" must be construed with some limitation. For instance, regard must not be had to payment or discharge of debts due from the employer to the workman, nor, in the case of a seaman, to any payment, allowance, or benefit which under the M. S. Acts the employer is bound to give, or which is not received in respect of the seaman's incapacity & in respect of that period of incapacity which is covered by the Compensation Act. The meaning is that the seaman is not to be paid twice over by the overlapping of benefits derived from two separate statutes.

A seaman on a voyage abroad was rendered totally incapable by an accidental injury, & was placed in a foreign hospital. The shipowners, in accordance with their obligations under the M. S. Acts, paid him eight days' wages for the interim between the accident & his discharge, also his medical & surgical expenses in the hospital, & made provision for his maintenance & return to England:—*Held:* in fixing the amount of the weekly payment under Workmen's Compensation Act, 1906 (c. 58), in respect of his continued incapacity in England regard must not be had to the payment of the eight days' wages or of the maintenance & other expenses.—MCDERMOTT *v.* TINTORETTO (OWNERS), [1911] A. C. 35; 80 L. J. K. B. 161; 103 L. T. 769; 27 T. L. R. 149; 55 Sol. Jo. 124; 4 B. W. C. C. 123; 11 Asp. M. L. C. 515, H. L.

Annotations:—**Distd.** Porter *v.* Whitbroad (1914), 7 B. W. C. C. 205. **Expld.** Considine *v.* McInerney, [1916] 2 A. C. 162. **Distd.** Watts *v.* Manchester Corpn., [1917] 1 K. B. 791. **Expld.** Ashrody *v.* City of Edinburgh (Owners), [1920] 1 K. B. 301. **Consd.** Anchor Line (Henderson Bros.) *v.* Mohad, [1922] 1 A. C. 146; Danish Bacon Co. *v.* Food Ministry (1922), 91 L. J. K. B. 743. **Apld.** Smallbone *v.* Fawcett, Preston, [1922] 2 K. B. 638. **Consd.** Langford *v.* Port of London Authority (1926), 95 L. J. K. B. 887. **Refd.** Kempson *v.* Moss Rose (Owners) (1910), 4 B. W. C. C. 101; Buls *v.* Steamship Teutonic (1913), 109 L. T. 127.

3397. Not payment of debt due from employer to workman.]—MCDERMOTT *v.* TINTORETTO (OWNERS), No. 3396, *ante*.

3398. Payments in excess of compulsory compensation.]—Employers paid 28*s.* a week as generous compensation to an injured workman. After having paid this for some time they reduced it to half wages. They paid this for some weeks until the workman's solr. pointed out that certain extras in the shape of "beer & coffee" money had not been included as wages, & that the workman was consequently entitled to slightly higher compensation. The employers admitted the computation & offered to submit to an award on this basis, but they refused to pay arrears on the ground that they had already much overpaid the workman & they were entitled to have these extra payments regarded. The county ct. judge made an award in favour of the empoyers & awarded them costs to be deducted from compensation:—*Held:* there was no misdirection & the county ct. judge's discretion as to costs had been exercised judicially.—PORTER *v.* WHITBREAD & Co. (1914), 7 B. W. C. C. 205, C. A.

3399. Superannuation allowance & gratuity.]—An attendant at a lunatic asylum employed subject to the regulations of the Civil Service Comrs. was permanently incapacitated by an injury sustained by accident arising out of & in the course of his employment & was retired in consequence of his incapacity. He was then aged forty-eight & had been in his employment for twenty years. Under the Superannuation Acts, 1834–1909, he was entitled to expect on retirement at the age of sixty, or before that age in the case of bodily or mental infirmity, a superannuation allowance & a lump sum by way of gratuity calculated on the basis of the number of years which he had served, but he had no legal right to these payments, & on his retirement he duly received a superannuation allowance & gratuity from the asylum authorities. Upon a claim for compensation under Workmen's Compensation Act, 1906 (c. 58):—*Held:* the superannuation allowance & gratuity were payments, allowances, or benefits within para. 3 of Schedule I. to which regard should be had in fixing the amount of the weekly compensation.—CONSIDINE *v.* MCINERNEY, [1916] 2 A. C. 162; 85 L. J. P. C. 168; 114 L. T. 1138; 32 T. L. R. 453; 60 Sol. Jo. 456; 9 B. W. C. C. 390, H. L.

Annotations:—**Expld.** Watts *v.* Manchester Corpn., [1917] 1 K. B. 791. **Consd.** Langford *v.* Port of London Authority (1926), 95 L. J. K. B. 887.

3400. Pension—So far as contributed by employer.]—A fireman in the service of the Manchester Corpn. Fire Brigade met with an accident by which he was permanently incapacitated. The corpn. admitted their liability to pay compensation under Workmen's Compensation Act, 1906 (c. 58), but contended that in fixing the amount of the weekly payment regard ought to be had to a pension to which appct. was entitled under the corpn. superannuation scheme out of the fire brigade fund. This fund was provided partly by the dividends on an invested fund & partly by contributions of the men out of their pay, any deficiency being made up by the corpn. out of the city rate. In an arbn. under the Act:—*Held:* so far as the pension was provided for by payments made by the corpn. it was "payment, allowance, or benefit" received from the employers which ought to be regarded in fixing the amount of the weekly payment of compensation under Workmen's Compensation Act, 1906 (c. 58), Sched. I. clause 3.—WATTS *v.* MANCHESTER CORPN., [1917] 1 K. B. 791; 86 L. J. K. B. 669; 116 L. T. 578; 33 T. L. R. 238; 10 B. W. C. C. 191, C. A.

3401. —— ——.]—LANGFORD *v.* PORT OF LONDON AUTHORITY, No. 3695, *post*.

3402. Military pay & allowance.]—PORT OF LONDON AUTHORITY *v.* GRAY, No. 3384, *ante*.

3403. Not unemployment benefit.]—BALL *v.* COULTHARD (T.) & Co., LTD., No. 3393, *ante*.

3404. Not war additions—Payable under Workmen's Compensation (War Addition) Acts, 1917, 1919.]—In assessing the amount of the compensation under Workmen's Compensation Act, 1906 (c. 58), sched. I., para. 1 (*b*), payable to an infant workman in the case of total incapacity, the county ct. judge is not entitled to take into consideration the effect of the war additions under the Workmen's Compensation (War Additions) Acts, 1917 & 1919, notwithstanding that the result may be that the weekly payments together with the war additions may exceed the amount of the infant's workman's average weekly earnings before the accident.—SMALLBONE *v.* FAWCETT,

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for by the employer on an account rendered by the hospital. The arbitrator found that this payment was a benefit received by the seaman during the period of his incapacity:—*Held:* there was evidence to support the finding.—SORENSEN *v.* GAFF & Co. (1912), 49 Sc. L. R. 896; 6 B. W. C. C. 279. —SCOT.

l. *Relief from poor-law authorities.*]—The amount received by the workman in poor-law relief does not fall to be computed in discharge of the compensation to which he is found entitled.—GILROY *v.* MACKIE, ETC. (LEITH DISTRESS COMMITTEE), [1909] S. C. 466; 46 Sc. L. R. 325; [1909] 1 S. L. T. 141; 2 B. W. C. C. 269.—SCOT.

Sect. 13.—*Amount of compensation: Sub-sect.* 2, *D. & E.; sub-sect.* 3, *A.* (*a*).]

PRESTON & Co., [1922] 2 K. B. 638; 91 L. J. K. B. 933; 128 L. T. 55; 66 Sol. Jo. 693; 15 B. W. C. C. 176, C. A.

3405. Not agreement to provide work.]—WOOD *v.* WENTWORTH SILKSTONE COLLIERY CO., LTD., No. 3393, *ante.*

E. War Additions.

See Workmen's Compensation (War Addition) Acts, 1917 (c. 42), & 1919 (c. 83); Workmen's Compensation Act, 1923 (c. 42), s. 1; Workmen's Compensation Act, 1925 (c. 84), s. 50 (2) & sched. IV.

3406. When payable—Not unless weekly payment made or agreed to be made.]—HAYDOCK *v.* GOODIER, No. 3587, *post.*

3407. —— Not in respect of partial incapacity.]—A caretaker was engaged in chopping wood when a piece flew upward into his eye, causing him to lose the sight of one of his eyes. Compensation was paid for some months, but was ultimately discontinued. The caretaker was offered similar work by his employers but could not accept it on the account of dizziness. The county ct. judge found that, having regard to his knowledge of the state of the labour market, & the fact that applt. was incapable of doing the only work offered to him, & that no other work was available, he was entitled to 15*s.* per week on the ground of partial incapacity & war addition at the rate of 11*s.* 3*d.* per week. The workman's counsel admitted in the county ct. that on this finding there was nothing due in respect of "war addition." The employers appealed:—*Held:* there was ample medical evidence on which the arbitrator could find partial incapacity, & the arbitrator was entitled to apply his own knowledge of the labour market & local conditions that no suitable light work was available. The employers were entitled to have 11*s.* 3*d.* war bonus struck out of the award, but they were not entitled to costs as the workman agreed to the alteration being made in the county ct.—LOCK *v.* CHATHAM EDUCATION COMMITTEE (1922), 15 B. W. C. C. 35, C. A.

Annotation:—**Reid.** Peart *v.* Bolckow, Vaughan, [1925] 1 K. B. 399.

3408. Effect of Workmen's Compensation Act, 1923 (c. 42), s. 1—Compensation redeemed.]—COSTELLO *v.* BROWN, No. 3777, *post.*

3409. —— ——.]—On May 15, 1919, appct. was entitled to compensation on the basis of total incapacity, & compensation was paid at the rate of £1 per week together with the addition under Workmen's Compensation (War Addition) Acts, 1917 (c. 42), & 1919 (c. 83), until Dec. 21, 1921. On this date the normal weekly compensation of £1 was redeemed for a lump sum payment of £436 16*s.* From that date down to & including Feb. 27, 1924, the war addition of 15*s.* per week was paid but was then stopped. Appct. applied for the payment of this war addition of 15*s.* per week from Feb. 27, 1924, & for the continuance of such payment for so long as the incapacity should be total. The learned county ct. judge held that the war additions ceased to be payable by virtue of Workmen's Compensation Act, 1923 (c. 42), s. 1, & made an award in favour of resps.: —*Held:* nothing in the 1923 Act caused the war additions to cease to be payable where they were payable before the 1923 Act.—TATE *v.* BRADFORD DYERS ASSOCN., LTD. (1924), 17 B. W. C. C. 209, C. A.

3410. —— Period of partial incapacity intervening.]—By Workmen's Compensation Act, 1923 (c. 42), s. 1, Workmen's Compensation (War Addition) Acts, 1917 (c. 42), & 1919 (c. 83), were repealed as from Dec. 31, 1923: "Provided that the addition provided for in the said Acts shall continue to apply to a weekly payment payable to a workman under Workmen's Compensation Act, 1906 (c. 58), . . . in respect of total incapacity arising from an accident which occurred on or before the said Dec. 31 so long as the workman remains totally incapacitated. . . ."

Before the repeal of the War Addition Acts a workman was totally incapacitated by an injury by accident arising out of & in the course of his employment. At the date of the repeal he was suffering from partial incapacity only, but shortly afterwards he again became totally incapacitated as the result of his injury:—*Held:* in assessing the compensation payable to him he was entitled under the proviso to Workmen's Compensation Act, 1923 (c. 42), s. 1, to the war addition provided for by the repealed Acts.—GLASGOW IRON & STEEL CO. *v.* DICKSON, COLTNESS IRON CO. *v.* DALGLEISH, [1925] A. C. 790; 95 L. J. P. C. 1; 133 L. T. 771; 41 T. L. R. 644; 69 Sol. Jo. 743, 794; 18 B. W. C. C. 411, H. L.

3411. Mention in award not essential.]—A workman filed particulars for arbitration, alleging total incapacity & average weekly earnings of £2 13*s.* No answer was filed by the employer. At the hearing the employer did not appear, but the county ct. judge heard some evidence from appct. as to wages, & then stated that as the claim was admitted he would make an award of 15*s.* a week compensation & war addition under Workmen's Compensation (War Addition) Act, 1917 (c. 42): —*Held:* in the circumstances, the particulars must be taken to have been admitted, & the workman was therefore entitled to £1 per week & war addition under Workmen's Compensation (War Addition) Acts, 1917 (c. 42), & 1919 (c. 83). The amount of the war addition is recoverable on an award for total incapacity, whether mentioned in the award or not.—CHAPMAN *v.* SMITH (1920), 13 B. W. C. C. 140, C. A.

SUB-SECT. 3.—RULES FOR DETERMINING EARNINGS.

A. What are Earnings.

(*a*) *In General.*

See Workmen's Compensation Act, 1925 (c. 84), s. 10.

3412. Actual amount received from employer—Whether in money or kind.]—"Earnings" in Schedule I., clause (1) (*a*) (i), of Workmen's Compensation Act, 1897 (c. 37), means the actual amount, whether in money or in kind, which the workman receives from his employers.

The average weekly earnings of a miner, who suffered injury from an accident in the course of

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PART XIV. SECT. 13, SUB-SECT. 2. —E.

3408 i. *Effect of Workmen's Compensation Act, 1923 (c. 42), s. 1.—Compensation redeemed.*] — TAYLOR & SON *v.* IRONS, [1924] S. C. 727; 61 Sc. L. R. 507; [1924] S. L. T. 535; 17 B. W. C. C. 375.—SCOT.

PART XIV. SECT. 13, SUB-SECT. 3.—A. (a).

m. *Whether incidental advantages included—Workman also contractor.*] —*Held:* the amount of compensation should be calculated upon the man's average weekly wage as a miner, & not upon such wage plus his profit upon his independent contract for working the coal.—LOGAN *v.* SHOTTS IRON CO., LTD. (1919), 12 B. W. C. C. 433.—SCOT.

his employment which resulted in his death, were £1 10*s.* 11*d.* a week, but a deduction of 6*d.* a week was made for oil supplied by his employers for the lamp used by the miner in his employment, so that the average amount of money actually received by him from his employers was £1 10*s.* 5*d.* only:—*Held:* in assessing compensation to the miner's dependants under Workmen's Compensation Act, 1897 (c. 37), the compensation must be computed upon the basis that the miner's average weekly earnings were £1 10*s.* 11*d.* a week.—HOUGHTON *v.* SUTTON HEATH & LEA GREEN COLLIERIES CO., [1901] 1 K. B. 93; 70 L. J. K. B. 61; 83 L. T. 472; 65 J. P. 134; 49 W. R. 196; 17 T. L. R. 54; 45 Sol. Jo. 59; 3 W. C. C. 173, C. A.

Annotations:—**Consd.** Midland Ry. *v.* Sharpe, [1904] A. C. 349. **Refd.** Shipp *v.* Frodingham Iron & Steel Co., [1913] 1 K. B. 577; Jones *v.* International Anthracite Collieries Co., [1919] 1 K. B. 156.

3413. —— Workman must be properly equipped.]—In estimating the compensation payable to an injured workman under Workmen's Compensation Act, 1897 (c. 37), the word "earnings" in the Act means the sum the workman receives for his labour when he comes to it properly equipped according to the general understanding & practice in the particular trade.

From the weekly wages of a collier his employers deducted by agreement sums for cleaning lamps, supply of oil, sharpening picks, & checking weights:—*Held:* his "earnings" under the Act for the purpose of estimating compensation for injury were his full wages without the deductions.—ABRAM COAL CO. *v.* SOUTHERN, [1903] A. C. 306; 72 L. J. K. B. 601; 89 L. T. 103; 19 T. L. R. 579; 5 W. C. C. 125, H. L.

Annotations:—**Consd.** Mid. Ry. *v.* Sharpe, [1904] A. C. 349. **Refd.** Shipp *v.* Frodingham Iron & Steel Co., [1913] 1 K. B. 577; Jones *v.* International Anthracite Collieries Co., [1919] 1 K. B. 156.

3414. Whether incidental advantages included—Must be capable of appraisement at money value.]—An apprentice sustained an injury to his right hand which prevented his working as a skilled artisan, & the indenture of apprenticeship was cancelled. On an application for compensation under Workmen's Compensation Act, 1897 (c. 37), he obtained an award of a weekly payment based on his wages for the previous year. He returned to the employment of the same employers as a workman, at weekly wages higher than his wages at the time of the accident, but less than those that would be ordinarily paid to a workman employed on the same class of work, since the injury he had sustained affected his ability to earn full wages. On an application by the employers for the review, & termination of the weekly payment, the county ct. judge dismissed the application, on the ground that the workman was earning less, by a sum equal to the amount of the weekly payment awarded, than if he had had the use of his right hand:—*Held:* (1) on a review of a weekly payment made by award under the Act, the test to be applied is the difference between the amount of the average earnings before the accident & the average amount which the workman is able to earn after the accident; in the absence of evidence of advantages incidental to the employment, & capable of being appraised at a money value, the earnings before the accident must be determined by the wages received; the county ct. judge was therefore wrong in refusing to review the weekly payment; but the weekly payment should be continued at a nominal amount, in order to preserve the right of appct. to make any further application that might become necessary.

(2) *Semble:* the value of the tuition given to an apprentice should not be taken into account in arriving at the amount of his average weekly earnings.—POMPHREY *v.* SOUTHWARK PRESS, [1901] 1 K. B. 86; 70 L. J. Q. B. 48; 83 L. T. 468; 65 J. P. 148; 17 T. L. R. 53; 45 Sol. Jo. 59; 3 W. C. C. 194, C. A.

Annotations:—**Consd.** Jones *v.* L. & N. W. Ry. (1901), 4 W. C. C. 140. **Refd.** Edwards *v.* Alyn Steel Tinplate Co. (1910), 3 B. W. C. C. 141; Roper *v.* Hussey-Freke (1915), 113 L. T. 635.

3415. —— Value of tuition to apprentice.]—POMPHREY *v.* SOUTHWARK PRESS, No. 3414, *ante.*

3416. —— Value of use of uniform.]—Where a workman was allowed by his employers to have the use for the purposes of his employment of a uniform, which was provided by them, & the property in which remained in them:—*Held:* the value to the workman of the use of the uniform formed an element which must be taken into account in estimating his earnings for the purpose of compensation under Workmen's Compensation Act, 1897 (c. 37).—GREAT NORTHERN RY. CO. *v.* DAWSON, [1905] 1 K. B. 331; 74 L. J. K. B. 271; 92 L. T. 145; 53 W. R. 309; 21 T. L. R. 193; 7 W. C. C. 114, C. A.

Annotations:—**Refd.** Dothie *v.* Macandrow, [1908] 1 K. B. 803; Penn *v.* Spiers & Pond (1908), 98 L. T. 541; Port of London Authority *v.* Gray, [1919] 1 K. B. 65.

3417. —— Value of board & lodging—How calculated—Seaman.]—On a claim for compensation under the Workmen's Compensation Act, 1906 (c. 58), by a seaman who received a weekly sum in cash & his board & lodging on the ship:—*Held:* having regard to the circumstances under which an ordinary seaman is necessarily engaged & paid, there is no other practicable test for computing the value to him of the board & lodging provided by the employer than, in the absence of special circumstances, the actual cost of these allowances to the shipowner.—ROSENQVIST *v.* BOWRING & CO., LTD., [1908] 2 K. B. 108; 77 L. J. K. B. 545; 98 L. T. 773; 24 T. L. R. 504; 1 B. W. C. C. 395, C. A.

3418. Tips—Knowledge of employers—Waiter.]—"Earnings in the employment of the same employer" in respect of which compensation is recoverable under the Workmen's Compensation Act, 1906 (c. 58), need not always come from the employer; & where the employment is of such a nature that the habitual giving & receiving of "tips" is open & notorious, & sanctioned by the employer, the money thus received with his knowledge & approval must be brought into account in estimating the "average weekly earnings" in respect of which compensation has to be awarded.—PENN *v.* SPIERS & POND, LTD., [1908] 1 K. B. 766; 77 L. J. K. B. 542; 98 L. T. 541; 24 T. L. R. 354; 52 Sol. Jo. 280; 1 B. W. C. C. 401, C. A.

Annotations:—**Folld.** Knott *v.* Tingle Jacobs (1910), 4 B. W. C. C. 55. **Distd.** Huscroft *v.* Bennett (1914), 110 L. T. 494. **Apprvd.** G. W. Ry. *v.* Helps, [1918] A. C. 141. **Refd.** Craske *v.* Wigan (1909), 101 L. T. 6; Brandy *v.* S.S. Raphael, [1911] 1 K. B. 376; Skailes *v.* Blue Anchor Line, [1911] 1 K. B. 360; Griffith *v.* Penrhyn Castle (Owners) (1916), 116 L. T. 169; Port of London Authority *v.* Gray, [1919] 1 K. B. 65; Wild *v.* Brown, [1919] 1 K. B. 134.

3419. —— —— Services outside ordinary employment.]—In calculating a workman's average weekly earnings, where the evidence is that he habitually received certain tips to the knowledge of his employers, the county ct. judge is entitled to take them into consideration, even though such tips are given for services outside his ordinary employment.—KNOTT *v.* TINGLE JACOBS & CO. (1910), 4 B. W. C. C. 55, C. A.

Sect. 13.—*Amount of compensation: Sub-sect.* 3, *A.* (*a*) *&* (*b*), *&* *B.* (*a*).]

3420. —— —— Railway porter.]—For the purpose of assessing the compensation payable under the Workmen's Compensation Act, 1906 (c. 58), to a railway porter who has sustained injuries by accident arising out of & in the course of his employment, gratuities or "tips" received by him from passengers whom he has assisted in the execution of his duties, where the practice of giving & receiving tips is open & notorious & is sanctioned by the railway co., are included in his earnings.—GREAT WESTERN RY. CO. *v.* HELPS, [1918] A. C. 141; 87 L. J. K. B. 230; 118 L. T. 235; 34 T. L. R. 118; 62 Sol. Jo. 120; 10 B. W. C. C. 654, H. L.; *affg.* S. C. *sub nom.* HELPS *v.* GREAT WESTERN RY. CO. (1917), 86 L. J. K. B. 1006, C. A.

Annotations:—**Distd.** Wild *v.* Brown, [1919] 1 K. B. 134. **Refd.** Calver *v.* Groom & Symonds (1918), 88 L. J. K. B. 129; Jones *v.* International Anthracite Collieries Co., [1919] 1 K. B. 156; Baker *v.* Dalgleish S.S. Co., [1922] 1 K. B. 361.

3421. Tips & commission.]—HAINS & STRANGE *v.* CORBET, No. 3315, *ante*.

3422. Payments to miner as trade union delegate.]—WILD *v.* BROWN (JOHN) & CO., No. 3472, *post*.

3423. Payments to miner as inspector of mine.]—WILD *v.* BROWN (JOHN) & CO., No. 3472, *post*.

(*b*) *Payments by Employer for Special Expenses.*

See Workmen's Compensation Act 1925 (c. 84), s. 10 (4).

3424. Deduction from miner's wages—Cost of lamp oil.]—HOUGHTON *v.* SUTTON HEATH & LEA GREEN COLLIERIES CO., No. 3412, *ante*.

3425. —— Cost of maintenance of working tools, etc.]—ABRAM COAL CO. *v.* SOUTHERN, No. 3413, *ante*.

3426. —— Cost of blasting powder.]—In a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), founded upon the average weekly earnings of the workman, it appeared that his work was that of a miner of ironstone, & he formed one of a gang of fifteen men similarly employed. In getting the ironstone it was necessary to remove sand & use gunpowder for blasting. The gang were paid at the rate of 6½*d.* per ton for ironstone plus a bonus of 3¾ per cent., & 2½*d.* per yard for sand with a bonus of 6¼ per cent. From the aggregate of these sums was deducted the value of the powder used by the gang, & the net sum was paid to the ganger, who distributed it amongst the men in proportion to the number of hours they had worked. The employers provided the powder at cost price. The workman claimed 14*s.* 7*d.* per week on the ground that his average weekly earnings had been £1 9*s.* 2*d.*, namely, his share of the full amount due to the gang without deducting anything for powder supplied to them. The employers contended that 3*s.* a week per man for powder ought to be deducted from the wages, & that appct. was only entitled to half of £1 6*s.* 2*d.*:—*Held*: sched. I., s. 2 (*d*), of the Act did not apply; the employers had only contracted to pay appct. an aliquot share of the gross earnings of the gang less the value of the powder used by them; & he was only entitled to compensation at the rate of half of £1 6*s.* 2*d.*—SHIPP *v.* FRODINGHAM IRON & STEEL CO., LTD., [1913] 1 K. B. 577; 82 L. J. K. B. 273; 108 L. T. 55; 29 T. L. R. 215; 57 Sol. Jo. 264; 6 B. W. C. C. 1, C. A.

Annotation:—**Consd.** Jones *v.* International Anthracite Collieries Co., [1919] 1 K. B. 156.

3427. —— ——.]—In calculating the average weekly earnings of a miner for the purpose of arriving at the true basis of compensation for accident:—*Held*: the county ct. judge had properly taken into account a deduction made by the employers before payment of the wages of the average amount of 6*s.* 6*d.* a week for the actual cost price of blasting powder used by the miner, & supplied to him under Coal Mines Act, 1911 (c. 50), by the employers, the cost of the powder not being part of the earnings.—JONES *v.* INTERNATIONAL ANTHRACITE COLLIERIES CO., [1919] 1 K. B. 156; 88 L. J. K. B. 361; 120 L. T. 165; 35 T. L. R. 56; 63 Sol. Jo. 83; 11 B. W. C. C. 274, C. A.

3428. Payment to railway guard for lodging away from home.]—A railway guard was paid in addition to his wages a fixed sum whenever his duties required him to lodge away from home. No inquiry was made whether he spent that sum or any sum:—*Held*: these fixed sums were part of his "earnings" within the meaning of Workmen's Compensation Act, 1897 (c. 37), sched. I.—MIDLAND RY. CO. *v.* SHARPE, [1904] A. C. 349; 73 L. J. K. B. 666; 91 L. T. 181; 53 W. R. 114; 20 T. L. R. 546; 6 W. C. C. 119, H. L.; *affg.* S. C. *sub nom.* SHARPE *v.* MIDLAND RY. CO., [1903] 2 K. B. 26.

Annotations:—**Consd.** Jones *v.* International Anthracite Collieries Co., [1919] 1 K. B. 156. **Refd.** Shipp *v.* Frodingham Iron & Steel Co., [1913] 1 K. B. 577.

3429. Payment for help of workman's family—Where no express contract.]—ROPER *v.* HUSSEY-FREKE, No. 2218, *ante*.

B. Average Weekly Earnings.

(*a*) *In General.*

See Workmen's Compensation Act, 1925 (c. 84), s. 10.

3430. General principle of calculation.]—PERRY *v.* WRIGHT, CAIN *v.* LEYLAND & CO. (1900), LTD., BAILEY *v.* KENWORTHY, LTD., GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LTD., No. 3329, *ante*.

3431. ——.]—In estimating for the purpose of compensation under Workmen's Compensation Act, 1906 (c. 58), the amount of a workman's "average weekly earnings" the true test is what were his earnings in a normal week, regard being had to the known & recognised incidents of the employment. If work was discontinuous, that is an element which must be taken into account.—ANSLOW *v.* CANNOCK CHASE COLLIERY CO., LTD., [1909] A. C. 435; 78 L. J. K. B. 679; 100 L. T. 786; 25 T. L. R. 570; 53 Sol. Jo. 519; 2 B. W. C. C. 365, H. L.

Annotations:—**Consd.** Calver *v.* Groom & Symonds (1918), 88 L. J. K. B. 129. **Refd.** White *v.* Wiseman, [1912] 3 K. B. 352; Griffiths *v.* Gilbertson (1915), 84 L. J. K. B. 1312.

3432. Meaning of "average."]—A workman was under an agreement to work for his employers

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PART XIV. SECT. 13, SUB-SECT. 3.—A. (b).

3426 i. *Deduction from miner's wages—Cost of blasting powder.*]—A miner was in the habit of purchasing the explosives which he required for his work from his employers, & the price of these was retained by them from his wages:—*Held*: in estimating a miner's earnings for the purpose of compensation under Workmen's Compensation Act, 1906, his wages must be taken at the full rate without deducting the cost of the explosives.—MCKEE *v.* STEIN & CO., LTD., [1910] S. C. 38.—SCOT.

PART XIV. SECT. 13, SUB-SECT. 3.—B. (a).

3432 i. *Meaning of "average."*]—KELLY *v.* YORK STREET FLAX SPINNING CO., LTD. (1909), 43 I. L. T. Jo. 81; 2 B. W. C. C. 493.—IR.

3432 ii. ——.]—On a claim for compensation by the dependants of a de-

on the nights of Thursday & Friday in each week, for a period extending over two weeks, & at a fixed rate of wages for each night. During the rest of each week he worked at times for the same employers, when they had work to give him, & at other times for other firms carrying on a similar business to that of the employers. The workman was injured during the third week of his employment under the agreement. He claimed compensation under the Workmen's Compensation Act, 1897 (c. 37), & an award was made in his favour based on the weekly wages earned by him in respect of the two nights a week during which he worked under the agreement: —*Held:* (1) the employment for two nights a week was a continuous one, & the earnings on those two nights were properly taken into account in determining the weekly payment to be made to the applicant; (2) the amount received for casual work done for the same or different employers could not be taken into account in estimating the average weekly earnings of appct.—HATHAWAY *v.* ARGUS PRINTING CO., [1901] 1 K. B. 96; 70 L. J. Q. B. 12; 83 L. T. 465; 64 J. P. 804; 49 W. R. 113; 17 T. L. R. 42; 3 W. C. C. 177, C. A.

Annotations:—As to (1) **Refd.** Hill *v.* Begg, [1908] 2 K. B. 802; Cue *v.* Port of London Authority, [1914] 3 K. B. 892; Price *v.* Guest, Keen & Nettlefolds, [1918] A. C. 760.

3433. ——.]—(1) The right to compensation given by Workmen's Compensation Act, 1897 (c. 37), s. 1, is not restricted by the schedule to employments by the week, or for weekly wages, or for two weeks at least. Employment by the day for one or more days is within the Act.

(2) The word "average" in the expression "average weekly earnings" is used loosely & inaccurately in the First Schedule to the Act.

(3) Stevedores were loading a vessel in a dock by means of machinery. The cargo had been put into the hold, & the men employed by the stevedores were "finishing off" by slinging iron beams across the hatchway. The machinery having become entangled, one of the workmen went to disentangle it, was caught by it, & injured so that he died:—*Held:* the stevedores were occupying a "factory," namely, the machinery, within the meaning of the Workmen's Compensation Act, 1897 (c. 37), s. 7 (2), & the Factory & Workshop Act, 1895 (c. 37) s. 23 (1) (ii), & deceased was injured in the course of his employment in loading from the wharf, the process of loading not being complete till the hatchway was secured, within the meaning of those Acts.

(4) Where death results from injury & the workman has left dependants, the compensation must be at least £150. It is to be £150 or a sum equal to either the actual amount or the hypothetical amount of his earnings for the three years immediately preceding the accident, not exceeding in any case £300. But if the workman has not served the full period of three years & if you could not find a basis on which to calculate the hypothetical amount, the compensation would, I think, still be £150 (LORD MACNAGHTEN).

(5) Construction of Acts (*see* No. 2032, *ante*).—LYSONS *v.* KNOWLES (ANDREW) & SONS, LTD., STUART *v.* NIXON & BRUCE, [1901] A. C. 79; 70 L. J. K. B. 170; 84 L. T. 65; 65 J. P. 388; 49 W. R. 630; 17 T. L. R. 156; 45 Sol. Jo. 150; 3 W. C. C. 1, H. L.; *revsg.*, [1900] 1 Q. B. 780; & *revsg.*, [1900] 2 Q. B. 95.

Annotations:—As to (1) **Apld.** Ayres *v.* Buckeridge, Wheale *v.* Rhymney Iron Co., Jones *v.* Rhymney Iron Co., [1902] 1 K. B. 57. **Refd.** Ball *v.* Hunt, [1912] A. C. 496; Cue *v.* Port of London Authority, [1914] 3 K. B. 892. *As to* (2) **Apld.** Ayres *v.* Buckeridge, Wheale *v.* Rhymney Iron Co., Jones *v.* Rhymney Iron Co., [1902] 1 K. B. 57; Bartlett *v.* Tutton, [1902] 1 K. B. 72. **Consd.** Giles *v.* Belford, Smith [1903] 1 K. B. 843. **Refd.** Watters *v.* Clover, Clayton (1901), 18 T. L. R. 60; Gill *v.* Grainger (1916), 10 B. W. C. C. 515. *As to* (3) **Apld.** Case *v.* Colonial Wharves (1905), 53 W. R. 514. **Refd.** Houlder Line *v.* Griffin, [1905] A. C. 220; Bones *v.* Associated Portland Cement Manufacturers (1900), Ltd. (1920), 90 L. J. K. B. 456. *Generally*, **Refd.** Churm *v.* Dalton Main Collieries, [1916] 1 A. C. 612; Wild *v.* Brown, [1919] 1 K. B. 134; King *v.* Port of London Authority, [1920] A. C. 1; Russell *v.* Corser, [1921] 1 A. C. 351; Howlett *v.* Shaw, Savill & Albion (1924), 40 T. L. R. 538.

3434. ——.]—On an application for compensation under Workmen's Compensation Act, 1897 (c. 37), it was proved that appct., a casual dock labourer, who had not been previously employed by resps., was engaged for a day at a certain rate of wages per hour, but subject to discharge on an hour's notice. He met with an accident in the course of that day. The county ct. judge took into consideration the average weekly earnings of a labourer such as appct., taking one week with another, by whomsoever employed, & awarded a weekly payment of half that sum:—*Held:* this mode of arriving at the amount of compensation to be awarded was erroneous, as it was not based upon the period during which applicant had been in the employment of the same employer as required by the sched. to the Act.—BARTLETT *v.* TUTTON & SONS, [1902] 1 K. B. 72; 71 L. J. K. B. 52; 85 L. T. 531; 66 J. P. 196; 50 W. R. 149; 18 T. L. R. 35; 46 Sol. Jo. 48; 4 W. C. C. 133, C. A.

Annotation:—**Refd.** Case *v.* Colonial Wharves (1905), 53 W. R. 514.

3435. Mathematical accuracy not required.]—JAMES *v.* MORDEY, CARNEY & CO., LTD., No. 3289, *ante*.

3436. ——.]—In a claim by a dependant the only dispute was with regard to the average weekly earnings. Deceased entered his employment on a Monday, pay day was Thursday; he worked over a year & a half, & was killed on a Monday. He had been away for two periods of four days, due to illness. He was paid by the hour. The county ct. judge taking the odd days at the beginning & end of the employment as two full weeks divided the total earnings by the total number of weeks from the beginning to the end of the employment. He made no allowance for what he could have earned during the eight days' absence:—*Held:* the odd days should not be taken as full weeks, but this was too trivial for appeal, otherwise there was no misdirection.—TURNER *v.* PORT OF LONDON AUTHORITY (1913), 29 T. L. R. 404; 6 B. W. C. C. 23, C. A.

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ceased workman it appeared that he had only been in employment for twenty-six weeks before his death, & that during that period his weekly earnings had varied from £1 2*s.* 7*d.* to 2*s.* 3*d.*:—*Held:* for the purpose of ascertaining the amount of compensation payable to the dependants, the county ct. judge was bound to calculate the "average weekly earnings" of the deceased workman by dividing the total amount actually earned by him by twenty-six.—GILL *v.* GRAINGER (1916), 10 B. W. C. C. 515.—IR.

3432 iii. ——.]—SMALL *v.* M'CORMICK & EWING (1899), 1 F. (Ct. of Sess.) 883; 36 Sc. L. R. 700; 7 S. L. T. 35. —SCOT.

3432 iv. ——.]—PEACOCK *v.* NIDDRIE & BENHAR COAL CO. (1902), 4 F. (Ct. of Sess.) 443.—SCOT.

3432 v. ——.]—"Average weekly earnings" mean the total amount actually earned by the workman during his employment divided by the number of weeks during which or part of which he was employed.—FLEMING *v.* LOCHGELLY IRON & COAL CO. (1902), 4 F. (Ct. of Sess.) 890.—SCOT.

3432 vi. ——.]—NIMMO (J.) CO., LTD. *v.* MYLES (1917), 10 B. W. C. C. 719. —SCOT

3432 vii. ——.]—REYNOLDS *v.* MUNT, COTTRELL & CO., LTD. (1904), 24 N. Z. L. R. 980.—N.Z.

Sect. 13.—*Amount of compensation: Sub-sect.* 3, *B.* (*a*) & (*b*) *i.* & *ii.*, & (*c*).]

3437. Effect of fixing by agreement—No power to vary—Though fall in wages.]—JAMES *v.* OCEAN COAL CO., No. 3364, *ante*.

(*b*) *Where Computation Practicable.*

i. *In General.*

See Workmen's Compensation Act, 1925 (c. 84), s. 10 (1).

3438. Practicability a question for county court judge.]—In a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), it appeared that the workman had been in the employment of his employers at wages which averaged £1 15*s.* per week for more than twelve months prior to Dec. 1910, when he left their employment. In May, 1911, he went to Canada, where he received wages averaging £5 3*s.* a week. In Nov. he returned to Bristol & made arrangements to transfer his family to Canada in Apr. 1912. To fill up the time he went back to his employers & worked for them for nine weeks at an average of £1 9*s.* 6*d.* per week. In Feb. he sustained personal injury by accident.

On a question as to the amount of the average weekly earnings of the workman, the county ct. judge held that it was not impracticable to compute the rate of remuneration from the earnings during the period of nine weeks on the basis that appct. was about to leave the country, & awarded 14*s.* 9*d.* per week:—*Held:* the judge had jurisdiction to compute the average earnings on the footing that the employment of appct. was only of a temporary character, & the appeal must be dismissed.—GODDEN *v.* COWLIN (W.) & SONS, [1913] 1 K. B. 590; 82 L. J. K. B. 509; 108 L. T. 166; 29 T. L. R. 255; 57 Sol. Jo. 282; 6 B. W. C. C. 154, C. A.

Annotations:—**Refd.** Cox *v.* Trollope, [1916] 2 K. B. 682; Calver *v.* Groom & Symonds (1918), 88 L. J. K. B. 129; Twidale *v.* L. & N. E. Ry., [1925] 2 K. B. 455.

3439. ——.]—COX *v.* TROLLOPE (GEORGE) & SONS, No. 3458, *post*.

3440. ——.]—TWIDALE *v.* LONDON & NORTH EASTERN RY. CO., No. 3498, *post*.

ii. *How Calculated.*

See Workmen's Compensation Act, 1925 (c. 84), s. 10 (1).

3441. General rule.]—In order to ascertain the "average weekly earnings" within the meaning of Workmen's Compensation Act, 1897 (c. 37), Sched. I., s. 1 (*b*), the total amount earned by the workman during the previous twelve months should be divided by fifty-two.—KEAST *v.* BARROW HAEMATITE STEEL CO., LTD., *Re* WORKMEN'S COMPENSATION ACT, 1897 (1899), 63 J. P. 56; 15 T. L. R. 141; 1 W. C. C. 99, C. A.

Annotation:—**Refd.** Williams *v.* Poulson (1899), 16 T. L. R. 42.

3442. ——.]—PERRY *v.* WRIGHT, CAIN *v.* LEYLAND & CO. (1900), LTD., BAILEY *v.* KENWORTHY, LTD., GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LTD., No. 3329, *ante*.

3443. ——.]—ANSLOW *v.* CANNOCK CHASE COLLIERY CO., LTD., No. 3431, *ante*.

3444. ——.]—WHITE *v.* WISEMAN, No. 3452, *post*.

3445. ——.]—WEBSTER *v.* HARRISON, TOWNSEND & CO., LTD., No. 3379, *ante*.

3446. Short employment—Presumption of continuance.]—WATTERS *v.* CLOVER, CLAYTON & CO. (1901), 18 T. L. R. 60; 46 Sol. Jo. 67; 4 W. C. C. 138, C. A.

3447. —— ——.]—On an application for an award of compensation under Workmen's Compensation Act, 1897 (c. 37), in the case of a workman who had met with his death from an accident occurring in the course of his employment, it was proved that deceased had been promised work for sixty hours a week at a given rate of wages per hour, but that he was liable to be dismissed at an hour's notice. He actually worked for four days, & the accident which caused his death happened on the fourth day. The county ct. judge awarded the maximum compensation on the basis of an employment to work sixty hours a week at the agreed rate of wages per hour:—*Held:* it was a fair inference from the terms of the engagement that the employment was not casual, but was to continue from week to week; & the county ct. judge was therefore entitled to treat deceased as a person whose standard of wages at the time he met with the accident was sixty hours a week at the agreed rate of wages per hour; & the award must stand.

On an application for an award of compensation under Workmen's Compensation Act, 1897 (c. 37), in the case of a workman who had met with an accident in the course of his employment, it was proved that appct. had worked from Wednesday in one week up to & including Wednesday in the next week, & that he then met with an accident which incapacitated him. The county ct. judge awarded a weekly payment calculated on the basis of an employment to work six days a week at the agreed rate of wages per day:—*Held:* the county ct. judge was not bound to divide the actual sum earned by appct. by two so as to average the amount by reference to the two weeks in which it was earned, but he was entitled on the evidence to arrive at the conclusion that the average weekly earnings of appct. had he had the opportunity of earning wages in two or more weeks, would have been six times the amount of the agreed daily wages, & the award must stand.—AYRES *v.* BUCKERIDGE, WHEALE *v.* RHYMNEY IRON CO., JONES *v.* RHYMNEY IRON CO., [1902] 1 K. B. 57; 71 L. J. K. B. 28; 85 L. T. 472; 65 J. P. 804; 50 W. R. 115; 18 T. L. R. 20; 46 Sol. Jo. 48; 4 W. C. C. 120, C. A.

Annotations:—**Distd.** Case *v.* Colonial Wharves (1905), 53 W. R. 514. **Refd.** Watters *v.* Clover, Clayton (1901), 18 T. L. R. 60; Edwards *v.* Alyn Steel Tinplate Co. (1910), 3 B. W. C. C. 141.

3448. —— **May be reckoned on daily wages.**]—AYRES *v.* BUCKERIDGE, WHEALE *v.* RHYMNEY IRON CO., JONES *v.* RHYMNEY IRON CO., No. 3447, *ante*.

3449. —— **Single week may be regarded.**]—(1) By Workmen's Compensation Act, 1906 (c. 58), Sched. I., s. 1 (*b*), the compensation for an injury under the Act is a weekly payment based upon

PART XIV. SECT. 13, SUB-SECT. 3.—B. (b) i.

n. *Practicability a question for court.*]—*Re* BARRIE & DIAMOND COAL CO., LTD. (1914), 28 W. L. R. 701; 7 Alta. L. R. 138; 6 W. W. R. 651; 17 D. L. R. 385.—CAN.

PART XIV. SECT. 13, SUB-SECT. 3.—B. (b) ii.

3441 i. *General rule.*]—In calculating the average weekly earnings, the actual earnings for each week should be taken, irrespective of the number of working days in that week.—RUSSELL *v.* M'CLUSKEY (1900), 2 F. (Ct. of Sess.) 1312.—SCOT.

3441 ii. ——.]—In order to ascertain the average weekly earnings of a piece-worker whose ordinary week's work is not a full week's work it becomes necessary to make such a computation as is best calculated to give the rate per week at which the worker was being remunerated, while at work.—AWA *v.* TAUPIRI COAL MINES, LTD., [1926] N. Z. L. R. 205.—N.Z.

3449 i. *Short employment—Single week may be regarded.*]—DOYLE *v.* BEATTIE & SONS (1900), 2 F. (Ct. of Sess.) 1166; 37 Sc. L. R. 915; 8 S. L. T. 131.—SCOT.

3449 ii. —— ——.]—Where a work-

the average weekly earnings of the workman during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer. By sect. 2 (*a*), "Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment & in the same district":—*Held:* it is for the county ct. judge in abnormal circumstances to decide what were the average weekly earnings of the workman, & for that purpose he is entitled to take into consideration the nature of the employment, its terms & duration, & the personal qualifications of the workman; but the question whether upon the facts found by him there are two grades or only one grade of employment may be a question of law upon which an appeal will lie.

(2) In the first of two claims under the Act claimant, an able seaman, who could do ship painting & rigging work, was taken on at the London Docks as an "extra casual labourer," & the next day met with an accident. In the docks labourers were divided into A labourers with permanent employment & B labourers who had admission tickets & got employment after the A labourers. Extra casual labourers had a chance of work after the B labourers & at the same rate of pay.

The county ct. judge held that the B labourers & "extra casual labourers" formed only one grade & awarded compensation having regard to the wages of the B labourers:—*Held:* the B labourers & the "extra casual labourers" formed or might form separate grades, & the case must be remitted to the county ct. for reconsideration.

(3) In the second claim claimant, a workman whose ordinary occupation of a meat porter had been suspended owing to a strike at the docks, obtained employment at the docks as a strike breaker, being taken on as an "extra" casual labourer each day for twelve continuous days until his accident. He was given a ticket of admission within the dock gates, but the ticket did not ensure actual employment. For his first completed week he earned 26*s.* 10*d.*, & there was every probability that but for his accident he would have been continuously employed until the end of the dock strike, which lasted for some five weeks after the accident. The county ct. judge took the actual earnings of the first completed week as his guide & awarded appct. a weekly payment of 13*s.* 5*d.* during incapacity:—*Held:* the county court judge, in taking as his guide, in the abnormal circumstances of the case, 26*s.* 10*d.* as the normal wage for a normal six days, had not taken a wrong view of the law, & the award must stand.—BARNETT *v.* PORT OF LONDON AUTHORITY, PRIESTLEY *v.* PORT OF LONDON AUTHORITY, [1913] 2 K. B. 115; 82 L. J. K. B. 353; 108 L. T. 277; 29 T. L. R. 252; 57 Sol. Jo. 282; 6 B. W. C. C. 105, C. A.

Annotations:—As to (1) **Consd.** Snell *v.* Bristol Corpn. [1914] 2 K. B. 291. **Refd.** Godden *v.* Cowlin (1913), 57 Sol. Jo. 282; Cue *v.* Port of London Authority, [1914] 3 K. B. 892; Twidale *v.* L. & N. E. Ry., [1925] 2 K. B. 455.

3450. What time must be allowed—Days when no work done—Only if incidental to employment.]—PERRY *v.* WRIGHT, CAIN *v.* LEYLAND & CO. (1900), LTD., BAILEY *v.* KENWORTHY, LTD., GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LTD., No. 3329, *ante*.

3451. —— —— ——.]—ANSLOW *v.* CANNOCK CHASE COLLIERY CO., LTD., No. 3431, *ante*.

3452. —— —— **Absence due to shortage of work.**]—In calculating a workman's average weekly earnings for twelve months before an accident for the purpose of compensation under Workmen's Compensation Act, 1906 (c. 58), weeks in which he had not work enough to employ him for the whole of every day must be taken into account. The average must be obtained by dividing the total wages earned by the number of working weeks in the year, after allowing for recognised holidays & interruptions by fortuitous accidents.—WHITE *v.* WISEMAN, [1912] 3 K. B. 352; 81 L. J. K. B. 1195; 107 L. T. 277; 28 T. L. R. 542; 56 Sol. Jo. 703; 5 B. W. C. C. 654, C. A.

3453. —— —— **Recognised holidays.**]—WHITE *v.* WISEMAN, No. 3452, *ante*.

3454. —— —— **Interruptions by fortuitous accidents.**]—WHITE *v.* WISEMAN, No. 3452, *ante*.

3455. —— —— **Absence due to fluctuations of trade.**]—In computing "average weekly earnings" under Workmen's Compensation Act, 1906 (c. 58), sched. I., absence from work due to trade fluctuations during a period of war, but arising independently of the war, is not to be excluded as absence due to "unvoidable cause" within Sched. I. (2) (*c*) of the Act.

Even if the absence from work were due to fluctuations of trade caused by war, it ought not to be excluded, as such fluctuations would not, during a period of war, be abnormal incidents of the employment (WARRINGTON, L.J.).—GRIFFITHS *v.* GILBERTSON (W.) & CO., LTD. (1915), 84 L. J. K. B. 1312; 113 L. T. 628; 8 B. W. C. C. 548, C. A.

(*c*) *Where Computation Impracticable.*

See Workmen's Compensation Act, 1925 (c. 84), s. 10 (1).

3456. Question for county court judge.]—BARNETT *v.* PORT OF LONDON AUTHORITY, PRIESTLEY *v.* PORT OF LONDON AUTHORITY, No. 3449, *ante*.

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man in the course of his employment had earned 16*s.* 2*d.* in the first week, & in the second week had worked for two hours but earned nothing & was then injured:—*Held:* 16*s.* 2*d.* represented his average weekly earnings.—NELSON *v.* KERR & MITCHELL (1901), 3 F. (Ct. of Sess.) 893; 38 Sc. L. R. 645; 9 S. L. T. 83.—**SCOT.**

3449 iii. ——.]—BROWN *v.* CUNNINGHAM, LTD. (1904), 6 F. (Ct. of Sess.) 997; 41 Sc. L. R. 835; 12 S. L. T. 231.—**SCOT.**

3450 i. *What time must be allowed—Days when no work done—Only if incidental to employment.*]—Evidence was given at the hearing on behalf of the employers to show that strikes were of such frequent occurrence in the coal mines in the district that they were a normal & recognised incident in the employment. The arbitrator held that in determining the "average weekly earnings" these stoppages should not be considered in estimating the number of weeks of work available for the applicant in the course of the year:—*Held:* on the question whether cessation from work is an incident of the employment is not a question of law but a question of fact.—COLLINS *v.* SOUTH GRETA COLLIERY CO., COXHELL *v.* HEPBURN CO. (1925), 25 S. R. N. S. W. 109; 42 N. S. W. W. N. 16. —**AUS.**

o. —— *Overtime.*]—SOUTH AFRICAN RYS. *v.* MELLETT, N. O., [1916] T. P. D. 596.—**S. AF.**

Sect. 13.—*Amount of compensation: Sub-sect.* 3, *B.* (*c*), (*d*) & (*e*) *i.*]

3457. How calculated—General rule—Reference to earnings of person in same grade of employment.]—PERRY *v.* WRIGHT, CAIN *v.* LEYLAND & CO. (1900), LTD., BAILEY *v.* KENWORTHY, LTD., GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LTD., No. 3329, *ante.*

3458. —— —— ——.]—Appct. was employed by resps. as a scaffolder at a wage of 8½*d.* an hour. On Jan. 27, 1916, he met with an accident arising out of & in the course of his employment & was totally incapacitated. At the time of the accident he had been in the employment of resps. for seven weeks, & his average weekly earnings during that period amounted to £1 7*s.* 8½*d.* There was evidence that scaffolders were usually employed for short periods only by different employers, but that they could generally obtain employment throughout the whole year. They worked longer hours in summer than in winter & consequently earned more money. Appct. estimated his average weekly earnings for a year at £1 15*s.* 10*d.* The county ct. judge held that, having regard to the shortness of the time during which appct. had been in resps.' employment & to the fact that the weekly earnings varied in summer & winter, it was impracticable within the proviso to para. 2 (*a*) of Sched. 1. to the Workmen's Compensation Act, 1906 (c. 58), to compute fairly the rate of appct.'s remuneration by reference to his earnings during the seven weeks' employment, & he accordingly awarded compensation at the rate of 17*s.* 11*d.* a week by reference to the average weekly earnings of a person in the same grade employed in the same class of employment & in the same district: —*Held:* the words "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated" at the beginning of para. 2 (*a*) were the dominant guiding words of the paragraph & were quite sufficient to justify the county ct. judge in adopting the course he did.—COX *v.* TROLLOPE (GEORGE) & SONS, [1916] 2 K. B. 682; 85 L. J. K. B. 1652; 115 L. T. 394; 32 T. L. R. 670; 9 B. W. C. C. 524, C. A.

Annotation:—**Refd.** Twidale *v.* L. & N. E. Ry., [1925] 2 K. B. 455.

3459. —— **Estimate may be made.**]—CALVER *v.* GROOM & SYMONDS, No. 3360, *ante.*

3460. What may be taken into consideration—Personal capacity of workman.] — PERRY *v.* WRIGHT, CAIN *v.* LEYLAND & CO. (1900), LTD., BAILEY *v.* KENWORTHY, LTD., GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LTD., No. 3329, *ante.*

3461. —— ——.]—BARNETT *v.* PORT OF LONDON AUTHORITY, PRIESTLEY *v.* PORT OF LONDON AUTHORITY, No. 3449, *ante.*

3462. —— ——.]—CUE *v.* PORT OF LONDON AUTHORITY, No. 3333, *ante.*

3463. —— ——.]—SNELL *v.* BRISTOL CORPN., No. 3363, *ante.*

3464. —— **Terms & duration of employment.**]—BARNETT *v.* PORT OF LONDON AUTHORITY, PRIESTLEY *v.* PORT OF LONDON AUTHORITY, No. 3449, *ante.*

3465. What are earnings of person in same grade of employment—Meaning of grade—Question for judge.]—PERRY *v.* WRIGHT, CAIN *v.* LEYLAND & CO. (1900), LTD., BAILEY *v.* KENWORTHY, LTD., GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LTD., No. 3329, *ante.*

3466. —— **Earnings of applicant at similar work for previous employer.**]—A workman was engaged to break up old metal by blasting. He had no regular hours of work & his employment was rather intermittent. He was injured by an explosion in the course of his work & claimed compensation. The question then arose whether he was a workman within Workmen's Compensation Act, 1906 (c. 58), or an independent contractor. The county ct. judge found that he was a workman within the meaning of the Act on the ground that the work was such that he could not delegate it to any one else. It was held by the Ct. of Appeal that the judge had applied the wrong test, & that the proper test was the employer's power of control over his work, & the Ct. of Appeal ordered a rehearing. On the rehearing the county ct. judge found that the man was working under a contract of service & affirmed the award.

On the question of the amount of compensation, the judge found that appct. had been working only intermittently for resps. & the employment with them was of a casual nature. He had only earned a small sum while in their employment, but that he had earned £4 10*s.* a week while doing similar work for a previous employer, which work had terminated shortly before the accident. He assessed the compensation on the basis of appct.'s being able to earn a sum of £2 per week, & awarded accordingly a weekly payment of £1. In arriving at this figure the judge regarded the earnings with the previous employer as earnings of a person in the same grade at the same class of employment: —*Held:* (1) the county ct. judge having considered the question of control, there was evidence to support his finding that the man was employed under a contract of service & therefore a "workman" & there was no misdirection; (2) as regards the scale of compensation, the appct.'s earnings at similar work for his previous employer might properly be regarded as the earnings of a "person in the same grade employed in the same class of employment & in the same district," within Workmen's Compensation Act, 1906 (c. 58), sched. I. (2) (*a*), & were therefore a proper basis for assessment of the compensation due to appct. —UNDERWOOD *v.* PERRY & SON, LTD. (No. 2) (1922), 15 B. W. C. C. 257, C. A.

(*d*) *Concurrent Contracts of Service.*

See Workmen's Compensation Act, 1925 (c. 84), s. 10 (ii.).

3467. Earnings under concurrent contracts to be taken into account.] — RAPHAEL (OWNERS) *v.* BRANDY, No. 3470, *post.*

3468. —— **Effect of rule providing for exclusive service.**]—Where a workman is employed concurrently under two or more contracts of service, they need not be *ejusdem generis* in order to be "concurrent contracts of service" within the meaning of Workmen's Compensation Act, 1906 (c. 58), sched. I., clause 2 (*b*).

A workman was employed by a railway co. as a platelayer, his hours of work being from 6 a.m. to 5 p.m. on week days, except Saturdays, when he finished work at 12 noon. He also worked of an evening as checktaker at a theatre under a contract of service. When the workman was first taken into the railway co.'s employment, he was handed a book entitled "Rules & Regulations for the Guidance of Officers & Men" in this co.'s employment. Rule 1 provided that "persons

3467 *l. Earnings under concurrent contracts to be taken into account.*]—RIORDAN *v.* O'NEILL (1916), 10 B. W. C. C. 498, n.—IR.

employed by the co. must devote themselves exclusively to the co.'s services." The workman, having met with an accident while working for the railway co. made a claim for compensation under Workmen's Compensation Act, 1906 (c. 58): —*Held:* rule 1, on its true construction, only meant that the workman was to devote himself exclusively to the co.'s service during the actual hours of his employment, by them &, notwithstanding that rule, the workmen's compensation must be computed on the footing that his "average weekly earnings" were the combined earnings in his two concurrent employments in accordance with Workmen's Compensation Act, 1906 (c. 58), sched. I., clause 2 (*b*).—LLOYD *v.* MIDLAND RY. CO., [1914] 2 K. B. 53; 83 L. J. K. B. 330; 110 L. T. 513; 30 T. L. R. 247; 58 Sol. Jo. 249; 7 B. W. C. C. 72, C. A.

3469. What are earnings under concurrent contract—Teaching music in spare time.]—Appct. was employed in a laundry, at 7*s.* a week wages, where she met with an accident to her hand. She was also earning 3*s.* a week by teaching music in her spare time to a neighbour's children:—*Held:* (1) appct. was not entitled to compensation under clause 2 (*b*) of Schedule I. to the Workmen's Compensation Act, 1906 (c. 58), on the footing of having entered into "concurrent contracts of service" with two employers, but only under clause 1 (*a*) on the footing of the weekly wages of 7*s.*

(2) It is for the arbitrator to decide on the circumstances of each particular case whether a professional person is a "workman" within the meaning of the Act, & unless he has misdirected himself the Ct. of Appeal ought not to interfere.

(3) *Semble:* an usher in a private school, or a teacher in a provided or non-provided school, or a nursery governess, would, under ordinary circumstances, be entitled to claim the benefit of the Act.—SIMMONS *v.* HEATH LAUNDRY CO., [1910] 1 K. B. 543; 79 L. J. K. B. 395; 102 L. T. 210; 26 T. L. R. 326; 54 Sol. Jo. 392; 3 B. W. C. C. 200, C. A.

Annotations:—*As to* (1) **Refd.** Brandy *v.* S.S. Raphael (1910), 80 L. J. K. B. 217. *As to* (2) **Refd.** Doggett *v.* Waterloo Taxi-Cab Co., [1910] 2 K. B. 336; Wilmerson *v.* Lynn & Hamburg SS. Co. (1913), 82 L. J. K. B. 1064; Hughes *v.* Quinn (1917), 11 B. W. C. C. 420. *Generally.* **Mentd.** *Re* Morison (1912), 106 L. T. 731; Scottish Insce. Comrs. *v.* Royal Infirmary of Edinburgh (1913), 6 B. W. C. C. N. 120; Wray *v.* Taylor (1913), 109 L. T. 120; University of London Press *v.* University Tutorial Press, [1916] 2 Ch. 601.

3470. —— Retainer to stoker in Royal Naval Reserve.]—A stoker on board a merchant ship, who was entitled to wages from the shipowners, & also as a stoker in the Royal Naval Reserve to £6 a year as a retainer, was injured by an accident on the ship which disabled him from continuing to serve in the Royal Naval Reserve:—*Held:* the stoker was entitled under Workmen's Compensation Act, 1906 (c. 58), to compensation from the shipowners not only in respect of his wages but also of the retainer, which must be taken into account as earnings under a concurrent contract of service.—RAPHAEL (OWNERS) *v.* BRANDY, [1911] A. C. 413; 80 L. J. K. B. 1067; 105 L. T. 116; 27 T. L. R. 497; 55 Sol. Jo. 579; 4 B. W. C. C. 307, H. L.; *affg.* S. C. *sub nom.* BRANDY *v.* RAPHAEL (OWNERS), [1911] 1 K. B. 376, C. A.

Annotation:—**Apld.** Port of London Authority *v.* Gray, [1919] 1 K. B. 65.

3471. —— Casual labourer.]—CUE *v.* PORT OF LONDON AUTHORITY, No. 3333, *ante*.

3472. —— Miner acting as trade union delegate.]—A miner was injured at work in circumstances which admittedly entitled him to compensation from the mine owners. In assessing his average weekly earnings, it was contended on his behalf that there should be included, in addition to his weekly wages as a miner, certain payments made to him, during the twelve months prior to the accident, (*a*) by his union, for carrying out the duties of a branch delegate, he having been elected as such by his branch in accordance with the rules of the union; (*b*) from a fund, contributed to by his fellow miners, for acting as the person appointed by them to inspect the mine under Coal Mines Act, 1911 (c. 50), s. 16 (1); & (*c*) from a similar fund, for carrying out inspecting work with reference to certain matters arising under the Coal Mines (Minimum Wage) Act, 1912 (c. 2), s. 1 (2). During the time the man was carrying out the above duties he was not paid by the mine owners:—*Held:* the additional payments could not be included in assessing the miner's average weekly earnings; they were not received under concurrent contracts of service because with regard to (*a*) there was no relation of master & servant between the delegate & his branch, or his union, & no contract of service therefore existed; with regard to (*b*) & (*c*) the miner in carrying out his statutory duties, acted as a skilled expert, was subject to no control, & was therefore also under no contract of service; the payments were not received in respect of any work done in fulfilment of the miner's contract of service with the owners, & the principle of *Great Western Ry. Co.* v. *Helps*, No. 3420, *ante*, did not therefore apply.—WILD *v.* BROWN (JOHN) & CO., [1919] 1 K. B. 134; 88 L. J. K. B. 119; 120 L. T. 143; 35 T. L. R. 51; 63 Sol. Jo. 67; 11 B. W. C. C. 237, C. A.

3473. —— Miner acting as statutory inspector.]—WILD *v.* BROWN (JOHN) & CO., No. 3472, *ante*.

(*c*) *Break in Employment.*

i. *In General.*

See Workmen's Compensation Act, 1925 (c. 84), s. 10 (iii).

3474. How calculated—From commencement of new employment.]—HEWLETT *v.* HEPBURN & CO., No. 3480, *post*.

3475. —— ——.]—A workman was employed by a firm of coal-owners from Oct. 3, 1897, to Mar. 31, 1898, when the workman went out on strike & the contract of employment was duly determined by notice. He remained on strike for five months, & on Sept. 12, 1898, again entered the service of the same employers under a fresh contract of employment containing different terms; on Oct. 3, 1898, he was injured by an accident arising out of & in the course of his employment:—*Held:* the period of employment contemplated by Workmen's Compensation Act, 1897 (c. 37), sched. I. (1) (*b*), was a substantially continuous employment during which the relation of master & servant substantially existed between the employer & workman, & therefore, in ascertaining the workman's average weekly earnings, regard could only be had to the period of employment between the end of the strike & the date of the accident, the employment before the strike having been duly determined by the act of the parties.—JONES *v.* OCEAN COAL CO., [1899] 2 Q. B. 124; 68 L. J. Q. B. 731; 80 L. T. 582; 47 W. R. 484; 15 T. L. R. 339; 43 Sol. Jo. 454; 1 W. C. C. 94, C. A.

Annotations:—**Apld.** Appleby *v.* Horseley Co., [1899] 2 Q. B. 521. **Folld.** Giles *v.* Bolford, Smith, [1903] 1 K. B. 843. **Distd.** Price *v.* Guest, Keen & Nettlefolds, [1917] 1 K. B. 780. **Refd.** Hathaway *v.* Argus Printing Co. (1900), 70 L. J. Q. B. 12; Gill *v.* Fortescue (1913), 6 B. W. C. C. 577.

Sect. 13.—*Amount of compensation: Sub-sect.* 3, *B.* (*e*) *i. & ii., &* (*f*) *i. & ii., &* (*g*).]

3476. ——.]—A stevedore's labourer became entitled to receive from his employers, who were master stevedores, compensation for injury by accident. He had worked for them irregularly from time to time, according as his services were needed, for the twelve months preceding the accident. He was paid by the hour, it being an understood thing in this kind of employment that he would work overtime, at a larger rate of wages per hour, when required so to do. The county ct. judge found as a fact that he had worked continuously for the same employers for the seventeen days preceding the accident, & that for the eight days preceding that period of continuous work, there had been a break in the employment. He therefore awarded compensation upon the basis of the labourer's average weekly earnings, including therein the amount earned for overtime, during the period of seventeen days, preceding the accident:—*Held:* there being evidence justifying the finding by the county ct. judge as to the break in the employment, the compensation was assessed upon the right basis.—GILES *v.* BELFORD, SMITH & Co., [1903] 1 K. B. 843; 72 L. J. K. B. 569; 88 L. T. 754; 67 J. P. 399; 51 W. R. 692; 19 T. L. R. 422; 47 Sol. Jo. 470; 5 W. C. C. 136, C. A.

Annotation:—**Refd.** Gill *v.* Fortescue (1913), 6 B. W. C. C. 577.

3477. ——.]—Deceased workman had been employed for three years; one hundred & nineteen weeks by one employer, then twenty-nine weeks by other employers, & then eight weeks by the first employer, when he was killed by accident. A claim for compensation was made on behalf of the children; the widow, who was joined as resp., took no part in this claim as she wished to make a claim under Lord Campbell's Act. The county ct. judge computed the average weekly earnings by treating the one hundred & nineteen weeks as continuous employment & dividing the total amount earned during this period by one hundred & nineteen & multiplying the result by one hundred & fifty-six. He awarded the total thus obtained to the children:—*Held:* there was misdirection, but the case being settled it should not be remitted. The children were entitled to the whole amount awarded as the widow had waived her rights to any share in the compensation.—GILL *v.* FORTESCUE (N.) & SONS, LTD. (1913), 6 B. W. C. C. 577, C. A.

ii. *What Constitutes Break.*

See Workmen's Compensation Act, 1925 (c. 84), s. 10 (iii).

3478. Intermittent employment.]—WILLIAMS *v.* POULSON, No. 3495, *post.*

3479. ——.]—HUNTER *v.* SOUTH SHIELDS CORPN., No. 3494, *post.*

3480. Absence for eleven weeks—Return without fresh engagement.]—Where there has been a break in the employment, the average weekly earnings must be calculated from the commencement of the new employment. If a man is away from work for eleven weeks & returns without any fresh engagement, having left his tools on the job, there is evidence of a break in the employment.

Qu.: must there be a continuity of contractual engagement.—HEWLETT *v.* HEPBURN & Co. (1899), 16 T. L. R. 56; 2 W. C. C. 123, C. A.

3481. Strike.]—JONES *v.* OCEAN COAL CO., No. 3475, *ante.*

3482. ——.]—PRICE *v.* GUEST, KEEN & NETTLEFOLDS, No. 3325, *ante.*

3483. Absence from illness.]—PERRY *v.* WRIGHT, CAIN *v.* LEYLAND & Co. (1900), LTD., BAILEY *v.* KENWORTHY, LTD., GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LTD., No. 3329, *ante.*

3484. Change of grade.]—PRICE *v.* MARSDEN (J.) & SONS, No. 3487, *post.*

3485. ——.]—PERRY *v.* WRIGHT, CAIN *v.* LEYLAND & Co. (1900), LTD., BAILEY *v.* KENWORTHY, LTD., GOUGH *v.* CRAWSHAY BROTHERS, CYFARTHA, LTD., No. 3329, *ante.*

3486. —— **As result of injury by accident.**]—In Dec. 1908, a collier was injured by accident. In Dec. 1909, he tried to resume his old work as a collier with the same employers, but being unable to do it was given work by them as a ventilation or windroad man, work paid by the day, not piecework. In Jan. 1910, he died from an accident within the meaning of the Act. A county ct. judge held that there had been a break in the continuity of his employment & he assessed the compensation for the dependants upon the basis of his earnings as a windroad man:—*Held:* the question was one of fact for the county ct. judge, & there being evidence to support it, the ct. would not interfere with his decision.—WILLIAMS *v.* WYNNSTAY COLLIERIES, LTD. (1910), 3 B. W. C. C. 473, C. A.

(*f*) *Employment in Different Grades.*

i. *In General.*

3487. Temporary employment in higher grade—Whole earnings to be taken into account.]—(1) The provision in Workmen's Compensation Act, 1897 (c. 37), sched. I. 1 (*b*), that where total or partial incapacity for work results from an injury, the subject of compensation under the Act, the amount of compensation shall be a weekly payment during the incapacity, after the second week, not exceeding 50 per cent. of the workman's average weekly earnings during the previous twelve months, "if he has been so long employed," means if he has been so long employed in the employment of the same employer.

(2) Where the workman has during the previous twelve months been employed in the employment of the same employer, compensation in case of personal injury must be based upon his average weekly earnings during the whole twelve months, although during the twelve months he may have passed into a higher grade of employment at higher weekly wages.—PRICE *v.* MARSDEN (J.) & SONS, [1899] 1 Q. B. 493; 68 L. J. Q. B. 307; 80 L. T. 15; 47 W. R. 274; 15 T. L. R. 184; 1 W. C. C. 108, C. A.

Annotations:—*As to* (1) **Folld.** Williams *v.* Poulson, *Re* Workmen's Compensation Act, 1897 (1899), 63 J. P. 757. **Refd.** Hathaway *v.* Argus Printing Co. (1900), 70 L. J. Q. B. 12.

PART XIV. SECT. 13, SUB-SECT. 3.—B. (e) ii.

3483 i. *Absence from illness.*]—GIBB *v.* DUNLOP & Co., LTD. (1902), 4 F. (Ct. of Sess.) 971; 39 Sc. L. R. 750; 10 S. L. T. 184.—**SCOT.**

3483 ii. ——.]—CARTER *v.* LANG & SONS, [1908] S. C. 1198; 45 Sc. L. R. 938; 16 S. L. T. 345; 1 B. W. C. C. 379.—**SCOT.**

3484 i. *Change of grade.*]—DALGLEISH *v.* EDINBURGH ROPERIE & SAIL CLOTH CO., LTD., [1913] S. C. 1007; 50 Sc. L. R. 916.—**SCOT.**

p. Dismissal in one capacity—Entering into employment in another capacity.]—HUNTER *v.* BAIRD (1904), 7 F. (Ct. of Sess.) 304.—**SCOT.**

PART XIV. SECT. 13, SUB-SECT. 3.—B. (f) i.

q. Temporary employment in higher grade—What earnings to be taken into account.]—BABCOCK & WILCOX, LTD. *v.* YOUNG (1911), 4 B. W. C. C. 367.—**SCOT.**

3488. —— ——.]—A workman was employed as a casual labourer for five weeks, when he met with an accident in the course of that employment. Occasionally during that time he had been employed to take the place of a grinder who was ill, for which he received higher remuneration, but he had not been employed as a grinder for fourteen days before the accident:—*Held:* in considering the amount of compensation to be awarded, the earnings in both capacities should be taken into account.—DOBSON *v.* BRITISH OIL & CAKE MILLS, LTD. (1912), 106 L. T. 922; 5 B. W. C. C. 405, C. A.

Annotations:—**Consd.** Edge *v.* Gorton, [1912] 3 K. B. 360. **Folld.** Jury *v.* S.S. Atlanta, [1912] 3 K. B. 366.

3489. —— ——.]—JURY *v.* ATLANTA (OWNERS), No. 3491, *post.*

3490. —— ——.]—EDGE *v.* GORTON (J.), LTD., No. 3493, *post.*

ii. *What is Change of Grade.*

3491. Question of law.]—A sailor who had for some time been employed in various capacities & at various rates of wages by applts., who were shipowners, on Feb. 3, 1912, was taken on temporarily as a mate in the place of his son, who had met with an accident. On Feb. 6, while thus employed as mate on board applts.' vessel, he was drowned. Upon an application for compensation by his dependants, the county ct. judge held that the man's "grade" at the time of his death was that of a mate, & he assessed compensation accordingly:—*Held:* the question of what grade the man occupied was not one merely of fact upon which the decision of the county ct. judge was final, but it was a question of law whether, upon the facts as found, the workman occupied a grade within Workmen's Compensation Act, 1906 (c. 58), sched. I. (1), (2); the workman was at the time of his death temporarily acting as a mate, & the county ct. judge must ascertain as best he could the "average weekly earnings" of the man, taking into consideration the various rates of his wages.—JURY *v.* ATLANTA (OWNERS), [1912] 3 K. B. 366; 81 L. J. K. B. 1182; 107 L. T. 366; 28 T. L. R. 562; 56 Sol. Jo. 703; 5 B. W. C. C. 681, C. A.

Annotations:—**Refd.** Barnett *v.* Port of London Authority, Priestley *v.* Port of London Authority, [1913] 2 K. B. 115; Snell *v.* Bristol Corpn., [1914] 2 K. B. 291.

3492. ——.]—BARNETT *v.* PORT OF LONDON AUTHORITY, PRIESTLEY *v.* PORT OF LONDON AUTHORITY, No. 3449, *ante.*

3493. Not temporary employment in higher grade.]—A workman was first employed by resps. on May 19, 1911, as a casual carter, his duty being to drive a one-horse cart. On July 27, 1911, he died from the effects of an accident arising out of & in the course of his employment. At the date of the accident & for about a fortnight before he had been working for resps. as a casual teamster & receiving a higher wage. Upon an application by dependants of deceased for compensation under Workmen's Compensation Act, 1906 (c. 58), the county ct. judge found as a fact that the workman had only been employed temporarily & casually as a teamster, & in calculating the "average weekly earnings" he took into account the total amount of wages earned by the workman, whether as a casual carter or as a casual teamster, from May 19 until his death:—*Held:* there had been no change of "grade" in the employment of the workman, & the method of calculation adopted by the county court judge was right.—EDGE *v.* GORTON (J.), LTD., [1912] 3 K. B. 360; 81 L. J. K. B. 1185; 107 L. T. 340; 28 T. L. R. 506; 56 Sol. Jo. 719; 5 B. W. C. C. 614, C. A.

(*g*) *Casual Employment.*

3494. General rule—Earnings of workman in same grade to be regarded.]—Appct., having registered at the Labour Exchange as an unemployed man, was given occasional relief by the resp. corpn. under a scheme whereby work was allocated among the unemployed. Appct. was first employed by resp. corpn. under the scheme in July, 1921, & afterwards for periods of one week each on eight occasions in a total period of forty-two weeks. In May, 1922, he was injured by accident in the course of his employment & claimed compensation. The county ct. judge held that the employment had been continuous, & awarded compensation on the basis of the average weekly earnings during the whole period of forty-two weeks, *i.e.* by dividing the actual amount earned by forty-two:—*Held:* the county ct. judge had assessed the compensation on a wrong basis; the employment was of a casual nature, & therefore regard should have been had to the average weekly amount earned by a person in the same grade as the injured workman.—HUNTER *v.* SOUTH SHIELDS CORPN. (1922), 15 B. W. C. C. 261, C. A.

3495. What may be taken into account—Earnings from other employers.]—A casual dock labourer met with an accident after being in employment for three & a half days. During the previous twelve months he had worked for many employers, & at various times for resp. who had engaged him in every week except four during a long period, but sometimes for only one day. The county ct. judge added together the sums earned in resp.'s employment during the twelve months, divided the total by fifty-two, & awarded 50 per cent. as weekly compensation:—*Held:* (1) earnings from other employers could not be taken into consideration, & weekly compensation should not be calculated when a workman had been in employment less than a week as if he had been in the employment for two weeks at the same rate of daily wages as he was earning at the time of the accident; (2) there was evidence of continuous employment.—WILLIAMS *v.* POULSON (1899), 63 J. P. 757; 16 T. L. R. 42; 2 W. C. C. 126, C. A.

Annotations:—**Apld.** Giles *v.* Belford, Smith, [1903] 1 K. B. 843. **Refd.** Hathaway *v.* Argus Printing Co. (1900), 70 L. J. Q. B. 12.

3496. —— ——.]—CUE *v.* PORT OF LONDON AUTHORITY, No. 3333, *ante.*

3497. —— ——.]—ALDERMAN *v.* WARREN, No. 2202, *ante.*

3498. —— ——.]—Appct. who was a dock labourer, met with an accident whilst in the employment of resps. which resulted in his total incapacity. His employment was of a casual nature: he was employed by the job, but paid daily. Although he worked principally for resps. he was in fact employed from time to time by other employers. In arbn. proceedings in the county ct. to determine the amount of the weekly payment to which appct. was entitled under Workmen's Compensation Acts, a statement was put in showing the payments made by resps. during the twelve months preceding the accident. This statement admittedly showed that in the last seven weeks, during which period he apparently worked for resps. alone, he received from them altogether a sum which, when divided by the number of weeks, gave an average of considerably over £3 per week. It was also admitted that the sum earned during the whole twelve months if divided by the number of days on which he was actually employed by resps. would work out at

Sect. 13.—*Amount of compensation: Sub-sect.* 3, *B.* (*g*). *Sect.* 14: *Sub-sects.* 1 & 2.]

more than £3 per week, but that if divided by the number of weeks in which he worked for resps. it would give an average of considerably less than £3 per week. It was further admitted that during this period appct. worked for other employers besides resps. & appct. stated in evidence that if the sums received by him from such other employers were added to the amounts received from resps. his average earnings would amount to more than £3 per week. Resps. put in statements showing the amounts paid by them during the same twelve months to two other dock labourers in the same grade as appct. These statements did not show the number of days worked, but the total sum, earned in each case when divided by the number of weeks gave a figure of considerably less than £3. It was, however, admitted that each of these men worked during the twelve months for other employers besides resps. The county ct. judge, being of opinion that he had sufficient material to enable him to compute appct.'s "average weekly earning" without having recourse to the proviso in Workmen's Compensation Act, 1906 (c. 58), Sched. I. (2) (*a*), held upon the evidence that appct. was being remunerated at the rate of over £3 per week, & made an award for the weekly sum of £1 10*s.*:—*Held:* the question was one of fact for the county ct. judge; in computing the average weekly earnings he was entitled to take into consideration the wages paid by the other employers besides resps., & there was evidence before him which enabled him to arrive at the conclusion he did.—TWIDALE *v.* LONDON & NORTH EASTERN RY. CO., [1925] 2 K. B. 455; 95 L. J. K. B. 292; 133 L. T. 442; 18 B. W. C. C. 218, C. A.

3499. —— Not earnings in independent business—Rag & bone merchants.]—ALDERMAN *v.* WARREN, No. 2202, *ante.*

3500. —— —— Jobbing gardener.]—Appct. was in the employment of resp. as a jobbing gardener at wages which usually amounted to 10*s.* per week, he being regularly employed at the rate of 5*s.* per day one day per week, but as a rule he did another day's work for the same employer. He had been in that employment for more than twelve months before Feb. 9, 1915, on which date he met with an accident while engaged in trimming a hedge which resulted in the loss of his left eye. Liability on the part of resp. to pay compensation to appct. was admitted. The only question, therefore, to be determined was the amount of the compensation payable to appct. It appeared from appct.'s evidence that he was engaged on various other jobs of a casual nature. But there was no evidence to show that any of such casual employment constituted a true contract of service:—*Held:* regard must be had only to the wages that appct. earned from resp. for the twelve months previous to the accident; & the fact that his income was increased by earnings derived from work not performed under contract of service could not be taken into consideration.—SALES *v.* ABBOTT (1916), 85 L. J. K. B. 1666; 114 L. T. 819; 32 T. L. R. 374; 9 B. W. C. C. 333, C. A.

3501. Employment for short period—Fruit picker.]—A fruit picker was employed in the fruit picking season for three weeks, & had earned 32*s.* 11*d.* when she met with an accident. She had not been employed at all during the previous twelve months, but had picked fruit in the season of the year before that. The county ct. judge estimated the average weekly earnings of a damson picker, earning 11*s.* a day during the season, at 70*s.* a year or 1*s.* 4*d.* a week, & awarded 8*d.* a week compensation. The fruit picker appealed on the ground that the county ct. judge had estimated the earnings in the wrong grade of fruit pickers:—*Held:* without deciding any question of grade, the judge had made the best estimate possible in the circumstances.—WILLIAMS *v.* HOLLINGS (1915), 9 B. W. C. C. 47, C. A.

Annotation:—**Apld.** Bones *v.* Associated Portland Cement Manufacturers (1900), Ltd. (1920), 90 L. J. K. B. 456.

3502. —— Schoolboy employed in holidays.]—A schoolboy, eleven years of age, was employed in the last week of his Christmas holidays, in Dec. 1918, under a permit to his employers to employ schoolboys during their holidays, on a casual job at a wage of 1*s.* a day. He met with an accident on the first day of his employment, by which he lost his left leg. There was no evidence that he had ever earned any money before, or was likely to earn any money again, at similar jobs in his holidays. It was admitted that he also earned 2*s.* a week from a greengrocer. The arbitrator computed his average weekly earnings *per annum* from the employment at 2*d.* a week, based on a probable duration of employment of one week *per annum* at 6*s.* a week, making with the 2*s.* a week from the greengrocer 2*s.* 2*d.* a week, which sum he awarded as compensation:—*Held:* the arbitrator had properly computed the compensation in accordance with Workmen's Compensation Act, 1906 (c. 58), Sched. I., para. 2 (*a*).—BONES *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LTD. (1920), 90 L. J. K. B. 456; 124 L. T. 1; 13 B. W. C. C. 120, C. A.

SECT. 14.—ORDERS AND AWARDS AS TO COMPENSATION.

SUB-SECT. 1.—RETROSPECTIVE ORDERS AND AWARDS.

3503. Whether court has power to make——Application specifying no date for complete recovery—From date prior to hearing of application.]—When an application to review a weekly payment made under Workmen's Compensation Act, 1897 (c. 37), on the ground that the workman's incapacity has ceased, is brought before an arbitrator, he is not bound to treat the agreement for or award of a weekly payment as enforceable up to the time of his decision, but has jurisdiction to inquire whether the incapacity had ceased when the application to review was made, or at any & what subsequent time before the hearing, & to make his award with reference to the date so determined.—MORTON & CO., LTD. *v.* WOODWARD, [1902] 2 K. B. 276; 71 L. J. K. B. 736; 86 L. T. 878; 66 J. P. 660; 51 W. R. 54; 4 W. C. C. 143, C. A.

Annotations:—**Expld.** Charing Cross, Euston & Hampstead Ry. *v.* Boots, [1909] 2 K. B. 640. **Apprvd.** Gibson *v.* Wishart, [1915] A. C. 18. **Refd.** Upper Forest & Western Steel & Tinplate Co. *v.* Thomas, [1909] 2 K. B. 631; Ocean Coal Co. *v.* Davies (1926), 135 L. T. 498.

3504. —— —— Not from date anterior to application.]—An application under Workmen's Compensation Act, 1897 (c. 37), to record an agreement between a workman who had been injured by an accident arising out of & in the course of his employment & his employer for payment of a weekly sum to the workman during incapacity was opposed by the employer on the ground that the man had recovered. The county ct. judge, however, ordered the agreement to be recorded, but granted a stay to enable the employer to apply for a review. The employer by his

application to review asked for termination of the weekly payment, the ground alleged in the particulars being that "resp. has completely recovered" from the accident, without specifying any date. The county ct. judge found that the incapacity of the workman had ceased at an antecedent date & ordered that the payment should terminate from that date:—*Held:* upon an application to review in this form the judge had no jurisdiction to order a review from a date antecedent to the application, & the award ought to be set aside.—UPPER FOREST & WESTERN STEEL & TINPLATE CO., LTD. *v.* THOMAS, [1909] 2 K. B. 631; 78 L. J. K. B. 1113; 2 B. W. C. C. 414, C. A.

Annotations:—**Folld.** Charing Cross, Euston & Hampstead Ry. *v.* Boots, [1909] 2 K. B. 340. **Refd.** Gibson *v.* Wishart, [1915] A. C. 18.

3505. —— —— ——.]—(1) Upon an application under Workmen's Compensation Act, 1906 (c. 58), for a review & termination of a weekly payment payable by way of compensation to a workman who has been injured by an accident arising out of & in the course of his employment, under an agreement between the employer & the workman, where the ground on which termination is claimed is stated in the particulars to be that the incapacity resulting from the injury has ceased, without specifying any date, it is not competent to the arbitrator to award that the payment shall terminate from a date antecedent to the application to review.

(2) *Semble:* where the application to review asks in express terms for termination from a definite antecedent date it is competent to the arbitrator to order termination from that date.—CHARING CROSS, EUSTON & HAMPSTEAD RY. CO. *v.* BOOTS, [1909] 2 K. B. 640; 78 L. J. K. B. 1115; 101 L. T. 53; 25 T. L. R. 683; 2 B. W. C. C. 385, C. A.

Annotations:—*As to* (2) **Apld.** Bagley *v.* Furness, Withy, [1914] 3 K. B. 974. **Apprvd.** Gibson *v.* Wishart, [1915] A. C. 18. *Generally,* **Mentd.** Cory *v.* Hughes, [1911] 2 K. B. 738; Popple *v.* Frodingham Iron & Steel Co., [1912] 2 K. B. 141.

3506. —— **Where such order expressly asked for.**]—CHARING CROSS, EUSTON & HAMPSTEAD RY. CO. *v.* BOOTS, No. 3505, *ante.*

3507. —— ——.]—WILLIAMS *v.* BWLLFA & MERTHYR DARE STEAM COLLIERIES (1891), LTD., No. 3760, *post.*

3508. —— ——.]—BRIGGS *v.* DRYDEN (T.) & SONS, TALBOT *v.* VICKERS, LTD., No. 3752, *post.*

3509. —— **Date of recovery fairly raised.**]—Upon an application under Workmen's Compensation Act, 1906 (c. 58), for a review & termination of a weekly payment payable by way of compensation to a workman who had been injured by an accident arising out of & in the course of his employment, where the issue whether the incapacity has ceased & when is fairly raised, there is jurisdiction to make an order terminating the weekly payment as from a date antecedent to the date of the application for review.—BAGLEY *v.* FURNESS, WITHY & CO., LTD., [1914] 3 K. B. 974; 83 L. J. K. B. 1546; 7 B. W. C. C. 560, C. A.

3510. —— ——.]—A workman was injured by accident in the course of his employment & obtained an award of compensation on the basis of total incapacity. Subsequently, being partially recovered, he was given light work by his employers at reduced wages. The employers on Apr. 15, 1922, filed a request for review of the weekly payment & asked for a diminution, adding that the injured workman had been working for them & receiving wages from Nov. 21, 1921. The deputy county ct. judge ordered diminution from Mar. 6, 1922:—*Held:* the application to diminish, coupled with the statement that the workman had been earning since Nov. 21, 1921, gave the judge power to diminish the weekly payment as from that date, which on the evidence he should have done.—CHURCH, ASHBY & CO. *v.* WADDINGTON (1922), 15 B. W. C. C. 183, C. A.

3511. —— **Payment in fact terminated from antecedent date.**]—Where an injured workman who is in receipt of compensation under Workmen's Compensation Act, 1906 (c. 58), completely recovers from his incapacity, & no further payment is made to him thereafter it is competent to the arbitrator, upon an application to review asking for the termination of the weekly payments as from the date of recovery, to terminate the weekly payments as from that date. *Semble:* the same principle applies to an application to diminish or increase the weekly payments.

Qu.: whether payments made after the date of recovery can be recovered by the employer.—GIBSON (GEORGE) & CO. *v.* WISHART, [1915] A. C. 18; 83 L. J. P. C. 321; 111 L. T. 466; 30 T. L. R. 540; 58 Sol. Jo. 592; 7 B. W. C. C. 348, H. L.

Annotations:—**Folld.** Bagley *v.* Furness, Withy, [1914] 3 K. B. 974. **Apld.** Church, Ashby *v.* Waddington (1922), 15 B. W. C. C. 183; Talbot *v.* Vickers, [1925] 2 K. B. 682. **Consd.** Ocean Coal Co. *v.* Davies (1926), 43 T. L. R. 108. **Refd.** Watson *v.* Beardmore (1914), 7 B. W. C. C. 913. **Mentd.** Hunter *v.* Städtische Hochseefischerei Gesellschaft, [1925] 2 K. B. 493; Lindsay *v.* Glasgow Iron & Steel Co. (1925), 18 B. W. C. C. 600.

3512. —— **Necessity for evidence of incapacity during period.**]—WILLIAMS *v.* BWLLFA & MERTHYR DARE STEAM COLLIERIES (1891), LTD., No. 3760, *post.*

Set off of overpayment.]—*See* Sub-sect. 4, *post.*

SUB-SECT. 2.—PROSPECTIVE ORDERS AND AWARDS.

3513. Validity of—Jurisdiction of arbitrator—Onus shifted to workman.]—On an application to review weekly payments under Workmen's Compensation Act, 1906 (c. 58), an arbitrator has no jurisdiction to make a prospective award terminating the compensation at a given date. An arbitrator has only jurisdiction to award payments during the incapacity of the workman, & his duty is to ascertain what is the workman's earning capacity at the date of the application & to award accordingly, leaving it to the employer to apply for a reduction in the event of the workman's recovery. A prospective award is also wrong inasmuch as it shifts the *onus* of proof from the employer to the workman in a way that may be unfair to the workman.

It is not competent for a county ct. judge acting as arbitrator under Workmen's Compensation Act, 1906 (c. 58), to make a prospective award of so much a week for a certain time, & after that time a smaller sum.—BAKER *v.* JEWELL, [1910] 2 K. B. 673; 79 L. J. K. B. 1092; 103 L. T. 173; 3 B. W. C. C. 503, C. A.

Annotations:—**Folld.** Walton *v.* South Kirkby, Featherstone & Hemsworth Colliery (1912), 107 L. T. 337. **Expld.** Evans *v.* Barrow Hæmatite Steel Co. (1914), 7 B. W. C. C. 681. **Mentd.** Newhouse *v.* Johnson (1911), 5 B. W. C. C. 137; Calico Printers' Assocn. *v.* Higham, [1912] 1 K. B. 93; Turner *v.* Lee (1925), 133 L. T. 67.

3514. —— —— ——.]—WALTON *v.* SOUTH KIRKBY, FEATHERSTONE, & HEMSWORTH COLLIERY, LTD., No. 3738, *post.*

r. *Order that ought not to be made.*]—ALLAN *v.* SPOWART & CO., LTD. (1906), 8 F. (Ct. of Sess.) 811.—SCOT.

Sect. 14.—*Orders and awards as to compensation: Sub-sect.* 6, *A., B., C. & D.* (*a*) & (*b*).]

the event of prospective loss, was a question of fact, with the decision of which the ct. could not interfere.—EMMERSON *v.* DONKIN & Co. (1910), 4 B. W. C. C. 74, C. A.

3535. —— ——.]—A workman injured one finger in July, 1909, & compensation was paid under a registered agreement. On Nov. 26, 1909, the workman admitted to the employers' doctor that he was able to work, but on Jan. 17, 1910, when the employers applied to terminate the agreement, the tip of the finger was still slightly tender. The arbitrator terminated the compensation, & refused to make a suspensory award:—*Held:* the decision was on a question of fact, & there was evidence to support it; it was not a proper case for a suspensory award.—GOODALL & CLARKE *v.* KRAMER (1910), 3 B. W. C. C. 315, C. A.

3536. —— ——.]—FURNESS, WITHY & Co. *v.* BENNETT, No. 3276, *ante*.

3537. —— ——.]—An injured workman was given light work & part compensation. The compensation was stopped, & he was offered his old work. He brought proceedings for part compensation. The medical referee reported that he was probably able, at the date when compensation was stopped, to do his old work. The county ct. judge therefore gave no compensation, but made a declaration of liability:—*Held:* there was evidence to support the order.—PARRY *v.* RHYMNEY IRON & COAL CO., LTD. (1912), 5 B. W. C. C. 632, C. A.

3538. —— ——.]—BAYNTON *v.* MANGANESE, BRONZE & BRASS CO., LTD., No. 3532, *ante*.

3539. —— ——.]—GRIFFIN *v.* WHITE (SAMUEL) & CO., LTD., No. 3221, *ante*.

3540. —— ——.]—WATKINS *v.* PORT OF LONDON AUTHORITY, No. 3601, *post*.

3541. —— **Merely because injury severe.**]—FOSTER *v.* WHARNCLIFFE WOODMOOR COLLIERY CO., No. 3559, *post*.

B. Time for Application.

3542. No statutory limit of time—Promptness essential.]—FOSTER *v.* WHARNCLIFFE WOODMOOR COLLIERY CO., No. 3559, *post*.

3543. As early as possible—Not later than opening case.]—A workman who had admittedly in the course of his employment met with an accident whereby amputation of the second finger of his left hand was necessary, after receiving full compensation, subsequently returned to his employers & was given light work. He worked for a short time & then became incapable of further work by reason of traumatic neurasthenia, in respect of which he claimed compensation under Workmen's Compensation Act, 1906 (c. 58), during incapacity. Medical evidence was given that the neurasthenia was a consequence of the accident, but it was suggested by one medical witness that appct. might have "brooded" over his troubles & thus aggravated his condition. The county ct. judge found that the workman's condition was due to his having brooded over his troubles & refused to grant compensation. At the conclusion of the judgment appct.'s counsel asked for a declaration of liability, but the judge refused to grant it:—*Held:* (1) there was no substantial evidence that the neurasthenia was a result of appct.'s alleged brooding, & that there must be a new trial; (2) in regard to the declaration of liability, it was not proper to ask for it at so late a stage in the proceedings. Either party might apply for such a declaration, but should do so at the earliest possible moment, & certainly not later than the opening of the case, so as to give the other party an opportunity of assenting to it or producing evidence.—MARSHALL *v.* CLAYTON & SHUTTLEWORTH, [1919] 1 K. B. 509; 88 L. J. K. B. 516; 120 L. T. 452; 63 Sol. Jo. 265; 12 B. W. C. C. 47, C. A.

Annotations:—*As to* (2) **Consd.** Ashrody *v.* City of Edinburgh (Owners), [1920] 1 K. B. 301. **Reid.** Baynton *v.* Manganese, Bronze & Brass Co. (1919), 12 B. W. C. C. 59; Foster *v.* Wharncliffe Woodmoor Colliery Co., [1922] 2 K. B. 701; Statham *v.* Oxcroft Colliery Co. (1922), 15 B. W. C. C. 271.

3544. May be made by either party.]—MARSHALL *v.* CLAYTON & SHUTTLEWORTH, No. 3543, *ante*.

C. Form.

3545. Where no incapacity has ensued.]—KING *v.* PORT OF LONDON AUTHORITY, No. 3548, *post*.

D. When Made.

(*a*) *In General.*

3546. May be made by consent.]—A workman with a steel splinter in his eye suffered no serious inconvenience for three & a half years. The splinter was then removed by an operation which did not necessitate the man being absent from work for a full week. He applied for a declaration of liability. The employers opposed this & denied accident; they also pleaded want of notice. The county ct. judge dismissed the application. On appeal a declaration of liability was granted by consent.—MILNE *v.* PETRIE (JOHN) JUNIOR, LTD. (1914), 7 B. W. C. C. 84, C. A.

3547. May be made on original application—Or on review.]—On a workman's application for compensation under Workmen's Compensation Act, 1906 (c. 58), a suspensory award may be made on an original application for compensation as well as on an application to review under Schedule I., clause 16 of the Act. If the workman's application is dismissed without any such suspensory award being made the matter is *res judicata* & no subsequent application for compensation can be entertained in respect of the same accident, although the workman's capacity for work may have altered in the meantime.

In cases of a permanent physical injury the arbitrator, if satisfied that the workman's incapacity for work has for the time ceased, ought as a general rule, inasmuch as in such a case an incapacity for work due to the injury may supervene at a later time, not to make an award simply terminating the weekly payment, but should make an order keeping alive the employer's liability (KENNEDY, L.J.).—GREEN *v.* CAMMELL, LAIRD & Co., LTD., [1913] 3 K. B. 665; 82 L. J. K. B. 1230; 109 L. T. 202; 29 T. L. R. 703; 6 B. W. C. C. 735, C. A.

Annotations:—**Consd.** Watson *v.* Beardmore (1914), 7 B. W. C. C. 913. **Reid.** King *v.* Port of London Authority, [1920] A. C. 1.

3548. ——.]—A workman, who was practically blind in his right eye from childhood, received a blow in this eye from a sling rope while he was working for resps. This happened on Dec. 18,

PART XIV. SECT. 14, SUB-SECT. 6.—D. (a).

3546 1. *May be made by consent.*]—BENT COLLIERY CO., LTD. *v.* O'HARE, CADZOW COAL CO., LTD. *v.* HASSAN, WATSON (JOHN), LTD. *v.* FITZPATRICK, SAME *v.* SCULLION, M'ANDREW & Co., LTD. *v.* BARKAUSAS, WATSON (JOHN), LTD. *v.* COLLINS (1924), 17 B. W. C. C. 424.—SCOT.

1. *Memorandum of agreement not superseded.*]—BAIRD (WILLIAM) & Co., LTD. *v.* M'WHINNIE (1908), 1 B. W. C. C. 109.—SCOT.

2. *Whether period subsequent to recording of memorandum.*]—FIFE COAL CO., LTD. *v.* LINDSAY, [1908] S. C.

1915. He reported the facts to the foreman the same day, & again reported it to one of resp.'s agents on Dec. 20, 1915. The eye became inflamed, & he attended hospital for treatment, but continued at his work. The eye got worse, & he had an interview with resps.' superintendent manager, who advised that he should be put on a lighter job. Resps. thereupon gave him lighter work, but continued his pay at the same rate. He continued at this until Mar. 1916, when he resumed his old work at the same wages. In Feb. 1917, he was dismissed for reasons unconnected with the accident, but was able to find work elsewhere at higher wages. He then applied on July 12, 1917, for a declaration of liability against his former employers. At the hearing there was medical evidence to the effect that the accident "would aggravate the condition of the defect in the eye, & precipitate, probably, the necessity of removal." The county ct. judge made an award, granting a declaration of liability, but the Ct. of Appeal set this aside on the ground that there was no evidence to support the award, & no jurisdiction in such circumstances to grant a declaration of liability. The workman appealed to the House of Lords:—*Held:* (1) though the findings in the county ct. judge's judgment were obscure, it appeared that he had intended to find that there was reasonable probability of future incapacity resulting from the injury; there was evidence to support such a finding & jurisdiction to make the award; (2) without questioning the validity of an award for a declaration of liability or 1*d.* a week compensation, the better order in such cases is "that the arbn. do stand adjourned," reserving to each of the parties liberty to make such further application in the matter as he or they may be advised. Such an order can be made on an original application, or one by way of review, where it is found by the judge that there has been an injury by accident arising out of & in the course of the employment, & though there is no present incapacity for work there is a "reasonable probability that such incapacity may ensue."

(3) In the above circumstances resps. also raised the objection that no claim had been made within six months. The county ct. judge upon this point said, "I think the circumstances disclosed in this case, which I need not elaborate, are such as enable me to afford the relief which is provided by Workmen's Compensation Act, 1906 (c. 58), s. 2 (1) (*b*)." The Ct. of Appeal held that this was not a finding that the delay was excused for any reason within the Act, & that being the case the claim must fail:—*Held:* the statement by the learned county ct. judge amounted to a finding that the delay was excused by reasonable cause, & there was evidence to support such a finding; in law the facts proved in this case constituted a reasonable cause for the delay in making a claim.

(4) Arbitrators, in cases of this kind, whether they be county ct. judges or other, should make it clear on the face of their awards what are their rulings on pure questions of fact, what on questions of law & what on mixed questions of law & fact (LORD ATKINSON).—KING *v.* PORT OF LONDON AUTHORITY, [1920] A. C. 1; 88 L. J. K. B. 889; 121 L. T. 587; 35 T. L. R. 622; 63 Sol. Jo. 661; 12 B. W. C. C. 260, H. L.

Annotations:—*As to* (1) **Reld.** Foster *v.* Wharncliffe Woodmoor Colliery Co., [1922] 2 K. B. 701; Statham *v.* Oxcroft Colliery Co. (1922), 15 B. W. C. C. 271. *As to* (2) **Folld.** Hillman *v.* L. B. & S. C. Ry., [1920] 1 K. B. 284. **Consd.** Lomax *v.* Sutton Heath & Lea Green Collieries (1926), 135 L. T. 564. *As to* (3) **Consd.** Hillman *v.* L. B. & S. C. Ry., [1920] 1 K. B. 284; Lingley *v.* Firth, [1921] 1 K. B. 655. **Reld.** Leslie *v.* Robson (1920), 13 B. W. C. C. 150; Fenton *v.* Kelvin (Owners), [1925] 2 K. B. 473. *As to* (4) **Reld.** Harrison *v.* Matthews (1920), 13 B. W. C. C. 109; Slater *v.* Maconochie (1920), 89 L. J. K. B. 1238.

(*b*) *Possibility of Recurrence of Incapacity.*

3549. General rule.]—POMPHREY *v.* SOUTHWARK PRESS, No. 3414, *ante.*

3550. ——.]—On an application by an employer under Workmen's Compensation Act, 1906 (c. 58), sched. I. (16), to have the weekly payments reviewed on the ground that the incapacity no longer existed, there is jurisdiction, in a case where the incapacity, owing to the effects of the original accident, may recur, to suspend instead of ending the compensation by awarding a nominal sum or by making a declaration of continuing liability, & this is the proper course to be adopted in these cases.—TYNRON (OWNERS) *v.* MORGAN, [1909] 2 K. B. 66; 78 L. J. K. B. 857; 100 L. T. 641; 2 B. W. C. C. 406, C. A.

Annotations:—**Folld.** Griga *v.* Harelda (Owners) (1910), 26 T. L. R. 272; Chapman *v.* Sage (1915), 85 L. J. K. B. 47. **Reld.** L. & N. W. Ry. *v.* Taylor (1910), 4 B. W. C. C. 11; Green *v.* Cammell, Laird, [1913] 3 K. B. 665; Wardell *v.* Cargo Fleet Iron Co. (1916), 10 B. W. C. C. 124. **Mentd.** Birmingham Cabinet Manufacturing Co. *v.* Dudley (1910), 102 L. T. 619.

3551. ——.]—While at work on board a vessel appct. fell & ruptured himself. He was laid up for a short time & then returned to work. Later, he was medically examined, & the result of that examination was that he was ruptured, but was fit for work if he wore a proper truss & took proper precautions. On an application for compensation under Workmen's Compensation Act, 1906 (c. 58), the county ct. judge refused to award any compensation or to make a suspensory order so as to keep the employers' liability alive:—*Held:* a suspensory award of 1*d.* a week should have been made so as to preserve the right of the appct. in the event of future trouble arising as the result of his injury.—GRIGA *v.* HARELDA (OWNERS) (1910), 26 T. L. R. 272; 3 B. W. C. C. 116, C. A.

Annotations:—**Consd.** Green *v.* Cammell, Laird, [1913] 3 K. B. 665. **Folld.** Chapman *v.* Sage (1915), 85 L. J. K. B. 471. **Consd.** King *v.* Port of London Authority, [1920] A. C. 1.

3552. ——.]—COX *v.* BRAITHWAITE & KIRK, No. 3715, *ante.*

3553. ——.]—GREEN *v.* CAMMELL, LAIRD & CO., LTD., No. 3547, *ante.*

3554. ——.]—A workman suffered a rupture from accident arising out of & in the course of his employment. His wife made him a belt with a pad to keep the rupture up, & he continued for some time in the same employment at the same wages. He was subsequently discharged from this employment, & gave evidence that he had found it difficult to get other work, & made a claim for compensation. Medical evidence was given that he was not in a worse condition than before the accident provided he wore an efficient truss. The county ct. judge declined to make an award in appct.'s favour:—*Held:* the workman having suffered a permanent injury, with a possibility of incapacity in the future if he did not take certain precautions, the county ct. judge should have made a declaration of liability, or a nominal award in appct.'s favour, which would be open to review in the future.—CHAPMAN *v.* SAGE & CO., LTD. (1915), 85 L. J. K. B. 471; 113 L. T. 623; 8 B. W. C. C. 559, C. A.

Annotations:—**Reld.** Wardell *v.* Cargo Fleet Iron Co. (1916), 10 B. W. C. C. 124; Slater *v.* Maconochie (1920), 89 L. J. K. B. 1238. **Mentd.** Higgins *v.* Higgins (1915), 85 L. J. K. B. 1224.

Sect. 14.—*Orders and awards as to compensation: Sub-sect.* 6, *D.* (*b*), (*c*) & (*d*). *Sect.* 15: *Sub-sect.* 1.]

3555. Conflicting opinions of doctors.]—HIGGS & HILL, LTD. *v.* UNICUMBE, No. 3258, *ante.*

No probability of recurrence—Declaration should not be made.]—*See* Sub-sect. 5, *ante.*

(c) Earning or Able to Earn Same Wages as before Accident.

3556. Workman in fact earning same or greater wages.]—A workman was employed as foreman in a carpet-weaving factory; his principal duty was to supervise the hands, but he also to the knowledge of his employer used to set up & adjust the machines. While adjusting a machine he received an injury necessitating the amputation of his thumb; he continued however to attend regularly to his work, only absenting himself from the factory for a sufficient time to enable him to have his hand dressed. He was incapacitated by the accident from setting up & adjusting the machines, & his work was afterwards confined to the supervision of the hands. His employer continued to pay his wages at the same rate after as before the accident; but it was admitted that, should he leave his employer's service, his wage-earning power as a foreman in any other factory would be materially decreased: —*Held:* (1) as the workman had been prevented by reason of the accident from doing a substantial part of the work at which he had previously earned his wages, he had been disabled for two weeks from earning full wages "at the work at which he was employed" within Workmen's Compensation Act, 1897 (c. 37), s. 1 (2) (*a*); (2) as the workman had hitherto suffered no pecuniary loss, the proper course was to make a declaration of the liability of the employer, leaving the amount & duration of the compensation to be fixed upon an application under sched. I., clause 12, to vary the award, should the workman at any future time be unable by reason of the accident to earn the same wages.

We have ever held that a finding of fact of a county ct. judge binds us & that it is only on a matter of law that there is an appeal; but if a learned county ct. judge decides a fact when there is no evidence upon which he could find it, this is a matter of law, for in such a case he has misdirected himself, & this is law (A. L. SMITH, L.J.).—CHANDLER *v.* SMITH, [1899] 2 Q. B. 506; 68 L. J. Q. B. 908; 81 L. T. 317; 47 W. R. 677; 15 T. L. R. 480; 1 W. C. C. 19, C. A.

Annotations:—As to (2) **Reld.** Hewitt *v.* Hepburn (1900), 44 Sol. Jo. 330; Marshall *v.* Clayton & Shuttleworth, [1919] 1 K. B. 509; King *v.* Port of London Authority, [1920] A. C. 1.

3557. ——.]—POMPHREY *v.* SOUTHWARK PRESS, No. 3414, *ante.*

3558. ——.]—DUBERLEY *v.* MACE, No. 3382, *ante.*

3559. —— Reasonable probability of not being able to earn them in future.]—A miner, in the course of his employment on Sept. 30, 1912, met with an accident, which resulted in the loss of one of his eyes. He was paid compensation during total incapacity until he returned to work in Dec. 1912. He continued in the same employment until Nov. 1921, at wages higher than he had earned before the accident. Nine years after the accident he took proceedings to obtain a declaration of liability against his employers. There was no evidence of any change of circumstances, or that it was reasonably probable that in consequence of the accident incapacity to earn the same wages as he earned before would arise at a later date. The county ct. judge held that inasmuch as no time was limited by the Workmen's Compensation Act, 1906 (c. 58), or by any case decided thereunder, within which an injured workman must make a claim for a declaration, it was open to him at any time to ask for one; the point at issue was whether the injury he had suffered was such as to render the workman an "odd lot" in the labour market & prevent his obtaining work in the event of his being discharged by the employer in whose service he was at the time of the accident, so that incapacity to earn wages might ensue; upon these grounds he made a declaration of liability against the employers:—*Held:* (1) he had misunderstood the meaning of the expression an "odd lot." It was not necessary to prove that a man or his labour was an "odd lot" in order to obtain a declaration of liability. If he showed that, although there was no loss of earning capacity at the moment, there was a reasonable probability that he would be wholly or partially incapacitated from earning his old wages in future, he might be entitled to a declaration. It was putting too heavy a burden on the workman to say that the issue was whether he was an "odd lot" or not. But on the evidence in this case the workman was not entitled to a declaration.

(2) The mere fact that there has been a serious injury does not justify a declaration being granted where there is no claim for compensation by reason of the workman being at the time employed at full wages.

(3) There are certain propositions, I think, about which there does not seem to be very much dispute with regard to the declaration of liability. There is no statutory limit of time within which it must be applied for. Also it has been said over & over again, & I do not think anything has ever been said to the contrary, that in ordinary circumstances it should be applied for promptly (LORD STERNDALE, M.R.).—FOSTER *v.* WHARNCLIFFE WOODMOOR COLLIERY CO., [1922] 2 K. B. 701; *sub nom.* FOSTER *v.* WHARNCLIFFE WOODMOOR COLLIERY CO., LTD., FARMERY *v.* WHARNCLIFFE WOODMOOR COLLIERY CO., LTD., BATEMAN *v.* WHARNCLIFFE WOODMOOR COLLIERY CO., LTD., GOODLIFFE *v.* WHARNCLIFFE WOODMOOR COLLIERY CO., LTD., PARRY *v.* WHARNCLIFFE WOODMOOR COLLIERY CO., LTD., 92 L. J. K. B. 5; 127 L. T. 771; 38 T. L. R. 729; 66 Sol. Jo. 594; 15 B. W. C. C. 136, C. A.

Annotations:—As to (1) **Consd.** Wilmot *v.* Askern Coal & Iron Co. (1924), 17 B. W. C. C. 17; Clarke *v.* United Steel Cos. (1925), 18 B. W. C. C. 525. **Reld.** Clay *v.* Sherwood Colliery Co. (1922), 92 L. J. K. B. 169; Purdie *v.* Colville (1923), 16 B. W. C. C. 307; Palmer *v.* Crawshay (Cyfarthfa) (1926), 135 L. T. 355.

3560. Capacity to earn same or greater wages—Prevented by own misconduct.]—A workman was partially incapacitated by an accident, & the injury was permanent, but his employers found him work in another capacity at a higher wage than that at which they had employed him before the accident. From this employment he was dismissed by reason of his own misconduct. The workman took proceedings for compensation under Workmen's Compensation Act, 1906 (c. 58), from the employers, but the county ct. judge made his award in favour of the employers on the ground that the workman's incapacity was due

PART XIV. SECT. 14, SUB-SECT. 6.—D. (c).

3556 i. *Workman in fact earning same or greater wages.*]—SMITH *v.* KAURI TIMBER CO., LTD., [1918] N. Z. L. R. 536.—N.Z.

3556 ii. ——.]—HUSBAND *v.* CAMPBELL (1903), 5 F. (Ct. of Sess.) 1146.—SCOT.

to his own misconduct. The workman had asked for substantial compensation & did not ask for a suspensory award of 1*d.* a week:—*Held:* the workman, though somewhat disabled, had the capacity to earn the same wages as formerly, & was only prevented from doing so through his own misconduct, he was not entitled to a substantial award.—HILL *v.* OCEAN COAL CO., LTD. (1909), 3 B. W. C. C. 29, C. A.

3561. —— Prevented by action of trade union.]—THOMPSON *v.* JOHNSON (RICHARD) & NEPHEW, LTD., No. 3240, *ante*.

3562. —— ——.]—WILLIAMS *v.* OAKWOOD COLLIERY CO., LTD., No. 3241, *ante*.

(d) Earning Capacity Narrowed.

3563. Declaration of liability to be made.]—A seamstress, while employed as a seam-presser, lost the top of her sewing finger as the result of an accident which happened in the course of her employment. In arbn. proceedings the county ct. judge made an award in her favour on the footing that she was a seam-presser & a seam-presser only, & omitted to take into consideration the question whether, owing to her inability to use her sewing finger, her earning capacity had been narrowed. No declaration of liability was asked for or made:—*Held:* while the decision of the county ct. judge ought to be supported, so far as his finding affected her capacity as a seam-presser, he was wrong in saying that there were no grounds for making a declaration of liability, & she was in the circumstances entitled to such a declaration.—SUMMERS *v.* GENESE & YOUNG (1922), 129 L. T. 11; 16 B. W. C. C. 52, C. A.

Annotation:—**Apld.** Donn *v.* British Oil & Cake Mills (1923), 129 L. T. 680.

3564. ——.]—Appct., who had formerly been a bootmaker, was, in Feb. 1921, accidentally injured while employed as a rollerman by resps., & it became necessary for the tip of his left thumb to be amputated. A declaration of liability was filed. Subsequently an application for compensation was heard & evidence tendered to the effect that the injury prevented the man obtaining his old work as a bootmaker. The county ct. judge treated this evidence as irrelevant, &, upon evidence that the man was neither totally nor partially incapacitated for employment similar to that in which he was engaged at the time of the accident, dismissed the application & made a declaration terminating the liability of the employers:—*Held:* the county ct. judge was wrong in disregarding appct.'s incapacity for other employment which might be open to him but for his injury. Declaration of liability to continue.—DONN *v.* BRITISH OIL & CAKE MILLS, LTD. (1923), 129 L. T. 680; 16 B. W. C. C. 171, C. A.

SECT. 15.—AGREEMENTS FOR COMPENSATION.

SUB-SECT. 1.—IN GENERAL.

3565. Agreement as bar to other proceedings by workman—Action for damages—Agreement made on behalf of infant—Not to his benefit.]—STEPHENS *v.* DUDBRIDGE IRONWORKS CO., No. 4070, *post*.

—— Arbitration.]—*See* Sect. 10, sub-sect. 1, *ante*.

3566. Agreement as estoppel of liability by master.]—WILLIAMS *v.* GUEST, KEEN & NETTLEFOLDS, LTD., No. 3718, *post*.

3567. Agreement with dependants—Infant dependant—Approval of registrar necessary to validity.]—Where a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), is made by dependants some of whom are infants & the employer admits liability, & some one on behalf of the infant dependants enters into a conditional agreement with the employer as to the amount of compensation, the agreement has no validity until it has come before the registrar of the county ct., whose duty it is to consider it on behalf of the infants; but if the money is sent to the registrar for payment into ct. under Workmen's Compensation Rules, 1907, para. 4, r. 56A, upon a *præcipe* according to Form 53A, & the registrar signifies his approval by signing a receipt for the money, the agreement becomes binding for all purposes, & the employer is freed from all further liability, & the county ct. judge has no jurisdiction to require his appearance in any further proceedings, *e.g.* proceedings as to the apportionment of the money in ct.

An agreement as to the amount of compensation payable to dependants under Workmen's Compensation Act, 1906 (c. 58), ought not to be signed by the dependants' solr. on their behalf.

The employer ought not to be liable for the costs of appearing in a matter in which he has really no concern. In my view the order of the county ct. judge was wrong & the order for payment of costs must be discharged (COZENS-HARDY, M.R.).—RHODES *v.* SOOTHILL WOOD COLLIERY CO., LTD., [1909] 1 K. B. 191; 78 L. J. K. B. 141; 100 L. T. 14; 2 B. W. C. C. 377, C. A.

Annotations:—**Apld.** Ware *v.* Whitlock, [1923] 2 K. B. 418. **Refd.** Mullholland *v.* Whitehaven Colliery Co., [1910] 2 K. B. 278.

3568. —— —— Money sent for payment into court—Effect of acceptance by registrar.]—RHODES *v.* SOOTHILL WOOD COLLIERY CO., LTD., No. 3567, *ante*.

3569. —— Signature by solicitor to dependants.]—RHODES *v.* SOOTHILL WOOD COLLIERY CO., LTD., No. 3567, *ante*.

3570. Termination of agreement—On claim for compensation.]—A workman, having been in receipt of full compensation for some months, entered into an agreement with his old employers, to do light work at his former rate of wages, & that in the event of total incapacity recurring his rights under the Act should revive. He again became totally incapacitated, & claimed compensation, which was paid. He was subsequently offered light employment at reduced wages, with half the difference between his former & present wages. This offer he refused, claiming that, according to the terms of the agreement, he was entitled to full wages. The employers maintained that the agreement terminated when the subsequent claim for compensation was made, & that the workman was relegated to his rights under the Act. The county ct. judge upheld the contention of the employers:—*Held:* the agreement terminated on the recurrence of total incapacity & the claim for compensation being made, & did not afterwards revive.—BRANFORD *v.* NORTH EASTERN RY. CO. (1910), 4 B. W. C. C. 84, C. A.

PART XIV. SECT. 15, SUB-SECT. 1.

k. *Construction of agreement — Whether plaintiff "fit & capable of doing work."*]—RUSSELL *v.* TWIN CITY COAL CO. (Alta.) (1917), 36 D. L. R. 235—CAN.

l. *Agreement entered into in mutual error.*]—DORNAN *v.* ALLAN & SON (1900), 3 F. (Ct. of Sess.) 112; 38 Sc. L. R. 70; 8 S. L. T. 265.—SCOT.

m. ——.]—M'GUIRE *v.* PATERSON & CO., [1913] S. C. 400; 50 Sc. L. R. 289; [1913] 1 S. L. T. 32.—SCOT.

Sect. 15.—*Agreements for compensation: Sub-sects.* 1, 2 & 3, *A.*]

3571. —— Power of judge to terminate.]—TAYLOR *v.* LONDON & NORTH WESTERN RY. CO., No. 3524, *ante.*

Need not be in writing—Implied agreements.]—*See* Sub-sect. 2, *post.*

SUB-SECT. 2.—IMPLIED AGREEMENTS.

3572. Validity.]—JONES *v.* GREAT CENTRAL RY. CO., No. 3595, *post.*

3573. ——.]—GODBOLD *v.* LONDON COUNTY COUNCIL, No. 3578, *post.*

3574. From what implied—Course of conduct—Payment of compensation.]—PHILLIPS *v.* VICKERS, SONS & MAXIM, No. 3596, *post.*

3575. —— —— ——.]—The mere payment by an employer of a weekly payment by way of compensation to a workman who has been injured by accident arising out of & in the course of his employment, within the meaning of Workmen's Compensation Act, 1906 (c. 58), s. 1, does not suffice to establish that an agreement so to do has been come to, a memorandum of which is capable of being recorded pursuant to Sched. 2, s. 9, of that Act.—HARTSHORNE *v.* COPPICE COLLIERY CO. (1912), 106 L. T. 609; 5 B. W. C. C. 358, C. A.

Annotation:—**Apld.** Godbold *v.* L. C. C. (1914), 111 L. T. 691.

3576. —— —— ——.]—STANDING *v.* EASTWOOD & CO., No. 2058, *ante.*

3577. —— —— ——.]—A workman was injured in Aug. 1911, in the course of his employment by the negligent act of a third party. His employers made weekly payments of half wages, 12*s.* 5*d.*, which the man accepted, & for which he gave receipts headed with the words "Compassionate allowances." While in receipt of this he brought an action for damages against third parties, which was heard in Feb. 1912, but failed on the ground that he was in receipt of compensation. The employers still continued the weekly payments of 12*s.* 5*d.* In Apr. 1913, he applied for an award of 15*s.* basing the extra on the allegation that he had a concurrent contract with another employer to work on Sundays at the time of the accident:—*Held:* there was an implied agreement to accept 12*s.* 5*d.* a week in satisfaction of any claim for compensation.—FERRITER *v.* PORT OF LONDON AUTHORITY (1913), 6 B. W. C. C. 732, C. A.

3578. —— —— ——.]—A workman having been injured by "accident arising out of & in the course of" his employment, his employers paid a weekly sum representing half his wages to the workman for a time & then discontinued the payment on the advice of their doctor that the workman had recovered from the effects of the accident. The workman subsequently applied to the registrar of the county ct. to record a memorandum of an alleged agreement. The workman sought by recording the memorandum of the alleged agreement to impose upon the employers the burden of showing that circumstances had been changed so that they would be entitled to claim a review of the agreement, which if recorded would have the effect of an award. The employers, however, contended that no such agreement as was alleged had in fact ever been entered into; that the county ct. judge could not make an agreement between the parties; but that the ct. could only record a memorandum of an agreement which had in fact been made:—*Held:* an agreement within Workmen's Compensation Act, 1906 (c. 58), need not be in writing, it might be inferred & implied by reason of the conduct of the parties & all the circumstances; but there was no evidence in the present case to support the view that any such document as was sought to be recorded was in fact entered into; & the learned county ct. judge had no jurisdiction to order an agreement to be recorded which was not really an agreement entered into between the parties.—GODBOLD *v.* LONDON COUNTY COUNCIL (1914), 111 L. T. 691; 7 B. W. C. C. 409, C. A.

3579. —— —— ——.]—SMITH *v.* REDPATH, BROWN & CO., LTD., No. 3074, *ante.*

3580. —— —— —— **Receipts given by workman.**]—MADDEN *v.* GUEST'S EXECUTORS, No. 3615, *post.*

3581. —— ——.]—An agreement to pay compensation under Workmen's Compensation Act, 1906 (c. 58), may be implied from the conduct of the parties & a memorandum thereof recorded, notwithstanding the incapacity is alleged to have ceased.—HUMPHREYS *v.* LAW LAND BUILDING DEPARTMENT, LTD. (1912), 57 Sol. Jo. 114.

SUB-SECT. 3.—AGREEMENTS FOR LUMP SUM.

A. In General.

3582. Validity—Agreement apart from statutory provisions—Relating to redemption of weekly payments.]—There is nothing in Workmen's Compensation Act, 1906 (c. 58), to prevent an adult workman before entering a claim for an award & before any payment of a weekly sum has been made to him from coming to an arrangement by way of compromise with his employer to accept a lump sum in satisfaction of all claims in respect of an injury occasioned by an accident which has happened to him whilst in the employer's service, & such agreement, if entered into, will be valid although not registered under the Act.

Clause 10 of Sched. II. presupposes that a weekly payment has been made which but for the existence of the agreement to pay a lump sum would have continued, & has no application to a case where no weekly payment has ever in fact been made.—RYAN *v.* HARTLEY, [1912] 2 K. B. 150; 81 L. J. K. B. 666; 106 L. T. 702; 5 B. W. C. C. 407.

Annotations:—**Apld.** Hudson *v.* Camberwell B. C. (1917), 86 L. J. K. B. 558; Williams *v.* Minister of Munitions (1919), 88 L. J. K. B. 1105. **Consd.** Haydock *v.* Goodier, [1921] 2 K. B. 384. **Overd.** Russell *v.* Rudd, [1923] A. C. 309. **Refd.** Rawlings *v.* Hodgson (1918), 119 L. T. 137.

3583. ——.]—Under Workmen's Compensation Act, 1906 (c. 58), an adult workman not under a disability is at liberty, before any weekly payment of compensation has been made to him, to agree with his employer to accept a lump sum in satisfaction for his claim to compensation; & upon an application to the county ct. to record such an agreement, neither the registrar nor the county ct. judge has any jurisdiction to refuse to record it upon any of the grounds set out in clause 9 (*d*) of Sched. II. of the Act, but the registrar must record the agreement on being satisfied of its genuineness.

PART XIV. SECT. 15, SUB-SECT. 3. —A.

n. *Validity—Agreement apart from statutory provisions.*]—WATERS *v.* CAPE & CO., LTD. (Que.) (1916), 23 R. de J. 410.—CAN.

o. —— ——.]—CARR *v.* IMPERIAL OIL CO., LTD., [1918] 1 W. W. R. 89; 38 D. L. R. 154; 10 Sask. L. R. 429.—CAN.

p. —— ——.]—BROWN (JOHN) & CO., LTD. *v.* BAIRD (1923), 17 B. W. C. C. 289.—SCOT.

Where, therefore, on an application to record such an agreement supported by both the workman & his employers, the registrar refused to record it on the ground of the inadequacy of the lump sum, & referred it to the county ct. judge, who refused to record it on the grounds, that the agreement was tainted with fraud; that the lump sum was inadequate; & that the agreement amounted to contracting out of the Act:—*Held:* (1) both the registrar & county ct. judge had exceeded the limits of their jurisdiction, & the agreement must be recorded; (2) on the facts there was no evidence of fraud, & no county ct. judge ought to find fraud when it had not been suggested by the opposite side & when the person found guilty of fraud had had no opportunity of defending himself.—HUDSON *v.* CAMBERWELL BOROUGH COUNCIL (1917), 86 L. J. K. B. 558; 116 L. T. 523; 10 B. W. C. C. 400, C. A.

Annotation:—*As to* (1) **Overd.** Russell *v.* Rudd, [1923] A. C. 309.

3584. —— —— ——.]—The registrar, under Sched. II., clause (9) (*d*) of Workmen's Compensation Act, 1906 (c. 58), cannot refuse to record a memorandum of an agreement to pay a lump sum in satisfaction of all claims under Workmen's Compensation Act, 1906 (c. 58), if satisfied of its genuineness & that it has not been improperly obtained, upon the ground of the inadequacy of the sum, unless it is to be paid in redemption of a weekly payment, or to a person under legal disability, or to dependants.

The registrar refused to record a memorandum of an agreement to pay a lump sum in satisfaction of all claims under Workmen's Compensation Act, 1906 (c. 58), on the ground of the inadequacy of the sum. Weekly payments had been made, but not under any agreement, & at the time the agreement to pay the lump sum was entered into all weekly payments had ceased, the parties disputing the weekly amount payable. The workman was of full age & properly advised:—*Held:* the lump sum was not paid in redemption of any weekly payment, & the registrar had therefore no jurisdiction under Workmen's Compensation Act, 1906 (c. 58), Sched. II., clause 9 (*d*), to refuse to record the memorandum on the ground of inadequacy, & the memorandum must be recorded.—RAWLINGS (H. D.), LTD. *v.* HODGSON (1918), 87 L. J. K. B. 761; 119 L. T. 137; 62 Sol. Jo. 534; 11 B. W. C. C. 73, C. A.

Annotations:—**Apld.** Williams *v.* Minister of Munitions (1919), 88 L. J. K. B. 1105; Haydock *v.* Goodier, [1921] 2 K. B. 384. **Overd.** Russell *v.* Rudd, [1923] A. C. 309.

3585. —— —— ——.]—A workman met with an injury by accident, resulting in total incapacity. The employers admitted liability & paid him 19*s.* 2*d.* a week full compensation for several months after the accident. The workman had by that time sufficiently recovered to do some work, & the employers proposed to pay him 15*s.* a week for the next three months. This led to negotiations for the payment of a lump sum. The employers put forward a sum stated to be "in full settlement & discharge of all claims & demands whatsoever." The workman's solr. tried to obtain a larger sum on the ground, among others, that the registrar & judge would never sanction the sum suggested by the employers as adequate. The amount was slightly raised by the employers, & subsequently accepted by the workman. A memorandum was then sent for record, stating the agreement to be one for the redemption of a weekly payment by a lump sum, & the matter was referred to the judge on the question of adequacy. The judge refused to record on the ground that the sum was inadequate. An application for arbn. was then filed, but before the hearing another memorandum was sent for record, this time setting out the agreement as being one in full discharge, & not one in redemption of a weekly payment, & an answer was filed by the employers in the arbn. proceedings to the effect that all questions had been settled by agreement. The application to record was again referred to the judge by the registrar on the question of adequacy, & the matter was pending at the time of the hearing of the arbn. The judge, considering the sum inadequate, awarded weekly compensation:—*Held:* the agreement was not one in redemption of weekly payments, but was in respect of an unascertained liability, & being genuine, & not otherwise within Sched. II. (9) (*d*), should have been recorded by the registrar without reference to the judge. The employers were in no way estopped by the original mistake as to the true construction of the agreement, & were entitled to rely upon it as a complete answer to the workman's claim. The county ct. judge had, therefore, no jurisdiction to entertain the arbn.—WILLIAMS *v.* MINISTER OF MUNITIONS (1919), 88 L. J. K. B. 1105; 121 L. T. 341; 12 B. W. C. C. 213, C. A.

Annotations:—**Apld.** Haydock *v.* Goodier, [1921] 2 K. B. 384. **Overd.** Russell *v.* Rudd, [1923] A. C. 309.

3586. —— —— ——.]—An injured workman received full compensation for some time. On Dec. 15, 1919, payments were stopped, the employers alleging that the workman was no longer incapacitated. After certain negotiations for a settlement the parties ultimately, on May 8, 1920, agreed to a payment of £40 in full discharge of all liability. No weekly payments or compensation had been paid between Dec. 15, 1919, & May 8, 1920. An application was then made to the ct. to record a memorandum of this agreement. The registrar referred the matter to the judge on the ground of the adequacy of the amount, & the judge stated that he considered that the sum agreed upon was inadequate & refused to record the memorandum:—*Held:* the agreement was not one for the redemption of a weekly payment, & not being otherwise within Sched. II. (9) (*d*) the memorandum should have been recorded without reference to the amount. The appeal was allowed without costs, & an order made that the memorandum should be recorded.—PARK *v.* HUDSPITH (1920), 13 B. W. C. C. 289, C. A.

3587. —— —— ——.]—A workman having met with an accident in the course of his employment filed a request for arbitration claiming compensation on the ground that he was totally incapacitated by reason of the accident. The employers disputed their liability on various grounds & did not make or agree to make any weekly payment. At the hearing the parties informed the county ct. judge that they had settled the matter for a lump sum of £150. The judge thereupon, at their request, made an award by consent for £150 & agreed costs in full satisfaction of all claims in respect of the injury by accident arising out of & in the course of the employment. Subsequently, on July 7, 1920, the workman, being still incapacitated, filed a further request for arbitration, claiming that notwithstanding the payment to him of the £150 he was entitled to be paid a further sum of 5*s.* per week to Jan. 1, 1920, under Workmen's Compensation (War Addition) Act, 1917 (c. 42), & 15*s.* per week after that date under Workmen's Compensation (War Addition) Amendment Act, 1919 (c. 83). The county ct. judge made an award in the workman's favour. On appeal:—*Held:* (1) the consent award was not

Sect. 15.—*Agreements for compensation: Sub-sect.* 3, *A. & B.; sub-sect.* 4. *Sect.* 16: *Sub-sects.* 1, 2 & 3, *A.*]

a redemption of a weekly payment, but a compromise of a disputed claim for a lump sum, & was final & therefore put an end to all claims in respect of this accident; (2) as no weekly payment had ever been made or agreed to be made there was no jurisdiction to make an award under War Addition Acts, therefore the workman's claim failed.—HAYDOCK *v.* GOODIER, [1921] 2 K. B. 384; 90 L. J. K. B. 425; 125 L. T. 71; 37 T. L. R. 381; 65 Sol. Jo. 416; 14 B. W. C. C. 50, C. A.

Annotation:—As to (1) **Overd.** Russell *v.* Rudd, [1923] A. C. 309.

3588. ——— ——— ———.]—(1) An agreement between an injured workman & his employer for the settlement of all claims to compensation under Workmen's Compensation Act, 1906 (c. 58), by the payment of a lump sum, apart from the provisions of the Act relating to agreements for the redemption of a weekly payment, is void as being a contracting out of the Act contrary to sect. 3 (1).

(2) It was held in *Rawlings, Ltd.* v. *Hodgson*, No. 3584, *ante*, & in *Haydock* v. *Goodier*, No. 3587, *ante*, that there could not be an agreement for the redemption of weekly payments until the weekly payment had been fixed.... When a workman is suffering from incapacity caused by an accident falling within the Act he becomes *ipso facto* entitled to a weekly payment, which, though not ascertained as to amount is capable of being immediately ascertained by the process laid down in the statute. I see no reason why the liability to make this ascertainable weekly payment should not be redeemed though the amount has not in fact been fixed (LORD CAVE, C.).—RUSSELL *v.* RUDD, [1923] A. C. 309; 92 L. J. K. B. 420; 129 L. T. 193; 39 T. L. R. 324; 67 Sol. Jo. 421; 16 B. W. C. C. 358, H. L.

Annotations:—As to (1) **Refd.** Williams *v.* Guest, Keen & Nettlefolds (1925), 133 L. T. 111; Feeney *v.* Firbeck Main Collieries, [1926] 2 K. B. 218. *Generally*, **Refd.** Chadbourne *v.* Barber, Walker (1923), 16 B. W. C. C. 147.

B. In Redemption of Weekly Payments

3589. Whether weekly payment must be previously fixed.]—RAWLINGS (H. D.), LTD. *v.* HODGSON, No. 3584, *ante*.

3590. ———.]—HAYDOCK *v.* GOODIER, No. 3587, *ante*.

3591. ——— **Sufficiency of mere liability to pay.**]—RUSSELL *v.* RUDD, No. 3588, *ante*.

3592. Adequacy of sum.]—A workman in receipt of maximum compensation of 17*s.* 3*d.* per week agreed with his employers to receive the sum of £175 to redeem the liability. The workman was proved to have so far recovered as to be able to do some light work. The judge refused to allow the agreement to be registered, being, apparently, of opinion that it was not a proper sum for the redemption of a permanent payment of 17*s.* 3*d.* per week:—*Held:* the decision must be overruled, as the judge had, in assuming that 17*s.* 3*d.* was a permanent payment which the employer was under an obligation to pay, misdirected himself, & the memorandum sent for registration must be recorded.—O'NEILL *v.* ANGLO-AMERICAN OIL CO., LTD. (1909), 2 B. W. C. C. 434, C. A.

3593. ——— **Scale adopted on statutory redemption.**]—Appct., a woman aged fifty-nine, met with an accident arising out of & in the course of her employment with resps. which resulted in the loss of her right arm & injury to her left hand. She was paid by resps. a sum of 4*s.* 10½*d.* a week compensation. An application under Sched. I., para. 17, was made by resps. for redemption of this weekly payment by the payment of a lump sum of £113 2*s.* 5*d.* but was withdrawn, & an agreement was entered into between the parties for redemption by the payment of the £113 2*s.* 5*d.* The £113 2*s.* 5*d.* represented the redemption value of 4*s.* 10½*d.* a week calculated on the 75 per cent. basis by Sched. I., para. 17. Resps. applied to the registrar under Sched. II., para. 9 (*d*), to record a memorandum of this agreement. The registrar refused to do so on the ground that the sum was inadequate & referred the matter to the county ct. judge, who upheld the registrar's view:—*Held:* on an application under Sched. II., para. 9 (*d*), to record a memorandum of an agreement the county ct. judge in determining the question of adequacy of amount was not bound by the standard fixed by para. 17 of Sched. I., but the two paragraphs were to be read separately & had different functions, para. 7 dealing with cases of compulsory redemption by the employer & para. 9 with cases of agreement between the parties.—SHARP *v.* RICHARDSON & CO., [1920] 3 K. B. 152; 89 L. J. K. B. 1050; 13 B. W. C. C. 129, C. A.

3594. Stamp — Necessity for.]—COTTRELL *v.* HIPPERSON (1912), 134 L. T. Jo. 111.

———.]—*See, generally*, REVENUE.

SUB-SECT. 4.—REGISTRATION OF AGREEMENTS.

See Sect. 16, *post*.

SECT. 16.—REGISTRATION OF AGREEMENT AND AWARDS.

SUB-SECT. 1.—IN GENERAL.

See Workmen's Compensation Act, 1925 (c. 84), ss. 23–25, 44; Workmen's Compensation Rules, 1926, rr. 43–52, 97.

3595. To what matters applicable—Implied agreements.]—(1) An agreement settling a question under Workmen's Compensation Act, 1897 (c. 37), may be implied.

(2) A memorandum of an implied agreement may be registered.

(3) Where an effective agreement between the parties subsists, a question does not arise within the meaning of Workmen's Compensation Act, 1897 (c. 37), ss. 1, 3, upon one party making a capricious claim against the other.

(4) To found jurisdiction in arbn., a question must have arisen before the request for arbn.—JONES *v.* GREAT CENTRAL RY. CO. (1901), 18 T. L. R. 66; 4 W. C. C. 23, C. A.

Annotations:—As to (2) **Distd.** Hartshorne *v.* Coppice Colliery Co. (1912), 106 L. T. 609; Phillips *v.* Vickers & Maxim, [1912] 1 K. B. 16.

3596. ——— ———.]—A workman was injured by an accident in Aug. 1909. His employers, without any proceedings for compensation having been

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PART XIV. SECT. 16, SUB-SECT. 1.

q. To what matters applicable — Agreement to pay during incapacity — Effect of offer of suitable work.]—KEEVANS *v.* MUNDY (1914), 7 B. W. C. C. 883.—SCOT.

r. Application to register — Interested parties—Employers only with right to notice—When application signed by workman.]—TONNER *v.* BAIRD (WILLIAM) & CO., LTD., [1926] S. C. 773.—SCOT.

t. Effect of recording — Operation in bar of arbitration proceedings.]—

taken, admitted the accident & paid the workman 16*s.* 3*d.* a week, being half his wages, & said that they would continue to do so as long as their own doctor certified that total incapacity continued. In Jan., 1911, the workman applied to have recorded an alleged agreement whereby the employers agreed to pay him the weekly sum of 16*s.* 3*d.* during incapacity caused by the accident. The employers opposed the application on the grounds that no such agreement had been made, & that no question had arisen to give jurisdiction under Workmen's Compensation Act, 1906 (c. 58), s. 1 (3). The county ct. judge ordered a memorandum of the alleged agreement to be registered:—*Held:* there was no evidence to support the alleged agreement, & no such agreement could be implied from the fact that the employers had paid compensation & were willing to continue the same so long as their own doctor should certify the incapacity.—PHILLIPS *v.* VICKERS, SONS & MAXIM, [1912] 1 K. B. 16; 81 L. J. K. B. 123; 105 L. T. 564; 5 B. W. C. C. 23, C. A.

Annotations:—**Apld.** Hartshorne *v.* Coppice Colliery Co. (1912), 106 L. T. 609; Payne *v.* Fortescue, [1912] 3 K. B. 346; Godbold *v.* L. C. C. (1914), 111 L. T. 691. **Refd.** Moore *v.* Pryde (1912), 6 B. W. C. C. 384.

3597. *S. P.* HEALE *v.* VICKERS, SON & MAXIM (1911), 5 B. W. C. C. 22, C. A.

3598. *S. P.* BARTHOLOMEW *v.* VICKERS, SON & MAXIM (1911), 5 B. W. C. C. 22, C. A.

3599. —— ——.]—HARTSHORNE *v.* COPPICE COLLIERY CO., No. 3575, *ante.*

3600. —— **Award by committee.**] — MULLHOLLAND *v.* WHITEHAVEN COLLIERY CO., No. 3039, *ante.*

3601. —— **Agreement to find suitable work.**]—An injured workman received compensation for some time. His employers then stopped payments & wrote a letter to the workman to the effect that, if the man was unable to find work elsewhere, they would provide him with suitable work at his old rate of wages. The workman tried work offered by his employers, but said he could not do it, & consequently applied for compensation to be continued. He asked for the letter to be recorded as a memorandum of agreement. The county ct. judge made an award for compensation to a certain date, with a declaration of liability to follow, but refused to record a memorandum:—*Held:* there was no misdirection.—WATKINS *v.* PORT OF LONDON AUTHORITY (1920), 13 B. W. C. C. 243, C. A.

3602. —— **Agreement to find light work—For men receiving compensation.**]—WOOD *v.* WENTWORTH SILKSTONE COLLIERY CO., LTD., No. 3393, *ante.*

—— **Agreements invalid unless registered.**]—*See* Sub-sect. 2, *post.*

3603. —— **Collateral documents—Memorandum in addition to award.**]—It is not necessary to forward a memorandum if the award itself be sent to the registrar.—BAILEY *v.* PLANT (1901), 17 T. L. R. 449; 3 W. C. C. 207, D. C.

3604. —— —— **Statement as to weekly earnings.**]—Where under Workmen's Compensation Act, 1906 (c. 58), Sched. II. (9), a memorandum of agreement between employer & workman as to compensaton has been sent to the registrar of the county ct. for registration together with a statement in writing under Workmen's Compensation Rules, rr. 43 (3) & 51 (1), by the workman as to his average weekly earnings, the memorandum is entered on the special register, but it is not the practice to enter the statement. In the event of the statement containing an error, the proper order to make is that it be returned to the party who sent it in for correction; but the judge has no jurisdiction to order the statement to be altered or to order the memorandum recorded to be altered so as to show a rectification of the mistake in the statement.—EDGE *v.* GREEN (1918), 87 L. J. K. B. 1011; 119 L. T. 12; 11 B. W. C. C. 32, C. A.

3605. Application to register—Interested parties—Approved society—Workman insured under National Health Insurance Acts.]—BONNEY *v.* JOSHUA HOYLE & SONS, LTD., No. 3850, *post.*

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 23 (6).

SUB-SECT. 2.—AGREEMENTS INVALID UNLESS REGISTERED.

See Workmen's Compensation Act, 1925 (c. 84), ss. 23–25, 44; Workmen's Compensation Rules, 1926, rr. 43–52, 97.

3606. Compensation to infant.]—An infant, by his father, claimed compensation &, after negotiations for nearly three months, the employers made a voluntary payment, & took a receipt both from the infant & his father in full satisfaction & discharge of all claims. This agreement was left unregistered. The claim was carried to the county ct. but resisted by the employers on the ground that the matter had been settled by agreement, & that the jurisdiction of the ct. had thus been ousted:—*Held:* the agreement, being unregistered, was no bar to these proceedings.—BATES *v.* HOLDING (J.) & CO. (1914), 7 B. W. C. C. 80, C. A.

3607. ——.]—R. *v.* BURY COUNTY COURT REGISTRAR, No. 3638, *post.*

3608. Compensation to dependant.] — A girl living with her parents gave the bulk of her earnings to her mother. She died from an industrial disease admittedly contracted at her work. The girl's father agreed to accept from the employers, who admitted liability, £10 in respect of such liability. The county ct. judge, on the authority of *Ryan* v. *Hartley*, No. 3582, *ante*, held the settlement binding, although no memorandum of the same had been registered in accordance with the Act, & dismissed the application:—*Held:* this being a settlement of liability admittedly within the Act, *Ryan* v. *Hartley*, No. 3582, *ante*, did not apply, &, there being no memorandum recorded, the settlement did not relieve the employers of liability under the Act.—MACEY *v.* EDMONTON MUNITIONS CO., LTD. (1918), 11 B. W. C. C. 68, C. A.

SUB-SECT. 3.—POWERS AND DUTIES OF REGISTRAR AND JUDGE.

A. Registrar.

See Workmen's Compensation Act, 1925 (c. 84), ss. 23–25; Workmen's Compensation Rules, 1926, rr. 43–52, 97.

3609. Compensation to infants—Power to bind infants—Infant dependants.]—RHODES *v.* SOOTHILL WOOD COLLIERY CO., LTD., No. 3567, *ante.*

3610. —— **Decision as validity.**]—R. *v.* BURY COUNTY COURT REGISTRAR, No. 3638, *post.*

LOCHGELLY IRON & COAL CO., LTD. *v.* SINCLAIR, [1907] S. C. 1071.—**SCOT.**

a. —— *Operation in bar of application for further compensation.*]—GORMLEY *v.* SCOTTISH IRON & STEEL CO., LTD., [1918] S. C. 742; 55 Sc. L. R. 567; [1918] 2 S. L. T. 102; 11 B. W. C. C. 370.—**SCOT.**

Sect. 16.—*Registration of agreement and awards: Sub-sect.* 3, *A. & B.*]

3611. To interfere with award of committee.]—MULLHOLLAND *v.* WHITEHAVEN COLLIERY CO., No. 3039, *ante.*

3612. To register without reference to judge—Agreement in redemption of weekly payments—If satisfied of genuineness.]—Where there has been an agreement between employer & workman that the employer shall redeem by a lump sum weekly payments of compensation payable to the workman under Workmen's Compensation Act, 1906 (c. 58), it is *primâ facie* the duty of the registrar of the county ct. under Sched. II., s. 9, of the Act to record a memorandum of the agreement on being satisfied of its genuineness. If the adequacy of the sum is called in question it is the duty of the registrar, proceeding under proviso (*d*) to that sect., to inquire whether the sum is adequate. This is so notwithstanding that Form 38 in the Appendix to the Consolidated Workmen's Compensation Rules, July, 1913, indicates that the registrar may refer the matter to the county ct. judge on the mere objection of the workman to the registration of the agreement on the ground of the inadequacy of the sum.—R. *v.* BOW COUNTY COURT REGISTRAR, *Ex p.* SCOTTISH SHIRE LINE, LTD., [1914] 3 K. B. 266; 83 L. J. K. B. 1806; 111 L. T. 277; 7 B. W. C. C. 1001, C. A.

Annotation:—**Refd.** Price *v.* Westminster Brymbo Coal & Coke Co., [1915] 2 K. B. 128.

3613. —— —— On request of employer.]—R. *v.* THETFORD COUNTY COURT REGISTRAR, No. 3052, *post.*

—— Agreement for sum not in redemption of weekly payments.]—*See* Nos. 3582–3588, *ante.*

3614. To inquire into adequacy of sum—Agreement in redemption of weekly payments.]—R. *v.* BOW COUNTY COURT REGISTRAR, *Ex p.* SCOTTISH SHIRE LINE, LTD., No. 3612, *ante.*

Refusal to register—Grounds for refusal.]—*See* Sub-sect. 4, *post.*

B. Judge.

See Workmen's Compensation Act, 1925 (c. 84), ss. 23–25; Workmen's Compensation Rules, 1926, rr. 43–52, 97.

3615. Foundation of jurisdiction to record agreements—Necessity for existence of agreement.]—The jurisdiction as to recording an agreement to pay compensation to an injured workman under Workmen's Compensation Act, 1906 (c. 58), can only exist & be exercised if in truth there is such an agreement. It need not necessarily be in writing, but it may be inferred. An acknowledgment, however, by the workman that a certain sum was paid to him while he was totally incapacitated for work does not constitute in any shape or form an agreement binding the employer or the workman, or justify the ct. in holding that there was an agreement to pay compensation in the full terms of the Act.—MADDEN *v.* GUEST'S EXECUTORS, [1916] 1 K. B. 76; 85 L. J. K. B. 679; 114 L. T. 19; 32 T. L. R. 74; 9 B. W. C. C. 1, C. A.

Annotation:—**Refd.** Shaddick *v.* Palmer's Shipbuilding & Iron Co. (1917), 86 L. J. K. B. 1017.

3616. Compensation to infant dependants—Approval of registrar — Power to interfere.]—RHODES *v.* SOOTHILL WOOD COLLIERY CO., LTD., No. 3567, *ante.*

3617. Agreement for redemption of weekly payment—Whether agreement ought or ought not to be recorded.]—Where the registrar of a county ct. has refused to register an agreement between an employer & a workman who has been injured in his service, for the redemption of a weekly payment by a lump sum, on the ground of the inadequacy of the sum agreed upon, & has referred the matter to the judge under Workmen's Compensation Act, 1906 (c. 58), Sched. II., clause 9 (*d*), the sole question for the judge is whether the agreement is one which ought or ought not to be recorded. He is not entitled to treat the agreement as a submission by the employer to pay any sum which the judge may, under the circumstances, think reasonable.—MORTIMER *v.* SECRETAN, [1909] 2 K. B. 77; 78 L. J. K. B. 521; 100 L. T. 721; 2 B. W. C. C. 446, C. A.

Annotation:—**Folld.** M'Vie *v.* Taylor (1914), 7 B. W. C. C. 891.

3618. To treat agreement as submission by employer—To pay sum found reasonable by judge.]—MORTIMER *v.* SECRETAN, No. 3617, *ante.*

3619. —— —— Unless parties consent—Consent to be clearly expressed.]—A workman applied to register a memorandum of agreement under which his employer agreed to pay him as compensation a certain sum each week. The judge, under the impression that the parties had agreed to his arbitrating as to the amount of the weekly payments, made an award for a different sum:—*Held:* on an application to register a memorandum of agreement to pay compensation the judge has no power to alter the amount and to treat that agreement as a submission by the employer to pay any sum the judge thought reasonable. *Semble:* such jurisdiction may be given by consent, but the consent must be clearly so expressed & should be mentioned in the award.—HALLS *v.* FURNESS, WITHY & CO. (1909), 3 B. W. C. C. 72, C. A.

3620. To treat award by committee as agreement.]—MULLHOLLAND *v.* WHITEHAVEN COLLIERY CO., No. 3039, *ante.*

3621. To interfere with award of committee.]—MULLHOLLAND *v.* WHITEHAVEN COLLIERY CO., No. 3039, *ante.*

3622. To register only agreement arrived at.]—A workman was injured & paid full compensation. Four weeks after the accident the workman left with the registrar a memorandum of an agreement. The employers gave notice of objection on the ground that the memorandum provided for the payment of full compensation during total "or partial" incapacity, but no further steps were then taken, & the full payments were continued.

PART XIV. SECT. 16, SUB-SECT. 3. —A.

3614 i. *To inquire into adequacy of sum—Agreement in redemption of weekly payments.*]—BAIRD (WILLIAM) & CO., LTD. *v.* ANCIENT ORDER OF FORESTERS (1914), 7 B. W. C. C. 943. —SCOT.

PART XIV. SECT. 16, SUB-SECT. 3. —B.

3622 i. *To register only agreement arrived at.*]—Appt. applied to have a memorandum of agreement recorded, & it appeared that the memorandum included certain terms as to which there was no evidence of any agreement having been arrived at:—*Held:* the memorandum could not be recorded.—M'GEOWN *v.* WORKMAN, CLARK & CO., LTD. (1911), 45 I. L. T. 165.—IR.

3622 ii. ——.]—SYRON *v.* KILMARTIN, [1922] 2 I. R. 164.—IR.

3622 iii. ——.]—Where an agreement in writing has been entered into between an employer & a workman with regard to compensation, it is the duty of the sheriff, if objection is taken, to refuse to record a memorandum which is not in the precise terms of the written agreement. It is not part of his duty to construe the written agreement & then to determine whether the memorandum gives effect to it as so construed.—M'LEAN *v.* ALLAN LINE S.S. CO., LTD., [1912] S. C. 256.—SCOT.

3622 iv. ——.]—MOORE & CO. *v.* PRYDE, [1913] S. C. 457; 50 Sc. L. R. 302; [1913] 1 S. L. T. 49; 6 B. W. C. C. 384.—SCOT.

Eighteen months later the workman had partially recovered, & was given light work by the employers, who offered to continue the payments on the basis of partial incapacity; this offer being refused, the workman applied to have the agreement recorded. The county ct. judge held that the agreement was to pay full compensation during total incapacity, & refused to register unless the memorandum were altered by striking out the words "or partial," & adding certain other words: —*Held:* the real agreement between the parties was to pay full compensation during total incapacity. Such an agreement does not imply any agreement to pay the same during partial incapacity.—MAUNDRELL *v.* DUNKERTON COLLIERIES CO., LTD. (1910), 4 B. W. C. C. 76, C. A.

Annotations:—**Folld.** M'Carthy *v.* Stapleton-Bretherton (1911), 4 B. W. C. C. 281. **Consd.** Madden *v.* Guest's Exors., [1916] 1 K. B. 76.

3623. ——.]—The county ct. judge ordered the recording of a memorandum submitted by the workman, which was different in terms to the agreement made by the employer:—*Held:* the county ct. judge had power only to record a memorandum of the agreement in fact made between the parties.—LUNT *v.* SUTTON HEATH & LEA GREEN COLLIERIES, LTD. (1911), 4 B. W. C. C. 219, C. A.

3624. ——.]—An injured workman, whose wages had been 18*s.* per week, was told that he would be paid 9*s.* per week till he could do light work. He received this for a few weeks, & was then given light work. No further compensation being paid, he sent for record a memorandum of agreement to pay 9*s.* per week during "total or partial incapacity." The employer objected, but the county ct. judge recorded the memorandum:—*Held:* there was no evidence of any agreement to pay during partial incapacity, & therefore the memorandum ought not to have been recorded.—M'CARTHY *v.* STAPLETON-BRETHERTON (1911), 4 B. W. C. C. 281, C. A.

3625. ——.]—The employers of an injured workman agreed to pay him weekly compensation during "total incapacity." The workman sent a memorandum to the registrar to be recorded, containing the words, "until the same shall be ended, diminished, or increased, by order of ct., or by agreement between the parties." The employers gave notice of objection on the ground that the proposed agreement by the workman contained terms to which they had not agreed. The county ct. judge refused to record:—*Held:* the memorandum should not be recorded, as it did not in fact correctly set out the agreement made between the parties.—SHORE *v.* HYRCANIA (OWNERS) (1911), 4 B. W. C. C. 207, C. A.

3626. ——.]—GODBOLD *v.* LONDON COUNTY COUNCIL, No. 3578, *ante*.

3627. To entertain reference from registrar—Adequacy of sum.]—An agreement for the redemption of a weekly payment by a lump sum was sent to a registrar to record. It appearing inadequate, the registrar, under the powers given him by Sched. II. (9) (*d*), referred it to the judge. The judge, holding that the sole question for him to decide was whether the agreement had in fact been made, declined to decide the question of adequacy:—*Held:* the case must go back for the question of adequacy to be decided.—SEGURA (OWNERS) *v.* BLAMPIED (1911), 4 B. W. C. C. 192, C. A.

3628. —— **Reference not within powers of registrar.**]—HUDSON *v.* CAMBERWELL BOROUGH COUNCIL, No. 3583, *ante*.

3629. Where registrar failed to comply with rules—Before reference to judge.]—The parents of a lad who was killed at sea, claimed £150 as compensation. Ultimately they agreed to accept £80, & a memorandum of an agreement to that effect was sent to the registrar to be recorded. The genuineness of the agreement was not disputed. The registrar did not send out notices to the parties required by Workmen's Compensation Rules, 1913–1918, r. 51 (2), asking for further information, nor did he report in writing to the judge under r. 51 (3). He, however, refused to record the memorandum because of some information he had received, and referred the matter to the judge, to whom he verbally gave his reasons for refusing to record. A day was fixed for hearing when respts. took the objection that the judge had no jurisdiction to deal with the matter because the registrar had not complied with the rules. The judge overruled the objection & offered to hear the case on its merits. This being refused he made an order that the agreement should not be recorded, & gave a special direction as to costs:—*Held:* the order of the county ct. judge should be discharged & the matter remitted to the registrar to be dealt with by him in accordance with the rules.—ROBERTS *v.* BLOW, RICHARD & CO. (1920), 13 B. W. C. C. 4, C. A.

3630. To hear oral evidence—Genuineness of agreement disputed.]—HALL *v.* FRANCOIS CEMENTATION CO., LTD., No. 3650, *post*.

To refuse registration.]—*See* Sub-sect. 4, *post*.

Rectification.]—*See* Sub-sect. 5, *post*.

Removal from register.]—*See* Sub-sect. 6, *post*.

Costs.]—*See* Sub-sect. 7, *post*.

3622 v. ——.]—M'LAUGHLIN *v.* PUMPHERSTON OIL CO., LTD., [1915] S. C. 65; 52 Sc. L. R. 48; [1914] 2 S. L. T. 306; 8 B. W. C. C. 354.—**SCOT.**

b. —— *Power to add provisions in terms of the Act.*]—PEARSON *v.* BABCOCK & WILCOX, LTD., [1913] S. C. 959.—**SCOT.**

c. —— ——.]—SCOTT *v.* SANQUHAR & KIRKCONNEL COLLIERIES CO., [1915] S. C. 520; [1915] 1 S. L. T. 241.—**SCOT.**

3627 i. *To entertain reference from registrar—Adequacy of sum.*]—BURNS *v.* BAIRD & CO., LTD., [1912] S. C. 358; 50 Sc. L. R. 280; [1912] 2 S. L. T. 491; 6 B. W. C. C. 362.—**SCOT.**

d. —— —— *No power to make payment into court of sum paid to workman a condition precedent to hearing.*]—M'VIE *v.* TAYLOR & CO., [1914] S. C. 533; 51 Sc. L. R. 435; [1914] 1 S. L. T. 342; 7 B. W. C. C. 891.—**SCOT.**

e. *To record an oral agreement.*]—TRAILL & SONS *v.* COCHRANE (1901), 3 F. (Ct. of Sess.) 1091; 38 Sc. L. R. 848; 9 S. L. T. 183.—**SCOT.**

f. *Concurrent application to record & review—Suspension of warrant to record to await hearing of review.*]—M'EWAN *v.* BAIRD & CO., LTD., [1910] S. C. 436.—**SCOT.**

g. —— ——.]—M'VEY *v.* DIXON, LTD., [1910] S. C. 544.—**SCOT.**

h. *Duty to decide validity of discharge of agreement.*]—An arbitrator can competently determine the question as to the validity of an alleged discharge of agreement in the application to record the memorandum, & where the parties have joined issue on the question he is bound to determine it.—HANLEY *v.* NIDDRIE & BENHAR COAL CO., LTD., [1910] S. C. 875.—**SCOT.**

k. *Recording a judicial act.*]—The act of the sheriff in recording a memorandum of agreement under Workmen's Compensation Act, 1906, is a judicial act.—BROWN *v.* ORR, [1910] S. C. 526.—**SCOT.**

l. *To record with conditions—Where workman has returned to work at same wages.*]—MATTHEWS *v.* BAIRD & CO., LTD., [1910] S. C. 689.—**SCOT.**

m. *Agreement to pay during total incapacity—Partial cessation of incapacity—Duty of arbitrator to determine before recording.*]—SMITH *v.* PETRIE (1913), 50 Sc. L. R. 749; [1913] 1 S. L. T. 470; 6 B. W. C. C. 833.—**SCOT.**

n. *Arbitration proceedings concurrent with application to record—No power to conjoin processes.*]—ARNISTON COAL CO. *v.* KING, [1913] S. C. 892; 50 Sc. L. R. 685; [1913] 1 S. L. T. 581; 6 B. W. C. C. 826.—**SCOT.**

o. *To suspend recording to await medical reference.*]—SOMERVILLE *v.* BARCLAY, CURLE & CO., LTD., [1926] S. C. 246.—**SCOT.**

Sect. 16.—*Registration of agreement and awards: Sub-sect.* 4, *A. & B.* (*a*), (*b*), (*c*) & (*d*).]

SUB-SECT. 4.—REFUSAL TO REGISTER.

A. In General.

See Workmen's Compensation Act, 1925 (c. 84), ss. 23–25, 44; Workmen's Compensation Rules, 1926, rr. 43–52, 97.

3631. Effect of refusal—Parties relegated to previous rights—Subsequent application for arbitration.]—A judge refused to record a memorandum of agreement for a lump sum settlement, on the ground of inadequacy. The workman then applied for compensation, & the judge, finding that his incapacity was no longer due to the accident, & that the amount in fact paid under the abortive settlement was enough to cover all compensation due for the short period during which the incapacity had been due to the accident, awarded in favour of the employers:—*Held:* on the refusal to record, the parties were relegated to their previous rights. The judge was entitled to decide the application for compensation freely on the evidence, not being bound, by his previous decision, to award for the workman.—BEECH *v.* BRADFORD CORPN. (1911), 4 B. W. C. C. 236, C. A.

3632. Improper refusal—Mandamus to registrar.]—R. *v.* THETFORD COUNTY COURT REGISTRAR, No. 3652, *post.*

B. Grounds for.

(*a*) *In General.*

See Workmen's Compensation Act, 1925 (c. 84), ss. 23-25, 44; Workmen's Compensation Rules, 1926, rr. 43–52, 97.

3633. Request for arbitration filed.]—FIELD *v.* LONGDEN & SONS, No. 3066, *ante.*

3634. Accident not arising out of & in course of employment — Compassionate payments — Alleged implied agreement.]—The workman was injured, & was paid compensation for twenty-one weeks. The employers then stopped payment & disputed liability of any kind, including even the occurrence of an accident, & arbitration proceedings brought by the workman terminated in their favour. Subsequently application was made by the workman to the same county ct. judge to have the implied agreement recorded. The judge refused on the ground that he had already found, as a fact, no personal injury by accident arising out of or in the course of his employment was caused to the workman on the date alleged in the particulars, & that the payments were in the nature of a compassionate allowance, & that there was no agreement:—*Held:* these were findings of fact with which the ct. could not interfere.—TURNER *v.* BELL (G.) & SONS, LTD. (1910), 4 B. W. C. C. 63, C. A.

3635. Award of committee ultra vires.]—MULLHOLLAND *v.* WHITEHAVEN COLLIERY CO., No. 3039, *ante.*

3636. Applicant not a "workman"—Status previously settled by agreement.]—Appct. met with an accident whilst in the employment of resps. For some time he received £1 a week compensation from resps.' agents, & an agreement was then come to in the form of a receipt as follows: "Received this Mar. 16, 1912, from the Shipping Federation Ltd. on behalf of the owners of the *Lloyds* the sum of £5 being weekly compensation at the rate of £1 per week from Feb. 10, 1912, to Mar. 16, 1912, inclusive under Workmen's Compensation Act, 1906 (c. 58), under which Act I elect to claim for personal injury by accident sustained by me on or about Dec. 6, 1911. This weekly payment is to be continued during my total disablement resulting from the accident in accordance with the provisions of the above mentioned Act, the amount of any payment due during partial disablement to be settled hereafter." This was signed by appct., described as a "bargemaster," & sealed by the federation, & bore a sixpenny agreement stamp as well as a penny receipt stamp. The federation stopped payment on the ground that appct. was not a "workman" within the Act. Appct. applied to the registrar to record a memorandum of the agreement, but the latter refused to do so on the ground that appct. was not a workman:—*Held:* as the genuineness of the agreement was not questioned, no fraud or mutual mistake was alleged, & it was settled by the agreement that appct. was a workman within the Act, the learned judge had no jurisdiction to refuse to record the agreement.—GOODSELL *v.* LLOYDS (OWNERS), [1914] 3 K. B. 1001; 83 L. J. K. B. 1733; 111 L. T. 784; 30 T. L. R. 622; 7 B. W. C. C. 631, C. A.

Annotation:—**Refd.** Dutton *v.* Sneyd Bycars Co., [1920] 1 K. B. 414.

3637. Death of either party—Workman.]—A workman was in receipt of weekly compensation from his employers for injury by accident. On June 12, 1914, an agreement in writing duly executed by the parties, by which the employers agreed to pay the workman a lump sum of £85 in redemption of all their liability under Workmen's Compensation Act, 1906 (c. 58), was sent to the registrar to be recorded. The registrar thereupon sent out the proper notices, & on June 22, 1914, no notice of objection having been received, recorded the agreement. Meanwhile, on June 18, 1914, before the seven days allowed for sending in notices of objections had elapsed, the workman died, admittedly from causes altogether outside the accident. Neither the registrar nor the employers were aware of his death when the agreement was recorded. There were no dependants. Upon application by the administratrix of deceased workman for leave to issue execution:—*Held:* the agreement was not conditional until it was recorded & it had been duly recorded despite the death of the workman within the seven days, & it was enforceable as a county ct. judgment by the administratrix under Workmen's Compensation Act, 1906 (c. 58), Sched. II. (9).

Sched. I. (19) of the Act does not bar a claim by a legal personal representative to enforce a deceased workman's right against his employer.—PRICE *v.* WESTMINSTER BRYMBO COAL & COKE CO., [1915] 2 K. B. 128; 84 L. J. K. B. 746; 112 L. T. 905; 31 T. L. R. 219; 59 Sol. Jo. 301; 8 B. W. C. C. 257, C. A.

Annotation:—**Folld.** R. *v.* Bury County Court Registrar, [1918] 2 K. B. 342.

3638. —— —— Infant.]—An agreement was entered into on behalf of an infant workman for the redemption of a weekly payment of a lump sum, & sent to the registrar to be recorded. Before it was recorded the workman died:—*Held:* notwithstanding Workmen's Compensation Rules,

PART XIV. SECT. 16, SUB-SECT. 4.—B. (a).

p. *Death of either party — Workman—Infant—Death before curator appointed.*] — A minor workman presented an application to have a memorandum of agreement recorded, but he died before a *curator ad litem* had been appointed. His exor. having been sisted as appct. in his place, the application was refused:—*Held:* the approval of a *curator ad litem* was a condition suspensive of the validity of the agreement, & as the condition could not be purified, the application had been rightly refused.—DONALDSON'S EXECUTOR *v.* SHARP & SONS, [1922] S. C. 566.—SCOT.

1913–1918, r. 44, para. 6. the death of the infant workman did not affect the obligation of the registrar to record the agreement.

The meaning of that rule is that the agreement of a person under a legal disability, such as an infant, is "conditional" in the sense, not that it is of no validity until recorded, but that it is liable to be set aside if it does not satisfy the condition of being for that person's benefit, & that until so set aside it is just as valid as an agreement made by a person of full age.—R. *v.* BURY COUNTY COURT REGISTRAR, [1918] 2 K. B. 342; 87 L. J. K. B. 1154; 119 L. T. 280; 34 T. L. R. 413; 11 B. W. C. C. 431.

Memorandum not expressing agreement arrived at.]—*See* Nos. 3622–3627, *ante*.

(b) Agreement not Genuine.

See Workmen's Compensation Act, 1925 (c. 84), ss. 23–25, 44; Workmen's Compensation Rules, 1926, rr. 43, 52, 97.

3639. Evidence of want of genuineness—Compensation less than half wages.]—FOX *v.* BATTERSEA BOROUGH COUNCIL, No. 3071, *ante*.

3640. —— Payment received not as compensation—Mistake by workman.]—A girl employed in resps.' confectionary department to pack sweets & cover chocolates, contracted eczema & obtained a certificate of disablement by an industrial disease within Workmen's Compensation Act, 1906 (c. 58). After some correspondence between her approved society & her employers, a request for arbn. was filed on her behalf by the approved society. Meanwhile the girl received a sum of £34 from her employers, which she accepted under the mistaken impression that it represented the full amount of wages due to her. She also received £5 in addition, & signed receipts & a memorandum of agreement which was expressed to be in full settlement of compensation. The employers applied to the registrar to record the memorandum. The registrar refused, & the matter was referred to the judge. The county ct. judge found on the evidence that there was a mistake, & that the agreement was not a genuine agreement. He accordingly refused to record the memorandum:—*Held:* the county ct. judge was justified in coming to the conclusion that the memorandum was not genuine & ought not to be recorded.—SAWYER *v.* LIPTON, LTD. (1921), 14 B. W. C. C. 163, C. A.

3641. No fraud suggested by parties—Finding of fraud by judge.]—HUDSON *v.* CAMBERWELL BOROUGH COUNCIL, No. 3583, *ante*.

(c) Inadequacy of Sum.

See Workmen's Compensation Act, 1925 (c. 84), ss. 23–25, 44; Workmen's Compensation Rules, 1926, rr. 43–52, 97.

3642. Award of committee.]—MULLHOLLAND *v.* WHITEHAVEN COLLIERY CO., No. 3039, *ante*.

3643. Composition agreement.]—A workman met with an accident to his head in 1909. He got apparently perfectly well, & returned to his work. Two years later he died from the effects of an operation for abscess on the brain.

The dependants claimed compensation, & the employers offered to pay *ex gratia* £10 to settle the claim. This sum was accepted, & thereupon the employers paid £10 into ct. under Workmen's Compensation Rules. 1907–1912, r. 56 (*c*). The registrar was not satisfied, as two of the children were minors, that this sum was sufficient, & required the employers, before recording the memorandum, to furnish him with the reports of medical evidence which they had. The dependants had no such evidence. The employers objected on the ground that the reports were privileged. The registrar thereupon referred the matter to the judge, who refused to record the memorandum:—*Held:* without deciding whether the medical reports were privileged or not, that there was ample evidence on which the registrar could decide the sum offered was inadequate, & the judge refuse to record the memorandum.—JOHNSON *v.* OCEANIC STEAM NAVIGATION CO., LTD. (1912), 5 B. W. C. C. 322, C. A.

3644. Payment to persons under disability.]—RAWLINGS (H. D.), LTD. *v.* HODGSON, No. 3584, *ante*.

3645. Payment to dependants.] — RAWLINGS (H. D.), LTD. *v.* HODGSON, No. 3584, *ante*.

3646. Payment of lump sum—In redemption of weekly payments.]—RAWLINGS (H. D.), LTD. *v.* HODGSON, No. 3584, *ante*.

—— Not in redemption of weekly payments.]—*See* Sect. 15, sub-sect. 3, A., *ante*.

(d) Agreement Exhausted.

See Workmen's Compensation Act, 1925 (c. 84), ss. 23–25, 44; Workmen's Compensation Rules, 1926, rr. 43–52, 97.

3647. Cessation of incapacity—Partial cessation.]—Workmen's Compensation Act, 1897 (c. 37), sched. II., s. 8, provides that where the amount of compensation under the Act shall have been ascertained by agreement, a memorandum thereof shall be sent by any party interested to the registrar of the county ct., who, "on being satisfied as to its genuineness," shall record it in a special register:—*Held:* the registrar could not refuse to record the memorandum merely because owing to altered circumstances the workman was no longer entitled to the amount of compensation fixed by the agreement, but that his only duty was to ascertain whether the memorandum accurately represented the agreement which had been entered into.—BLAKE *v.* MIDLAND RY., CO. [1904] 1 K. B. 503; 73 L. J. K. B. 179; 90 L. T. 433; 68 J. P. 215; 20 T. L. R. 191; 6 W. C. C. 163.

Annotations:—**Folld.** Keeling *v.* Eastwood, Swingler (1904), 68 J. P. Jo. 207. **Distd.** Popple *v.* Frodingham Iron & Steel Co., [1912] 2 K. B. 141.

3648. —— ——.] — KEELING *v.* EASTWOOD, SWINGLER & CO. (1904), 6 W. C. C. 167; 68 J. P. Jo. 207, D. C.

3649. —— Agreement to pay during total incapacity.]—Where an agreement has been entered into between an employer & a workman, who has been injured by an accident arising out of & in the course of his employment, for the payment of weekly compensation from the date of the accident & to continue during total incapacity for

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PART XIV. SECT. 16, SUB-SECT. 4.—B. (b).

q. *Evidence of want of genuineness—Payment above statutory limit immaterial.*]—MACDONALD *v.* FAIRFIELD SHIPBUILDING & ENGINEERING CO. (1905), 8 F. (Ct. of Sess.) 8.—**SCOT.**

r. —— *Ignorant workman—No consideration for final discharge.*]—MACANDREW *v.* GILHOOLEY, [1911] S. C. 448; 48 Sc. L. R. 511; [1911] 1 S. L. T. 92; 4 B. W. C. C. 370.—**SCOT.**

PART XIV. SECT. 16, SUB-SECT. 4.—B. (c).

3646 i. *Payment of lump sum — In redemption of weekly payments.*]—In determining the adequacy or inadequacy of a lump sum agreed to be paid in redemption of a weekly payment, the county ct. judge ought not to be guided by the principle laid down in Workmen's Compensation Act, 1906, sched. I. (17), unless he is satisfied that the incapacity of the injured workman is permanent.—SWANNICK *v.* CONGESTED DISTRICTS BOARD TRUSTEES (1912), 46 I. L. T. 253; 6 B. W. C. C. 449.—**IR.**

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work, the ct. will not direct a memorandum of the agreement to be recorded if at the date of the application to register the total incapacity has ceased.—POPPLE *v.* FRODINGHAM IRON & STEEL CO., [1912] 2 K. B. 141; 81 L. J. K. B. 769; 106 L. T. 703; 5 B. W. C. C. 394, C. A.

Annotations:—**Distd.** Smith *v.* Petrie (1913), 6 B. W. C. C. 833. **Consd.** Hall *v.* Francois Cementation Co. (1923), 130 L. T. 443. **Distd.** Hulmston *v.* Birkenhead Union (1925), 95 L. J. K. B. 529. **Refd.** Goodsell *v.* Sailing Barge Lloyds, [1914] 3 K. B. 1001; R. *v.* Thetford County Court Registrar, [1915] 1 K. B. 224.

3650. —— Agreement providing for total or partial incapacity.]—The workman in Nov. 1922, received an injury from an accident arising out of & in the course of his employment by applts., & it was agreed that applts. should pay him £1 a week compensation during his total or partial incapacity. This sum was paid until Apr. 13, 1923, when the employers alleged he was no longer incapacitated. A doctor reported the workman fit for work on Apr. 9, 1923, & on that day the workman applied to the registrar to record a memorandum of the agreement which, however, he refused to do after receiving on Apr. 20 a notice from applts. that they disputed the genuineness of the agreement on the ground that it was no longer subsisting or enforceable as the workman was no longer incapacitated. On the matter coming before the county ct. judge on May 16 he ordered the agreement to be recorded as being a subsisting one on Apr. 9, on the ground that at that date compensation was being paid, & it was admitted that the workman had not returned to work & was not earning any wages, & the county ct. judge then refused to hear medical evidence tendered by applts. as to incapacity. Workmen's Compensation Rules, 1913–1921, r. 50 (*c*), provided that when the genuineness of an agreement designed to be recorded was disputed before the county ct. judge witnesses might be orally examined in the same manner as on the hearing of an action:—*Held*: the case must be remitted to the county ct. for re-hearing & evidence to be taken, the county ct. judge having directed his mind to proviso (*b*) to para. 9 of Sched. II. of the Workmen's Compensation Act, 1906 (c. 58), without considering para. 9 itself or rules 47 (*a*) (*b*) & 50 (*c*) of the Workmen's Compensation Rules. The question whether the right date to consider whether the agreement was a subsisting or enforceable one was the date of the application to record it, namely, Apr. 9, 1923, or the date of the hearing, namely, May 16, 1923, must be raised if necessary to the re-hearing.—HALL *v.* FRANCOIS CEMENTATION CO., LTD. (1923), 130 L. T. 443; 16 B. W. C. C. 202, C. A.

3651. —— ——.]—H. while employed by applts. on Dec. 4, 1923, had an accident & was thereby totally incapacitated. On Dec. 11, 1923, an agreement was come to as follows: "I agree that this weekly payment is to be continued only so long as I am totally incapacitated for work & that the amount of any payment due in respect of subsequent partial incapacity is to be ascertained as & when a question arises." H. thereafter received 24*s.* 6*d.* a week until Apr. 4, 1925. Applt.'s doctor having examined her on Mar. 17, 1925, reported she was fit to resume her old work, & in pursuance of Workmen's Compensation Act, 1923 (c. 58), s. 14 (*c*), applts. gave notice, on Mar. 24, 1925, to terminate the weekly payment within ten days, & sent a copy of the doctor's report. In accordance with proviso (i) to sect. 14 (*c*) of that Act, H. sent a report of her own doctor to applts. stating in effect that she was now partially incapacitated. Neither party continued the procedure under that proviso by applying for the matter to be referred to a medical referee, & no payment into ct. was made by applts. under proviso (ii) to sect. 14 (*c*). H. then applied to have the agreement recorded under Workmen's Compensation Act, 1906 (c. 58), sched. II., para. 9, & on applts.' objecting that it was a spent agreement as soon as total incapacity ceased, & therefore could not be recorded, the matter came before the county ct. judge, who held that the employers were not entitled to end or diminish the weekly payments, the special procedure under sect. 14 of the Act of 1923 not having been proceeded with, & that therefore the agreement was still in operation, & must be referred to, consequently it was not a "spent" agreement within the meaning of *Popple* v. *Frodingham Iron & Steel Co.*, No. 3649, *ante*, & ordered it to be recorded:—*Held*: though it was admitted total incapacity had ceased, the doctor of H. reported there still existed partial incapacity, & the agreement did not confine itself to dealing with total incapacity but provided further for the contingency of partial incapacity, & therefore it was not a "spent" agreement but was one which could be recorded, & the weekly payment could not be stopped as Workmen's Compensation Act, 1923 (c. 42), s. 14, had not come into complete operation.—HULMSTON *v.* BIRKENHEAD UNION (1925), 95 L. J. K. B. 529; 133 L. T. 757; 18 B. W. C. C. 378, C. A.

3652. Sum due thereunder paid over—Agreement unenforceable.]—A workman having lost a leg by accident, his employers paid him full compensation for over two years, & then, upon their desiring to redeem by payment of a lump sum, an agreement was entered into between the parties for payment of an amount calculated in accordance with Workmen's Compensation Act, 1906 (c. 58). The money was paid over to the workman, who gave a receipt, a memorandum of which was sent to the registrar for record. The registrar refused to record it on the ground that, the money having already been paid, the agreement was unenforceable. The registrar's refusal was upheld by the county ct. judge:—*Held*: the registrar was bound to record the memorandum. The ct. accordingly made a rule *nisi* for a *mandamus*, obtained by the employers, absolute.

The provision of Workmen's Compensation Act, 1906 (c. 58), Sched. II. (9), that the memorandum when registered shall be enforceable as a county ct. judgment applies equally whether the memorandum is sought to be enforced by the workman or employer.—R. *v.* THETFORD COUNTY COURT REGISTRAR, [1915] 1 K. B. 224; 84 L. J. K. B. 291; 112 L. T. 413; 8 B. W. C. C. 276.

SUB-SECT. 5.—RECTIFICATION.

See Workmen's Compensation Act, 1925 (c. 84), ss. 23–25, 44; Workmen's Compensation Rules, 1926, rr. 43–52, 97.

3653. Jurisdiction to rectify—Alleged mistake of fact.]—A mill hand, who was born on Feb. 9, 1889, met with an accident on Feb. 8, 1910. Compensation at the rate of full wages, 8*s.* 2*d.* a week was paid her, & a memorandum of the agreement to pay her 8*s.* 2*d.* during total incapacity was recorded on the assumption that she was an infant. The employers then applied to have the register rectified on the ground that the proper compensation should be 4*s.* 1*d.* half wages, the

woman really being of full age at the time. The county ct. judge found she was of full age & granted the application:—*Held:* there was no jurisdiction to rectify in this case.—SCHOFIELD *v.* CLOUGH (W. C.) & CO. (1912), 5 B. W. C. C. 417, C. A.

3654. —— Statement accompanying memorandum—Return of statement for correction.]—EDGE *v.* GREEN, No. 3604, *ante*.

3655. Memorandum entered without knowledge of workman.]—SAYERS *v.* MASSON SCOTT & CO. (1905), 49 Sol. Jo. 237.

3656. Memorandum based on erroneous statement—Memorandum containing no error.]—EDGE *v.* GREEN, No. 3604, *ante*.

SUB-SECT. 6.—REMOVAL FROM REGISTER.

See Workmen's Compensation Act, 1925 (c. 84), ss. 23–25, 44; Workmen's Compensation Rules, 1926, rr. 43–52, 97.

3657. Jurisdiction to remove—Application must be within six months.]—A workgirl, who was born on Feb. 9, 1889, met with an accident on Feb. 8, 1910. Compensation at the rate of full wages 8*s.* 2*d.* was paid to her under memorandum of agreement to pay her 8*s.* 2*d.* during total incapacity. The memorandum was recorded on the assumption that she was an infant. The employers having failed in an attempt to get the register rectified on the ground that she was not an infant attempted, two years after the recording of the agreement, to have the record removed on the same ground. The county ct. judge granted the application:—*Held:* the judge has no power to remove the record, except under Workmen's Compensation Act, 1906 (c. 58), Sched. II. (9) (*e*), & had therefore no jurisdiction in this case.—SCHOFIELD *v.* CLOUGH (W. C.) & CO., [1913] 2 K. B. 103; 82 L. J. K. B. 447; 108 L. T. 532; 57 Sol. Jo. 243; 6 B. W. C. C. 67, C. A.

Annotations:—**Consd.** Ware *v.* Whitlock, [1923] 2 K. B. 418. **Refd.** Park *v.* Anderson (1924), 17 B. W. C. C. 403.

3658. —— Agreement obtained by improper means.]—SCHOFIELD *v.* CLOUGH (W. C.) & CO., No. 3657, *ante*.

3659. —— Inadequacy of sum—Compensation to infant—Approval of registrar.]—When an agreement for payment of compensation in a lump sum for injury by accident to an infant has been duly recorded by the registrar, after notices have been sent to the parties, & no objection has been taken on the ground of inadequacy of amount, the county ct. judge has no power to remove it from the record under Workmen's Compensation Act, 1906 (c. 58), Sched. II. 19 (*e*), or under any general jurisdiction of the county ct., on the ground that in his opinion the compensation agreed on is inadequate.—WARE *v.* WHITLOCK, [1923] 2 K. B. 418; 92 L. J. K. B. 763; 129 L. T. 595; 67 Sol. Jo. 658; 16 B. W. C. C. 100, C. A.

SUB-SECT. 7.—COSTS.

See Sect. 24, *post*.

SUB-SECT. 8.—APPEALS.

See Sect. 23, *post*.

SECT. 17.—ENFORCEMENT OF AGREEMENTS AND AWARDS.

See Workmen's Compensation Act, 1925 (c. 84), s. 23; Workmen's Compensation Rules, 1926, rr. 82–84, &, *generally*, COUNTY COURTS, Vol. XIV., pp. 448 *et seq.*; EXECUTION, Vol. XXI., pp. 415 *et seq.*

3660. Enforceable as county court judgment.]—Where a memorandum of an agreement has been recorded by the registrar of a county ct. pursuant to Workmen's Compensation Act, 1906 (c. 58), Sched. II. (9), whereby compensation to a workman is made payable by his employer so long as his total incapacity for work shall last, it may be right to apply to the registrar to enforce that agreement as a county ct. judgment; but if the employer raises the question whether total incapacity has ceased, that being a question which goes to the root of the matter, the registrar cannot direct execution to issue. If, on the other hand, it is admitted by the employer that the total incapacity continues, then on that admission there is his duty to pay compensation which will be enforced by execution.—WARREN *v.* ROXBURGH (1912), 106 L. T. 554; 5 B. W. C. C. 263, C. A.

Annotation:—**Refd.** Jackson *v.* Rutter (1913), 57 Sol. Jo. 464.

3661. ——.]—R. *v.* THETFORD COUNTY COURT REGISTRAR, No. 3652, *ante*.

3662. ——.]—PRICE *v.* WESTMINSTER BRYMBO COAL & COKE CO., No. 3637, *ante*.

3663. Right to enforce—Passes to personal representative.]—PRICE *v.* WESTMINSTER BRYMBO COAL & COKE CO., No. 3637, *ante*.

3664. Execution—Application for leave to issue—Other remedy open.]—SAYERS *v.* MASSON SCOTT & CO. (1905), 49 Sol. Jo. 237.

3665. —— —— Made ex parte.]—A memorandum of agreement was registered in the county ct. by which the employers agreed to make a weekly payment of compensation to a workman, Ibrahim Said, "during the time of the incapacity of the said Ibrahim Said for work as a result of the accident in accordance with the terms of Workmen's Compensation Act, 1906 (c. 58)." The employers ceased their weekly payments under this agreement. Thereupon the workman applied in the county ct. for leave to issue execution. The employers who appeared, tendered evidence to show that the workman was no longer incapacitated at the date when the payments ceased. This evidence was held to be inadmissible, & leave was granted to the workman to issue execution:—*Held:* the evidence tendered was admissible to show that there had been no default.

Qu.: whether such an application for leave to issue execution can be made *ex parte*.—IBRAHIM SAID *v.* WELSFORD (J. H.) & CO., LTD. (1910), 3 B. W. C. C. 233, C. A.

Annotations:—**Follid.** M'Dowell *v.* M'Gladdery (1916), 9 B. W. C. C. 638. **Refd.** Jackson *v.* Rutter (1913), 57 Sol. Jo. 464.

PART XIV. SECT. 16, SUB-SECT. 6.

t. *Jurisdiction to remove — Application must be within six months —Workman without knowledge of recording or grounds for removal within time limited.*]— PARK *v.* ANDERSON BROTHERS, [1924] S. C. 1017.—SCOT.

a. —— —— *Order competent after time if application within time.*]— PATERSON *v.* ARDROSSAN HARBOUR CO., [1926] S. C. 442.—SCOT.

b. —— *Inadequacy of sum — Temporary capacity only contemplated —Permanent incapacity supervening.*]— M'GUIRE *v.* PATERSON & CO., [1913] S. C. 400; 50 Sc. L. R. 289; [1913] 1 S. L. T. 32; 6 B. W. C. C. 370.—SCOT.

c. —— *Recovery of workman at time of recording—Order for removal not proper remedy.*]—BAIRD & CO., LTD. *v.* STEVENSON, [1907] S. C. 1259.—SCOT.

PART XIV. SECT. 17.

3660 i. *Enforceable as county court judgment.*]—LAWRIE *v.* BROWN & CO., LTD., [1908] S. C. 705; 45 Sc. L. R. 477; 15 S. L. T. 981; 1 B. W. C. C. 137.—SCOT.

d. *Right to enforce — Effect of resumption of work at full wages— Agreement not enforceable for particular period.*]—BEATH & KEAY *v.* NESS

Sect. 17.—*Enforcement of agreements and awards.* *Sect.* 18: *Sub-sects.* 1, 2 & 3, *A.*]

3666. —— —— Question as to capacity of workman raised—Admissibility of evidence for employer.]—IBRAHIM SAID *v.* WELSFORD (J. H.) & CO., LTD., No. 3665, *ante.*

3667. —— —— —— Jurisdiction of registrar.]—WARREN *v.* ROXBURGH, No. 3660, *ante.*

3668. —— —— Review of amount payable.]—MOAKES *v.* BLACKWELL COLLIERY CO., LTD., No. 3340, *ante.*

3669. Judgment summons—Debtor's Act, 1869 (c. 62).]—The memorandum of the compensation awarded by an arbitrator under Workmen's Compensation Act, 1897 (c. 37), when recorded in the manner prescribed by Sched. II. (8) of the Act, may be enforced by an order of committal under Debtor's Act, 1869 (c. 62), s. 5.—BAILEY *v.* PLANT, [1901] 1 K. B. 31; 70 L. J. K. B. 63; 83 L. T. 459; 65 J. P. 52; 49 W. R. 103; 17 T. L. R. 48; 45 Sol. Jo. 57; 3 W. C. C. 209, C. A.

SECT. 18.—PROTECTION OF COMPENSATION.

SUB-SECT. 1.—PAYMENT INTO COURT AND INVESTMENT.

See Workmen's Compensation Act, 1925 (c. 84), ss. 13, 26, Sched. I. (10), & Sched. II.; Workmen's Compensation Rules, 1926, rr. 60–65a.

3670. Jurisdiction of arbitrator to order—For investment on behalf of dependants.]—Where an application for compensation under Workmen's Compensation Act, 1897 (c. 37), is made by the legal personal representative of a deceased workman or behalf of himself & other dependants of the workman, the county ct. judge or other arbitrator has jurisdiction under Sched. I., clauses 4–7, to order so much of the compensation as is allotted to the dependants to be paid to the county ct. registrar for investment in his name on their behalf, & is not compelled to order it to be paid to the legal personal representative.

In an arbn. under Workmen's Compensation Act, 1897 (c. 37), the county ct. judge awarded that a sum payable by employers as compensation for injury to a workman, resulting in death, should be apportioned between the widow who was the legal personal representative of the workman & the two infant sons who were the other dependants of the workman, & that the employers should pay the sum apportioned to the sons to the registrar of the ct., to be invested in his name in the Post Office Savings Bank for their benefit:—*Held:* on the true construction of Workmen's Compensation Act, 1897 (c. 37), Sched. I., clauses 4–7, the county ct. judge had jurisdiction to make the order, & was not bound by the first part of clause 4 to order the payment of the full amount of the compensation to the legal personal representative of the workman.—DANIEL *v.* OCEAN COAL CO., [1900] 2 Q. B. 250; 69 L. J. Q. B. 567; 82 L. T. 523; 64 J. P. 436; 48 W. R. 467; 16 T. L. R. 368; 2 W. C. C. 135, C. A.

3671. Who may make payment—Agents of employer—Other than solicitors.]—Notwithstanding the terms of rule 56*a* & form 43 of Workmen's Compensation Rules, 1907–11, where an amount of compensation has been agreed, it can be paid into ct. by other agents of the employers than their solrs., & the *præcipe* sent with the money may be signed by such agents, *e.g.* the Shipping Federation.—THOMPSON (G.) & CO., LTD. *v.* PITT-TAYLOR (1913), 57 Sol. Jo. 479.

3672. —— —— ——.]—A memorandum of an agreement as to a lump sum had been recorded in favour of the widow of a deceased workman. A firm of ship owners, the employers, sought to pay the amount into ct. Form 53, which, by Workmen's Compensation Rules, 1907–1912, r. 56A (4), must accompany such payment, requires that it shall be signed by the employers or their solrs. In this case the form was signed by "The Shipping Federation, Ltd., as agents for the employers." The registrar refused to accept the amount unless the form were strictly followed with regard to signature, & on the widow levying execution the employers brought an action for damages against the registrar:—*Held:* the registrar was wrong in refusing the form signed in this way; form 53 was not an inflexible form, & was to be followed only so far as the circumstances of the case would permit.—THOMPSON & CO. *v.* FERRARO (1913), 6 B. W. C. C. 461.

3673. Effect of payment in—Employer freed from further responsibility.]—RHODES *v.* SOOTHILL WOOD COLLIERY CO., LTD., No. 3567, *ante.*

3674. Right to payment out—Not for costs of appealing—Stay granted on payment in.]—On an application in the county ct. by employers to redeem weekly payments to a permanently injured workman, the county ct. judge fixed the amount at £534. The employers, who admitted that at least £355 was due to the workman, obtained a stay pending appeal on paying the £534 into ct. The workman thereupon applied for leave to take out £50 to be used by his solr. in resisting the appeal:—*Held:* no costs having yet been incurred & the application not being in accordance with Workmen's Compensation Act, 1906 (c. 58), Sched. II. (14), it must be refused.—MARSHALL, SONS & CO., LTD. *v.* PRINCE (1914), 7 B. W. C. C. 381, C. A.

3675. —— Infant dependant—On attaining majority.]—An infant dependant to whom a sum of money has been apportioned as part of the compensation for the death of her father under Workmen's Compensation Act, 1906 (c. 58), is not entitled as of right to have it paid out when she becomes *sui juris*, but the judge retains unfettered control over the disposal of it for her benefit.—*Re* GOLDS (1918), 62 Sol. Jo. 424.

3676. —— —— ——.]—Where, in pursuance of a recorded agreement between an infant workman & his employer, a lump sum of money had been paid into ct. under Workmen's Compensation Rules, r. 53, in satisfaction of all claims under the Act in respect of an injury sustained by the workman in the course of his employment:—*Held:* (1) the workman on attaining twenty-one was absolutely entitled to the fund & to have it paid out to him; (2) an appeal lay to the Ct. of Appeal from the refusal of the county ct. judge to make an order for payment out.—JOHNSTON *v.* LISTON (H.) & Co., [1920] 1 K. B. 99; 88 L. J. K. B. 1152;

(1903), 6 F. (Ct. of Sess.) 168.—**SCOT.**

e. Execution — Application for leave to issue—Question as to capacity of workman raised.]—M'DOWELL *v.* M'GLADDERY (1916), 9 B. W. C. C. 638.—**IR.**

f. Unrecorded agreement—Enforceable by recording & charging—Oral agreement.]—COCHRANE *v.* TRAILL (1900), 2 F. (Ct. of Sess.) 794.—**SCOT.**

g. —— ——.]—DUNLOP *v.* RANKIN & BLACKMORE (1901), 4 F. (Ct. of Sess.) 203.—**SCOT.**

h. —— Cannot be subject of arbitration proceedings — But a matter of defence.]—COLVILLE *v.* TIGUE (1905), 8 F. (Ct. of Sess.) 179.—**SCOT.**

PART XIV. SECT. 18, SUB-SECT. 1.

k. Agreement with dependants — Sum must be paid into court.]—HARLAND & WOLFF *v.* RADCLIFFE (1909), 43 I. L. T. 166; 2 B. W. C. C. 374.—**IR.**

121 L. T. 626; 35 T. L. R. 656; 63 Sol. Jo. 702; 12 B. W. C. C. 224, C. A.

SUB-SECT. 2.—APPORTIONMENT AMONG DEPENDANTS.

See Workmen's Compensation Act, 1925 (c. 84), ss. 21 (2), 22; Workmen's Compensation Rules, 1926, rr. 5, 64.

3677. Jurisdiction of county court judge—To apportion.]—DANIEL *v.* OCEAN COAL CO., No. 3670, *ante*.

3678. —— ——.]—A workman was killed by accident, & the employers paid £300 into ct., with an admission of liability. There were two dependants, the widow & an infant child. The county ct. judge did not apportion the compensation between them, but made an order for certain payments to the widow. An agreement was then entered into between the widow & the child's grandfather, whereby the latter should maintain & have the control & custody of the child, & the widow should pay towards maintenance. The widow broke the agreement & obtained the custody of the child, whereupon the grandfather applied to the county ct. judge to vary the order of Sept., on the basis of the agreement. The county ct. judge made an order that the child should be in the custody of the grandfather:—*Held:* the county ct. judge had no power to deal with the custody of the child, but could only apportion the compensation between the two dependants.—FLEMING *v.* RORURITE CO., LTD., *Re* FLEMING (1917), 10 B. W. C. C. 176, C. A.

3679. —— **Not to give custody of infant.**]—FLEMING *v.* RORURITE CO., LTD., *Re* FLEMING, No. 3678, *ante*.

3680. Duty of arbitrator to apportion—Where infant dependants—No power to delegate to trustee.]—Where there are infant dependants, an arbitrator has no power to hand over to trustees the whole of the compensation to be disposed of for the benefit of all the dependants, with power to exclude from time to time such of the dependants as circumstances might in their judgment render expedient; he must make a specific allotment of part of the capital to each dependant.—MANCHESTER *v.* CARLTON IRON CO., LTD. (1904), 89 L. T. 730; 68 J. P. 209; 52 W. R. 291; 20 T. L. R. 155; 6 W. C. C. 135, C. A.

3681. Agreement to apportion—Effect of disability—Power of registrar to sanction.]—RHODES *v.* SOOTHILL WOOD COLLIERY CO., LTD., No. 3567, *ante*.

3682. Employer not to be brought in.]—RHODES *v.* SOOTHILL WOOD COLLIERY CO., LTD., No. 3567, *ante*.

3683. Right to re-apportionment—Variation of circumstances—Death of one dependant.]—(1) The death of one of several "dependants" who are beneficiaries under an award under Workmen's Compensation Act, 1906 (c. 58), constitutes such a "variation of the circumstances" of the other "dependants" as will justify the ct., if it think proper, in altering the award under the provisions of Schedule I., Clause 9 of the statute.

(2) The notice of an application for variation that it is necessary in such a case by Workmen's Compensation Rules, 1907, r. 58 (3), to serve upon "all persons interested" may be served upon the personal representative of a dead "dependant."

(3) The interest of a "dependant" in compensation awarded him under the Act does not pass to his personal representative on his death as part of his personal estate.—IVEY *v.* IVEY, [1912] 2 K. B. 118; 81 L. J. K. B. 819; 106 L. T. 485; 5 B. W. C. C. 279, C. A.

3684. Notice of application for re-apportionment—May be served on personal representative of deceased dependant.]—IVEY *v.* IVEY, No. 3683, *ante*.

SUB-SECT. 3.—ON BANKRUPTCY OR WINDING UP.

A. Right to Preferential Payment.

See Workmen's Compensation Act, 1925 (c. 84), s. 7.

See, generally, BANKRUPTCY, Vol. IV., pp. 471–480; COMPANIES, Vol. X., pp. 942–946.

3685. Jurisdiction of county court judge—No jurisdiction to order payment by liquidator.]—A workman alleged to have been employed by a co. applied under Workmen's Compensation Act, 1906 (c. 58), s. 5, for arbn. on the question whether the receiver appointed on behalf of debenture holders of the co. & the liquidator under its voluntary liquidation were liable to pay him as a preferential payment the sum for which a weekly payment of 16*s.* 3*d.* awarded to him before the winding up could be redeemed, & as to the amount of such payment. The county ct. judge made an order for the payment by the receiver & liquidator of a lump sum to the workman:—*Held:* any question whether this sum was to be paid as a preferential payment was not the subject of an appeal under Workmen's Compensation Act, 1906 (c. 58), but must be decided in the winding up.

Qu.: whether the county ct. judge had jurisdiction under Workmen's Compensation Act, 1906 (c. 58), s. 5, to make the order for payment of the amount. HOMER *v.* GOUGH, [1912] 2 K. B. 303; 81 L. J. K. B. 261; 105 L. T. 732; 5 B. W. C. C. 51, C. A.

3686. Limit of preferential payment—Workmen's Compensation Act, 1923 (c. 42), s. 19 (2)—Not retrospective.]—Above sub-sect. which came into operation on Jan. 1, 1924, enacted that Workmen's Compensation Act, 1906 (c. 58), s. 5 (3), which limited the preferential payment to a workman entitled to compensation on the winding up of the co. which employed him to £100, should cease to have effect. Above sect. is not retrospective, & therefore, where a co. has gone into liquidation before Jan. 1, 1924, the preferential payment of compensation to any injured workman is limited to £100.—*Re* CLEMMONS ALUMINIUM, LTD. (1924), 94 L. J. K. B. 487; 132 L. T. 448; 41 T. L. R. 138; 17 B. W. C. C. 263; [1925] B. & C. R. 61, D. C.

Annotation:—**Apprvd.** *Re* Snowdown Colliery Co., South Eastern Coalfield Extension Co. *v.* Snowdown Colliery Co. (1925), 94 L. J. Ch. 305.

3687. — — —— ——.]—The abolition of the limitation to £100 in the case of a bkpcy. or winding up on the preference accorded to payments of compensation to workmen for injury by accident effected by above sub-sect., is prospective, & not retrospective, & therefore the preference given by Workmen's Compensation Act, 1906 (c. 58), s. 5 (3), is still limited to £100 where a receiver had been appointed in a debenture holders' action against the co. liable & the compensation had become payable before Jan. 1, 1924, the date when Workmen's Compensation Act, 1923 (c. 42), came into operation.—*Re* SNOWDOWN COLLIERY CO., LTD., SOUTH EASTERN COALFIELD EXTENSION CO., LTD. *v.* SNOWDOWN COLLIERY CO., LTD. (1925), 94 L. J. Ch. 305; 133 L. T. 451; 41 T. L. R. 326; 17 B. W. C. C. 258, C. A.

What is amount due in respect of compensation.]—*See* BANKRUPTCY, Vol. IV., p. 474, No. 4276.

Liability of receiver & manager.]—*See* COMPANIES, Vol. X., p. 793, No. 4982.

Sect. 18.—*Protection of compensation: Sub-sect.* 3, *B.; sub-sect.* 4. *Sects.* 19 *&* 20: *Sub-sect.* 1.]

B. Right of Workman where Employer Insured.

See Workmen's Compensation Act, 1925 (c. 84), s. 7.

3688. Workman subrogated to rights of employer.]—KNIVETON *v.* NORTHERN EMPLOYERS' MUTUAL INDEMNITY CO., [1902] 1 K. B. 880; 71 L. J. K. B. 588; 86 L. T. 721; 50 W. R. 704; 4 W. C. C. 37; *sub nom.* NORTHERN EMPLOYERS' MUTUAL INDEMNITY CO., LTD. *v.* KNIVETON, 18 T. L. R. 504; 46 Sol. Jo. 432, D. C.

Annotations:—**Refd.** Daff *v.* Midland Colliery Owners' Mutual Indemnity Co. (1913), 82 L. J. K. B. 1340; Pallin *v.* Northern Employers' Mutual Indemnity Co., [1925] 2 K. B. 73.

See, further, INSURANCE, Vol. XXIX., pp. 406–408, Nos. 3204–3213.

SUB-SECT. 4.—DEDUCTION AND SET-OFF.

See Workmen's Compensation Act, 1925 (c. 84), s. 40.

3689. What may be deducted—Rent—Where assent by workman.]—A workman in receipt of a weekly payment of compensation assented to the rent of his cottage which he held as a tenant of his employers being deducted from it:—*Held:* it was not necessary for the employers to pay the workman the full sum & then to receive back their rent, as the workman had assented to the deduction.—BROWN *v.* SOUTH EASTERN & CHATHAM RY. CO. (1910), 3 B. W. C. C. 428, C. A.

3690. —— Not compensation overpaid.]—Where under Workmen's Compensation Act, 1906 (c. 58), an application is made to reduce as from a definite antecedent date a weekly payment of compensation under a recorded agreement, & a reduction is ordered as from that date, the amount overpaid under the agreement between the date from which the reduction is to take effect & the date of the order cannot be treated as a payment in advance *pro tanto* of the subsequent reduced weekly payments. *Semble:* the amount overpaid may be recovered from the workman by action.—HOSEGOOD & SONS *v.* WILSON, [1911] 1 K. B. 30; 80 L. J. K. B. 519; 103 L. T. 616; 27 T. L. R. 88; 4 B. W. C. C. 30, C. A.

Annotation:—**Refd.** Gibson *v.* Wishart, [1915] A. C. 18.

—— **Solicitor's costs.**]—*See* Workmen's Compensation Act, 1925 (c. 84), Sched. I. (10).

—— **Repayments of poor relief.**]—*See* Workmen's Compensation Act, 1925 (c. 84), s. 41.

—— **Advance under National Health Insurance Act, 1924 (c. 38).**]—*See* National Health Insurance Act, 1924 (c. 38), s. 16.

SECT. 19.—**PROHIBITION AGAINST ENDING, ETC., WEEKLY PAYMENTS.**

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 12.

3691. Effect of Workmen's Compensation Act, 1923 (c. 42), s. 14.]—DAVIES *v.* GLYNCORRWG COLLIERY CO., No. 3059, *ante*.

3692. —— On jurisdiction of arbitrator to award compensation—After incapacity ceased.]—Workmen's Compensation Act, 1923 (c. 42), s. 14, confers no jurisdiction on the arbitrator to award compensation to an injured workman after the incapacity has ceased.

Where a dispute arises within Workmen's Compensation Act, 1923 (c. 42), s. 14 (*c*) (i.), as to the cessation of the workman's incapacity & an application is made to refer the dispute to a medical referee, the employer, pending the settlement of the dispute, may, under s. 14 (*c*) (ii), pay into ct. the weekly payments payable in the meantime, whether the medical reference is allowed or is refused on the ground that the dispute ought to be settled by arbn.

Under an award made under Workmen's Compensation Act, 1906 (c. 58), & recorded in May, 1913, in the register of the Sheriff Ct., applts. paid compensation to resp., an injured workman in their employment, until Sept. 8, 1925, when they stopped payment. A dispute having arisen as to the cessation of resp.'s incapacity, applts. applied to refer the dispute to a medical referee, but the application was refused on the ground that the matter ought to be settled by arbn., & applts. then applied for a review. Pending the arbn., resp., under the law of Scotland, charged applts. under the award of May, 1913, for arrears of compensation from Sept. 8, 1925, to the date of the charge. Applts. then raised an action of suspension & consigned in ct. the sum charged for & a further sum for expenses, & had since paid into ct. the subsequent weekly payments. Suspension was refused on the ground that payment into ct., under s. 14 (*c*) (ii), was not applicable, except where a reference had actually been made to a medical referee:—*Held:* the suspension ought to be allowed.—NIDDRIE & BENHAR COAL CO. *v.* DEE, [1927] A. C. 299, H. L.

Annotation:—**Consd.** Ocean Coal Co. *v.* Davies, [1927] A. C. 271.

3693. Provisions of Act—Applicable to payments under unrecorded agreement—Or to voluntary payments.]—PUDNEY *v.* FRANCE (WILLIAM), FENWICK & CO., SMITH *v.* LEACH & CO., No. 3081, *ante*.

3694. —— ——.]—The workman was incapacitated by an accident & received full compensation from his employers until his panel doctor certified he was fit for work on Jan. 5, 1925. On that day he took the certificate to the employers, who paid him the weekly payment then due. He signed a receipt for that payment in which it was described as a "final claim." When he was told that the weekly payments would be stopped, he said "All right." He did not go back to his old work, & made no further claim until Aug. 7, 1925. The claim was heard on Nov. 10, 1925, & the county ct. judge found the man was fit for work on Jan. 5, 1925, & he dismissed the claim for

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PART XIV. SECT. 18, SUB-SECT. 3. —B.

l. *Liability of employer transferred to insurance company.*]—DISOURDI *v.* SULLIVAN GROUP MINING CO. & MARYLAND CASUALTY CO. (No. 3) (1909), 14 B. C. R. 273; 2 B. W. C. C. 514.—**CAN.**

m. ——.]—CRAIG & HANCOCK *v.* ROYAL INSURANCE CO., LTD. (1915), 49 I. L. T. Jo. 200.—**IR.**

PART XIV. SECT. 18, SUB-SECT. 4.

3690 i. *What may be deducted—Not compensation overpaid.*]—FLYNN *v.* BURGESS (1914), 48 I. L. T. 132. —**IR.**

n. *What may be subject of set-off —Not expenses awarded employer in application for review.*]—ROSEWELL GAS COAL CO. *v.* M'VICAR (1904), 7 F. (Ct. of Sess.) 290.—**SCOT.**

PART XIV. SECT. 19.

o. *Power to terminate payments—Excepted cases—Right of temporary suspension only.*]—The employer's right to end or diminish a weekly payment in the excepted cases under Workmen's Compensation Act, 1923, s. 14, is merely a right to withhold or reduce *pro tempore* his actual disbursements, & is without prejudice to the question of his liability in the event of the workman establishing that the true state of the facts does not warrant the employer's action.—M'GINTY *v.* CANADIAN PACIFIC S.S. CO., LTD., ELDER *v.* HAY (J.) & SONS, LTD., [1925] S. C. 33.—**SCOT.**

p. *Power to suspend payments.*]—

compensation from that date to the hearing on the ground that payment was stopped by agreement within Workmen's Compensation Act, 1923 (c. 42), s. 14 :—*Held :* there was an agreement within Workmen's Compensation Act, 1923 (c. 42), s. 14, & the employers were entitled to stop compensation ; agreement in this sect. means assent & need not be registered.—FEENEY *v.* FIRBECK MAIN COLLIERIES, LTD., [1926] 2 K. B. 218 ; 95 L. J. K. B. 689 ; 134 L. T. 745 ; 19 B. W. C. C. 33, C. A.

3695. —— Not applicable to payments under pension scheme.]—A workman, aged sixty-one, in the employment of the Port of London Authority, was receiving compensation for total incapacity. Under a pension scheme, to which the Authority & its employees contributed, he would have been entitled to a pension on retiring at the age of sixty-five, or if incapacitated by injury, at such earlier age as he might be superannuated. Until the pension fund reached a certain figure, which had not yet happened, the pensions were to be paid out of the general revenue of the Authority. The workman was superannuated at sixty-one & was thereafter paid the pension & received no compensation. On a claim for compensation the county ct. judge treated the pension as contributed half by the workman & half by the employers, & taking it into consideration on that basis he awarded compensation at the full rate of 35*s.* until the date of the award & then at the rate of 12*s.* 6*d.* a week : *Held :* (1) the fact that the payments under the pension scheme were made from the general funds of the employers did not, in the circumstances, make the payments purely voluntary on the part of the employers, & the county ct. judge was entitled to exercise his discretion in taking them into consideration on the basis he did ; (2) the judge was right in awarding full compensation until the date of the award, because the pension scheme was not an agreement under which the employers could end or diminish compensation within Workmen's Compensation Act, 1923 (c. 42), s. 14 ; (3) the county ct. judge was right in excluding the consideration that the pension to which the workman was entitled at the age of sixty-one was less than that to which he would have been entitled at the age of sixty-five, but if & when the workman attained sixty-five he might be entitled to apply for a review of the compensation.—LANGFORD *v.* PORT OF LONDON AUTHORITY (1926), 95 L. J. K. B. 887 ; 135 L. T. 625 ; 19 B. W. C. C. 253, C. A.

3696. —— Right of workman to resort to arbitration—Procedure not followed.]—PUDNEY *v.* FRANCE (WILLIAM), FENWICK & CO., SMITH *v.* LEACH & CO., No. 3081, *ante*.

3697. —— —— Procedure followed.]—Where the procedure laid down in Workmen's Compensation Act, 1923 (c. 42), s. 14 (*c*) & the proviso thereto is followed & prosecuted by both parties to a conclusion there is no right to file a subsequent request for arbn., except by way of review where there has been some change of circumstances.—RHODES *v.* DIGBY COLLIERY CO. (1926), 70 Sol. Jo. 796 ; *sub nom.* RHODES *v.* DIGBY COLLIERY CO., LTD., WILSON *v.* DIGBY COLLIERY CO., LTD., 19 B. W. C. C. 283, C. A.

3698. —— Dispute as to ending of incapacity—Right of master to pay compensation into court.]—NIDDRIE & BENHAR COAL CO. *v.* DEE, No. 3692, *ante*.

3699. Failure by employer to adopt procedure—Omission to appoint medical referee.]—DAVIES *v.* GLYNCORRWG COLLIERY CO., No. 3059, *ante*.

3700. —— Omission to serve report of medical practitioner.]—Workmen's Compensation Act, 1923 (c. 42), s. 14 (*c*), is to be read with Workmen's Compensation Act, 1906 (c. 58), Sched. I. (15), & accordingly, the employer must serve the report of a medical practitioner, upon which he relies, within six days from its date, in accordance with the requirements of that paragraph.—GILLETT *v.* FOWLER (JOHN) & CO. (LEEDS), LTD. (1926), 19 B. W. C. C. 267, C. A.

3701. —— Right to recover payments made.]—By Workmen's Compensation Act, 1923 (c. 42), s. 14 : "an employer shall not be entitled otherwise than in pursuance of an agreement or arbn. to end or diminish a weekly payment under the principal Act except" in certain cases : *Held :* an employer is not liable *de jure* to pay compensation after the termination of incapacity, & though he must continue weekly payments *de facto* until it has been determined in an arbn. that the incapacity has ceased, he is entitled on such determination to recover back the payments made during incapacity.—OCEAN COAL CO., LTD. *v.* DAVIES (1926), 43 T. L. R. 108 ; 70 Sol. Jo. 1219, H. L. ; *revsg.* 19 B. W. C. C. 223, C. A.

3702. Power to terminate payments—After agreement to pay full compensation.]—DAVIES *v.* MIDLAND RAILWAY CARRIAGE & WAGGON CO., LTD., No. 2768, *ante*.

SECT. 20.—REVIEW OF WEEKLY PAYMENTS.

SUB-SECT. 1.—IN GENERAL.

See, generally, Workmen's Compensation Act, 1925 (c. 84), s. 11.

3703. Only remedy for disputes after arbitration had.]—WATTS *v.* LOGAN & HEMINGWAY, No. 3078, *ante*.

3704. May be made without proceedings in court—Implied from conduct of parties.]—A review of weekly payments by the parties themselves may take place. Such a review & an agreement may be implied.

Compensation was paid from Aug. 22 to Sept. 23, when the man returned to work at full wages. This he continued to do till Nov. 16, when he was discharged because the pit was closed. For the next three months he applied for work, but there was none for him to do : *Held :* there was evidence that on Sept. 23 the weekly payment was reviewed & ended by mutual consent.—BRADBURY

An employer who is applying for review of an award is not entitled, pending review, to suspend a charge under the award.—BENT COLLIERY CO., LTD. *v.* O'HARE, CADZOW COAL CO., LTD. *v.* HASSAN, WATSON (JOHN), LTD. *v.* FITZPATRICK, SAME *v.* SCULLION, M'ANDREW & CO., LTD. *v.* BARKAUSAS, WATSON (JOHN), LTD. *v.* COLLINS (1924), 17 B. W. C. C. 424.—**SCOT.**

q. *Application to payments accepted as statutory compensation.*]—The prohibition against ending or diminishing weekly payments under Workmen's Compensation Act, 1923, s. 14, is not limited to payments made under an award or a recorded or immediately recordable agreement, but extends to any payments *de facto* made by the employer & accepted by the workman as statutory compensation.—LINDSAY *v.* GLASGOW IRON & STEEL CO., [1925] S. C. 287.—**SCOT.**

PART XIV. SECT. 20, SUB-SECT. 1.

3703 i. *Only remedy for disputes after arbitration had.*]—FIFE COAL CO., LTD. *v.* LINDSAY, [1908] S. C. 431 ; 45 Sc. L. R. 317 ; 15 S. L. T. 742 ; 1 B. W. C. C. 117.—**SCOT.**

3703 ii. ——.]—WILSON & CLYDE COAL CO., LTD. *v.* CAIRNDUFF, [1911] S. C. 647.—**SCOT.**

r. *Date from which review is open—Date of cessation of incapacity.*]—GIBSON & CO. *v.* WISHART (1914), 51 Sc. L. R. 516.—**SCOT.**

Sect. 20.—Review of weekly payments: Sub-sects. 1, 2 & 3, A., B. & C.; sub-sect. 4, A.]

v. BEDWORTH COAL & IRON CO. (1900), 2 W. C. C. 138, C. A.

Annotations :—**Refd.** Busby *v.* Richardson (1901), 3 W. C. C. 54; Webster *v.* L. & N. W. Ry. (1901), 3 W. C. C. 52.

SUB-SECT. 2.—WHAT PAYMENTS MAY BE REVIEWED.

See Workmen's Compensation Act, 1925 (c. 84), s. 11.

3705. Compensation awarded by committee representative of workman & employer.] —Where a committee, representative of an employer & his workmen, acting under Workmen's Compensation Act, 1897 (c. 37), sched. II., para. 1, have decided the amount to be paid weekly to a workman as compensation for an accident, & the workman subsequently desires that the weekly payment may be reviewed, & gives due notice that he objects to the committee holding an arbn. with respect to the review, a county ct. judge has jurisdiction to hear & determine the application to review.—R. *v.* TEMPLER, *Ex p.* HOWARTH, [1912] 2 K. B. 444; 81 L. J. K. B. 805; 106 L. T. 855; 28 T. L. R. 410; 56 Sol. Jo. 501; 5 B. W. C. C. 454, C. A.

Annotation :—**Expld.** Schofield *v.* Clough, [1913] 2 K. B. 103.

3706. Weekly payments under unrecorded agreement.] —WILLIAMS *v.* GUEST, KEEN & NETTLEFOLDS, LTD., No. 3718, *post*.

SUB-SECT. 3.—WHEN REVIEW AVAILABLE.

A. Conditions Precedent.

3707. Whether amounting to condition precedent—Existence of dispute between parties.] —A workman having met with an accident within Workmen's Compensation Act, 1906 (c. 58), an agreement was made between him & his employers whereby they admitted liability & total incapacity & agreed to make him a weekly payment as compensation. They subsequently applied for a review of the weekly payments & asked that they should be terminated on the ground that the incapacity of the workman had ceased. The county ct. judge held that no question had arisen between the parties when the application was commenced, therefore he had no jurisdiction to entertain it: *Held*: the existence of a dispute between the parties was not a condition precedent to an application to review under Workmen's Compensation Act, 1906 (c. 58), sched. I., clause 16.—TYNE TEES SHIPPING CO., LTD. *v.* WHILLOCK, [1913] 3 K. B. 642; 82 L. J. K. B. 1091; 109 L. T. 84; 57 Sol. Jo. 716; 6 B. W. C. C. 559, C. A.

3708. —— Payment being made at time of application.]—On Aug. 18, 1923, S. having met with an accident while in the course of his employment, the employers entered into an agreement with him on Nov. 5, 1923, admitting liability & agreeing to pay him compensation during total incapacity. The workman sufficiently recovered to be able to return to his work on Nov. 24, 1923, when the weekly payment which had been made to him as compensation was stopped. The employers, having commenced arbn. proceedings on Mar. 22, 1924, with a view of terminating or diminishing the compensation agreed to be paid during total incapacity, the workman filed a memorandum of the agreement of Nov. 5, 1923, whereupon the proceedings were adjourned *sine die*. On July 2, 1924, the employers commenced arbn. proceedings again by way of review to diminish the weekly payment under the agreement on the ground that the workman had returned to work. At the hearing in the county ct. a preliminary objection was taken to the proceedings on behalf of the workman that no case for review had arisen under Workmen's Compensation Act, 1906 (c. 58), sched. I., para. 16, which had reference only to a weekly payment in existence. This preliminary objection to procedure was dismissed by the county ct. judge on the ground that the weekly payment under the agreement was only in abeyance, & he awarded the workman 3*s.* 6*d.* a week from Nov. 24, 1923, on the ground that now there was only partial incapacity, & he modified the agreement accordingly & the workman was ordered to pay the costs. The workman appealed against the decision on the preliminary objection:—*Held*: the employers were entitled to take the proceedings by way of review under Workmen's Compensation Act, 1906 (c. 58), sched. I., which referred to a weekly payment which was still in a legal sense in existence, though as under the agreement in the case, in abeyance, as there was a liability in respect of the accident existing at the time of the application to review although the employers at the time were not making any weekly payments.—WOLSELEY MOTORS, LTD. *v.* SHARP (1925), 133 L. T. 70; 18 B. W. C. C. 15, C. A.

—— Change of circumstances.] —*See* Sub-sect. 4, *post*.

B. Order of Court Terminating Compensation.

3709. Bar to review.] —NICHOLSON *v.* PIPER, No. 3521, *ante*.

3710. ——.] —TAYLOR *v.* LONDON & NORTH WESTERN RY. CO., No. 3524, *ante*.

C. Application of Doctrine of res judicata.

3711. Whether applicable—To question of incapacity of workman—Change of circumstances.]—Upon an application by employers for a review of the weekly sum paid as compensation to a workman in respect of injuries arising from an accident under Workmen's Compensation Act, 1897 (c. 37), the county ct. judge, acting on the opinion of medical experts that the workman was not incapacitated for work, made an award, ordering the weekly payment to be reduced to a nominal amount. On an application for further review of the payment by the workman, evidence was tendered to show that, since the previous hearing, he had repeatedly applied for employment, & had been unable to obtain it on account of his condition arising from the accident. The county ct. judge refused to entertain the application on the

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PART XIV. SECT. 20, SUB-SECT. 2.

t. *Weekly payments under unrecorded agreement — Payments discontinued—Agreement recorded.*]—LOCHGELLY IRON & COAL CO., LTD. *v.* SINCLAIR, [1909] S. C. 922.—**SCOT.**

a. —— ——.]—NELSON *v.* SUMMERLEE IRON CO., [1910] S. C. 360. —**SCOT.**

b. —— *Agreement not acted on for ten years.*]—WILSON *v.* BAIRD & CO., [1923] S. C. 164.—**SCOT.**

PART XIV. SECT. 20, SUB-SECT. 3. —A.

c. *Consignment of payments weekly — Consignment in lump sum of all payments due to date of suspension—Sufficient.*]—PENMAN *v.* CAPRINGTON & AUCHLOCHAN COLLIERIES, LTD., [1926] S. C. 406.—**SCOT.**

PART XIV. SECT. 20, SUB-SECT. 3. —B.

3709 i. *Bar to review.*]—CADENHEAD *v.* AILSA SHIPBUILDING CO., LTD., [1910] S. C. 1129.—**SCOT.**

ground that the condition of the workman was *res judicata*, & that there had been no change of circumstances since the previous hearing, so as to give him jurisdiction to review the payment:—*Held:* the doctrine of *res judicata* did not apply to the decision of the county ct. judge on the previous hearing, &, there apparently being evidence of a change of circumstances, he ought to entertain the application.—SHARMAN *v.* HOLLIDAY & GREENWOOD, LTD., [1904] 1 K. B. 235; 73 L. J. K. B. 176; 90 L. T. 46; 68 J. P. 151; 20 T. L. R. 135; 48 Sol. Jo. 130; 6 W. C. C. 147, C. A.

Annotations:—**Consd.** Boag *v.* Lochwood Collieries (1909), 3 B. W. C. C. 549. **Folld.** Cawdor & Garnant Collieries *v.* Jones (1909), 3 B. W. C. C. 59; Thrammere Bay Development Co. *v.* Brennan (1909), 2 B. W. C. C. 403. **Apprvd.** Mead *v.* Lockhart (1909), 2 B. W. C. C. 398. **Apld.** Radcliffe *v.* Pacific Steam Navigation Co., [1910] 1 K. B. 685. **Distd.** Linthorpe Dinsdale Smelting Co. *v.* Hoy (1917), 86 L. J. K. B. 995. **Refd.** Ball *v.* Hunt, [1912] A. C. 496; Gibson *v.* Wishart, [1915] A. C. 18; Dundee, Perth & London Shipping Co. *v.* Willcock (1916), 9 B. W. C. C. 471. **Mentd.** Russell *v.* Rudd, [1923] A. C. 309.

3712. — — — — — — —.]—After injury by accident an award of £1 per week compensation was made to the injured workman in Feb. 1908. On an application for review in Oct. 1908, the county ct. judge, after hearing the medical evidence, continued the weekly payments of £1. On a further application to review in Mar. 1909, the employers tendered evidence in support of this application which admittedly called in question the accuracy of the medical evidence given in Oct. as to the then condition of the workman. The county ct. judge held that the man's condition in Oct. was *res judicata*, & refused to admit the evidence:—*Held:* The evidence must be admitted.—MEAD *v.* LOCKHART, LTD. (1909), 2 B. W. C. C. 398, C. A.

Annotation:—**Folld.** Cawdor & Garnant Collieries *v.* Jones (1909), 3 B. W. C. C. 59.

3713. — — — — — — .]—A collier lost the sight of an eye by accident, & compensation was paid for two & a half years under an agreement. Another agreement reducing the amount of compensation was then entered into in Mar. 1908. In Jan. 1909, the employers applied to further reduce the compensation. The workman contended that the amount of his incapacity had been settled once & for all by the agreement of Mar. 1908. The judge held that the man was fit for his work as a miner, & reduced the compensation to 1*d.* a week:—*Held:* there was evidence before the county ct. judge with regard to the man's condition on which he was entitled to come to such a decision. The workman's contention that his condition was *res judicata*, & that no change of circumstance had taken place, was bad.—CAWDOR & GARNANT COLLIERIES, LTD. *v.* JONES (1909), 3 B. W. C. C. 59, C. A.

3714. — — — — — — —.]—RADCLIFFE *v.* PACIFIC STEAM NAVIGATION CO., No. 3733, *post*.

3715. — — — — — —.]—As the result of an accident, a riveter had one eye blinded. He received compensation until the wound had healed &, on an application by the employers to terminate the payments, he was awarded a declaration of liability & payments were stopped. He was at this time quite able to do his old riveting work, & had been offered it by his employers, but had refused, as he was afraid of the remaining eye being injured. His employers found him painting work instead. He was, however, not able to earn his full old wages at the painting work, & applied for an increase of compensation as from the date of the first review on this ground. There was evidence that the employers had repeated their offer to employ him at his old work, but that he had again refused. There was no change in the circumstances since the first review:—*Held:* the application was misconceived.—COX *v.* BRAITHWAITE & KIRK (1912), 5 B. W. C. C. 618, C. A.; *previous proceedings, sub nom.* BRAITHWAITE & KIRK *v.* COX (1911), 5 B. W. C. C. 77, C. A.

Annotations:—**Refd.** Howards *v.* Wharton (1913), 6 B. W. C. C. 614.

3716. — — — — — —.]—A workman broke his wrist by accident arising out of & in the course of his employment. Liability was admitted & compensation paid by agreement. The employers, later, applied to review & diminish the weekly payment, & the county ct. judge awarded the reduced amount of 5*s.* a week. More than two years after the employers applied again to review & terminate the payment on the ground that all incapacity due to the accident had come to an end. The county ct. judge held that he had no power to do so, having made a "final award" of 5*s.* a week:—*Held:* he had misdirected himself, & the case must be remitted to him for review in accordance with the provisions of Workmen's Compensation Act, 1906 (c. 58), sched. 1. (16).—DUNDEE, PERTH & LONDON SHIPPING CO. *v.* WILLCOCK (1916), 9 B. W. C. C. 471, C. A.

3717. — — — — **Payments terminated on previous application.**]—NICHOLSON *v.* PIPER, No. 3521, *ante*.

3718. — — **To question of liability of employer—Admitted under existing decisions—Subsequently reversed in House of Lords.**]—In 1918 a lad employed in resp.'s colliery was seriously injured by accident while travelling by a train specially provided for resps.' workmen by contract with the railway co., & had to have his leg amputated. Having regard to the case of *Cremins v. Guest, Keen & Nettlefolds, Ltd.*, No. 2361, *ante*, the employers admitted liability & paid compensation for a period. In 1923 the House of Lords in *St. Helens Colliery Co., Ltd. v. Hewilson*, No. 2361, *ante*, reversed this decision. In 1921 the workman having been discharged owing to the closing of the colliery, & having in the meantime attained the age of twenty-one years, filed an application for arbn.: as to the liability of resps., & as to the amount of the compensation, which he claimed should be increased. The county ct. judge made an award for increased compensation, & held that the question of liability had been settled by agreement:—*Held:* the application was really one to review a payment under an unrecorded agreement, the question of liability was concluded by such agreement, although not recorded, & it could not be reopened because of a subsequent decision of the House of Lords holding that there was no liability on the employers in a similar case.—WILLIAMS *v.* GUEST, KEEN & NETTLEFOLDS, LTD. (1925), 133 L. T. 111; *sub nom.* GUEST, KEEN & NETTLEFOLDS, LTD. *v.* WILLIAMS, 18 B. W. C. C. 68, C. A.

Annotations:—**Distd.** Davies *v.* Midland Ry. Carriage & Waggon Co. (1926), 19 B. W. C. C. 69. **Apprvd. & Apld.** Feeney *v.* Firbeck Main Collieries, [1926] 2 K. B. 216.

3719. — — **To question of calculation of compensation.**]—CROSSFIELD & SONS, LTD. *v.* TANIAN, No. 3721, *post*.

3720. — — — — **Wrong principle applied in calculating average weekly earnings.**]—HAINS & STRANGE *v.* CORBET, No. 3315, *ante*.

SUB-SECT. 4.—CHANGE OF CIRCUMSTANCES.

A. Condition Precedent to Review.

3721. General rule.]—An application under Workmen's Compensation Act, 1897 (c. 37),

Sect. 20.—Review of weekly payments: Sub-sect. 4, A. & B. (a) & (b).]

sched. I., clause 12, for the review of a weekly payment cannot be entertained, where there has been no change in the circumstances of the case since the weekly payment was awarded.—CROSSFIELD & SONS, LTD. *v.* TANIAN, [1900] 2 Q. B. 629; 69 L. J. Q. B. 790; 82 L. T. 813; 48 W. R. 609; 16 T. L. R. 476; 44 Sol. Jo. 591; 2 W. C. C. 141, C. A.

Annotations:—**Refd.** Sharman *v.* Holliday & Greenwood, [1904] 1 K. B. 235; Radcliffe *v.* Pacific Steam Navigation Co., [1910] 1 K. B. 685; Linthorpe Dinsdale Smelting Co. *v.* Hoy (1917), 86 L. J. K. B. 995; Tarr *v.* Cory, [1917] 2 K. B. 774.

3722. ——.]—A workman lost an eye by accident, & received compensation. When partially recovered he obtained an award of partial compensation, & was given light work. Later on the employers, believing that the incapacity had ceased, applied for a review. The employers' doctor said the man could do his old work, though for fine work he might have to wear glasses. The man said he could not do this work, & his doctor gave evidence that the man's condition was the same as at the time the former award was made. The county ct. judge found there had been no change of circumstances upon which a review could be based, & dismissed the application:—*Held:* there was evidence to support the finding.—NORTH EASTERN MARINE ENGINEERING CO. *v.* DAVISON (1915), 8 B. W. C. C. 248, C. A.

3723. ——.]—In 1915 a boy claimed 12*s.* 6*d.* a week compensation for a fractured hip caused by accident in his employment, alleging total incapacity. The employers denied the incapacity & disputed the amount claimed, but consented to an award of 7*s.* 6*d.* a week. At the hearing a doctor gave evidence for the employers that the boy was suffering from *coxa vara* as the result of rickets. The county ct. judge awarded the boy 12*s.* 6*d.* a week. In 1917 the employers applied to review on the ground that the boy was not now suffering from the effects of the accident. At the hearing the same doctor gave the same evidence as he did in 1915. The arbitrator refused to review on the ground that he was being asked to find that the boy was suffering from *coxa vara* due to rickets, when by the award of 1915 it had been decided that he was suffering from *coxa vara* due to accident:—*Held:* the arbitrator was right, as the same issue was raised by the application to review which had been decided by the award, & there had been no change of circumstances since the award.—LINTHORPE DINSDALE SMELTING CO., LTD. *v.* HOY (1917), 86 L. J. K. B. 995; 117 L. T. 234; 10 B. W. C. C. 350, C. A.

3724. ——.]—MOAKES *v.* BLACKWELL COLLIERY CO., LTD., No. 3090, *ante*.

3725. ——.]—The workman, who was suffering from miner's nystagmus, was in receipt of compensation under a duly recorded agreement dated Apr. 11, 1918. In Apr. 1919, he applied for a review & increase of the weekly payments, & an award was made on the basis of total incapacity. On Mar. 28, 1923, the employers applied for a review & diminution of the weekly payments last awarded, on the ground that the workman no longer suffered the same degree of disability by reason of the nystagmus. The medical evidence did not show any improvement in the workman's physical condition & the application was dismissed by the county ct. judge:—*Held:* no inquiry could now be made as to whether the award of Apr. 1919, was correct, & as no change of circumstances since then had been proved the appeal must be dismissed.—POPE & PEARSON, LTD. *v.* GAMBLE (1923), 129 L. T. 684; 16 B. W. C. C. 157, C. A.

3726. ——.]—The workman, a collier, in 1907 lost the sight of his right eye by an accident while employed by resps., & received compensation. In 1913 he returned to his work as a collier receiving higher wages than prior to his accident. On Oct. 28, 1914, a declaration of liability was filed. He continued to work underground as a collier until May, 1925, when his employment was terminated owing to the mine being partially worked out. Alleging that he was unable to work underground in consequence of his injury, which was affecting the other eye also, he applied for a review in Sept. 1925. The county ct. judge referred the matter to a medical referee, who reported that there was nothing wrong with the other eye & that the man was perfectly fit for his work as a collier. Upon this report the judge made an award in favour of resps. The workman in Dec. 1925, twice applied for work in other employments, but was refused. On Mar. 10, 1926, he again applied for a review. On Mar. 17, 1926, resps. offered him work as a collier, but he asked for twenty-four hours to consider the offer, & the place was filled. The county ct. judge held there was no change in the circumstances or the man's condition since the previous award & dismissed the application:—*Held:* there was evidence to support the finding that there was no change in the circumstances entitling appet. to a review, & no misdirection.—MEADE *v.* UNITED NATIONAL COLLIERIES, LTD. (1926), 19 B. W. C. C. 339, C. A.

3727. Case must be heard on merits—Before deciding that condition is not fulfilled.]—Where an application is made by an employer to review a registered agreement, upon the ground that the injured workman is partly or entirely fit for work at the date of the application, it is the duty of the arbitrator to hear such application upon its merits. It is not essential to prove a change of circumstances since the previous application to review.—TIRANMERE BAY DEVELOPMENT CO., LTD. *v.* BRENNAN (1909), 2 B. W. C. C. 403, C. A.

See, also, Sub-sect. 3, C., *ante*.

B. What Amounts to.

(a) General Principles.

3728. Opinion given by medical witness proving unfounded.]—(1) Where an agreement has been entered into between a workman who has been injured by "accident arising out of & in the course of" his employment, within Workmen's Compensation Act, 1906 (c. 58), s. 1 (1), & his employers for payment to him of compensation "during his total incapacity for work," the weekly payment cannot be reviewed under Workmen's Compensation Act, 1906 (c. 58), sched. I., 16, merely because the total incapacity, which the parties thought would be temporary, has subsequently become permanent by reason of the necessity that the workman should undergo a surgical operation, that not being a "change of circumstances" within the meaning of the authorities.

(2) The meaning of "change of circumstances" is that where an injured workman is awarded compensation on the footing that he is able to do some light work, he being only partially incapacitated, the weekly payment to him can be reversed if it is subsequently proved that that which, according to the medical evidence, was believed to be the fact turns out to have been unfounded. Or,

if it can be proved that total incapacity has ceased & that there is only partial incapacity, there can be a review of the weekly payment.

(3) If total incapacity was supposed to exist at the date of the award or the agreement, it is immaterial to consider whether, that which was a matter for doubt at one time has subsequently become a matter of certainty.—SCOTT *v.* LONG MEG PLASTER CO. (1914), 111 L. T. 773; 7 B. W. C. C. 502, C. A.

Annotation :—As to (1) **Refd.** Russell v. Rudd, [1923] A. C. 309.

3729. Total incapacity ended—Partial incapacity remaining.]—SCOTT *v.* LONG MEG PLASTER CO., No. 3728, *ante*.

3730. Supposition of total incapacity at time of award—Supposition subsequently proved to be true.]—SCOTT *v.* LONG MEG PLASTER CO., No. 3728, *ante*.

3731. Obtaining affirmative evidence of extent of incapacity—Inability to obtain suitable work.]—On Dec. 7, 1916, a workman was awarded compensation for an injury to the fingers of his right hand on the basis of partial incapacity. On Feb. 14, 1917, he applied by review to increase the compensation on the ground that he had been unable to find any suitable employment. The sheriff-substitute found that the physical condition of the man was the same as at the time of the previous award, but that he had made many attempts to find work, & although he had not completely exhausted his chances of obtaining employment, the difficulty of obtaining it was due to the injury. He increased the compensation :—*Held :* although the condition of appt.'s hand had not altered since the original application to review, the fact that he was now in a position to give affirmative evidence of his inability to obtain suitable work constituted a change of circumstances that entitled the arbiter to deal with the application, &, there being evidence on which his award could be supported, the ct. had no jurisdiction to interfere with it, & the appeal must be allowed.

It appears to me that the amount may be reviewed if there has either been a change of circumstances, or if further events have put a different complexion on the case (LORD FINLAY).

What is meant by change of circumstances is, that there has been more light thrown . . . upon the results of the injury. . . . The arbiter who pronounced the original judgment may find that the award does not fit the case with the additional light now thrown upon it by experience (LORD SHAW).—M'ALINDEN *v.* NIMMO (JAMES) & CO., LTD., [1920] A. C. 39; 88 L. J. P. C. 131; 121 L. T. 585; 63 Sol. Jo. 722; 12 B. W. C. C. 293, H. L.

Annotations : —**Refd.** Fallens v. Dixon (1923), 17 B. W. C. C. 314; Portland Colliery Co. v. Murray, Watson v. Quinn, Dixon v. Madden, [1923] A. C. 566; M'Combe v. Bent Colliery Co. (1924), 17 B. W. C. C. 319.

3732. More light thrown upon results of injury.]—M'ALINDEN *v.* NIMMO (JAMES) & CO., LTD., No. 3731, *ante*.

3733. Subsequent experience proving previous decision wrong.]—The amount which an injured workman "is earning or is able to earn in some suitable employment" at the date of an application to review a weekly payment under Workmen's Compensation Act, 1906 (c. 58), cannot necessarily have been finally determined at any period of time, & cannot therefore be *res judicata*. The issue on such an application is the same as if it were an original award made at the date of the application to review.

(2) Where subsequent experiment has shown that the previous decision based on expert evidence was wrong, there is a change of circumstances which will justify an application to review the weekly payments.

Although I think it is competent to the county ct. judge to review an award similar to that which was made in June, it is right to add that any such application should be jealously scrutinised, &, further, that great care must be taken not to allow fluctuations of the general labour market to justify a review (COZENS-HARDY, M.R.).—RADCLIFFE *v.* PACIFIC STEAM NAVIGATION CO., [1910] 1 K. B. 685; 79 L. J. K. B. 429; 102 L. T. 206; 26 T. L. R. 319; 54 Sol. Jo. 401; 3 B. W. C. C. 185, C. A.

Annotations :—As to (1) **Distd.** Green v. Cammell, Laird, [1913] 3 K. B. 665. **Consd.** Tarr v. Cory, [1917] 2 K. B. 774. **Refd.** R. v. Templer, *Ex p.* Howarth, [1912] 1 K. B. 351; Linthorpe Dinsdale Smelting Co. v. Hoy (1917), 86 L. J. K. B. 995. *As to* (2) **Consd.** Cardiff Corpn. v. Hall, [1911] 1 K. B. 1009; Ball v. Coulthard (1919), 122 L. T. 164. **Refd.** Ball v. Hunt, [1912] A. C. 496; Osborne v. Tralee & Dingle Ry. (1913), 6 B. W. C. C. 913; Kear v. Shelton Iron, Steel & Coal Co. (1921), 14 B. W. C. C. 121; M'Clure v. M'Neil (1924), 18 B. W. C. C. 585.

3734. Calculation based on expenses which have ceased to exist—Family brought to reside near work.]—A workman was in receipt of 17*s.* 5*d.* a week compensation. His employers then gave him light work at Cardiff, some miles from his home, & filed an application to review. The county ct. judge reduced the payments to 13*s.* a week: in arriving at this figure he allowed the man 4*s.* 6*d.* for a week-end ticket & lodging allowance, as he had to live apart from his family during the week. The family then came to live in Cardiff, & the employers filed a further application to reduce on the ground of this change of circumstances. The judge then reduced the payments by a further 2*s.* :—*Held :* the decision was on a question of fact, & the ct. would not interfere.—TAFF VALE RY. CO. *v.* LANE (1910), 3 B. W. C. C. 297, C. A.

(*b*) *Fluctuations of General Labour Market.*

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 11 (3).

3735. Whether justifying review.]—RADCLIFFE *v.* PACIFIC STEAM NAVIGATION CO., No. 3733, *ante*.

3736. —— General rise in wages.]—Upon an application to review a weekly payment in a case of partial incapacity under Workmen's Compensation Act, 1906 (c. 58), Sched. I., clause 16, the fact that since the last award there has been a substantial alteration in the rate of wages common to the trade in which the workman is employed is one which the arbitrator is not only entitled but bound to take into consideration. Such an alteration is a change of circumstances which gives jurisdiction to entertain an application to review.—TARR *v.* CORY BROTHERS & CO., LTD. [1917] 2 K. B. 774; *sub nom.* CORY BROTHERS & CO., LTD. *v.* TARR, CORY BROTHERS & CO., LTD. *v.* HOPKINS, 86 L. J. K. B. 1340; 61 Sol.

PART XIV. SECT. 20, SUB-SECT. 4.—B. (b).

3736 i. *Whether justifying review—General rise in wages.*]—In an application for review an arbitrator is not bound to grant an increase on account, *per se*, of a general rise in the rate of wages, but he is entitled to take this into account as an element in considering what the workman would probably have earned had he remained uninjured.—MALCOLM *v.* SPOWART (THOMAS) & CO., LTD., [1913] S. C. 1024; 50 Sc. L. R. 823; [1913] 2 S. L. T. 141; 6 B. W. C. C. 856.—**SCOT.**

3736 ii. —— ——.]—In reviewing the compensation due to a partially disabled miner under Workmen's Compensation Act, 1906, an arbitrator is

Sect. 20.—*Review of weekly payments: Sub-sect.* 4, *B.* (*b*), (*c*) & (*d*).]

Jo. 708; 10 B. W. C. C. 590; *sub nom.* THOMAS *v.* NIXON'S NAVIGATION CO., LTD., TARR *v.* CORY BROTHERS & CO., LTD., HOPKINS *v.* CORY BROTHERS & CO., LTD., 117 L. T. 513, C. A.

Annotations:—**Refd.** Fallens *v.* Dixon (1923), 17 B. W. C. C. 314; M'Combe *v.* Bent Colliery Co. (1921), 17 B. W. C. C. 349.

3737. —— Fluctuation of wages.]—Where, after a period of total incapacity, an injured workman, having been given light work, is paid compensation in respect of partial incapacity, & then, owing to a general rise in wages, the actual wages earned at the light work exceed his average weekly earnings prior to the accident & payment of compensation is suspended, & ultimately, owing to a further change in the conditions of the labour market, either the wages earned at the light work fall below the pre-accident wages or no light work is available for him, there being no change in the man's physical condition, his right to receive compensation for partial incapacity revives, & the amount of compensation payable must be determined by arbitration, having regard to what the man is competent to earn in the circumstances of the case.—PORTLAND COLLIERY CO. *v.* MURRAY, WATSON (J.), LTD. *v.* QUINN, DIXON (W.), LTD. *v.* MADDEN, [1923] A. C. 566; 92 L. J. P. C. 177; 129 L. T. 746; 39 T. L. R. 579; 16 B. W. C. C. 116, H. L.

Annotations:—**Apld.** Fallens *v.* Dixon (1923), 17 B. W. C. C. 314; M'Combe *v.* Bent Colliery Co. (1921), 17 B. W. C. C. 349. **Consd.** Hamilton *v.* Shelton Iron, Steel & Coal Co., Leigh *v.* Same, Timmins *v.* Same (No. 1) (1926), 43 T. L. R. 97. **Refd.** Bromley *v.* Staveley Coal & Iron Co., Drew *v.* Staveley Coal & Iron Co. (1923), 129 L. T. 620.

(*c*) *Inability to Do or Find Suitable Work.*

3738. Compensation reduced on ground of ability to work—Injured man undertaking work—Found to be unfit.]—An injured collier had his compensation reduced to 1*d.* a week. He asked his employers for light work, & they offered him only his old work. He attempted this, but quite failed to do it; it made him ill, & he had to attend a hospital for six months. He applied to have the compensation increased, & gave evidence of the above facts &, in addition, medical evidence that he was unfit for work. The county ct. judge dismissed the application on the ground that there was no change of circumstances:—*Held:* there was a change of circumstances, & the case must be remitted for assessment of compensation.

It is not competent for a county ct. judge, sitting as arbitrator under Workmen's Compensation Act, 1906 (c. 58), to prophesy as to how long the incapacity for work of a workman, who has been injured by accident arising out of & in the course of his employment, will last, & to anticipate what may happen in the future in the workman's condition. It is for the employer who desires to obtain on the ground of change of circumstances a review of the weekly payment which has been made payable to the injured workman to establish that such change has taken place, & the *onus* of so proving ought not to be shifted to the workman.—WALTON *v.* SOUTH KIRKBY, FEATHERSTONE & HEMSWORTH COLLIERY, LTD. (1912), 107 L. T. 337; 5 B. W. C. C. 640, C. A.

3739. —— —— ——.]—A riveter lost the sight in his left eye, which was removed. Full compensation was paid for a considerable period. The workman having filed an application, the employers offered to provide him with riveting work which it was thought he could do, & an award was made for full payment up to the date thereof, & a penny a week thereafter. The workman, finding he could not do the work offered, applied for a review, & the county ct. judge restored the payment of full compensation:—*Held:* the question was one of fact, & there was evidence to support the award.—THAYNE *v.* GRAY & CO., LTD. (1915), 8 B. W. C. C. 17, C. A.

3740. Repeatedly refused work on account of incapacity.]—SHARMAN *v.* HOLLIDAY & GREENWOOD, LTD., No. 3711, *ante*.

3741. Inability to find suitable work.]—A workman with an injury to his knee recovered sufficiently to be able to resume work, but his knee was liable to break down at any time, & did in fact break down. After a considerable time, during which he did not receive compensation, he took proceedings, & the county ct. judge, on the assumption that his former employers were going to find him work, awarded one penny per week. The former employers refused to find him work, & he was unable to obtain any from anyone else, owing to his having had an accident, & to the chance of his breaking down:—*Held:* he was entitled to full compensation.—THOMAS *v.* FAIRBAIRN, LAWSON & CO., LTD. (1911), 4 B. W. C. C. 195, C. A.

Annotation:—**Consd.** Jones *v.* New Brynmally Colliery Co. (1912), 106 L. T. 524.

3742. ——.]—A workman in a steel-rolling mill had the sight of one eye impaired by an accident. He received compensation for some time, & the employers then applied to review the payments. Conflicting medical evidence being given as to the state of the man's vision, the judge referred the matter to a medical referee, who reported that the man would see better with glasses, & could do his old work, but did not make it clear that he could work without glasses. The judge on this found that the man was physically able to work, but that, as a man with glasses was unlikely to obtain employment in the steel-rolling mill, he was not commercially "able to earn," & dismissed the application to review:—*Held:* there was evidence of a change of circumstances, which the judge ought to have considered, & the case must go back to him.—GUEST, KEEN & NETTLEFOLDS, LTD. *v.* WINSPER (1911), 4 B. W. C. C. 289, C. A.

3743. ——.]—A workman lost his eye by an accident, & on recovery applied for arbn. The judge found that he was capable of doing his old work as a boiler maker, & made an award of 1*d.* a week. He then returned to work with the same employers & at the same rate of wages. After he had been working some time he was discharged on the ground of misconduct; it was alleged that

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entitled to take into consideration a general rise in miners' wages since the date of the accident.—MCNEILL *v.* WOODILEE, [1918] S. C. (H. L.) 1.—**SCOT.**

3737*l*. —— *Fluctuation of wages.*]—M'COMBE *v.* BENT COLLIERY CO., LTD. (1924), 17 B. W. C. C. 349.—**SCOT.**

d. —— *General reduction of wages.*]—A minor, who was in receipt of compensation in respect of partial incapacity at a rate which his employers were willing to continue, claimed an increase of the rate, stating as the sole basis of his claim that there had been a general reduction in wages to the extent of at least 2*s.* per shift:—*Held:* he had failed to aver relevant grounds for a review of the rate of compensation.—QUILTER *v.* KEPPLEHILL COAL CO., LTD., [1921] S. C. 905.—**SCOT.**

e. —— *Fall in wages in one occupation—Occupation in which injured man now employed—Not his occupation before accident.*]—FALLENS *v.* DIXON (WILLIAM), LTD. (1923), 17 B. W. C. C. 314.—**SCOT.**

f. —— *Strike — Loss of employment.*]—HUTCHISON *v.* CADZOW COAL CO., LTD. (1924), 17 B. W. C. C. 365.—**SCOT.**

he was asleep at work. The man tried to get similar employment elsewhere but failed. On an application to review by the workman, the judge increased the payments, finding that the workman had not been guilty of misconduct, &, even when working for his old employers, he could not do his work properly. He also found that the man was, by the loss of his eye, unable to obtain work as a boiler maker elsewhere, & so was put in the position of a casual labourer:—*Held:* there was evidence to support the finding.

There is ample evidence for the judge to say that that which was believed to be probable has been proved by actual experience since not to have come true. This being so, there was ample evidence to justify the judge in saying that the amount of compensation ought to be reviewed (COZENS-HARDY, M.R.).—BROWN *v.* THORNYCROFT (J.) & Co., LTD. (1912), 5 B. W. C. C. 386, C. A.

3744. ——.]—A workman, in receipt of a weekly payment under a consent award, applied for a review & increase, alleging that there had been a change of circumstances since the award, in that he had not been able to obtain the light work that he thought he could do. The county ct. judge held that there had been no change of circumstances since the award, & dismissed the application:—*Held:* there was evidence to support the decision.—GIARDELLI *v.* LONDON WELSH S.S. Co. (1914), 7 B. W. C. C. 550, C. A.

3745. —— In district where workman lives.] —MACDONALD (OR DURIS) *v.* WILSONS & CLYDE COAL Co., No. 3232, *ante*.

3746. Greater difficulty in finding suitable work—Than was supposed when award made.]—M'ALINDEN *v.* NIMMO (JAMES) & Co., LTD., No. 3731, *ante*.

3747. Offer to return to work if paid lump sum.] —A workman met with an accident in Jan. 1917, by which he lost part of the little finger of his right hand. Full compensation was paid for some weeks, after which time the employers, being advised by their doctor that the workman was fit to return to work, offered to reinstate him in his old employment if he would return. The workman on Apr. 9, 1918, through a solr., offered to return to work on condition that he was paid a sum of £200 damages for the injury. The employers refused this & stopped his compensation. The man thereupon commenced proceedings. The employers in the meantime had offered a declaration of liability. The medical assessor sitting with the judge after examining the man's hand reported "that the man would probably be fit for work in the usual course about the end of May." Upon this the county ct. judge made an award of full compensation up to May 31, with a declaration of liability after that:—*Held:* there was no evidence of any incapacity to support an award for compensation to continue after Apr. 9. —DAVIES *v.* VICKERS, LTD. (1918), 11 B. W. C. C. 288, C. A.

3748. No bonâ fide effort to obtain suitable work.] —A workman, who had injured his foot by accident in the course of his employment received a weekly payment by way of compensation from his employers for nearly a year. After offering him light work, which he made no serious attempt to do, they reduced the amount of the compensation. The workman thereupon made an application for full compensation, but the ct. held that the employers were justified in making the reduction. Six months later an application was made by the employers for a further reduction. The deputy county ct. judge decided that since the previous application a change of circumstances had occurred, & that the man had made no *bonâ fide* effort to perform suitable work which had been offered to him. He therefore ordered that the weekly payment should be further reduced. The workman appealed:—*Held:* there was evidence to support the finding & no misdirection.—SABEY & SONS *v.* BAVIN (1921), 14 B. W. C. C. 223, C. A.

(d) Ability to Do Light Work.

3749. Offer of light work by employer.]—(1) A workman having sustained an injury received the full amount of compensation for a time, & then the employer offered him some light work which he refused to accept. The employer then applied for a review with the object of diminishing the weekly payments. It was proved that the man was able to do light work, but there was no evidence to show the exact amount of wages he would be able to earn. The county ct. judge, acting partly on his own local knowledge, diminished the payments:—*Held:* the employer having established a case for a review of the payments, the judge had a discretion to diminish the amount without evidence of the actual sum the workman could earn.

(2) It is quite clear that no appeal can arise on the point as to quantum unless it can be shown that the arbitrator has either misdirected himself in law or that there was no evidence on which he could have acted (COZENS-HARDY, M.R.).—ROBERTS & RUTHVEN, LTD. *v.* HALL (1912), 106 L. T. 769; 5 B. W. C. C. 331, C. A.

Annotations:—As to (1) **Consd.** Dyer *v.* Wilsons & Clyde Coal Co. (1914), 8 B. W. C. C. 367. *As to* (2) **Apld.** Peart *v.* Bolckow, Vaughan, [1925] 1 K. B. 399. **Reld.** Duberley *v.* Mace (1913), 6 B. W. C. C. 82; Healy *v.* Reilly (1917), 10 B. W. C. C. 711.

3750. ——.]—An unskilled dock labourer while working at the docks met with a serious accident which rendered him unable to do the full work that he did before. For a considerable time his employers paid compensation to the workman under an agreement with him. Subsequently they offered to take him on as a labourer & give him 8s. a day, & to find him work for four or five days a week, but they warned him that he must not take that as a guarantee by them of perpetual employment. The employers then applied under Workmen's Compensation Act, 1906 (c. 58), s. 16, sched. I., for an order to review the weekly payment payable to the workman, on the ground that there was a change in the circumstances because of their offer of light work to him:—*Held:* having regard to the findings of the county ct. judge that the workman was fit for light work, & to the fact that the employers had offered same to him, the judge ought to have required evidence as to the probable amount of the wages which the workman could earn in order to ascertain what alteration should be made in the weekly payment, if any; & the case must go back to the judge.—GRAY, DAWES & Co. *v.* REED (1913), 108 L. T. 53; 6 B. W. C. C. 13, C. A.

PART XIV. SECT. 20, SUB-SECT. 4.—B. (d).

g. Offer of light work by employer—Cessation of total incapacity.]—CARLIN *v.* STEPHEN & SONS, LTD., [1911] S. C. 901; 48 Sc. L. R. 862; [1911] 2 S. L. T. 19; 5 B. W. C. C. 486.—**SCOT.**

h. —— Refusal because necessitating change of residence unjustifiable.]—PEARSON *v.* RUSSELL (ARCHIBALD), LTD., [1916] S. C. 536; 53 Sc. L. R. 377; [1916] 1 S. L. T. 214; 9 B. W. C. C. 706.—**SCOT.**

Sect. 20.—*Review of weekly payments: Sub-sect.* 4, *C.; sub-sects.* 5 & 6.]

C. Burden of Proof.

3751. Lies on master.]—CORY BROTHERS & CO., LTD. *v.* HUGHES, No. 3321, *ante*.

SUB-SECT. 5.—INFANTS.

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 11 (2).

3752. Review after attainment of majority—Accrued right under Workmen's Compensation Act, 1906 (c. 58)—Repeal of provision by Workmen's Compensation Act, 1923 (c. 42)—Effect of Interpretation Act, 1889 (c. 63), s. 39 (2).]—Before Workmen's Compensation Act, 1923 (c. 42), came into force a workman under the age of twenty-one years met with an accident arising out of & in the course of his employment, & an agreement was recorded by which the employers admitted their liability to pay compensation to the workman under Workmen's Compensation Act, 1906 (c. 58), during total or partial incapacity. After the commencement of Workmen's Compensation Act, 1923 (c. 42), the workman, being then over twenty-one years of age, applied for a review & increase of the rate of compensation payable to him under the proviso to Workmen's Compensation Act, 1906 (c. 58), Sched. I., para. 16:—*Held:* the workman had an accrued right to a review of the rate of compensation under the proviso to Workmen's Compensation Act, 1906 (c. 58), sched. I., para. 16, & was therefore entitled, by Interpretation Act, 1889 (c. 63), s. 38 (2), to a review under that proviso even after it had been repealed by sect. 31 of the Act of 1923 & a new proviso "substituted" by sect. 24 (6) of that Act.—BRIGGS *v.* DRYDEN (T.) & SONS, TALBOT *v.* VICKERS, LTD., [1925] 2 K. B. 667; 95 L. J. K. B. 275; 133 L. T. 409; 69 Sol. Jo. 610; 18 B. W. C. C. 163, C. A.

Annotations:—**Refd.** Wood *v.* Wentworth Silkstone Colliery Co. (1925), 133 L. T. 656; Clement *v.* Davis (1926), 43 T. L. R. 10.

3753. —— Effect of Workmen's Compensation Act, 1923 (c. 42), s. 24 (6).]—The workman was under twenty-one years of age when he was injured by an accident in his employment, in Mar. 1924, & was paid compensation. Some time after Aug. 1924, in which month he attained twenty-one, he applied under proviso to above sub-sect., for a review of the weekly payments he was receiving as compensation for the purpose of obtaining the benefit of the increase provided for by that proviso:—*Held:* the words "before the workman attains the age of twenty-one years," contained in the proviso substituted by above sub-sect., for the proviso to Workmen's Compensation Act, 1906 (c. 58), sched. I. (16), prevented the workman receiving the benefit of that proviso when making an application to review after he came of age.—JONES *v.* MEIROS COLLIERIES, LTD. (1926), 95 L. J. K. B. 754; 135 L. T. 469; 42 T. L. R. 589; 70 Sol. Jo. 707; 19 B. W. C. C. 182, C. A.

3754. "Weekly sum workman would probably have been earning"—Not limited to same employment—Or same employer.]—Upon a review of the weekly payments to a workman who has been injured by an accident entitling him to compensation & who was then under age, if the review takes place more than twelve months after the accident "the amount of the weekly payments may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding £1," as enacted by the proviso to clause 16 of sched. I. of Workmen's Compensation Act, 1906 (c. 58).

The probable earnings there referred to are not restricted to what the workman would probably have been earning in his actual employment under the same employer, but are left to the discretion & good sense of the county ct. judge upon the evidence.—VICKERS, SONS & MAXIM, LTD. *v.* EVANS, [1910] A. C. 444; 79 L. J. K. B. 954; 103 L. T. 292; 26 T. L. R. 548; 54 Sol. Jo. 651; 3 B. W. C. C. 403, H. L.; *affg.* S. C. *sub nom.* EVANS *v.* VICKERS, SONS & MAXIM, LTD., [1910] 1 K. B. 554, C. A.

Annotations:—**Refd.** Clarke, Nicholls & Coombs *v.* Knox (1913), 6 B. W. C. C. 695; Abbey *v.* Nichols (1919), 88 L. J. K. B. 969.

3755. —— Woman discontinuing employment on marriage.]—A girl under twenty-one years of age was employed at wages of 10*s.* 3*d.* a week, & in June, 1917, she met with an accident arising out of & in the course of her employment, & lost the third & fourth fingers & part of the second finger of her right hand. She was paid compensation for some time at 10*s.* a week. She returned to work with the same employers in Jan. 1918, at 10*s.* a week. She had married soon after the accident, & in Apr. 1918, she left her employment at a time when her husband, a sailor, was home on leave. In May, 1918, she took work with other employers, & earned 29*s.* a week for a fortnight as cement tester, & afterwards 39*s.* a week at pushing trolleys loaded with cement. In July, 1918, she gave up this employment as being too heavy for her. Subsequently she commenced proceedings, under Workmen's Compensation Act, 1906 (c. 58), against her original employers for an increase in the compensation of 10*s.* a week said to have been agreed to. At the hearing she said she had not tried to get work recently because now she was married she hoped to have a home of her own. The county ct. judge found that she was only able to earn about 5*s.* a week, & that uninjured she would probably have earned about 30*s.* a week, & he awarded her as compensation under Workmen's Compensation Act, 1906 (c. 58), sched. I., clause 16, 50 per cent. of the difference between these two sums, or 12*s.* 6*d.* a week:—*Held:* (1) there was no evidence on which the county ct. judge could reasonably find that the girl's earning capacity was only 5*s.* a week, & therefore his award must be set aside & an award made in favour of the employers; (2) there was also no evidence on which the county ct. judge could hold that but for the accident the girl would probably be earning 30*s.* a week; &, indeed, on the girl's own evidence she would probably be earning nothing, seeing that she had no intention of going to work because, being married, she intended to look after her own home.—ABBEY *v.* NICHOLS (JAMES) & SONS, LTD. (1919), 88 L. J. K. B. 969; 120 L. T. 467; 12 B. W. C. C. 64, C. A.

PART XIV. SECT. 20, SUB-SECT. 4. —C.

k. *Lies on master — To prove recovery from injuries.*]—M'CALLUM *v.* QUINN, [1909] S. C. 227.—**SCOT.**

l. —— *To show workman could find work.*]—M'CLURE *v.* M'NEIL (WILLIAM) & CO., LTD. (1924), 18 B. W. C. C. 585.—**SCOT.**

m. *Lies on workman — On proof of partial recovery—To show inability to obtain work.*]—PRYDE *v.* MOORE & CO., [1913] S. C. 457; 50 Sc. L. R. 302; [1913] 1 S. L. T. 49.—**SCOT.**

n. —— —— ——.] — PURDIE *v.* COLVILLE & SONS, LTD., [1923] S. C. 772.—**SCOT.**

3756. —— If no accident had happened.]—A factory girl suffered the loss of an eye by accidental injury in 1919. At the time of the accident she was under twenty-one years of age. She was then earning 22*s.* 6*d.* a week, & she received, during the illness caused by the injury, the full compensation to which she was entitled until May, 1920. She was then offered light work by her employers, but refused it. Her compensation was discontinued, & she applied in the autumn of 1920 to the county ct. judge for an award. He came to the conclusion that there was then no present diminution of earning capacity, but that by reason of the loss of the eye there was a risk of future disability, & he made a nominal award of a penny a week, with a declaration of liability. Various events interposed. There was a cessation of employment, & afterwards re-employment. Ultimately, after her discharge from the employment, she again went to the county ct. with an application under Workmen's Compensation Act, 1906 (c. 58), sched. I. (16), for an increase in the amount of the award. This second application was not heard by the judge by whom the former application was heard. The employers met this application with a counter application that the award should be wholly discharged, & the county ct. judge, having heard both applications together, discharged the former award & made an award for resps. Appct. appealed:—*Held:* the evidence before the county ct. judge did not appear to justify him in giving a decision on the basis that the risk of incapacity had ceased; & with regard to the question of the increase of the weekly payment he did not seem to have considered the earning capacity of the girl, or the difference between her present earning capacity & what might have been her earning capacity if the accident had not occurred. The order should be discharged & the case remitted to him for reconsideration.—BRIGGS *v.* GANDY BELT MANUFACTURING CO., LTD. (1923), 129 L. T. 760; 16 B. W. C. C. 151, C. A.

3757. "Earnings before accident"—Probable earnings.]—A workman, who was a minor, was injured, & a declaration of the employer's liability was registered. Twelve months later the workman applied for a review under Workmen's Compensation Act, 1906 (c. 58), sched. I (16), on the ground that if uninjured he would "probably be earning" higher wages. The county ct. judge found that he would probably have been earning 4*s.* a week more, & awarded him 2*s.* a week compensation. The employers appealed on the grounds that there was no evidence to support the county ct. judge's award, & that sched. I. (16) must be read as governed by sched. I. (3), so that this workman must not receive compensation which exceeds the difference between the wages before & after the accident:—*Held:* there was evidence to support the award of the county ct. judge. Sched. I. (16) must be read as an addition to sched. I. (3), & not in subordination to it.

Semble: the correct principle in the case of a minor is to substitute the "probable earnings" for the "earnings before the accident" in reading sched. I. (3).—EDWARDS *v.* ALYN STEEL TINPLATE CO., LTD. (1910), 3 B. W. C. C. 141, C. A.

3758. Compensation limited to 50 per cent. of probable earnings.]—A girl aged sixteen earning 6*s.* a week was injured by accident, & received 6*s.* a week compensation. On a review when the girl was just under nineteen, the county ct. judge found that the girl would now have been earning 10*s.* a week had she not been injured. He refused to increase the compensation on the ground that under the proviso to sched. I. (16) of Workmen's Compensation Act, 1906 (c. 58), he could only award her 50 per cent. of what she would now be earning, *i.e.* 5*s.* a week:—*Held:* this decision was right.—AMBRIDGE *v.* GOOD (1912), 1 L. J. C. C. 69; 5 B. W. C. C. 691, C. A.

3759. Work offered at greater wages than before accident — Declaration of liability.] — A girl of seventeen, employed as a machinist at 6*s.* 10*d.* a week, lost the first & part of the second fingers of her left hand by accident. She was voluntarily paid compensation for three months, when she took domestic service at 5*s.* a week, board & lodging, & compensation was stopped. She left service after three weeks' trial as the work was too hard. She applied for compensation to be continued & was awarded 3*s.* a week. The employers applied, fourteen months after the accident, to review & terminate the payments. At the hearing they offered suitable light work at 8*s.* a week, with a possibility of earning 12*s.* The county ct. judge refused to reduce the amount of compensation, & stated that if the offer of light work had been made earlier the case would have been different. The award in no way purported to be founded on the probable increase of earnings of infant under the proviso in sched. I. (16) of Workmen's Compensation Act, 1906 (c. 58):—*Held:* there was no evidence to justify awarding the continuance of 3*s.* a week; compensation should have been stopped & a declaration of liability granted.—CLARKE, NICHOLLS & COOMBS, LTD. *v.* KNOX (1913), 57 Sol. Jo. 793; 6 B. W. C. C. 695, C. A.

3760. Date from which increase may be ordered.] A miner, under twenty-one years of age, was certified on Feb. 6, 1911, as being incapacitated from nystagmus. He received compensation paid voluntarily, until Apr. 20, 1911, when he was given surface work, at a slightly higher rate of pay. The compensation was then stopped. On Sept. 23, 1913, two years & seven months after disablement, he applied, under Workmen's Compensation Act, 1906 (c. 58), sched. I. (16), proviso, for a review & increase as from Apr. 20, 1911, two & a half years back, & only two & a half months after the disablement. The only evidence as to possible earnings was given by the employers, & related solely to earnings at the date of the application to review, *i.e.* Sept. 23, 1913. The county ct. judge refused to increase as from Apr. 20, 1911, such date not being twelve months after the disablement. But he increased the compensation as from Feb. 6, 1912, twelve months after the disablement, making his computation upon the evidence of probable earnings on Sept. 23, 1913:—*Held:* (1) there was no evidence of the possible earning capacity of the workman at the date from which the judge increased the compensation, & the award could not stand; (2) on the construction of the proviso, an increase should be made to commence from the date of review, or prior date if stated in the application.—WILLIAMS *v.* BWLLFA & MERTHYR DARE STEAM COLLIERIES (1891), LTD., [1914] 2 K. B. 30; 83 L. J. K. B. 442; 110 L. T. 561; 7 B. W. C. C. 124, C. A.

Annotation:—**Distd.** Talbot *v.* Vickers, [1920] 2 K. B. 682.

3761. Concurrent application to review & redeem.]—MORELAND & SONS *v.* ELEY, ELEY *v.* MORELAND & SONS, No. 3771, *post.*

SUB-SECT. 6.—PROCEDURE.

3762. Review may be had on original arbitration —Sufficiency of pleading.]—ROUSE *v.* HUTCHINSON, No. 3121, *ante.*

Sect. 20.—*Review of weekly payments: Sub-sects.* 6 & 7. *Sect.* 21: *Sub-sect.* 1, *A.*]

3763. Whether original arbitration or review appropriate—Recorded agreement for no specified sum.]—BEAMISH *v.* WAGON REPAIRS, LTD., No. 3092, *ante.*

3764. Termination of compensation—Must be raised on pleadings.]—A workman, in whose favour a judge made a declaration of liability, applied for a review & restoration of weekly payments. The employers opposed the application, but did not ask for a termination of their liability. The judge terminated the employer's liability:—*Held:* a judge has no power to terminate liability unless asked to do so by the employers in their answer.—HENSHAW *v.* FIELDING (1914), 7 B. W. C. C. 650, C. A.

3765. —— —— .]—The workman was injured by an accident in Oct. 1922, & was paid compensation under a recorded agreement until Aug. 1921. Upon an application by the employers for review & diminution of the weekly payment, the county ct. judge made an award terminating the payment:—*Held:* the application being for review & diminution, the county ct. judge was not entitled to terminate the payment, & the case must be remitted for an award of a nominal sum.—WILSON, LOVATT & SONS, LTD. *v.* JOHNSON (1925), 133 L. T. 662; 69 Sol. Jo. 675; 18 B. W. C. C. 206, C. A.

3766. —— —— **Sufficiency of answer.**]—In Apr. 1913, employers were ordered to pay appct. 1*d.* a week compensation. Subsequently appct. gave notice of his intention to apply for a review of the award, & the employers thereupon by their answer gave notice that on the hearing of the application they would apply for a termination of their liability. In Sept. 1915, the workman's application was heard. The county ct. judge refused to increase the penny a week, but held he had no jurisdiction to entertain the employers application to terminate, no formal application by them to review their liability having been filed. The employers appealed:—*Held:* in the circumstances the county ct. judge had jurisdiction to deal with the employers' application & the case must be remitted for him to do so.—PAULIZKY *v.* WANDSWORTH, WIMBLEDON & EPSOM DISTRICT GAS CO. (1916), 9 B. W. C. C. 206, C. A.

Concurrent application to review & redeem, *see* Sect. 21, sub-sect. 1, *A.*, *post.*

3767. Duty of judge—To hear workman's case.]—GRAY, DAWES & CO. *v.* REED, No. 3750, *ante.*

3768. —— **To consider offer of suitable work—Offer made in court.**]—A workman seriously incapacitated by injury & in receipt of full compensation was offered by his former employers light work at his old wages. The workman refused this offer, & the employers applied to review & diminish the compensation. From the answers of the employers' witnesses, it appeared that the employers were no longer willing to give the man work. At the end of the employers' case, however, & before the workman's case had been opened, counsel for the employers made a formal offer in ct. to employ the injured man in supervising work which would not need physical exertion. The workman's case was then heard. The judge found that the work offered was suitable, but the man had no earning capacity in the labour market. He then said that the original offer was no longer open to the man, & without in any way referring to the offer made in ct., he dismissed the application & refused to diminish the payments:—*Held:* as the judge had, for some unexplained reason, not taken into account the offer made in ct., which apparently was for full wages, the case must be remitted to the judge to assess compensation, at a reduced rate.—JENKINSON *v.* STEINER (F.) & Co. (1916), 9 B. W. C. C. 571, C. A.

Annotation:—**Folld.** Cross *v.* Whitehead Aircraft Co. (1918), 87 L. J. K. B. 702.

—— —— **When assessing compensation for partial incapacity.**]—*See* Nos. 3374, 3375, *ante.*

SUB-SECT. 7.—ORDER MADE ON REVIEW.

See Sect. 14, *ante.*

SECT. 21.—REDEMPTION OF WEEKLY PAYMENTS.

SUB-SECT. 1.—STATUTORY REDEMPTION.

A. In General.

See Workmen's Compensation Act, 1925 (c. 84), s. 13.

3769. Right to redeem—Absolute right—No discretion in judge to refuse.]—Where a weekly payment under Workmen's Compensation Act, 1906 (c. 58), has been continued by an employer for not less than six months he has an absolute right, under Sched. I., para. 17, to redeem the liability therefor by a payment as therein provided, & the judge has no discretion to refuse to allow him to do so.—KENDALL & GENT, LTD. *v.* PENNINGTON (1912), 106 L. T. 817; 5 B. W. C. C. 335, C. A.

Annotation:—**Apld.** Costello *v.* Brown (1924), 94 L. J. K. B. 220.

3770. —— **Concurrent application to review—Withdrawal of redemption proceedings.**]—Where an employer applied, under Workmen's Compensation Act, 1906 (c. 58), for a review in respect of the diminution or redemption or both, of a weekly payment which had been awarded to a workman injured by accident while in his employ:—*Held:* he was entitled to withdraw the application as to redemption & proceed upon it as to diminution.—GOTOBED *v.* PETCHELL, [1914] 2 K. B. 36; 83 L. J. K. B. 429; 110 L. T. 453; 30 T. L. R. 253; 58 Sol. Jo. 249; 7 B. W. C. C. 109, C. A.

3771. —— **Right of workman to review of payments—Rights co-equal—Priority of employer's application to redeem.**]—The rights given to a workman by sched. I., para. 16, & to the employer by sched. I., para. 17, of Workmen's Compensation Act, 1906 (c. 58), are co-equal rights, & the fact that the employer's application to redeem on the footing of existing facts is prior in date to the application of an infant workman for an increase of compensation does not give the former an absolute indefeasible right to his order.

The claimant, a girl of thirteen, met with an accident in Apr. 1910, which left her right hand useless. Liability under the Act was admitted, & the employers paid her her full wages, 5*s.* 5*d.*

PART XIV. SECT. 21, SUB-SECT. 1. —A.

o. Right to redeem—Inquiry as to permanency of incapacity.]—In determining whether an employer should be allowed to redeem for a lump sum weekly payments awarded under Workmen's Compensation Act, R. S. A., 1922, c. 176, the first inquiry the ct. should make is to ascertain whether the workman's incapacity for work is permanent.—JENNINGS *v.* CANADIAN PACIFIC RY. CO., [1925] 3 D. L. R. 838; [1925] 2 W. W. R. 622.—**CAN.**

a week, as compensation. In 1911 an agreement was recorded whereby the employers found her light work at 3*s.* a week, & the compensation was reduced to 2*s.* 5*d.* In Mar. 1912, the employers applied for redemption of their liability. Notice of the application was not properly served on the claimant, but a solr. appeared under protest for her at the hearing of the application for redemption & took the objection of want of service. The claimant applied for an increase of compensation, & both applications came on for hearing on the same day, that of the employers being first in the list. The county ct. judge refused, on the ground of want of service, to hear the application for redemption, & on the application of the claimant increased the compensation to 5*s.* 6*d.* a week with costs of both applications to be paid by the employers:—*Held:* the defect in service had been waived by the appearance of the solr. for the claimant, but that the employers had no such indefeasible right to have their application for redemption heard first as could prevent the judge from exercising his discretion as he had done. — MORELAND & SONS *v.* ELEY, ELEY *v.* MORELAND & SONS, [1916] 1 K. B. 85; 85 L. J. K. B. 250; 114 L. T. 22; 60 Sol. Jo. 59; 9 B. W. C. C. 11, C. A.

3772. Admissions by or on behalf of infants—Reliability.]—MARSHALL, SONS & CO., LTD. *v.* PRINCE, No. 3791, *post.*

3773. Allegations against infants—Must be proved.]—MARSHALL, SONS & CO., LTD. *v.* PRINCE, No. 3791, *post.*

3774. Application to redeem—Defective service on workman—Waiver.]—MORELAND & SONS *v.* ELEY, ELEY *v.* MORELAND & SONS, No. 3771, *ante.*

—— **Sum limited by employer.**]—*See* No. 3778, *post.*

3775. Redemption as completion of employer's liability—Award contemplating future payments.]—(1) The redemption of the weekly payment under Workmen's Compensation Act, 1906 (c. 58), must be a final & complete settlement of the whole liability of the employer.

(2) An employer is not entitled under Workmen's Compensation Act, 1906 (c. 58), Sched. I., clause 17, to redeem by payment of a lump sum, a weekly payment which does not represent the full compensation due under the Act, but only the balance of liability which remains, after taking into account any benefits or advantages which the workman may receive from the employer, & which may or may not be continued. The true measure of compensation in such a case is the weekly payment plus so much of the benefits & advantages conceded by the employer as will make up the difference between the statutory liability & the agreed weekly payment.

In 1910 a workman employed at a colliery at a weekly wage of £1 16*s.* 4*d.* met with an accident which resulted in lameness, & his employers paid him half wages on the footing of total incapacity until 1913. The workman having then partially recovered, an agreement was made between him & his employers whereby the employers agreed (*a*) to find him a house, for which he was to pay rent, near the colliery; (*b*) to find him suitable light work at which he could sit down; (*c*) to pay him wages at a rate which would enable him to earn £1 7*s.* 6*d.* a week & 8*s.* 10*d.* a week compensation. The workman worked under this agreement till 1916, when the employers applied to the county ct. judge to redeem the weekly payment of 8*s.* 10*d.*:—*Held:* the payment was incapable of redemption otherwise than by agreement.

Semble: the employers might apply to the county ct. judge either to have the weekly payment reviewed or to have the statutory weekly payment fixed on the footing of there being no agreement, inasmuch as the agreement was incapable of being enforced by either party, & in that case there might be no difficulty in making an order for redemption.—CLAWLEY *v.* CARLTON MAIN COLLIERY CO., [1918] A. C. 741; 87 L. J. K. B. 920; 119 L. T. 715; 34 T. L. R. 577; 62 Sol. Jo. 728; 11 B. W. C. C. 440, H. L.; *revsg.* S. C. *sub nom.* CARLTON MAIN COLLIERY CO. *v.* CLAWLEY, [1917] 2 K. B. 691, C. A.

Annotations:—*As to* (1) **Refd.** Russell *v.* Rudd, [1923] A. C. 309. *As to* (2) **Refd.** Rawlings *v.* Hodgson (1918), 11 B. W. C. C. 73; Russell *v.* Rudd, [1923] A. C. 309; Lindsay *v.* Glasgow Iron & Steel Co. (1925), 18 B. W. C. C. 600; Pudney *v.* France, Fenwick, Smith *v.* Leach, [1925] 1 K. B. 346; Williams *v.* Guest, Keen & Nettlefolds (1925), 133 L. T. 111. *Generally,* **Refd.** Williams *v.* Minister of Munitions (1919), 88 L. J. K. B. 1105; Haydock *v.* Goodier, [1921] 2 K. B. 381; Brown *v.* Baird (1923), 17 B. W. C. C. 289.

3776. To what payments applicable—Payments not representing full compensation—Payments supplemented by benefits.]—CLAWLEY *v.* CARLTON MAIN COLLIERY CO., No. 3775, *ante.*

3777. —— Primary payments—Inclusion of war time additions.]—The workman was totally incapacitated in Apr. 1914, & in Oct. 1914, an agreement was filed under which he was to receive £1 per week compensation. He was paid £1 per week with war additions. On Dec. 23, 1923, the employers applied to redeem the payment of the £1 per week, but the hearing did not take place until Feb. 18, 1924. In the meantime Workmen's Compensation Act, 1923 (c. 42), had come into operation as from Jan. 1, 1924. Workmen's Compensation (War Addition) Act, 1917 (c. 42), s. 1 (2), provided that the additional weekly sum payable under that Act should, notwithstanding that the primary weekly payment was redeemed subsequently to the commencement of that Act, continue to be payable in the same manner as if that liability had not been redeemed. Workmen's Compensation (War Addition) Amendment Act, 1919 (c. 83), merely increased the amount of war addition. By sect. 1 of 1923 Act, the War Addition Acts of 1917 & 1919 were repealed, but it was provided that the additions should continue to apply to a weekly payment in respect of total incapacity arising from an accident which occurred before Dec. 31, 1923, so long as the workman remained totally incapacitated, & the addition should, for all purposes, be treated as if it were part of the weekly payment. The county ct. judge held that there could be redemption in respect only of the primary payment of £1 per week. Appct. appealed on the ground that the weekly payment ought not to be considered as consisting of two sums, the £1 per week & the 15*s.* war addition, but under the proviso to Workmen's Compensation Act, 1923 (c. 42), s. 1, must be treated as one, & he was consequently entitled to have the 15*s.* per week also redeemed:—*Held:* under Workmen's Compensation (War Addition) Act, 1917 (c. 42), s. 1 (2), the right of the employer to redeem under Sched. I. (17) was only in respect of the primary weekly payment, & the additional weekly payment was still to continue, even though the liability to make the primary weekly payment was redeemed; & that position remained unaltered by Workmen's Compensation Act, 1923 (c. 42), s. 1, having regard to Interpretation Act, 1889 (c. 63), s. 38 (2), (*c*) & (*e*), in the case of an application to redeem made before Jan. 1, 1924, & in such a case the workman's privilege to continue to receive the additional 15*s.* per week

Sect. 21.—*Redemption of weekly payments: Sub-sect.* 1, *A. & B.* (*a*), (*b*) & (*c*), *& C.; sub-sect.* 2. *Sect.* 22: *Sub-sect.* 1.]

therefore remained. On an application to redeem, made after Jan. 1, 1924, the additional 15*s.* could be redeemed.—COSTELLO *v.* BROWN (1924), 94 L. J. K. B. 220; 132 L. T. 149; 68 Sol. Jo. 813; 17 B. W. C. C. 136, C. A.

B. Sum Payable on Redemption.

(*a*) *In General.*

See Workmen's Compensation Act, 1925 (*c.* 84), s. 13.

3778. Limitation of sum—Contained in application—Jurisdiction of judge to entertain such application.]—It is not competent, under Workmen's Compensation Act, 1897 (c. 37), sched. I., clause 13, for employers to apply for redemption of their liability to make weekly payments by way of compensation subject to a limit specified in the application of the sum to be payable for redemption; & a county ct. judge has no jurisdiction to entertain an application so limited.—CASTLE SPINNING CO. *v.* ATKINSON, [1905] 1 K. B. 336; 74 L. J. K. B. 265; 92 L. T. 147; 53 W. R. 360; 21 T. L. R. 192; 7 W. C. C. 124, C. A.

Annotation:—**Apld.** Calico Printers Assocn. *v.* Booth, [1913] 3 K. B. 652.

3779. Optional award—Deletion of optional words.]—CALICO PRINTERS ASSOCN., LTD. *v.* BOOTH, No. 3795, *post.*

3780. Adequacy of sum—Agreement to redeem & statutory redemption—Not in pari materia.]—SHARP *v.* RICHARDSON & CO., No. 3593, *ante.*

(*b*) *Incapacity Permanent.*

See Workmen's Compensation Act, 1925 (*c.* 84), s. 13.

3781. What is permanent incapacity—Partial incapacity included.]—(1) The words "where the incapacity is permanent" in Workmen's Compensation Act, 1906 (c. 58), sched. I., para. 17, include partial as well as total incapacity; but the question whether the diminished capacity to work is permanent or not is one which the arbitrator must decide on proper evidence before applying the actuarial method of ascertaining the amount of compensation under the first alternative in para. 17. It does not follow because the physical injury is permanent, as, for example, the loss of a finger, that the diminished capacity to work is necessarily permanent also.

(2) The arbitrator in assessing the commutation of a weekly payment under the second alternative in para. 17 is not determing the compensation to be given for the accident. He has to consider only the amount of the weekly payments, their probable duration, the probability of their being diminished or raised in the future, & the probable extent of such variation, if any, & ought not to be guided by any consideration of what a jury might allow as damages (FLETCHER MOULTON, L.J.).

(3) The words in sched. I., para. 3, "the average weekly amount which" the workman "is earning or is able to earn in some suitable employment or business after the accident," refer to the value of the work which the workman is doing in his own business, that is, the wages which he would have to pay to another for the services which he is himself performing therein (FLETCHER MOULTON, L.J.).

(4) The *onus* of proving permanent incapacity is on the person alleging it (FARWELL, L.J.).—CALICO PRINTERS' ASSOCN., LTD. *v.* HIGHAM, [1912] 1 K. B. 93; 81 L. J. K. B. 232; 105 L. T. 734; 28 T. L. R. 53; 56 Sol. Jo. 89; 5 B. W. C. C. 97, C. A.

Annotations:—*As to* (1) **Consd.** Calico Printers Assocn. *v.* Booth, [1913] 3 K. B. 652; Marshall *v.* Prince, [1914] 3 K. B. 1047. **Reid.** Howell *v.* Blackwell's Exors., Blackwell *v.* Howell (1912), 5 B. W. C. C. 293; Kendall & Gent *v.* Pennington (1912), 106 L. T. 817; Staveley Coal & Iron Co. *v.* Elson (1912), 5 B. W. C. C. 301; Moreland *v.* Eley, Eley *v.* Moreland, [1916] 1 K. B. 85; Birmingham Ry. Carriage & Waggon Co. *v.* Round (1917), 10 B. W. C. C. 612; Carlton Main Colliery Co. *v.* Clawley, [1917] 2 K. B. 691; Sharp *v.* Richardson, [1920] 3 K. B. 152; *As to* (4) **Dbtd.** Calico Printers Assocn. *v.* Booth, [1913] 3 K. B. 652. **Reid.** Marshall *v.* Prince, [1914] 3 K. B. 1047.

3782. —— ——.]—CALICO PRINTERS ASSOCN., LTD. *v.* BOOTH, No. 3795, *post.*

3783. —— **Incapacity to earn full wages.**]—MARSHALL, SONS & CO., LTD. *v.* PRINCE, No. 3791, *post.*

3784. Onus of proof—Whether on party alleging incapacity.]—CALICO PRINTERS' ASSOCN., LTD. *v.* HIGHAM, No. 3781, *ante.*

3785. —— ——.]—CALICO PRINTERS ASSOCN., LTD. *v.* BOOTH, No. 3795, *post.*

3786. —— **On employers.**]—MARSHALL, SONS & CO., LTD. *v.* PRINCE, No. 3791, *post.*

3787. Function of arbitrator—Does not determine compensation for accident.]—CALICO PRINTERS' ASSOCN., LTD. *v.* HIGHAM, No. 3781, *ante.*

3788. Matters for arbitrator's consideration—Degree of permanent incapacity.]—CALICO PRINTERS' ASSOCN., LTD. *v.* HIGHAM, No. 3781, *ante.*

3789. —— ——.]—STAVELEY COAL & IRON CO. *v.* ELSON (1912), 5 B. W. C. C. 301, C. A.

3790. —— ——.]—A workman was totally & permanently incapacitated for work as the result of an accident in 1906, & was awarded compensation under Workmen's Compensation Act, 1897, (c. 37), at the rate of 16*s.* 1*d.* per week, under which award he had received £179 6*s.* 7*d.* In 1911 the employers applied to have the weekly payment redeemed by a lump sum. The county ct. judge assessed the sum which would have been awarded to the workman by a jury for such an injury at the time of the accident at £300. He then deducted from that sum the £179 6*s.* 7*d.* which the workman had already received in weekly payments, leaving a balance of £120 13*s.* 5*d.*, which he awarded as the lump sum to be paid by the employers in redemption:—*Held:* this method of computation was wrong.

In computing the lump sum that may be ordered to be paid by an employer, pursuant to Workmen's Compensation Act, 1897 (c. 37), sched. I. (13), in redemption of the liability for a weekly payment that has been continued to a workman for not less than six months, the county ct. judge has not a free hand in the matter, but he must proceed on a correct principle, taking into consideration in determining the present value of future weekly payments, the probability of the workman's recovery, & of his capacity for work either wholly or partially, likewise his age & state

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PART XIV. SECT. 21, SUB-SECT. 1.—B. (a).

p. How fixed—Duty of judge—To consider condition & circumstances of workman at time of inquiry.]—In fixing the amount required to redeem the liability of an employer for payment of the weekly compensation awarded under Workmen's Compensation Act (Alta.), the district ct. judge must consider the condition & circumstances of the injured person at the time of the inquiry.—DUTKA *v.* BANKHEAD MINES (1915), 31 W. L. R. 687; 8 W. W. R. 1041.—**CAN.**

PART XIV. SECT. 21, SUB-SECT. 1.—B. (b).

q. Power of arbitrator — To fix lump sum without inquiry as to earning capacity.]—NATIONAL TELEPHONE CO. *v.* SMITH, [1909] S. C. 1363.—**SCOT.**

of his health, so that his expectation in life may be ascertained.—VICTOR MILLS, LTD. *v.* SHACKLETON, [1912] 1 K. B. 22; 81 L. J. K. B. 34; 105 L. T. 613; 5 B. W. C. C. 30, C. A.

Annotations:—**Consd.** Rawlings *v.* Hodgson (1918), 87 L. J. K. B. 761. **Refd.** Calico Printers' Assocn. *v.* Higham [1912] 1 K. B. 93.

3791. ——.]—(1) Where an application is made by employers to redeem a weekly payment to a workman under Workmen's Compensation Act, 1906 (c. 58), Sched. I., clause 17, on the ground of the permanent incapacity of the workman, the arbitrator must satisfy himself whether the physical condition of the injured workman is stable. The permanent incapacity referred to is the incapacity to earn full wages, & the condition of the workman may be stable & his incapacity permanent although if uninjured he would at some future time in the ordinary course of his employment become entitled to be paid higher wages.

(2) If the incapacity is permanent an infant under clause 17 is in no better position than an adult, & the weekly payment may be redeemed by the payment of a lump sum of such an amount as would purchase an annuity equal to 75 per cent. of the weekly payment, although his probable earnings would be likely to increase if he had remained uninjured.

(3) If the incapacity is not permanent the amount is in discretion of the arbitrator.

(4) On such an application to redeem a weekly payment the burden of proving the permanent incapacity of the workman lies upon the employers.

(5) Admissions by or on behalf of an infant cannot be relied upon, & all allegations against an infant must be proved, in proceedings under Workmen's Compensation Act, 1906 (c. 58), as well as in ordinary judicial proceedings. MARSHALL, SONS & CO., LTD. *v.* PRINCE, [1911] 3 K. B. 1017; 81 L. J. K. B. 16; 111 L. T. 1081; 30 T. L. R. 651; 58 Sol. Jo. 721; 7 B. W. C. C. 755, C. A.

Annotations:—*As to* (1) **Refd.** Carlton Main Colliery Co. *v.* Clawley, [1917] 2 K. B. 691. *Generally*, **Refd.** Moreland *v.* Eley, Eley *v.* Moreland, [1916] 1 K. B. 85.

3792. —— **Amount of weekly payment—Probable duration & stability.**]—CALICO PRINTERS' ASSOCN., LTD. *v.* HIGHAM, No. 3781, *ante*.

3793. ——.]—VICTOR MILLS, LTD. *v.* SHACKLETON, No. 3790, *ante*.

3794. —— **Possible damages by jury.**] CALICO PRINTERS' ASSOCN., LTD. *v.* HIGHAM, No. 3781, *ante*.

3795. —— **Personal knowledge of arbitrator—State of labour market.**]—A workman met with an accident within the meaning of Workmen's Compensation Act, 1906 (c. 58), which resulted in the loss of his left hand. He was awarded 15*s.* 4*d.* a week compensation; & the employers subsequently applied for an arbn. for the redemption of this payment. The county ct. judge held that permanent partial incapacity was proved & awarded that the weekly payments "may be redeemed" on payment by the appts. of £613, namely, 75 per cent. of thirty years' purchase. The workman appealed against the optional form of the award, & the employers appealed on the ground that the judge was not compelled to award that amount, that the incapacity was not permanent, & that the *onus* of proving that the incapacity was not permanent was not on them:—*Held:* (1) the judge must make an award for a lump sum which could be enforced as a judgment; (2) the word "may" must be struck out of the award; (3) there was evidence on which the judge was justified in finding that there was permanent partial incapacity.

(1) The county ct. judge was bound to do that which I have not the smallest doubt he did, decide the case according to the evidence brought before him, taking account, as he was entitled to do, of his general knowledge of the labour market (COZENS-HARDY, M.R.).—CALICO PRINTERS ASSOCN., LTD. *v.* BOOTH, [1913] 3 K. B. 652; 82 L. J. K. B. 985; 109 L. T. 123; 29 T. L. R. 661; 57 Sol. Jo. 662; 6 B. W. C. C. 551, 556, C. A.

Annotations:—*As to* (1) & (2) **Expld.** Gotobed *v.* Petchell, [1914] 2 K. B. 36. *Generally*, **Refd.** Moreland *v.* Eley, Eley *v.* Moreland (1915), 9 B. W. C. C. 11.

3796. Basis of computation of sum—Seventy-five per cent. of amount of weekly payment—Infancy of workman immaterial.]—MARSHALL, SONS & CO., LTD. *v.* PRINCE, No. 3791, *ante*.

(c) *Incapacity not Permanent.*

See Workmen's Compensation Act, 1925 (c. 84), s. 13.

3797. Discretion of arbitrator.]—MARSHALL, SONS & CO., LTD. *v.* PRINCE, No. 3791, *ante*.

3798. ——.]—An electrician's assistant while at work met with an accident which rendered the little finger of his right hand permanently useless & left the ring finger partially stiff, so that the grip of the hand was impaired. Compensation was paid for about a year, when an application was made by the employers to redeem. Medical evidence was called on either side. The arbitrator found that the condition of his ring finger was likely to improve; that the hand would not prevent him working at a machine, & that there was no reason why he should not at some future date earn the same wages as before the accident. In short he found that there was no permanent loss of capacity, though there was some partial incapacity at the time of the arbitration. Accordingly he awarded £80 as reasonable compensation. The workman appealed, & contended that the incapacity was permanent, & the arbitrator therefore had no alternative but to assess the compensation upon the actuarial basis fixed by Workmen's Compensation Act, 1906 (c. 58), Sched. I. (17), which would have amounted roughly to £220:—*Held:* there was evidence upon which the county ct. judge could find that the incapacity was not permanent, & that being so the amount of compensation was entirely in his discretion.—BIRMINGHAM RAILWAY CARRIAGE & WAGGON CO. *v.* ROUND (1917), 10 B. W. C. C. 612, C. A.

(*C*) *Payment into Court.*

See Workmen's Compensation Act, 1925 (c. 84), s. 13; Workmen's Compensation Rules, 1926, r. 65.

SUB-SECT. 2.—REDEMPTION BY AGREEMENT.

See Sect. 15, sub-sect. 3, B., *ante*.

SECT. 22.—INDUSTRIAL DISEASES.

SUB-SECT. 1.—IN GENERAL.

See Workmen's Compensation Act, 1925 (c. 84), ss. 43–47, Sched. III.; Workmen's Compensation Rules, 1926, r. 41.

PART XIV. SECT. 22, SUB-SECT. 1.

r. *Date of disablement—Date certified & fixed after leaving service—Immaterial if disease contracted during service.*]—VICTORIA INSURANCE CO., LTD. *v.* JUNCTION NORTH BROKEN HILL MINE, [1925] A. C. 354.—**AUS.** t. —— —— ——.]—KEARY *v.* RUSSELL (ARCHIBALD), LTD., [1915]

Sect. 22.—*Industrial diseases: Sub-sects.* 1, 2 & 3, *A.*]

Diseases generally—Whether "personal injuries by accidents."]—*See* Sect. 5, sub-sect. 1, C. (*f*), *ante.*

3799. Industrial disease as injury by accident—Contraction of anthrax.]—(1) While a workman was employed sorting wool in a factory a bacillus, according to the medical evidence, passed from the wool to the eye of the workman, & infected him with anthrax of which he died:—*Held:* this was a case of "injury by accident" within the meaning of Workmen's Compensation Act, 1897 (c. 37).

(2) Construction of Acts (*see* No. 2035, *ante*).—BRINTONS, LTD. *v.* TURVEY, [1905] A. C. 230; 74 L. J. K. B. 474; 92 L. T. 578; 53 W. R. 641; 21 T. L. R. 444; 49 Sol. Jo. 445; 7 W. C. C. 1, H. L.; *affg.* S. C. *sub nom.* HIGGINS *v.* CAMPBELL & HARRISON, LTD., TURVEY *v.* BRINTONS, LTD., [1904] 1 K. B. 328, C. A.

Annotations:—As to (1) **Apld.** Ismay, Imrie *v.* Williamson, [1908] A. C. 437. **Expld.** Broderick *v.* L. C. C., [1908] 2 K. B. 807; Eke *v.* Hart-Dyke, [1910] 2 K. B. 677. **Distd.** Chandler *v.* G. W. Ry. (1912), 106 L. T. 479. **Consd.** Coyle (or Brown) *v.* Watson, [1915] A. C. 1. **Distd.** Pyper *v.* Manchester Liners, [1916] 2 K. B. 691. **Apld.** Scott *v.* Pearson, [1916] 2 K. B. 61. **Folld.** Innes (or Grant) *v.* Kynoch, [1919] A. C. 765. **Distd.** Dennis *v.* Mid. Ry. (1920), 13 B. W. C. C. 542. **Refd.** Steel *v.* Cammell, Laird, [1905] 2 K. B. 232; Fitzgerald *v.* Clarke, [1908] 2 K. B. 796; Clover, Clayton *v.* Hughes, [1910] A. C. 242; Sherwood *v.* Johnson (1912), 5 B. W. C. C. 686; Allon Coal Co. *v.* Drylie (1913), 6 B. W. C. C. 398; Brown *v.* Watson (1914), 83 L. J. P. C. 307; Trim Joint District School Board of Management *v.* Kelly, [1914] A. C. 667; Glasgow Coal Co. *v.* Welsh (1915), 8 B. W. C. C. 635; Lyons *v.* Woodlee Coal & Coke Co. (1916), 9 B. W. C. C. 655; Burrell *v.* Selvage (1921), 90 L. J. K. B. 1340; Walker *v.* Wynn, Timmins (1922), 1 B. W. C. C. 122; Carr *v.* Port Glasgow Burgh (1923), 16 B. W. C. C. 331; Hutchinson *v.* Kiveton Park Colliery Co., [1926] 1 K. B. 279; Williams *v.* Guest, Keen & Nettlefolds, [1926] 1 K. B. 497.

3800. Operation of scheme substituted for statutory provisions—Scheme applicable in term to "accident"—Disablement from disease included.]—By Workmen's Compensation Act, 1906 (c. 58), s. 8 (1), where it is certified that a workman is suffering from a disease mentioned in one of the schedules to the Act & is disabled from earning his full wages & the disease is due to the nature of any employment in which he was employed within twelve months before the date of disablement, he is entitled to compensation as if the disease were a personal injury by accident arising out of & in course of the employment. The disablement is to be treated as the happening of an accident. Compensation is recoverable from the employer who last employed the workman during the twelve months before disablement in the employment to the nature of which the disease was due. The date of the disablement is the certified date of its commencement. For more than a year before Jan. 5, 1912, a miner had been in the employment of a firm of colliery owners. He was a member of a scheme, the provisions of which were under Workmen's Compensation Act, 1906 (c. 58), s. 3, substituted for the provisions of that Act. The scheme was by its terms intended to be in substitution for the Act & to provide a fund for the payment of compensation to any member of the scheme in respect of personal injury caused by accident arising out of or in the course of the member's employment. On Jan. 5, 1912, the miner left the employment of the firm. Subsequently he was certified as disabled from earning full wages from a disease of the class described in Workmen's Compensation Act, 1906 (c. 58), s. 8 (1), Jan. 6, 1912, being certified as the date of disablement:—*Held:* (1) the word "accident" in the scheme had the same meaning as in Workmen's Compensation Act, 1906 (c. 58), & included disablement from disease described in sect. 8 (1); (2) the provisions of the scheme were to be read with those of sect. 8 of the Act, & the firm were liable to pay compensation, notwithstanding that on the date of disablement the miner had left their employment.—LEAF *v.* FURZE, [1914] 3 K. B. 1068; 83 L. J. K. B. 1822; 111 L. T. 1100, D. C.

3801. —— Scheme construed in conjunction with Act.]—LEAF *v.* FURZE, No. 3800, *ante.*

SUB-SECT. 2.—DISEASES GIVING RISE TO CLAIM FOR COMPENSATION.

See Workmen's Compensation Act, 1925 (c. 84), ss. 43–47, sched. III.; Workmen's Compensation Rules, 1926, r. 41.

Diseases generally, *see* Sect. 5, sub-sect. 1 C. (*f*), *ante.*

3802. Death or incapacity must result from scheduled disease—Or sequela thereof—Sequela attributable solely to industrial disease—No evidence of attribution.]—Allegation of death due to lead poisoning or its sequelæ. The county ct. judge found that the immediate cause of death was granular kidney; that granular kidney is a *sequela* of lead poisoning but also a *sequela* of gout, of alcoholism, heart-pressure, & other complaints. That lead poisoning was not proved to have been the cause of death, but that, on the other hand, the employers had not, having regard to the words of Workmen's Compensation Act, 1906 (c. 58), s. 8 (2), proved that it was not the cause of death:—*Held:* a misdirection, as the words of Workmen's Compensation Act, 1906 (c. 58), s. 8 (2), have no application, unless it is proved that the death resulted proximately or ultimately from the disease, & the *onus* of proving this, notwithstanding the words of sect. 8 (2), rests upon appct.; sect. 8 (2) presupposes death caused by a disease mentioned in sched. III.; it does not create a liability, but only places the liability upon the right person.—HAYLETT *v.* VIGOR & CO., [1908] 2 K. B. 837; 77 L. J. K. B. 1132; 99 L. T. 674; 24 T. L. R. 885; 52 Sol. Jo. 741; 1 B. W. C. C. 282, C. A.

3803. —— Extension of schedule by agreement or estoppel—Not permissible.]—DUTTON *v.* SNEYD BYCARS CO., LTD., No. 3140, *ante.*

3804. —— Unauthorised treatment by wife of applicant—Novus actus interveniens.]—WILLIAMS *v.* GRAIGOLA MERTHYR CO., LTD., No. 2804, *ante.*

3805. —— Disease but not employment scheduled.]—Although in Workmen's Compensation Act, 1906 (c. 58), sched. III., as extended by the Schedule to the Order of July 30, 1913, "beat hand" is set opposite to the process of mining, yet it is a certifiable disease under Workmen's Compensation Act, 1906 (c. 58), s. 8 (1), in the case of a workman who is not a miner; but in

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S. C. 672; 52 Sc. L. R. 447; [1915] 1 S. L. T. 283; 8 B. W. C. C. 410.—**SCOT.**

a. *Condition precedent to compensation—Medical certificate—Sufficient if produced during arbitration proceedings.*]—TAYLOR *v.* BURNHAM & CO., [1909] S. C. 704; 46 Sc. L. R. 482; [1909] 1 S. L. T. 321; 2 B. W. C. C. 247.—**SCOT.**

PART XIV. SECT. 22, SUB-SECT. 2.

b. *Death or incapacity must result from scheduled disease—Or sequela thereof—Sequela not scheduled—Found in fact to be consequential to disease.*]—DUNN *v.* SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, LTD. (1924), 17 B. W. C. C. 336.—**SCOT.**

c. *Disease but not employment scheduled—Onus on workman to prove disease due to nature of employment.*]—

such a case the burden is on the workman to show that the disease is due to the nature of the employment.—WILSON *v.* BLYTH SHIPBUILDING & DRY DOCKS CO., LTD., [1919] 1 K. B. 324; 88 L. J. K. B. 27; 120 L. T. 1; 63 Sol. Jo. 67; 11 B. W. C. C. 173, C. A.

3806. —— General nature of employment—No direct evidence of contraction of disease.]—Where a workman, employed as a foreman of a gang of labourers who were engaged in unloading hides & skins from a ship, died from anthrax, one of the diseases mentioned in the schedule, it was held that the *onus* of proving that his death was due to the nature of his employment was not shifted to the dependants of the deceased workman notwithstanding that there was no direct evidence to show that he had himself in fact handled any of the hides or skins, & that as the employers had failed to prove that the disablement was not due to the nature of his employment his dependants were entitled to have an award made in their favour.—MEADOWS *v.* ELLERMAN LINES, LTD., [1920] 3 K. B. 544; 89 L. J. K. B. 1234; 124 L. T. 65; 36 T. L. R. 847; 64 Sol. Jo. 698; 13 B. W. C. C. 227, C. A.

3807. —— Presumption of disability therefrom—Employment at or immediately before date of disablement.]—A workman had worked for W. for several years as a lead worker & had contracted lead poisoning, but had not worked for him within twelve months of the disablement. He worked for R. in a lead process for nine days within twelve months of but not "at or immediately before" his disablement as provided in Workmen's Compensation Act, 1906 (c. 58), s. 8 (2). He died of lead poisoning, & his widow applied for compensation:—*Held:* the death not coming within Workmen's Compensation Act, 1906 (c. 58), s. 8 (2), there was no presumption that the disease was caused by the last employment; it was not enough for appel. to prove that her husband had been employed in a lead process within twelve months & that he died of lead poisoning; it must be shown that the disease was caused by the last employment; &, on the facts, the disease had not been contracted in the last employment, & no case had been made against third parties.—DEAN *v.* RUBIAN ART POTTERY, LTD., [1914] 2 K. B. 213; 83 L. J. K. B. 799; 110 L. T. 594; 30 T. L. R. 283; 58 Sol. Jo. 302; 7 B. W. C. C. 209, C. A.

Annotations:—**Consd.** M'Taggart *v.* Barr (1914), 8 B. W. C. C. 376. **Overd.** Blatchford *v.* Staddon & Founds (1927), 43 T. L. R. 424. **Refd.** Barron *v.* Seaton Burn Coal Co. (1915), 112 L. T. 897.

3808. —— —— —— ——.]—BLATCHFORD *v.* STADDON & FOUNDS, No. 3810, *post*.

3809. Disease contracted more than twelve months before disablement—Employment in same trade within twelve months—Liability of last employer.]—DEAN *v.* RUBIAN ART POTTERY, LTD., No. 3807, *ante*.

3810. —— —— ——.]—Applt., a painter, claimed compensation from resps., a firm of builders & house decorators, in respect of disablement caused by lead poisoning. Applt. served in the Navy as a painter until 1918, & during that service contracted the disease of lead poisoning. His last employment was with resps. from Oct. to Dec. 1924, when he left owing to illness. In July, 1925, the certifying surgeon certified that he was then suffering from lead poisoning & was thereby disabled from earning his full wages at the work at which he had been employed. The certificate gave no date for the commencement of the disablement, &, accordingly, by Workmen's Compensation Act, 1906 (c. 58), s. 8 (4), it was deemed to have commenced at the date of the certificate. The arbitrator was not satisfied that there was anything in the nature of applt.'s employment with resps. that would tend to aggravate or accelerate the process of the disease so as to warrant a finding that his disablement was due to that employment & made an award in favour of resps:—*Held:* applt. was entitled to compensation under Workmen's Compensation Act, 1906 (c. 58), s. 8 (1), from resps. as being the last employers who had employed him within the twelve months immediately preceding his disablement in the employment to the nature of which the disease was due, *i.e.* in work of the same character as that to which his disease was due, namely, lead painting, notwithstanding that he failed to prove that his disablement was due to his employment by resps.—BLATCHFORD *v.* STADDON & FOUNDS (1927), 43 T. L. R. 421, H. L.

3811. Results of surgical operation—Necessitated by disease.]—A workman, by reason of the nature of his work, contracted a disease in his right eye, which had to be removed. After the removal of the eye he obtained a certificate of disablement from a certifying surgeon, who certified that, having personally examined the workman, he was satisfied that "he is suffering from" an industrial disease—namely, ulceration of the corneal surface of the eye due to tar, pitch, etc.—& further certified, under the heading "Symptoms of Disease": "He has lost his right eye as the result of corneal ulceration":—*Held:* the words of Workmen's Compensation Act, 1906 (c. 58), s. 8 (2), "suffering from a disease mentioned in the Third Schedule to this Act," *i.e.* an industrial disease, ought to be construed as including the case of a workman suffering from the results of a surgical operation rendered necessary by the disease, & the certificate complied with the requirements of the Act.—RUSSELL (ARCHIBALD), LTD. *v.* CORSER, [1921] 1 A. C. 351; 90 L. J. P. C. 77; 124 L. T. 548; 37 T. L. R. 244; 65 Sol. Jo. 239; 13 B. W. C. C. 476, H. L.

Annotations:—**Distd.** Dunn *v.* Scottish Co-op. Wholesale Soc. (1924), 17 B. W. C. C. 336. **Apld.** Starkey *v.* Clayton (1925), 133 L. T. 612. **Consd.** Prendergast *v.* Lancasters Steam Coal Collieries (1925), 134 L. T. 166; Scahill *v.* Evans (1926), 19 B. W. C. C. 112.

SUB-SECT. 3. MEDICAL CERTIFICATE.

A. In General.

See Workmen's Compensation Act, 1925 (c. 84), ss. 43-47, Sched. III.

3812. By whom given—Certifying surgeon under Factories & Workshop Act, 1901 (c. 22)—For district where workman employed—Workman not in district having surgeon.]—Appct., whose home was at Liverpool, was employed by resps. as a boatswain, & whilst painting the ship's hold at sea contracted lead poisoning. He was discharged in New York in Apr. 1908, subsequently returned to Liverpool, & in Jan. 1909, obtained a certificate from the certifying surgeon for the Liverpool district under above Act, that he was disabled by lead poisoning from following his usual employment:—*Held:* under Workmen's Compensation

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SCULLION *v.* CADZOW COAL CO., LTD., [1914] S. C. 36; 51 Sc. L. R. 39; [1913] 2 S. L. T. 271; 7 B. W. C. C. 833.—**SCOT.**

d. —— —— ——.]—M'TAGGART *v.* BARR (WILLIAM) & SONS, LTD., [1915] S. C. 224; 52 Sc. L. R. 125; [1914] 2 S. L. T. 430; 8 B. W. C. C. 376.—**SCOT.**

e. —— —— ——.]—O'NEILL *v.* WILSONS & CLYDE COAL CO., LTD., [1926] S. C. 680.—**SCOT.**

Sect. 22.—Industrial diseases: Sub-sect. 3, A., B., C. & D.]

Act, 1906 (c. 58), s. 1 (4), para. 1, before appct. could make any claim for compensation in respect of an industrial disease he must get a certificate from the certifying surgeon appointed under above Act, for the district in which he was employed; &, inasmuch as there was no district in which he was employed at the time when he contracted the disease, he could not successfully make a claim.—CURTIS *v.* BLACK & Co., [1909] 2 K. B. 529; 78 L. J. K. B. 1022; 100 L. T. 977; 25 T. L. R. 621; 53 Sol. Jo. 576; 2 B. W. C. C. 239, C. A.

See, now, Workmen's Compensation Act, 1925 (c. 84), s. 44 (3).

3813. —— —— —— Certificate by surgeon where workman resided.]—The workman was examined on Jan. 10, 1924, by Dr. A., the certifying surgeon for the district in which he resided, who was not the certifying surgeon for the district where he was employed. Dr. A. certified that he was not suffering from lead poisoning. The workman applied for a reference to a medical referee, who, on Jan. 30, 1924, dismissed the workman's appeal & certified that he was not suffering from lead poisoning. On Apr. 9, 1924, Dr. P., the certifying surgeon for the district where the workman was employed, certified that he was suffering from lead poisoning & was thereby disabled from earning full wages, & that his disablement began on Jan. 2, 192 . The county ct. judge fixed the rate of compensation payable, but he held that the decision of the medical referee was conclusive & he awarded that no compensation was payable:—*Held:* Dr. A. not being the certifying surgeon for the district where the workman was employed, his certificate was of no effect & the appeal to the medical referee was not properly founded; the workman, having obtained the certificate of the certifying surgeon for the district in which he was employed, was entitled to compensation at the rate fixed by the county ct. judge.

I see no objection to a workman applying for & obtaining a fresh certificate after a reasonable lapse of time, & in my opinion even if Dr. A.'s certificate had been a proper certificate under the sect. [Workmen's Compensation Act, 1906 (c. 58), s. 8] there was no reason why the county ct. judge should not have paid attention to Dr. P.'s certificate.—ANDERTON *v.* MARKHAM HEYWOOD & Co. & EASTWOOD (JAMES) & SONS (1925), 18 B. W. C. C. 121, C. A.

3814. —— Chief medical officer of Post Office.]—Under the power now contained in Workmen's Compensation Act, 1925 (c. 84), s. 44 (3), the Secretary of State made regulations of which the material one was: "In the application of the provisions of the said sect. to telegraphist's cramp, so far as regards a workman employed by the Postmaster-General, the Post Office medical officer under whose charge the workman is placed shall, if authorised to act for the purposes of the said sect. by the Postmaster-General, be substituted for the certifying surgeon."

C., a telegraphist employed by the Postmaster-General, was on the capitation list of the local Post Office medical officer at Grimsby. She complained that she had telegraphist's cramp; in accordance with the regulations of the department, the case was referred to the chief medical officer, who had special knowledge of telegraphist's cramp. The chief medical officer certified that C. was not suffering from telegraphist's cramp. C. obtained a rule *nisi* for a *certiorari* to quash the certificate:—*Held:* (1) the chief medical officer was not the medical officer "under whose charge C. was placed," & he was not entitled to give a certificate; (2) the granting of a certificate was in the nature of a judicial act in respect of which *certiorari* would lie; (3) an appeal to a medical referee under s. 43 of the Act was not equally beneficial, since the referee's concurrence with the chief medical officer's certificate would be conclusive, whereas the certificate was a nullity; (4) (AVORY, J.) whether an appeal was equally beneficial or not, C. being a party aggrieved, *certiorari* would go *ex debito justitiæ* at her instance.—R. *v.* POSTMASTER-GENERAL, *Ex p.* CARMICHAEL (1927), 43 T. L. R. 228, D. C.

3815. Disablement antedated beyond six months—Claim by workman after expiration of six months—Whether out of time.]—MOORE *v.* NAVAL COLLIERY CO., LTD., No 3033, *ante.*

3816. Certificate of disablement—Certificate of suspension—Not mutually exclusive.]—Appct., a painter, was formerly in the employ of resp. On May 29, 1920, he became ill & consulted his panel doctor, who certified that he was suffering from lead poisoning. On Aug. 12, 1920, the certifying surgeon gave a certificate of suspension under Workmen's Compensation Act, 1906 (c. 58), s. 8 (1) (ii), that he had suspended appct. from his usual employment on account of his having contracted lead poisoning. Resp. appealed against this certificate to the medical referee, but his appeal was dismissed. Compensation was paid to appct. as from Aug. 12, 1920. On Jan. 20, 1921, appct. obtained from the same certifying surgeon a certificate of disablement under Workmen's Compensation Act, 1906 (c. 58), s. 8 (1) (i), which stated that he was suffering from dermatitis, the result of lead poisoning, & that the disablement commenced on May 29, 1920. An appeal from this certificate was dismissed by the medical referee on Feb. 4, 1921. Resp. refused to pay further compensation as from that date. In Apr. 1921, appct. commenced arbitration proceedings, & in his particulars of claim he set out both the certificate of suspension & the certificate of disablement. Resp. in his answer alleged that appct. had not since Feb. 4, 1921, been incapacitated from work as the result of lead poisoning or dermatitis. At the hearing evidence was given on behalf of resp. by medical witnesses that appct. was not suffering from lead poisoning or its *sequelæ*, &, further, that the dermatitis had nothing to do with lead poisoning. The deputy county ct. judge found that appct. was unable to work by reason of lead poisoning from May 29 to Aug. 12, 1920; that he was not incapacitated from work on account of lead poisoning or its *sequelæ* since Feb. 4, 1921; & that appct. had not satisfied him that dermatitis had any connection with lead poisoning. He held that the certificate of disablement was invalid, as appct., having elected to proceed under sect. 8 (1) (ii), could not revert to the procedure under sect. 8 (1) (i):—*Held:* (1) the remedies provided by Workmen's Compensation Act, 1906 (c. 58), s. 8 (1) (i) & (ii) were not alternative in the sense of being mutually exclusive, & appct., having obtained a certificate of suspension under clause (ii), was not precluded from subsequently obtaining a certificate of disablement under clause (i), which fixed the happening of the accident at an earlier date & thereby entitled him to compensation as from that date; (2) the certificate of disablement having certified that appct. was suffering from dermatitis, & no evidence having been adduced by resp. to

show that appct. was not then suffering from the same disease as that certified, the deputy county ct. judge was bound by the certificate, & was not entitled to find on the evidence before him that the disease was not in fact that which was certified; therefore the appeal must be allowed & an award made in favour of appct.—ROLLINGS *v.* THOMPSON, [1922] 1 K. B. 320; 91 L. J. K. B. 301; 126 L. T. 313; 66 Sol. Jo. 107; 14 B. W. C. C. 190, C. A.

Annotation :—**Apld.** Short *v.* Parker (1926), 95 L. J. K. B. 849.

B. Validity.

See Workmen's Compensation Act, 1925 (c. 84), ss. 43–47, sched. III.

3817. Certificate ambiguous & contradictory—Refusal of arbitrator to act thereon.]—A certifying surgeon certified that a bookbinder was suffering from lead poisoning or its *sequelæ*, but stated, in his certificate, that there were none of the usual symptoms & that the disease could only be inferred from the man's history of the case. The county ct. judge, with the advice of a medical assessor sitting with him, refused to act on this certificate, on the ground that it was ambiguous & contradictory, & dismissed an application for compensation based upon it :—*Held :* there was no misdirection, & the judge was entitled to ignore this certificate.—MAPP *v.* STRAKER & SON, SMITH BROTHERS, LTD. (1914), 7 B. W. C. C. 18, C. A.

Annotations :—**Distd.** Chuter *v.* Ford, [1915] 2 K. B. 113. **Dbtd.** Russell *v.* Corser, [1921] 1 A. C. 351. In my own opinion, it is not a judgment which should be followed (LORD SHAW OF DUNFERMLINE).

3818. At variance with finding of medical referee—Date of disablement.]—FROST *v.* CLANWAY COLLIERY CO., LTD., No. 3831, *post*.

3819. Insufficient description of disease.]—A certifying surgeon certified that a workman was suffering from "cataract of right eye" :—*Held :* the certificate was insufficient, as the term "cataract" alone was not an industrial disease under Workmen's Compensation Act, 1906 (c. 58).—DAVIES *v.* WERN TINPLATE CO., LTD. (1922), 15 B. W. C. C. 242, C. A.

Certificate given by wrong certifying surgeon.]—*See* No. 3813, *ante*.

C. How far Conclusive.

See Workmen's Compensation Act, 1925 (c. 84), ss. 43–47, sched. III.

3820. As to nature of disease—In absence of appeal to referee.]—B. was a painter employed by C. & Sons, Ltd., & he claimed compensation from them for incapacity caused by lead poisoning contracted by him whilst in their service in 1914. He consulted Dr. Bond, a certifying surgeon under Factory & Workshop Act, 1901 (c. 22), who on Mar. 31, 1915, gave a certificate that appct. was suffering from lead poisoning & its *sequelæ* & was thereby disabled from earning full wages; that the disablement commenced on Feb. 27, 1915, & that the leading symptoms of the disease were tremors in the arms & hands. There was no appeal to a medical referee. At the hearing of the arbitration Dr. Bond gave evidence confirming his certificate, & he was supported by another doctor. The employers called two doctors who had seen claimant in June, 1915, & they gave evidence that he was not suffering from lead poisoning, but from "Parkinson's disease," which was not an "industrial disease" within the Act. It was suggested that it was open to them to prove that this was so since the date of the certificate, but they admitted in cross-examination that appct. had been suffering from the same disease throughout, so that in effect their evidence was that the certificate was wrong & ought to be disregarded :—*Held :* the only appeal from the certificate was to a medical referee as provided by Workmen's Compensation Act, 1906 (c. 58), s. 8 (1) (*f*), & in the absence of such an appeal the correctness of the certificate could not be disputed; appct. was therefore entitled to compensation.—BEDFORD *v.* COWTAN & SONS, LTD., [1916] 1 K. B. 980; 85 L. J. K. B. 1066; 114 L. T. 861; 32 T. L. R. 410; 9 B. W. C. C. 208, C. A.

Annotations :—**Folld.** Rollings *v.* Thompson, [1922] 1 K. B. 329. **Refd.** Chippendale *v.* Lytham High Explosives (1918), 120 L. T. 9.

3821. —— No evidence of other disease.]—ROLLINGS *v.* THOMPSON, No. 3816, *ante*.

3822. Certificate in fact mistaken—Fresh proceedings on obtaining proper certificate.]—A workman claimed, & was certified after an examination by a certifying surgeon, to be suffering from an industrial disease namely T.N.T., or Trinitrotoluol poisoning. At the arbn. the employers proved that the disease could not possibly have been contracted in their employment as they did not make any trinitrotoluol, but only picric acid. It appeared that the surgeon had made a mistake, & should have certified poisoning by nitrous fumes. The county ct. judge dismissed the application :—*Held :* the certificate must be deemed to be conclusive, & the award must stand, but fresh proceedings might be initiated upon obtaining a proper certificate.—CHIPPENDALE *v.* HIGH EXPLOSIVES, LTD. (1918), 88 L. J. K. B. 143; 120 L. T. 9; 11 B. W. C. C. 221, C. A.

Certificate of recovery—Subsequent certificate of recurrence of disease.]—*See* No. 3061, *ante*.

Finding of medical referee.]—*See* Nos. 3830, 3831, *post*.

D. Appeal to Medical Referee.

See Workmen's Compensation Act, 1925 (c. 84), ss. 43–47, sched. III.

3823. Only mode of appeal against certificate.]—BEDFORD *v.* COWTAN & SONS, LTD., No. 3820, *ante*.

3824. Who may appeal—Last employers.]—The certifying surgeon certified that appct. was suffering from lead poisoning on Apr. 9, 1924. During the twelve months prior to that date appct. had been employed as a painter for the last fortnight by the first resps., M. H. & co., & during the rest of that year by the second resps., J. E. & Sons. Under Workmen's Compensation Act, 1906 (c. 58), s. 8 (i) (*e*), notice of the disablement was given to M. H. & co., who did not appeal to the medical referee. Appct. filed his request for compensation against M. H. & co., as resps., but the hearing on June 23 was adjourned to

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PART XIV. SECT. 22, SUB-SECT. 3.—B.

f. Non-conformity with statutory requirements.]—A workman received a certificate from a certifying surgeon which stated that he was suffering from paralysis as a sequel to, & a result of, lead-poisoning, & that he was incapacitated as from a certain date, but did not state the work in which the workmen alleged he was employed at or immediately before the date of disablement :—*Held :* the certificate was invalid as not conforming with statutory requirements.—MARR *v.* LEADHILLS CO., LTD., [1918] S. C. 815; 55 Sc. L. R. 732; [1918] 2 S. L. T. 170; 11 B. W. C. C. 389.—**SCOT.**

PART XIV. SECT. 22, SUB-SECT. 3.—D.

g. How far decision conclusive—Not as to employment being cause of disease—Merely displaces presumption in favour of workman.]—M'GINN *v.* UDSTON COAL CO., LTD., [1912] S. C. 668.—**SCOT.**

h. —— - — ——.]—WALKER *v.* CADZOW COAL CO., LTD. (1925), 18 B. W. C. C. 657.—**SCOT.**

k. Duty of referee—No obligation to certify extent of disablement.]—

Sect. 22.—Industrial diseases: Sub-sect. 3, D. & E.; sub-sects. 4 & 5.]

enable J. E. & Sons to be joined also as resps. J. E. & Sons then applied for leave to appeal to the medical referee, but were refused by the registrar, & at the hearing on July 21 the county ct. judge directed appct. to serve J. E. & Sons with the certificate of the certifying surgeon to enable them to appeal to the medical referee, & adjourned the case *sine die*. The workman appealed:—*Held:* the last employers, who were the persons primarily made liable for compensation under Workmen's Compensation Act, 1906 (c. 58), s. 8 (i) (*c*), were the only persons who had the right to appeal from the certifying surgeon's certificate to the medical referee under sect. 8 (i) (*f*), & the case must go back for hearing.—ANDERTON *v.* MARKHAM HEYWOOD & CO. & EASTWOOD (JAMES) & SONS (1924), 94 L. J. K. B. 525; 132 L. T. 233; 69 Sol. Jo. 88; 17 B. W. C. C. 211, C. A.; *subsequent proceedings* (1925), 18 B. W. C. C. 121, C. A.

3825. Grounds of appeal—By workman—Not refusal of certificate only.]—By Workmen's Compensation Act, 1906 (c. 58), s. 8 (1) (iii) (*f*), if an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement of a workman by an industrial disease within the Act, the matter shall be referred to a medical referee, whose decision shall be final. Where the certifying surgeon had given a certificate that a workman was suffering from an industrial disease, but in the certificate fixed the commencement of the disablement at a date which, under the circumstances of the case, precluded the workman from taking proceedings for compensation under the Act:—*Held:* the workman was "aggrieved" by the refusal of the surgeon to give a certificate within Workmen's Compensation Act, 1906 (c. 58), s. 8 (1) (iii) (*f*), & the workman had a right of appeal to the medical referee.—BIRKS *v.* STAFFORD COAL & IRON CO., [1913] 3 K. B. 686; 82 L. J. K. B. 1334; 109 L. T. 290; 57 Sol. Jo. 729; 6 B. W. C. C. 617, C. A.

3826. —— —— Certificate bearing erroneous date.]—BIRKS *v.* STAFFORD COAL & IRON CO., No. 3825, *ante*.

3827. Powers of referee—Fixation of date of disablement.]—BIRKS *v.* STAFFORD COAL & IRON CO., No. 3825, *ante*.

3828. —— ——.]—The workman, a collier, on Nov. 7, 1918, was certified to be suffering from miner's nystagmus. He had been working for some months in that year for a colliery co. other than resps. He received compensation on the ground of incapacity through nystagmus from Nov. 1918, up to Aug. 1919, when he started work again & earned the ordinary wages of a man of his class. In Nov. 1919, he entered the employment of resps., & worked for them up to Jan. 1920, when he was again certified by the certifying surgeon to be suffering from miner's nystagmus. The certificate was dated Jan. 30, 1920, but it did not state the date at which the disablement began. Resps. applied for a reference to the medical referee on the grounds (*inter alia*) that the workman only entered the employment of resps. in Nov. 1919, & that previous to his entering their employment, the workman was suffering from, & had been in receipt of compensation for, nystagmus, & further, that the certificate did not state the date of disablement. The medical referee gave his decision in the terms of the form in the regulations relating to medical references: "I allow the appeal of the East Barnsley Colliery Co., Ltd., against the certificate of disablement granted to Reuben Turton on Jan. 30, 1920." The workman's solr. then sought to have the certificate of the medical referee set aside & the question of liability decided under Workmen's Compensation Act, 1906 (c. 58). That was refused by resps., & proceedings were instituted for arbn. When the case came before the county ct. judge the preliminary point was taken that the proceedings were not maintainable because the certificate of the medical referee was conclusive, & showed that there was no ground for a claim. To that it was answered that the certificate of the medical referee was invalid either on the ground of uncertainty, or that the medical referee had decided it on grounds on which he had no right to decide it. The county ct. judge, with the consent of both parties, communicated with the medical referee, & was informed by him that he did find that the workman was suffering from nystagmus, but that he had come to the conclusion that resps. were not responsible, as the workman had said, definitely, that when he started work with resps., he had not got over the nystagmus which he had contracted while working for his previous employer. The county ct. judge held that the preliminary objection was bad, & that the arbn. must proceed:—*Held:* the medical referee had acted on grounds which were beyond his jurisdiction to entertain, & the judge was right in overruling the preliminary objection. The question as to whether a further reference to the medical referee was barred was not decided by reason of the counsel for the workman consenting not to oppose an application for the same if made.—TURTON *v.* EAST BARNSLEY COLLIERY, LTD., [1921] 1 K. B. 369; 90 L. J. K. B. 267; 124 L. T. 439; 13 B. W. C. C. 292, C. A.

3829. —— Fact of suffering from disease.]—TURTON *v.* EAST BARNSLEY COLLIERY, LTD., No. 3828, *ante*.

3830. How far decision conclusive.]—When a workman appeals from the refusal of a certifying surgeon to give him a certificate of disablement from an industrial disease under Workmen's Compensation Act, 1906 (c. 58), s. 8 (1) (i), & the medical referee allows the appeal & fixes the date of disablement, his decision is final, & is equivalent to the certificate which the certifying surgeon ought in the opinion of the medical referee to have given.—CHUTER *v.* FORD (J. J.) & SONS, LTD., [1915] 2 K. B. 113; 84 L. J. K. B. 703; 112 L. T. 881; 31 T. L. R. 187; 8 B. W. C. C. 100, C. A.

Annotations:—**Folld.** Frost *v.* Clanway Colliery Co., [1920] 1 K. B. 423. **Refd.** Bedford *v.* Cowtan, [1916] 1 K. B. 980.

3831. ——.]—Where the certifying surgeon has given to a workman a certificate that he is suffering from an industrial disease, & is thereby disabled from earning full wages, & that his disablement commenced on a certain date, & the medical referee has allowed an appeal by the employer, his decision is final, & the certifying surgeon cannot validly give a second certificate reasserting the same date of disablement.—FROST *v.* CLANWAY COLLIERY CO., LTD., [1920] 1 K. B. 423; 89 L. J. K. B. 355; 122 L. T. 298; 36 T. L. R. 56; 12 B. W. C. C. 358, C. A.

3832. ——.]—Where the workman, a baker, has obtained from a certifying surgeon a certificate

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Neither under Workmen's Compensation Act, 1906, nor under Workmen's Compensation Act, 1923, is a certifying surgeon or a medical referee required to certify as to the extent of the disablement.—GILHOOLEY *v.* WATSON (JOHN), LTD., [1924] S. C. 794; 6 Sc. L. R. 530; [1924] S. L. T. 547; 17 B. W. C. C. 388.—**SCOT.**

that he is suffering from bakers' dermatitis, & on that certificate the employer, for a time, pays the workman full compensation on the ground that the workman is suffering from dermatitis due to long exposure to dust in the baking industry, an industrial disease for which compensation is payable under Workmen's Compensation Act, 1906 (c. 58), s. 8, & the employer afterwards proceeds under Workmen's Compensation Act, 1923 (c. 42), s. 14, to have the compensation payable to the workman diminished or stopped, & on no agreement being come to between the employer & the workman with regard to the condition or fitness of the workman for employment, the matter is referred to a medical referee under Workmen's Compensation Act, 1906 (c. 58), sched. I., clause 15, there being no dispute that the workman was suffering from dermatitis due to long exposure to dust in the baking industry, the decision of the medical referee on the question submitted to him is final & conclusive & cannot be reviewed by a county ct. judge.—SHORT *v.* PARKER (1926), 95 L. J. K. B. 849; 135 L. T. 528; 19 B. W. C. C. 190, C. A.

3833. —— Consecutive & contradictory certificates—Certificate conclusive as to facts on particular date.]—PRENDERGAST *v.* LANCASTERS STEAM COAL COLLIERIES, LTD., No. 3061, *ante*.

3834. —— —— ——.]—A miner was certified suffering from nystagmus in July, 1923, & again in Aug. 1924. In Feb. 1925, the medical referee, on a reference to him under Sched. II. (15), certified that he "is not suffering from miner's nystagmus. He is hypercpic, & has incipient cataract; his condition is such that he is fit for surface work; his incapacity is not due to the accident." Compensation thereupon ceased. In July, 1925, the workman obtained another certificate that he was suffering from nystagmus, & the same medical referee this time confirmed it. The employers, however, resisted payment of compensation on the ground that the previous finding of the medical referee was conclusive. The county ct. judge, however, acted on the final certificate & awarded compensation:—*Held:* the certificate of the medical referee of Feb. 1925, was only conclusive of the matter at that date but did not preclude the judge from following the certificate given at a later date. The award was therefore right.—SCAHILL *v.* RICHARD EVANS & Co., LTD. (1926), 19 B. W. C. C. 112, C. A.

E. Certiorari to Quash.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 412 *et seq.*

3835. Certificate wrongly given—Whether appeal to medical referee alternative remedy.]—R. *v.* POSTMASTER-GENERAL, *Ex p.* CARMICHAEL, No. 3814, *ante*.

SUB-SECT. 4.—REPRESENTATION AS TO PARTICULAR DISEASE.

See Workmen's Compensation Act, 1925 (c. 84), ss. 43–47, Sched. III.

3836. Representation must be wilful—Declaration signed unread—Mistaken belief as to nature of document.]—In 1913, appct., while in the employment of respts., was incapacitated by miner's nystagmus & received compensation for a time. In 1914 he joined the army. In 1919 he re-entered resp.'s employment, having signed a statement declaring that he had not previously suffered from "nystagmus." He was later again disabled by miner's nystagmus, & claimed compensation. The employers contended that, by the signed statement, appct. had wilfully & falsely represented himself in writing as not having previously suffered from an industrial disease, & so disentitled himself from receiving compensation, by virtue of Workmen's Compensation Act, 1906 (c. 58), s. 8 (1) (*b*). Appct. said that he did not read or understand the statement before signing it, & assumed it was the usual signing-on form for obtaining his lamp. The county ct. judge believed appct. & found that the statement though false was not made wilfully. He therefore made an award for the payment of compensation:—*Held:* it was a question of fact upon which there was evidence to support the finding, & there was no misdirection.—BRINDLEY *v.* SHELTON IRON, STEEL & COAL CO., LTD. (1923), 128 L. T. 783; 16 B. W. C. C. 1, C. A.

3837. Doctors differing in diagnosis—Knowledge of workman—Deduced from similarity of symptoms.]—In July, 1922, a workman signed a declaration representing himself as not having previously suffered from nystagmus. In Nov., 1922, he contracted that disease. In July, 1919, after being in the army for some time, he had suffered from eye trouble. He had then been examined by two doctors, both of whom were called, & said that he was not in 1919 suffering from nystagmus, & he was granted a pension for the eye trouble as being caused by army service. The man admitted that he had in 1919 also been examined by a third doctor who had told him that he was suffering from nystagmus, & that, in Nov. 1922, he knew then that he had previously suffered from nystagmus, because he was then suffering from the same symptoms as in 1919. Relying chiefly upon this last admission, the county ct. judge decided that the man was not entitled to compensation, he having wilfully & falsely represented himself in writing as not having previously suffered from the disease, when in fact he had suffered from it & knew that he had:—*Held:* there was no evidence that the man in fact had suffered from nystagmus before he signed the declaration & therefore no evidence to justify a finding that he had wilfully & falsely represented himself in writing as not having previously suffered from the disease.—MULLINEUX *v.* FLORENCE COAL & IRON CO. (1923), 129 L. T. 401; 16 B. W. C. C. 88, C. A.

SUB-SECT. 5.—RECOVERY FROM AND RECURRENCE OF DISEASE.

See Workmen's Compensation Act, 1925 (c. 84), ss. 43–47, Sched. III.

3838. Proneness to recurrence — Whether amounting to suffering from disease—Or due to previous attack on natural tendency.]—A collier was predisposed to suffer from nystagmus, an industrial disease within Workmen's Compensation Act, 1906 (c. 58), sched. III. From two attacks he recovered completely, but his employers then refused to continue his employment on account of the likelihood of the recurrence of the disease. The workman being unable to obtain work, applied for compensation. The county ct. judge found that the man had "in a sense"

PART XIV. SECT. 22, SUB-SECT. 4.

1. *False statement of absence of use of lead in other employments—Claim not barred.*]—BURNHAM & Co. *v.* TAYLOR, [1910] S. C. 705; 47 Sc. L. R. 643; [1910] 1 S. L. T. 362; 3 B. W. C. C. 569.—SCOT.

PART XIV. SECT. 22, SUB-SECT. 5.

m. *Proneness to recurrence — Onus of proof on workman.*]—DARROLL *v.*

Sect. 22.—Industrial diseases: Sub-sects. 5 & 6.]

completely recovered from the last attack of the disease, but that his incapacity to get work was the result of the disease & awarded compensation:—*Held:* there was no evidence that the man's tendency to nystagmus was due to his previous attacks of the disease, as opposed to his natural tendency to this disease, & therefore there was no evidence that his incapacity resulted from his having had the attack of disease or "injury" when at work.—JONES *v.* NEW BRYNMALLY COLLIERY CO., LTD. (1912), 106 L. T. 524; 5 B. W. C. C. 375, C. A.

Annotations:—**Folld.** Darroll *v.* Glasgow Iron & Steel Co. (1912), 6 B. W. C. C. 354. **Apld.** Garnant Anthracite Collieries *v.* Rees, [1912] 3 K. B. 372. **Refd.** Jones *v.* Guest, Keen & Nettlefolds (No. 1) (1915), 60 Sol. Jo. 75.

3839. —— —— ——.] — On application by employers for a review of a weekly payment under Workmen's Compensation Act, 1906 (c. 58), it appeared that the compensation had been awarded in respect of an industrial disease, & the county ct. judge held that although appct. was no longer suffering from the disease he was unable to do his former work because of his increased susceptibility to the disease owing to his first attack, & that he was therefore still entitled to compensation:—*Held:* on this finding, the effects of the accident, that is of the industrial disease, still continued to exist, & appct. was entitled to compensation.—GARNANT ANTHRACITE COLLIERIES, LTD. *v.* REES, [1912] 3 K. B. 372; 81 L. J. K. B. 1189; 1 L. J. C. C. 70; 107 L. T. 279; 5 B. W. C. C. 694, C. A.

Annotations:—**Refd.** Darroll *v.* Glasgow Iron & Steel Co. (1912), 6 B. W. C. C. 354; Jones *v.* Guest, Keen & Nettlefolds (No. 1) (1915), 60 Sol. Jo. 75.

3840. —— —— ——.]—A miner who had been incapacitated by an industrial disease, & had been paid compensation, completely recovered, & the compensation was stopped. He then applied for an award as being partially incapacitated owing to increased susceptibility from having once had the disease, & adduced medical evidence to this effect. There was unanimous medical evidence, however, that such susceptibility was also due to a congenital defect from which he suffered. The county ct. judge held that there was no incapacity, & dismissed the application:—*Held:* there was no misdirection.—JONES *v.* GUEST, KEEN & NETTLEFOLDS, LTD. (No. 1) (1915), 60 Sol. Jo. 75; 9 B. W. C. C. 113, C. A.

3841. —— ——.] — PRENDERGAST *v.* LANCASTERS STEAM COAL COLLIERIES, LTD., No. 3061, *ante*.

3842. —— ——.]—In 1923 the workman while employed by M. contracted dermatitis, having been working as a baker for fifty years without previously having the disease. After he had recovered he went into the employment, on Aug. 11, 1924, of resps., but was certified to be suffering from dermatitis, the date of that disablement being fixed as commencing from Aug. 27, 1924, & he was paid compensation until Feb. 7, 1925, when resps. stopped the weekly payment in consequence of a report by their doctor that he had recovered. The workman did not proceed in accordance with proviso to sect. 14 (c) of Workmen's Compensation Act, 1923 (c. 42), but instituted arbitration proceedings under Workmen's Compensation Act, 1906 (c. 58), & thereby claimed compensation for partial incapacity. The county ct. judge found that he had entirely recovered from dermatitis but had acquired a proneness to the disease, so that if he returned to this particular work he ran the risk of a recurrence of the disease, & was in consequence incapacitated from work in his particular trade; but he held that because he was not at that moment suffering from the disease, Workmen's Compensation Act, 1906 (c. 58), s. 8 (1) (i), did not apply, & therefore he was not entitled to compensation:—*Held:* the case must go back for re-trial as too narrow a view had been taken by the county ct. judge of the meaning of "suffering from disease," & the man might be suffering if incapacitated from employment by the risk of recurrence of the disease due to a former attack, & that incapacity was due to the disease, & having regard to the words in the latter part of the order of the Secretary of State made on Jan. 22, 1923, in pursuance of the power so given by Workmen's Compensation Act, 1906 (c. 58), amending the order made on Feb. 26, 1918, "unless the judge is satisfied that the disease has been contracted through long exposure in the industry," the county ct. judge must find whether the disease had left a proneness to recurrence & then consider the last part of the order of 1923, & be satisfied whether the disease was contracted through long exposure in the industry.—STARKEY *v.* CLAYTON & SONS (1925), 133 L. T. 612; 18 B. W. C. C. 346, C. A.

Annotations:—**Apld.** Prendergast *v.* Lancasters Steam Coal Collieries (1925), 134 L. T. 166; Scahill *v.* Evans (1926), 19 B. W. C. C. 112. **Refd.** Rhodes *v.* Digby Colliery Co. (1926), 70 Sol. Jo. 796.

3843. Recurrences under different employers—Claim against intermediate employer—Having paid compensation up to recovery—No claim against last employer.]—A workman contracted in 1910 an industrial disease while engaged in building work in the employment of certain employers. He left their service to obtain work of another character. In Jan. 1913, he engaged in the same sort of work which had caused the disease, with Messrs. M., & the disease returned. He left their employment after working for a few days & received compensation from them down to Mar. 1913, when he had recovered from the disease. He then undertook other work, but in June, 1914, he went back to the same sort of work, & got employment with S. & M., & the disease reappeared, & he had to abandon the job. He claimed compensation from Messrs. M., on account of the injury sustained in Jan. 1913. The county ct. judge found that, although he had recovered from the attack of Jan. 1913, the susceptibility to the disease continued, & he awarded compensation to be paid by Messrs. M.:—*Held: primâ facie* the workman was entitled to recover compensation from S. & M. as his last employers, who ought to have been resps. & might have set up, under Workmen's Compensation Act, 1906 (c. 58), s. 8 (1) (i) (*c*) (ii), that other employers were liable, but that it was not open to him to make a claim & recover compensation from Messrs. M., as it was not shown that his susceptibility to the disease was contracted while in their employment.—TIMPSON *v.* MOWLEM (JOHN) & CO., LTD. (1915), 84 L. J. K. B. 1449; 112 L. T. 885; 8 B. W. C. C. 178, C. A.

Annotations:—**Consd.** Meredith *v.* Ebbw Vale Steel, Iron & Coal Co. (1925), 133 L. T. 641; Starkey *v.* Clayton (1925), 133 L. T. 612.

3844. Incapacity only as to particular employment—Wherein disease contracted—Compensation

GLASGOW IRON & STEEL CO., LTD., [1913] S. C. 387; 50 Sc. L. R. 226; [1912] 2 S. L. T. 506; 6 B. W. C. C. 354.—**SCOT.**

n. *Recurrence after settlement for lump sum & return to work—Workman not barred as to future claims for same disease.*]—GLANCY *v.* WATSON (JOHN), LTD., [1915] S. C. 232, n.; 52 Sc. L. R. 279; [1915] 1 S. L. T. 75; 8 B. W. C. C. 391.—**SCOT.**

for partial incapacity.]—By Statutory Rules & Orders, 1918, made by the Secretary of State under Workmen's Compensation Act, 1906 (c. 58), s. 8 (6), dated Feb. 26, 1918, it is provided by clause 2 of No. 287, that a workman suffering from dermatitis is not entitled to compensation "if he is disabled only from employment in the particular process in which the disease has been contracted."

Where, therefore, a baker contracted dermatitis in his employment, & the certifying surgeon certified that he was thereby disabled from earning full wages, the workman was awarded compensation during total incapacity. He claimed that he was entitled to further compensation on account of partial disablement. According to the medical evidence, he had recovered, & he was now capable of doing any kind of work except baking, or work which induced excessive perspiration:—*Held:* having regard to Statutory Rules & Orders, 1918, No. 287, clause 2, he was not entitled to any further compensation.—ALLMARK *v.* WHITE (1923), 92 L. J. K. B. 1081; 129 L. T. 114; 16 B. W. C. C. 8, C. A.

Annotation:—**Consd.** Starkey *v.* Clayton (1925), 133 L. T. 612.

3845. —— —— ——.]—STARKEY *v.* CLAYTON & SONS, No. 3842, *ante*.

3846. From when disablement dates—Two certificates of disablement—Whether later certificate marks date.]—The workman was employed as a collier for thirty-eight years, & up to 1920 his eyes were all right, but in June of that year he was certified to be suffering from miner's nystagmus. In Nov. 1920, he was able to return to work underground, & continued to earn full wages as a collier until Nov. 1921, when he was again certified to be suffering from nystagmus, the disablement being certified as from Oct. 29, 1921, & he received full compensation until Nov. 1923, when coloured glasses to the lamps used having been introduced he again worked as a collier, receiving full wages until June 16, 1924, when he was again certified as disabled from nystagmus. From June 16, 1921, he received 30*s.* a week as compensation. In Nov. 1924, he made a request for arbn., claiming that his total incapacity arose from an accident on Oct. 29, 1921, & that therefore under the proviso to Workmen's Compensation Act, 1923 (c. 42), s. 1, he was still entitled to be paid at the rate of 35*s.* a week under Workmen's Compensation Act, 1906 (c. 58), & War Addition Acts, 1917 & 1919. The employers alleged that the disablement which was to be treated under Workmen's Compensation Act, 1906 (c. 58), s. 8 (1) (*a*), as the happening of the accident, occurred on June 16, 1924, & that consequently, the amount of compensation payable was fixed by Workmen's Compensation Act, 1923 (c. 42), s. 4, at 30*s.* a week. The county ct. judge in a reserved judgment, found as a fact that the workman had never recovered from the nystagmus from which he suffered in June, 1920, but that where a workman contracted a disease to which Workmen's Compensation Act, 1906 (c. 58), s. 8, applied & was thereby disabled, & then recovered or overcame not the disease but the disablement, & returned to the work to which the disablement was due, was again disabled, the fresh disablement was the happening of the accident & that was more clearly so where the workman had, in respect of the later disablement, obtained a fresh certificate in respect of that disablement:—*Held:* the date of the disablement was a question of fact as to which there was evidence to support the finding, but it was doubtful where two certificates had been given that it followed as a matter of law that the second certificate prevailed & that its date must necessarily be the date of the accident from which the workman could claim compensation.—MEREDITH *v.* EBBW VALE STEEL, IRON & COAL CO., LTD. (1925), 133 L. T. 641; 18 B. W. C. C. 251, C. A.

SUB-SECT. C.—CONTRIBUTION BETWEEN EMPLOYERS WHERE DISEASE GRADUAL.

See Workmen's Compensation Act, 1925 (c. 84), ss. 43–47, Sched. III.; Workmen's Compensation Rules, 1926, r. 41.

3847. Gradual development of disease—While under several employers—Proof of contraction of disease—Partly in one employment, partly in other.]—Where a workman is suffering from an "industrial disease," within Workmen's Compensation Act, 1906 (c. 58), s. 8, due to the nature of the employment in which he was employed within twelve months previous to the date of his disablement from earning full wages, the disease being of such a "nature as to be contracted by a gradual process," & during such period he was employed by other employers in the employment to the nature of which the disease was due, it is not necessary to prove affirmatively that the workman contracted the disease while in the employment of such other employers, but merely that it was contracted partly in the workman's employment at the time of his disablement, & partly in that of his former employers, so that it may be ascertained what proportion of the compensation ought to be borne by the employers respectively.—MALLINDER *v.* MOORES (J.) & SONS, LTD., [1912] 2 K. B. 124; 81 L. J. K. B. 711; 106 L. T. 487; 5 B. W. C. C. 362, C. A.

—— —— **Onus of proof as against last employer.**]—*See* Nos. 3803, 3804, *ante*.

3848. Contract of service must be proved.]—P., a coach-builder, carried on business in partnership with another. They desired to wind up the business & appointed a trustee under a deed of assignment by which they were to receive the proceeds after paying 20*s.* in the pound to creditors. They were appointed by the trustee, under a clause in the deed of assignment, to help in the winding up. At this time P. entered into a contract of service with a coachpainter, when, after working for three months, he became ill & died three months later of lead poisoning. During this time he had been to the old place for about half an hour every day to help the trustee. He supervised the workmen, paid their wages, & kept a day-book. His dependants claimed compensation against the coachpainter, who in turn claimed contribution under Workmen's Compensation Act, 1906 (c. 58), s. 8 (1) (*c*) iii), from the trustee as another employer with whom the deceased might have in part contracted the disease. The county ct. judge found that the deceased was under no contract of service with the trustee:—*Held:* there was evidence to support the finding.—PEARS *v.* GIBBONS (1913), 6 B. W. C. C. 722, C. A.

3849. How contribution measured—Not merely respective periods of employment—Consideration

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PART XIV. SECT. 22, SUB-SECT. 6.

c. Disease due in part to previous employment within twelve months of disablement—Last employer primarily liable.]—MERRY & CUNINGHAME, LTD. *v.* M'GOWAN, [1915] S. C. 34; 52 Sc. L. R. 30; [1914] 2 S. L. T. 298; 8 B. W. C. C. 344.—**SCOT.**

d. Duty of workman to give information to employers—For ascertainment of rights against previous employers.]—DOCHERTY *v.* RUSSELL

Sect. 22.—Industrial diseases: Sub-sect. 6. Sect. 23: Sub-sect. 1, A. & B.; sub-sect. 2, A & B. (a).]

of merits of employers.]—A workman claimed compensation from his last employers on the ground that he was suffering from an industrial disease within Workmen's Compensation Act, 1906 (c. 58), s. 8. He had been employed by five firms as a coal miner within the twelve months. The amount of compensation was agreed, & third party notices were served on the other four firms claiming contribution from them. Three of them agreed to an award against them in amounts proportionate to the length of the respective periods of employment; but the fourth contended that the length of time of employment was immaterial, & claimed that the judge should hold an inquiry & admit evidence with a view to ascertaining the facts & fixing the respective liabilities. The judge refused to do this & made an award on the basis of the length of time of the respective employments:—*Held:* there was no principle which justified the view that the duty of the arbitrator was merely to work out the arithmetical proportions of the length of time of the employments. He must deal with it as with any other question in the arbn., admit evidence, & consider & distinguish between the respective merits of the employers.—BARRON *v.* SEATON BURN COAL CO., LTD., [1915] 1 K. B. 756; 112 L. T. 897; 31 T. L. R. 199; 59 Sol. Jo. 315; 8 B. W. C. C. 218; *sub nom.* BARRON *v.* SEATON BURN COAL CO., LTD., *Ex p.* EAST WALBOTTLE COAL CO., LTD., 84 L. J. K. B. 682, C. A.

SECT. 23.—APPEALS.

SUB-SECT. 1.—TO WHAT TRIBUNAL.

A. From Decision of County Court Judge.

3850. General rule—To Court of Appeal.]—(1) When a county ct. judge makes an order upon a matter referred to him by a registrar of the county ct. on his refusal to record a memorandum of agreement under Workmen's Compensation Act, 1906 (c. 58), Sched. II. (*a*) (*d*), an appeal from that order lies direct to the Ct. of Appeal & not to the Div. Ct.

(2) Where an agreement is made as to the redemption by a lump sum of a weekly payment to a workman who is an insured person within the meaning of National Insurance Act, 1911 (c. 55), the approved society concerned in the administration of any benefit to which such insured person is entitled under that Act are not "parties interested" for the purposes of Workmen's Compensation Act, 1906 (c. 58), Sched. II. (9), & have no *locus standi* to appear before the county ct. judge & object to the recording of a memorandum of such agreement.

The provision in Consolidated Workmen's Compensation Rules, July, 1913, r. 44 (3), that such an approved society shall for this purpose "be deemed to be parties interested" is *ultra vires*.—BONNEY *v.* JOSHUA HOYLE & SONS, LTD., [1914] 2 K. B. 257; 83 L. J. K. B. 541; 110 L. T. 729; 30 T. L. R. 280; 58 Sol. Jo. 268; 12 L. G. R. 358; 7 B. W. C. C. 168, C. A.

Annotations:—As to (1) **Reld.** Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169. *As to* (2) **Reld.** Gormley *v.* Scottish Iron & Steel Co. (1918), 11 B. W. C. C. 370; Brown *v.* Baird (1923), 17 B. W. C. C. 289.

3851. ——.]—TAYLOR *v.* CRIPPS, No. 3151, *ante*.

3852. —— **Writ of prohibition will not lie.**]—TURNER *v.* KINGSBURY COLLIERIES, LTD., No. 3047, *ante*.

3853. To Divisional Court—Refusal by county court judge to entertain jurisdiction.]—An application was made to a county ct. judge to review an award made by a committee of employers & workmen under Workmen's Compensation Act, 1906 (c. 58), Sched. II., para. 1. The judge refused to hear the application on the ground that the award having been made by a committee he had no jurisdiction to review it:—*Held:* the judge had refused to entertain jurisdiction & an appeal from his decision lay to the Div. Ct. & not to the Ct. of Appeal.—HOWARTH *v.* SAMUELSON & CO. (1911), 104 L. T. 907; 4 B. W. C. C. 287, C. A.

3854. —— **Order for detention of ship—Workmen's Compensation Act, 1906 (c. 58), s. 11.**]—PANAGOTIS *v.* PONTIAC (OWNERS), No. 2065, *ante*.

3855. —— **Order to pay sum for compensation in winding up.**]—HOMER *v.* GOUGH, No. 3685, *ante*.

B. From Decision of Arbitrator appointed by County Court Judge.

See, now, Workmen's Compensation Act, 1925 (c. 84), sched. I. (1).

3856. Appeal does not lie direct to Court of Appeal.]—An appeal will not lie direct to the Ct. of Appeal upon the award of an arbitrator appointed by a county ct. judge under Workmen's Compensation Act, 1897 (c. 37), sched. II. (2).—GIBSON *v.* WORMALD & WALKER, LTD., [1904] 2 K. B. 40; 73 L. J. K. B. 491; 91 L. T. 7; 68 J. P. 382; 52 W. R. 661; 20 T. L. R. 452; 48 Sol. Jo. 434; 6 W. C. C. 155, C. A.

Annotation:—**Folld.** Gray *v.* Southend Corpn. (1913), 6 B. W. C. C. 932.

3857. ——.]—Arbitrator, appointed by the judge, awarded £10 as compensation to an injured workman. The workman applied to the Ct. of Appeal to extend the time, which had expired, for appealing from the arbitrator's award:—*Held:* no appeal lay directly from an appointed arbitrator to the Ct. of Appeal, & therefore the Ct. of Appeal could not entertain this application.—GRAY *v.* SOUTHEND CORPN. (1913), 6 B. W. C. C. 932, C. A.

SUB-SECT. 2.—IN RESPECT OF WHAT MATTERS.

A. In General.

See, now, Workmen's Compensation Act, 1925 (c. 84), sched. II. (4).

3858. As to jurisdiction to entertain proceedings.]—(1) Under Workmen's Compensation Act, 1906 (c. 58), sched. II. (4), an appeal now lies to the Ct. of Appeal from a decision by a county ct. judge on a preliminary question of law, or as to his jurisdiction to entertain proceedings, & not, as formerly, only after an award has been made.

(ARCHIBALD), LTD., [1918] S. C. 115; 55 Sc. L. R. 140; [1918] 1 S. L. T. 2; 11 B. W. C. C. 311.—**SCOT.**

PART XIV. SECT. 23, SUB-SECT. 1. —B.

q. *To Supreme Court.*]—No appeal lies from the decision of an arbitrator appointed by a Supreme Ct. judge under Workmen's Compensation Act, 1902, Sched. II., clause 2.—LEE *v.* CROW'S NEST PASS COAL CO., LTD. (1905), 11 B. C. R. 323.—**CAN.**

r. ——.]—Where the award of an arbitrator under Workmen's Compensation Act is filed under Sched. II., paragraph 8, & thereby becomes enforceable as a county ct. judgment, an action to set aside the judgment & execution issued thereon is properly brought in the Supreme Ct.—BRITISH COLUMBIA COPPER CO., LTD. *v.* MCKITTRICK (1913), 18 B. C. R. 129.—**CAN.**

PART XIV. SECT. 23, SUB-SECT. 2. —A.

3858 1. *As to jurisdiction to entertain proceedings.*]—Workmen's Compensation Act, s. 2 (3), expressly confers upon an arbitrator jurisdiction to

(2) A scheme of compensation certified by the Registrar of Friendly Societies under Workmen's Compensation Act, 1897 (c. 37), s. 3, cannot, unless recertified under the Act of 1906, apply to an accident happening after the commencement of the Act of 1906, though within the six months at the end of which the scheme is declared to be revoked by s. 15.

A scheme providing a fund for the compensation of the servants of a railway co. provided that the fund should be managed by a committee thereby constituted according to rules, not inconsistent with the terms of this scheme, to be framed from time to time by the committee. Rules had been framed containing a contract by the workmen that the Act should not apply, & other provisions held by the ct. not to be in accordance with the scheme. The scheme was certified but the rules were not:—*Held:* there was no properly certified scheme excluding the Act.—MOSS *v.* GREAT EASTERN RY. CO., [1909] 2 K. B. 274; 78 L. J. K. B. 1048; 100 L. T. 747; 25 T. L. R. 466; 2 B. W. C. C. 168, C. A.

Annotations:—As to (1) **Folld.** Taylor *v.* Cripps, [1914] 3 K. B. 989. **Refd.** Bonney *v.* Hoyle, [1914] 2 K. B. 257; Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169. *As to* (2) **Refd.** Godwin *v.* Admiralty Lords Comrs. (1912), 106 L. T. 136.

3859. On preliminary point of law.]—MOSS *v.* GREAT EASTERN RY. CO., No. 3858, *ante*.

3860. Registration of memorandum of agreement.]—In proceedings under Workmen's Compensation Act, 1897 (c. 37), where there is a dispute as to the genuineness of a memorandum of agreement with regard to the amount of compensation payable to the workman, & the matter is referred by the registrar to the judge, if the latter hears evidence, &, as a result, orders the memorandum to be recorded, he is acting in a judicial capacity, & consequently an appeal will lie from his decision under County Courts Act, 1888 (c. 43), s. 120.—JOHNSTON *v.* MEW, LANGTON & CO., LTD. (1907), 98 L. T. 517; 24 T. L. R. 175; 51 Sol. Jo. 554; 1 B. W. C. C. 133, C. A.

3861. Deduction of costs from compensation.]—A county ct. judge having non-suited a pltf. in an action brought under the Employers' Liability Act, 1880 (c. 42), was subsequently applied to by pltf. to assess, under Workmen's Compensation Act, 1897 (c. 37), s. 1 (4), the compensation due to him under that Act. The judge did so, & deducted therefrom the costs incurred by defts. owing to pltf.'s bringing the action instead of proceeding under the Act, such costs to include the costs of an unsuccessful appeal against the non-suit in the action under Employers' Liability Act:—*Held:* the appeal from such order must be to the Ct. of Appeal, & not to a Div. Ct.—WILLIAMS *v.* ARMY & NAVY AUXILIARY CO-OPERATIVE SOCIETY, LTD. (1907), 23 T. L. R. 408; 9 W. C. C. 134.

3862. As to grade of workman.]—JURY *v.* ATLANTA (OWNERS), No. 3491, *ante*.

3863. Order for examination of witness.]—TAYLOR *v.* CRIPPS, No. 3151, *ante*.

3864. Refusal to pay compensation out of court—On applicant attaining majority.]—JOHNSTON *v.* LISTON (H.) & CO., No. 3676, *ante*.

B. Findings of Fact.

(*a*) *In General.*

3865. General rule—No appeal on question of fact.]—SMITH *v.* LANCASHIRE & YORKSHIRE RY. CO., No. 2147, *ante*.

3866. ——.]—CHANDLER *v.* SMITH, No. 3556, *ante*.

3867. ——.]—SIMMONS *v.* HEATH LAUNDRY CO., No. 3169, *ante*.

3868. ——.]—*Held:* the appeal must be dismissed as the decision was on a question of fact.—RAYMAN *v.* FIELDS (No. 2) (1910), 3 B. W. C. C. 123, C. A.

3869. ——.]—A workman was injured, returned to work, & received for two years wages slightly less than his average weekly earnings before the accident. He then brought proceedings for compensation & voluntarily left his employer's service. The judge awarded full compensation as from the date he left work, but declined to give any compensation in respect of the difference of wages before that date, on the ground that the workman had accepted the wages in lieu of any compensation. The workman appealed:—*Held:* there was no point of law taken by the workman, & the appeal failed.—GOFF *v.* AIRDS, LTD. (1912), 5 B. W. C. C. 277, C. A.

3870. ——.]—WHEELER, RIDLEY & CO. *v.* DAWSON, No. 3523, *ante*.

3871. ——.]—A workman was injured while weighing cargo on defts.' steamship & claimed compensation under Workmen's Compensation Act, 1906. He was an assistant meter & weigher appointed & licensed by the King's Lynn Conservancy Board under statutory authority & subject to certain internal rules & regulations of the Board providing (*inter alia*) that the employment of the meters & weighers should be in rotation according to a secret rota; that payment for their services according to a prescribed scale should be made by the shipowner to the headman appointed

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settle "any question as to whether the employment is one to which this Act applies;" & the only way to review the arbitrator's finding thereon is by means of a case submitted under sect. 4 of Sched. II.—DISOURDI *v.* SULLIVAN GROUP MINING CO. & MARYLAND CASUALTY CO. (NO. 3) (1909), 2 B. W. C. C. 514; 14 B. C. R. 241.—**CAN.**

3858 ii. ——.]—*Re* BASANTA & CANADIAN PACIFIC RY. CO. (1911), 18 W. L. R. 353; 16 B. C. R. 304.—**CAN.**

3860 i. *Registration of memorandum of agreement.*]—*Held:* the sheriff, in granting, under the 1906 Act, special warrant to record a memorandum of agreement, the genuineness of which was disputed, was acting in a judicial & not a ministerial capacity, & that appeal by way of stated case was therefore competent.—ADDIE (ROBERT) & SONS, LTD. *v.* COAKLEY, [1909] S. C. 545; 46 Sc. L. R. 408; [1909] 1 S. L. T. 261; 2 B. W. C. C. C. 437.—**SCOT.**

t. Order to pay sum exceeding £50.]—An appeal lies from the decision of a police magistrate ordering the payment of compensation under Workers' Compensation Act, 1905, when the person against whom the order is made is or may be liable to pay a sum exceeding £50.—GORMLEY *v.* BRISBANE TRAMWAYS CO., LTD., [1909] S. R. Q. 329.—**AUS.**

s. Assessment of compensation after failure of common law action.]—STEWART *v.* PERTH GENERAL STATION COMMITTEE, [1923] S. C. 356.—**SCOT.**

PART XIV. SECT. 23, SUB-SECT. 2.—B. (a).

3865 i. *General rule—No appeal on question of fact.*]—The right of appeal from a decision in the course of proceedings to which Workmen's Compensation Act, Sched. II., art. 4, applies is available only for questioning the determination of the ct. or judge upon some question of law.—BRITISH COLUMBIA SUGAR REFINING CO. *v.* GRANICK (1910), 44 S. C. R. 105.—**CAN.**

3865 ii. ——.]—There is no appeal except upon a question of law.—*Re* CANGEME & ALBERTA COAL MINING CO. (1912), 22 W. L. R. 68; 5 Alta. L. R. 173; 6 D. L. R. 231; 2 W. W. R. 1058.—**CAN**

3865 iii. ——.]—The sheriff-substitute awarded against a workman on a series of facts found. The workman appealed, & asked that the sheriff-substitute should be ordered to state a case for the opinion of the ct. as to whether the evidence at the hearing did not support a series of facts as set out by the workman contrary to those found by the sheriff-substitute:—*Held:* there is no appeal on questions of fact.—NELSON *v.* ALLAN BROTHERS & CO. (UNITED KINGDOM), LTD., [1913] S. C. 1003; 50 Sc. L. R. 820; [1913] 2 S. L. T. 147; 6 B. W. C. C. 853.—**SCOT.**

Sect. 23.—Appeals: Sub-sect. 2, B. (a) & (b), C. & D.; sub-sect. 3, A. & B.]

by the Board & be distributed by him, subject to certain deductions, amongst the meters & weighers, who were forbidden to receive any direct payment from the shipowner; & that the meters & weighers should act on all occasions under the direction & control of the Port & Harbour Committee of the Board, the committee having power to suspend & the Board having power to dismiss any meter & weigher for offences or irregularity. The employment of meters & weighers was compulsory in the case of shipowners desiring cargo to be weighed or measured within the limits of the port.

It appeared that while at work appct. was subject to the control & direction of the ship's foreman, who, if dissatisfied with the meters & weighers supplied, could stop the work & send to the headman for others. The county ct. judge found that appct. was in the employ of defts. & awarded compensation:—*Held:* there was sufficient evidence to support the finding & the award must stand.

(2) The function of the Ct. of Appeal in dealing with findings of fact by the county ct. judge acting as arbitrator under the Workmen's Compensation Act, 1906 (c. 58), discussed.

If he misdirects himself in point of law this ct. can interfere. If there is no evidence worthy of the consideration of a jury in support of the decision this ct. can & ought to set it aside. . . . If however there is evidence both ways it is not competent to this ct. to set aside the award of the county ct. judge, even though upon the balance of the evidence this ct. might be inclined to take a different view (COZENS-HARDY, M.R.).—WILMERSON *v.* LYNN & HAMBURG S.S. CO., LTD., [1913] 3 K. B. 931; 82 L. J. K. B. 1064; 109 L. T. 53; 29 T. L. R. 652; 57 Sol. Jo. 700; 6 B. W. C. C. 512, C. A.

Annotation:—As to (2) **Refd.** Newson *v.* Burstall & Farrow (1915), 112 L. T. 792.

3872. ——— ———.]—LANCASTER *v.* BLACKWELL COLLIERY CO., LTD., No. 2647, *ante.*

(b) What are Questions of Fact.

3873. Who is a workman.]—SIMMONS *v.* HEATH LAUNDRY CO., No. 3469, *ante.*

3874. Existence of relationship of master & servant.]—MOLLOY *v.* SOUTH WALES ANTHRACITE COLLIERY CO., No. 2375, *ante.*

3875. ——.]—The findings of fact by a county ct. judge sitting as an arbitrator under Workmen's Compensation Act, 1906 (c. 58), cannot be set aside if there was evidence to support the findings. The question whether there was evidence is a question of law.

Resps. let out a taxi-cab to applt., who was injured by an accident while he was driving the cab. Upon an application for compensation under the Act there was evidence that the relation of resps. to applt. was that of bailor & bailee of the taxi-cab. & the county ct. judge found as fact that that was the true relation & that ther was no contract of service:—*Held:* the findin could not be set aside, & applt. was not entitle to compensation.

Quoad the cab, the contract was an ordinar contract of *locatio rei*. *Quoad* the public, th relation of the cab driver to the cab owner, wa in my opinion, one of agency (LORD SHAW O DUNFERMLINE).—SMITH *v.* GENERAL MOTOR CA CO., LTD., [1911] A. C. 188; 80 L. J. K. B. 839 105 L. T. 113; 27 T. L. R. 370; *sub nom.* BATES SMITH *v.* GENERAL MOTOR CAB CO., LTD., 55 Sol Jo. 439; 4 B. W. C. C. 249, H. L.

Annotations:—**Refd.** Curtis *v.* Plumptre (1913), 6 B. W. C. C 87; Wilmerson *v.* Lynn & Hamburg S.S. Co., [1913 3 K. B. 931. **Mentd.** R. *v.* Messer (1911), 82 L. J. K. B 913; Komp *v.* Elisha, [1918] 1 K. B. 228.

3876. Whether accident occurred.]—TURNER *v* BELL (G.) & SONS, LTD., No. 3634, *ante.*

3877. Existence of incapacity.]—WARD *v.* MILES No. 3260, *ante.*

3878. Cessation of incapacity.] — WHEELER RIDLEY & CO. *v.* DAWSON, No. 3523, *ante.*

3879. ——.]—JONES *v.* ANDERSON, No. 3529 *ante.*

3880. ——.]—A workman was crushed betweer a handcart & a sand-drier & the right side of his back was injured. The accident resulted in the formation, in the injured portion of the body, of a patch containing a hard nodule about the size of a pea. He received compensation from his employers for several months, during which time he was periodically examined by a doctor on their behalf. Ultimately, as a result of the doctor's report, they stopped compensation. The workman applied for an award, & the county ct. judge, before whom the only question was that of partial incapacity, found that there was no incapacity, & made an award in favour of resps. On appeal the workman alternatively asked for a declaration of liability:—*Held:* the award, which was made on a pure question of fact, could not be interfered with; & as the question whether the county ct. judge ought to have a declaration of liability, on the ground that the injury might in the future incapacitate the workman to some extent, had not been raised before the county ct. judge, & as no evidence had been directed to that point before him, the Ct. of Appeal could not deal with it.—LEWIS *v.* LIVERPOOL CORPN. (1922), 15 B. W. C. C. 55, C. A.

3881. Lessening of incapacity.] — ATLANTIC TRANSPORT CO., LTD. *v.* LYNCH, No. 3197, *ante.*

3882. Question of contributory negligence.]—CUTSFORTH *v.* JOHNSON, No. 4116, *post.*

3883. Prejudice from absence of notice.]—LOCHGELLY IRON & COAL CO., LTD. *v.* KIRK, No. 2897, *ante.*

3884. Accident arising out of employment.]—THOMSON (W.) & CO. *v.* ANDERSON (OR SCRIMGEOUR), No. 2602, *ante.*

3885. ——.]—Where the whole question whether the incapacity is due to accident arising out of

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PART XIV. SECT. 23, SUB-SECT. 2.—B. (b).

3877 i. *Existence of incapacity.*]—DOHARTY *v.* BOYD, [1909] S. C. 87; 46 Sc. L. R. 71; 16 S. L. T. 429.—**SCOT.**

3878 i. *Cessation of incapacity.*]—In an appeal at the instance of the workman against the ending of compensation, the ct. refused to interfere with the sheriff's finding, holding that the question of the workman's recovery was one of fact only, upon which the sheriff's finding was final.—ANDERSON *v.* DARNGAVIL COAL CO., [1910] S. C. 456.—**SCOT.**

3883 i. *Prejudice from absence of notice.*]—Upon an appeal the co. objected that no notice in writing of the accident was given:—*Held:* the judge's finding, upon the facts & circumstances proved, that the co. were not thereby prejudiced in their defence, being supported by some evidence, the question whether it was the proper finding upon the evidence was not a question of law, & was not open upon an appeal.—*Re* BARRIE & DIAMOND COAL CO., LTD. (1914), 28 W. L. R. 701; 7 Alta. L. R. 138; 6 W. W. R. 651.—**CAN.**

3884 i. *Accident arising out of employment.*]—In an action under Workmen's Compensation Act a finding by the district ct. judge that the accident arose out of pltf.'s employment is not binding upon the Ct. of Appeal, where the relevant & material facts are either found or not disputed; in such a case the question whether the accident arose out of the workmen's employment is a question of law, not of fact.—CAMERON *v.* CANADIAN PACIFIC RY. CO., [1918] 2 W. W. R. 1025; 11 Sask. L. R. 277; 42 D. L. R. 345.—**CAN.**

& in the course of the employment is one of fact & there is evidence to support the decision of the county ct. judge, his decision is final.—GRANDIN *v.* GOLDSTEIN (1926), 19 B. W. C. C. 116, C. A.

3886. Medical point—Judge sitting with medical assessor.]—The ct. cannot interfere with a finding of fact on a medical point found by a county ct judge sitting with a medical assessor.—REGAN *v.* CANADIAN PACIFIC OCEAN SERVICES, LTD. (1922), 15 B. W. C. C. 50, C. A.

3887. Who is a dependant.]—PEART *v.* BOLCKOW, VAUGHAN & CO., No. 2118, *ante*.

C. Quantum of Compensation.

3888. Not matter of appeal.]—HUMPHREYS *v.* CITY OF LONDON ELECTRIC LIGHTING CO., No. 3368, *ante*.

3889. ——.]—ROBERTS & RUTHVEN, LTD. *v.* HALL, No. 3749, *ante*.

3890. ——.]—MCCARTHY *v.* MELITA (OWNERS), No. 2776, *ante*.

3891. ——.]—RAY *v.* VICKERS, LTD., No. 3317, *ante*.

3892. Power of Court of Appeal to correct slip of arbitrator.]—In estimating the amount of compensation to which an injured workman was entitled, the learned county ct. judge found that the man's capacity to earn was reduced to four-fifths of normal by reason of a condition of the heart unconnected with the accident. He subtracted the amount the man was able to earn, taking into consideration the reduced capacity owing to heart trouble, from the amount the man would have been earning but for the accident, & awarded compensation accordingly. In ascertaining the latter amount, however, he did not take into consideration the reduction of one-fifth due to the heart trouble:—*Held:* the amounts found by the judge were questions of fact from which there was no appeal, but the omission to deduct the one-fifth from both amounts was a slip, & the county ct. judge's award should be altered accordingly.—HOYLAND BRICK CO. *v.* WARD (1917), 10 B. W. C. C. 327, C. A.

D. Consent Orders.

3893. Cannot be appealed against.]—An injured workman for some months had been in receipt of partial compensation. He then applied for review & increase of the amount. Before this application was filed the employers had filed an application to redeem, although at the date of the application these payments had been continued for only four months. The application for review was heard first & dismissed by the judge, & he then immediately, by consent of the parties, proceeded to hear the application to redeem. He made an award for redemption for permanent partial incapacity based on the rate of compensation which the workman then received. The workman appealed against both orders:—*Held:* the order for redemption was in the nature of a consent order, & in consequence no appeal would lie from either order.—HOWELL *v.* BLACKWELL'S EXECUTORS, BLACKWELL *v.* HOWELL (1912), 5 B. W. C. C. 293, C. A.

Annotation:—**Consd.** Haydock *v.* Goodier, [1921] 2 K. B. 384.

SUB-SECT. 3.—GROUNDS FOR GRANTING OR REFUSING.

A. In General.

3894. Award may be supported—On apparent facts—Though not basis of judgment.]—BRINCKMAN *v.* HARRIS, No. 2419, *ante*.

3895. —— **Award based on several reasons—Some bad.**]—JACKSON *v.* HUNSLET ENGINE CO., LTD., No. 3389, *ante*.

3896. Decision on applicant's particulars.]—In his application for compensation, the workman stated that he had been struck by a fellow workman, which caused him to fall & injure himself. The county ct. judge asked counsel whether he wished to add anything to these particulars of the claim, & having received an answer in the negative, held that appct. must fail in his claim, as on these particulars the accident did not arise out of, & in the course of, his employment:—*Held:* the case must be remitted to the county ct. for rehearing with evidence.—LEPPER *v.* BURNELL & CO. (1921), 132 L. T. 232; 68 Sol. Jo. 882; 17 B. W. C. C. 179, C. A.

Sufficiency of evidence.]—*See* No. 3871, *ante*.

B. Wrongful Admission or Exclusion of Evidence.

3897. Wrongful admission.]—A statement made by a deceased workman to a fellow workman as to the cause of his injury is not admissible as there is no duty to make such a statement. Award set aside on the ground that the arbitrator had received evidence of such a statement & that no other evidence justifying the award existed.—WOLSEY *v.* PETHICK BROTHERS (1908), 1 B. W. C. C. 411, C. A.

3898. ——.]—A painter claimed compensation for a strained heart. The doctor was subpœnaed, but did not attend, & three certificates, though objected to, were admitted in evidence by the judge, who awarded for the workman:—*Held:* the certificates were inadmissible, & as they must have influenced the mind of the judge, a new trial was necessary.—RICHARDS *v.* SANDERS & SONS (1912), 5 B. W. C. C. 352, C. A.

3899. ——.]—A county ct. judge admitted certain statements by a deceased workman as to the cause of his injury. He said that he himself considered them inadmissible, but allowed them, in order that they might be there in case the Ct. of Appeal should decide to admit them as evidence:—*Held:* there must be a new trial [before another judge], as the judge's mind must have been coloured by the admission of these statements.—SMITH *v.* HARDMAN & HOLDEN, LTD. (1913), 6 B. W. C. C. 719, C. A.

Annotation:—**Consd.** Shea *v.* Wilson, Barnsley (1916), 9 B. W. C. C. 633.

3900. —— **Not resulting in miscarriage of justice.**]—TRIGG *v.* VAUXHALL MOTORS, LTD., No. 2727, *ante*.

3887 i. *Who is a dependant.*]—The ct. has no jurisdiction to review or interfere with the determination of the Workmen's Compensation Board that pltf. in an action brought against an employer is a dependant within the Workmen's Compensation Act.—FOSTER *v.* CANADIAN PACIFIC RY. CO., [1926] 4 D. L. R. 46; [1926] 2 W. W. R. 687; 36 Man. L. R. 61; *affg.*, [1926] 2 D. L. R. 836; [1926] 1 W. W. R. 853.—**CAN.**

3887 ii. ——.] LEGGETT *v.* BURKE (1902), 4 F. (Ct. of Sess.) 693.—**SCOT.**

3887 iii. ——.]—ROWHILL COAL CO., LTD. *v.* SMITH, [1909] S. C. 252.—**SCOT.**

b. *Question of serious & wilful misconduct.*]—GLASGOW & SOUTH-WESTERN RY. CO. *v.* LAIDLAW (1900), 2 F. (Ct. of Sess.) 708.—**SCOT.**

c. ——.]—CONDRON *v.* PAUL (1903), 6 F. (Ct. of Sess.) 29.—**SCOT.**

PART XIV. SECT. 23, SUB-SECT. 2.—C.

3888 i. *Not matter of appeal.*]—HEALY *v.* REILLY (1917), 10 B. W. C. C. 744.—**IR.**

3888 ii. ——.]—PANKHURST *v.* SMITH (1917), 44 N. B. R. 279; 33 D. L. R. 23.—**CAN.**

Sect. 23.—*Appeals: Sub-sect.* 3, *B., C., D., E., F. & G.*]

3901. —— ——.]—WALTHEW *v.* MUIRHEAD, MACDONALD, WILSON & CO., No. 2777, *ante.*

3902. Wrongful exclusion—Not resulting in miscarriage of justice.]—SECRETARY OF STATE FOR WAR *v.* WILLOUGHBY, No. 3294, *ante.*

C. Point Not Raised in Court Below.

3903. General rule—Appeal not allowed.]—The employers appealed on several points of law which had not been taken in the ct. below:—*Held:* the appeal must be dismissed as the points were not taken in the ct. below.—PAYNE *v.* CLIFTON (1910), 3 B. W. C. C. 439, C. A.

Annotation:—**Folld.** Stevens *v.* Thorne, [1916] 2 K. B. 69.

3904. —— ——.]—Upon an appeal from an award in an arbn. under Workmen's Compensation Act, 1906 (c. 58), points of law not taken at the hearing before the county ct. judge cannot be raised in the Ct. of Appeal.

A workman claimed compensation in respect of an injury by accident arising out of & in the course of his employment, & in the particulars of his claim described the nature of the injury as "rupture." The employers had paid compensation for eight months & then offered the man light work & reduced compensation. He refused this offer & commenced the proceedings for arbn. At the hearing he further complained of an injury to his back, of which no notice had been given to the employers. The medical evidence proved that the alleged injury to the back was independent of, & not causally connected with, the rupture. The county ct. judge, having heard the evidence, held that the workman was only entitled to a declaration of liability in respect of the rupture, & to this the employers were willing to submit. Appct. then asked for leave to amend his particulars so as to enable him to claim in respect of the injury to the back. The employers objected that as, prior to the arbn., no dispute had arisen as to the alleged injury to the back, the county ct. judge could not allow an amendment in respect of a matter as to which he had no jurisdiction to make an award. The county ct. judge upheld the objection & refused to allow the amendment:—*Held:* his decision was right.—STEVENS *v.* THORNE & CO., [1916] 2 K. B. 69; 85 L. J. K. B. 841; 114 L. T. 824; 9 B. W. C. C. 304, C. A.

3905. Power of judge—To order payment of lump sum—In winding up.]—HOMER *v.* GOUGH, No. 3685, *ante.*

3906. —— **To order private examination by medical assessor.**]—SMITH *v.* FOSTER, No. 3160, *ante.*

3907. —— **To allow amendment of claim.**]—MILLIGAN *v.* KERR, STUART & CO., No. 3291, *ante.*

3908. Omission to apply for declaration of liability.]—A ship's cook had the index finger of the right hand rendered stiff by an accident. The county ct. judge, on the employers promising to find the man employment, terminated the payments & dismissed the application for compensation. The workman appealed on the ground that there should have been an award of 1*d.* per week or a declaration of liability:—*Held:* as the question of a declaration of liability had not been raised before the county ct. judge, there was no jurisdiction for the Ct. of Appeal to grant it.—HARLOCK *v.* COQUET (OWNERS) (1914), 7 B. W. C. C. 88, C. A.

Annotation:—**Apld.** Stevens *v.* Thorne, [1916] 2 K. B. 69.

3909. ——.]—A workman met with an accident, the accident was admitted, & he was paid compensation for a month. He then returned to work. Shortly afterwards he complained that he could not work, & claimed compensation on the basis of total incapacity. The medical evidence as to this was conflicting. The judge, sitting with a medical assessor, found that the incapacity had ceased, & dismissed the application.

Though no suspensory award was asked for at the arbn. the workman appealed on the ground that such an award should have been made:—*Held:* the appeal could not be entertained.—MAUNDER *v.* HANCOCK (1914), 7 B. W. C. C. 648, C. A.

3910. ——.]—LEWIS *v.* LIVERPOOL CORPN., No. 3880, *ante.*

3911. Finding of fraud—On no evidence.]—A workman in 1911 met with an accident in his employment, & the employers agreed to pay him 15*s.* a week, the agreement being afterwards recorded. In 1919 they applied to terminate the payments on the ground that the incapacity of the man to work had ceased, & it was proved that for twenty-one weeks he had been working for, & earning wages from, other employers while receiving weekly payments from his old employers. The county ct. judge gave no decision on the question of incapacity, & did not comply with the application by terminating the payments, but he held that resp. had defrauded appcts. to the amount of twenty-one weeks' compensation, & suspended the compensation for that period, & for a further period of five weeks as a contribution towards appcts.' costs of the application. The workman appealed:—*Held:* (1) it was open to him on the appeal to raise the question as to the jurisdiction of the judge to make the order, although no objection had been taken at the hearing, inasmuch as the jurisdiction had been exercised upon a point not raised by the application, & the workman's counsel had had no opportunity of raising the objection prior to judgment being given; (2) the judge at the hearing had no evidence before him of actual fraud by the workman, & in any case, although he had jurisdiction under Workmen's Compensation Act, 1906 (c. 58), sched. I., clause 16, to end the compensation, or to diminish it, he had no jurisdiction to impound twenty-one weeks of the compensation for the benefit of the employers, still less to impound a further five weeks thereof towards payment of their costs.—KIRK & RANDALL, LTD. *v.* BOURKE (1919), 88 L. J. K. B. 1145; 121 L. T. 319; 12 B. W. C. C. 209, C. A.

3912. Objection to exclusion of evidence.]—SHELDON *v.* BUTTERLEY CO., LTD., No. 3354, *ante.*

3913. Objection to admission of evidence.]—MCCARTHY *v.* MELITA (OWNERS), No. 2776, *ante.*

3914. Whether workman in employment at time of accident.]—THOMSON (W.) & CO. *v.* MACKAY, No. 2181, *ante.*

3915. Whether workman acting in an emergency.]—WATKINS *v.* CWMGWRACH & EMPIRE COLLIERY CO., LTD., No. 2497, *ante.*

D. Surprise.

3916. Whether ground for rehearing—No application for adjournment at original hearing.]—ROCCA *v.* JONES (STANLEY) & CO., LTD., No. 2825, *ante.*

3917. —— ——.]—GOLDEN *v.* SWIFT OF COVENTRY, LTD., No. 2767, *ante.*

d. Power of judge—To order examination by medical assessor.]—LANE *v.* LEITCH & SON (1921), 55 I. L. T. 161.—IR.

3918. —— Application for adjournment refused.]—JONES *v.* S. R. ANTHRACITE COLLIERIES, LTD., No. 3169, *ante*.

E. Absence or Insufficiency of Judge's Note.
See Sub-sect. 4, *post*.

F. Failure to decide Material Issue.

3919. General rule—No facts found or reasons given.]—A foreman road mender delegated his duties one day to a roadman. Both men were employed by a district council. While the foreman was away, a traction engine truck, supplied by contractors to bring stones for road mending, got stuck in a ditch. One of the contractor's men asked the roadman to help free the truck. The roadman was injured in doing so. He claimed compensation against the district council, & the county ct. judge, without finding any facts or giving any reasons, held that the accident did not arise out of & in the course of the man's employment:—*Held:* the vital point, as to the foreman's duties & his authority to delegate them, not having been decided, there must be a new trial. SELLER *v.* BOSTON RURAL DISTRICT COUNCIL (1914), 7 B. W. C. C. 99, C. A.

3920. —— ——.]—SLATER *v.* MACONOCHIE BROTHERS, LTD., No. 3199, *ante*.

3921. —— Obscurity of findings.]—MCNALLY *v.* BOOTLE JUTE FACTORY CO., LTD., No. 3938, *post*.

3922. —— ——.]—A workman was injured in 1910, & compensation was paid until he went back to work some time after. He continued at work more or less regularly until Feb. 1920, when his employment came to an end. He had been complaining of his injury, & when his work terminated he applied for compensation. There was a protracted hearing, & several adjournments. The judge then found that the man was suffering from osteo-arthritis & neurasthenia as a result of the accident, & awarded £1 a week compensation on the assumption that the amount the man was entitled to, if liability were found against the employer, was not contested. Counsel for the employer then pointed out that the amount of compensation was in dispute, & that there was no evidence as to whether the man had applied for any work or whether he was unable to get it. The county ct. judge thereupon said he was not going to stultify his award because the man had not applied for work, & that there was sufficient evidence to be found in the shorthand notes to justify his award. On appeal counsel for the workman admitted that there was no evidence that the neurasthenia resulted from the accident:—*Held:* the judge had not applied the provisions of sched. I., 1 (3) in ascertaining the amount of compensation the workman was entitled to, & the hearing & award were generally so unsatisfactory that there must be a new trial, & this, without casting any reflection upon the judge who tried the case, should be before a different judge.

I think the whole thing should go down for a new trial, because in my opinion the whole of the first trial was unsatisfactory & we intend to do as we have done on several occasions, that is, send it to another judge as the K. B. Div. always considers that it is more satisfactory that a new trial should take place before a new mind (LORD STERNDALE, M.R.).—POSTMASTER-GENERAL *v.* BUTLER (1920), 13 B. W. C. C. 566, C. A.

3923. Whether continued incapacity due to negligent treatment.]—HUMBER TOWING CO., LTD. *v.* BARCLAY, No. 2824, *ante*.

3924. Whether delegation of work to applicant authorised.]—SELLER *v.* BOSTON RURAL DISTRICT COUNCIL, No. 3919, *ante*.

3925. Whether accident due to added risk.]—ROGERS *v.* GARSIDE, No. 2175, *ante*.

3926. Whether suitable work offered.]—The employers of a workman, who had been paid compensation for some time on the footing of total incapacity, considered, on a medical report obtained by them, that the workman had recovered sufficiently to do light work of a particular kind, which they offered to find for him. For a time nothing further was done, & then compensation was stopped. On an application for arbn. having been filed, the employers repeated their offer of work in their answer. Medical evidence was given on both sides before the county ct. judge, but, without dealing with the question whether the particular work offered was suitable or not, the judge decided that appct. was not fit at present to go back to his former work, & made an award in his favour for the payment of full compensation:—*Held:* the real issue, as to whether the work offered was suitable or not, had not been considered at all. Order for rehearing before another judge.

The issue upon which the parties went to trial not having been decided at all, the inevitable result is that there must be a new trial. The rule that where a new trial is ordered, the case goes before another judge will be followed (SWINFEN EADY, M.R.).—MORPETH *v.* EYRE SMELTING CO. (1918), 11 B. W. C. C. 258, C. A.

3927. Whether serious & permanent disablement—Finding of wilful misconduct.]—MALONEY *v.* PINK (E. & T.), LTD., No. 2753, *ante*.

G. Other Grounds.

3928. Refusal to await depositions from witnesses abroad.]—A seaman claimed compensation. The ship on which the alleged accident happened had sailed for a foreign port before the employers obtained the evidence necessary to their case from witnesses on board. They sent abroad for depositions of these witnesses. The county ct. judge, after granting adjournments on terms, finally went on with the case without waiting for the depositions:—*Held:* the case must go back for a rehearing, before another judge.—JESSOP *v.* MACLAY & M'INTYRE (1911), 5 B. W. C. C. 139, C. A.

3929. Direction to counsel to confine argument to one point—Adverse decision on other points.]—At the hearing of an arbitration, counsel for the employers submitted three defences: that the accident did not arise out of the employment; that the injury was not the result of the accident; & that proper notice had not been given. The deputy county ct. judge directed counsel for the workman to confine his reply to the question of notice only. By his award the deputy county ct. judge found in favour of the employers on

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PART XIV. SECT. 23, SUB-SECT. 3. —F.

3919 i. *General rule—No facts found or reasons given.*]—On an application by the employers to review & reduce weekly payments of 10s., the employers proved that the workman was earning 8*s.* 3*d.* weekly, this with 10*s.* compensation was within 1*s.* 9*d.* of his original earnings. The arbitrator, without stating facts in support, refused to reduce payments of compensation:—*Held:* the case must be remitted in respect that no facts appeared to justify continuation of full compensation.—MOORE & CO. *v.* PRYDE, [1913] S. C. 457; 50 Sc. L. R. 302; [1913] 1 S. L. T. 49; 6 B. W. C. C. 384.—**SCOT.**

u. Whether earning capacity affected.]—MULLIGAN *v.* GLASGOW CORPN., [1917] S. C. 450; 54 Sc. L. R. 352; [1917] 1 S. L. T. 230.—**SCOT.**

Sect. 23.—*Appeals: Sub-sect.* 3, *G.; sub-sects.* 4 & 5.]

the first two grounds of defence, & did not specifically decide the question of notice:—*Held:* there must be a rehearing.—SILK *v.* ISLE OF THANET RURAL DISTRICT COUNCIL (1913), 6 B. W. C. C. 539, C. A.

3930. —— ——.]—In an answer to a claim for compensation the employers relied upon two points, that notice had not been given & that the claim for compensation was out of time. At the arbitration the learned judge intimated to the workman's counsel that he did not wish to hear argument on the question of notice, & only wanted the question of claim dealt with. He then reserved his award on the question of claim. Some time later, however, he made his award against the workman on the question of notice, apparently having overlooked what had occurred with regard to this at the hearing, & stated that in view of his decision upon this point it was unnecessary to decide the question of claim:—*Held:* there must be a new trial for full consideration of all points.—DEMPSEY *v.* LONDON & SOUTH WESTERN RY. CO. (1918), 11 B. W. C. C. 224, C. A.

3931. Conflicting findings of fact—Unsupported by evidence.]—A boy was injured by being caught in a moving belt. The belt was used to convey coal to waggons. The boy was employed to pick out dirt or shale from the coal. The evidence was confused & conflicting as to what the boy was actually doing when he became caught in the belt. The county ct. judge made two conflicting findings, one in favour of the workman & the other in favour of the employer. He made an award in favour of the employer:—*Held:* the findings being conflicting, & neither being supported by evidence, there must be a rehearing.

In cases of this kind, the ct. will not entertain an application for a new trial before another judge unless bias or prejudice is alleged, or the judge expresses the desire not to retry the case (*per* CUR.).—SAMBROOK *v.* NEW SHARLSTON COLLIERIES CO., LTD. (1914), 7 B. W. C. C. 728, C. A.

3932. Examination of applicant by judge in private.]—EARLE'S SHIPBUILDING & ENGINEERING CO., LTD. *v.* WALKER, No. 3973, *post.*

SUB-SECT. 4.—JUDGE'S NOTES.

Duty of judge to take notes.]—*See* Sect. 11, sub-sect. 7, A. (*b*), *ante;* Workmen's Compensation Rules, 1926, r. 36.

3933. Absence or insufficiency as ground for rehearing—Notes of evidence—Absence of.]—(1) County ct. judges should always take a note in these cases whether they are requested to do so or not.

(2) If there are no notes of the evidence given at the arbitration, the case may be remitted for a rehearing.—BRINE *v.* CORRY & SON (1905), 7 W. C. C. 130, C. A.

Annotations:—As to (1) **Apld.** Rayman *v.* Fields (1910), 102 L. T. 154. **Consd.** Turner *v.* Miller & Richards (1910), 3 B. W. C. C. 305. **Refd.** Taylor *v.* Ward, Worcester (1914), 7 B. W. C. C. 441. *As to* (2) **Apld.** Taylor *v.* Ward, Worcester (1914), 7 B. W. C. C. 441. **Refd.** Rayman *v.* Fields (1910), 102 L. T. 154.

3934. —— —— **Incompleteness of.**]—A boy claimed compensation for injury by accident. It appeared that a machine, upon which he was engaged at work, was suddenly set going. His hand became caught in it & subsequently had to be amputated. The county ct. judge took no complete note of the evidence, & only furnished a short summary of its effect, which left many points, including the actual grounds of his decision, in doubt:—*Held:* the case should be remitted for a new trial before the same judge. Costs of the first trial & appeal to be costs in second trial.—TAYLOR *v.* WARD & CO., WORCESTER, LTD. (1914), 7 B. W. C. C. 441, C. A.

3935. —— —— ——.]—A minder was injured by having his hand crushed in the wheels of a spinning-machine, while attempting to clean off some black oil when the machine was in motion. The county ct. judge refused compensation on the ground that there was no need to clean off the black oil, that the man should not, in any event, have attempted to do it while the machine was in motion, & that the accident happened because the man had not replaced a guard on the machine which he had taken off two days previously. The judge's note was very short, & the evidence not at all clear:—*Held:* there must be a new trial, as the judge's note did not make it clear what the man was doing at the time of the accident, & it was impossible to say whether the accident arose out of his employment or not.—SHAW *v.* GREENACRES SPINNING CO., LTD. (1915), 8 B. W. C. C. 35, C. A.

3936. —— —— ——.]—JACOBS *v.* MANDELBAUM, No. 2982, *ante.*

3937. —— —— **Unintelligibility of.**]—The judge made an award based on the workman's capacity to earn before the accident, but his notes of the hearing were not clear:—*Held:* the case must go back to the county ct. judge for a rehearing, on the ground that the notes of the judge were largely unintelligible, but that it was plain that he had misdirected himself on the earning capacity of the workman before the accident.—GELLYCEIDRIM COLLIERY CO., LTD. *v.* ROGERS (1909), 3 B. W. C. C. 62, C. A.

3938. —— —— ——.]—Obscurity in the findings by a county ct. judge in a case arising under the Workmen's Compensation Act, 1906 (c. 58), was held to be a ground for sending the case back to him for a rehearing.

On Oct. 29, 1915, a girl, who was employed to fill cans of jute from a machine, had her hand caught in the machine, with the result that she sustained serious & permanent injury. She applied for compensation under Workmen's Compensation Act, 1906 (c. 58). Her evidence was that about a month before the accident some waste jute fell into the machine, stopping it & breaking some cogs. The foreman then warned her that she would be dismissed if it happened again. On the day of the accident a piece of waste jute again fell into the machine just as she was about to stop it. She at once tried to snatch the waste out of the cogs, & the accident then happened. She knew it was dangerous to do this. She admitted that the waste must have been thrown on to the machine, but said that all the girls near her had denied having thrown it. Her story of the incident a month before the accident was confirmed by another workgirl. At the conclusion of the evidence for appct. the county ct. judge dismissed the application, saying he was unable to accept her story as to the way the accident happened, & that, even on her own story, the accident was due to an added peril, & did not arise out of her employment:—*Held:* there must be a new trial.

Qu.: whether the warning of the foreman would operate to extend the scope of the girl's employment, so that, if her story were true, the accident would be an accident arising out of the employment.—MCNALLY *v* BOOTLE JUTE FACTORY

CO., LTD. (1916), 85 L. J. K. B. 774; 114 L. T. 816; 9 B. W. C. C. 323, C. A.

3939. —— Grounds of decision—Not set out.]—GRIFFITHS *v.* WYNNSTAY COLLIERIES, No. 3186, *ante*.

3940. —— —— ——.]—Appt. was injured by accident, & was paid compensation by his employers for about eighteen months on the basis of total incapacity. The employers then reduced the weekly payments of compensation, & appt. thereupon filed a request for arbn., & claimed compensation on the basis of total incapacity. The county ct. judge, without giving any reasons or recording any findings of fact, made an award "in favour of the employers." Appt. appealed, & asked that the award should be set aside, or that there should be a new trial, &, in any case, a declaration of liability:—*Held:* as there was no note of the findings of fact by the county ct. judge, nor any note of his reasons, & the matter had not been properly investigated, so as to enable the Ct. of Appeal to adjudicate on the matter properly, there must be a new trial.—THOMPSON *v.* FURNESS, WITHY & CO. (1922), 15 B. W. C. C. 75, C. A.

3941. —— **Findings of fact Not set out.**] In an appeal by the workman from an order of the Ct. of Appeal affirming a decision of a county ct. judge, the question was whether a rule made in accordance with Reg. 25*a* of General Colliery Regulations under powers given in Coal Mines Act, 1911 (c. 50), s. 86, that "no person below ground shall ride upon any tub or contrivance drawn by a horse" so affected the miner's employment that disobedience to the rule was an act on his part outside the sphere of his employment, & an accident which was due to that act was one for which the employer was not liable: *Held:* there should be a fuller & more specific statement of the facts than was contained in the considered judgment of the county ct. judge, & the Ct. of Appeal were wrong in not directing a new trial. The case was accordingly remitted for a new trial with a special direction as to costs.—MAYDEW *v.* CHATTERLEY-WHITFIELD COLLIERIES, LTD. (1918), 88 L. J. K. B. 360; 119 L. T. 262; 11 B. W. C. C. 171, H. L.; *revsg.*, [1917] 2 K. B. 742, C. A.

3942. —— —— ——.]—THOMPSON *v.* FURNESS, WITHY & CO., No. 3940, *ante*.

3943. —— —— —— **Evidence otherwise sufficient to support decision.**]—ATLANTIC TRANSPORT CO., LTD. *v.* LYNCH, No. 3197, *ante*.

3944. Difficulty in obtaining—Ground for adjournment.]—TAFF VALE RY. CO. *v.* LANE (1910), 3 B. W. C. C. 259, C. A.

3945. Omissions from notes—Not to be supplied by affidavit.]—GRIGGS *v.* GAMECOCK (OWNERS), No. 2525, *ante*.

3946. No note taken—Memorandum supplied by judge six months later.]—Appt. was injured in the course of his employment & was lame. He was paid compensation until the injuries healed, after which payment was stopped. He claimed further compensation, but the county ct. judge, while making a declaration of liability, refused to award compensation. Appt. asked for a new trial on the ground that the judge had stopped the case without hearing all the evidence & made his award without giving reasons. The judge took no note at the trial, but six weeks later supplied a memorandum from his recollection, from which it appeared that appt.'s solr. had consented to the hearing being concluded on the terms of the award. A report in a local newspaper stated that the judge had "stopped the case," & appt.'s solr. denied that the judge's memorandum was accurate:—*Held:* greater weight must be given to the judge's memorandum, & the newspaper report was not necessarily inconsistent with the memorandum. There were no proper materials on which the accuracy of the memorandum could be challenged & the award must stand.—MINES *v.* SELFE & SONS (1923), 16 B. W. C. C. 23, C. A.

SUB-SECT. 5.—APPEAL AGAINST PART OF AWARD.

3947. Acceptance of compensation awarded—Appeal as to costs.]—A workman having sustained personal injury within the meaning of the Workmen's Compensation Act, 1906 (c. 58), an agreement was recorded whereby his employers admitted liability & agreed to pay compensation. A question having arisen as to the amount to be paid, the workman applied for arbitration. The employers offered to submit to an award of 12*s.* 8*d.* a week, & the learned judge awarded compensation at that rate. He also ordered the employers to pay costs up to the receipt of their submission, & appt. to pay the subsequent costs with a set-off. Appt. accepted the 12*s.* 8*d.* per week & the costs were taxed, but he shortly afterwards appealed from part of the order as to costs:—*Held:* inasmuch as appt. had accepted & acted upon the award, he could not appeal against it.—JOHNSON *v.* NEWTON FIRE EXTINGUISHER CO., LTD., [1913] 2 K. B. 111; 82 L. J. K. B. 511; 108 L. T. 360; 6 B. W. C. C. 202, C. A.

Annotations:—**Folld.** Jones *v.* Winder (1914), 7 B. W. C. C. 201; Josey *v.* Vincent (1916), 9 B. W. C. C. 474; Ward *v.* Cundall (1917), 10 B. W. C. C. 611. **Apld.** Harris *v.* Munitions Minister (1920), 124 L. T. 489. **Folld.** Reeves *v.* Smith (1922), 15 B. W. C. C. 190.

3948. —— —— ——.]—The employers paid a certain sum into ct. with respect to a claim for compensation, & submitted to an award of 7*s* 6*d.* a week compensation. The workman refused to accept this, but the county ct. judge made an award in accordance with the employer's submission & ordered the costs to be deducted from the compensation, at 3*s.* a week. The workman received several weeks' compensation under this award, the costs being deducted each week, & then appealed on the grounds that the judge had no power to order the costs to be deducted from compensation, & that Workmen's Compensation Rules, 1907-1912, r. 18 (7), was *ultra vires*:—*Held:* this was an attempt to approbate & reprobate the award, which was indivisible, & the appeal must be dismissed.—STROEWER *v.* AEROGEN GAS CO. (1913), 6 B. W. C. C. 576, C. A.

Annotation:—**Apld.** Strange *v.* Davis Gas Stove Co. (1915), 9 B. W. C. C. 111.

3949. —— —— ——.]—The county ct. judge, on an application to review, awarded less compensation than the employers had offered to pay & made no order as to costs. The workman received compensation on this basis under the award, but appealed on the question of costs:—*Held:* this was an attempt to approbate & reprobate the award, & the appeal must be dismissed.—JOSEY *v.* VINCENT (1916), 9 B. W. C. C. 474, C. A.

PART XIV. SECT. 23, SUB-SECT. 4.

3941 i. *Absence or insufficiency as ground for rehearing—Findings of fact—Not set out.*]—The Ct. of Appeal remitted to the county court judge to be re-heard by him a case in which the county court judge's note of the evidence, required to be taken by statute, did not contain material findings of fact necessary to enable the ct. to do justice between the parties.—WALSH *v.* SCANLAN (1914), 48 I. L. T. 234; 8 B. W. C. C. 414.—**IR.**

Sect. 23.—Appeals: Sub-sects. 5 & 6, A. (a) & (b), B., C., D., E., F. & G.]

3950. —— ——.]—In arbitration proceedings an award was drawn up in a particular way by consent & the costs taxed. Appct. desired to appeal on the question of costs:—*Held:* the ct. had no jurisdiction to entertain such an appeal. —WARD *v.* CUNDALL (1917), 10 B. W. C. C. 611, C. A.

3951. — — Appeal against termination of compensation.]—A nursemaid was in receipt of 10*s.* a week in respect of an injury by accident. The employers stopped compensation when they considered her incapacity had ceased. She commenced arbitration proceedings & the employers paid £15 into ct. with a denial of liability. The county ct. judge found that, at the date of hearing, the nursemaid was no longer incapacitated. He, however, awarded her £9 5*s.* as compensation from the date payments were stopped to the date when he found incapacity ceased. She accepted the £9 5*s.* but appealed against the award:—*Held:* in support of a preliminary objection, this was an attempt to approbate & reprobate the award & the appeal must be dismissed.—JONES *v.* WINDER (1914), 7 B. W. C. C. 204, C. A.

Annotations:—**Apld.** Strange *v.* Davis Gas Stove Co. (1915), 9 B. W. C. C. 111. **Folld.** Ward *v.* Cundall (1917), 10 B. W. C. C. 611. **Apld.** Harris *v.* Munitions Minister (1920), 90 L. J. K. B. 1312. **Folld.** Reeves *v.* Smith (1922), 15 B. W. C. C. 190.

3952. —— Appeal as to quantum.]—A workman died as the result of a fall while at work & his mother claimed compensation as being totally dependent on his earnings of £1 a week. The county ct. judge made an award of £100 in her favour. She was paid the money, & costs were taxed. She, however, appealed against the award on the ground that on the basis of £1 a week earnings she ought to have received at least £156:—*Held:* this was an attempt to approbate & reprobate the award, & the appeal must be dismissed.—STRANGE *v.* DAVIS GAS STOVE CO., LTD. (1915), 9 B. W. C. C. 111, C. A.

Annotation:—**Apld.** Harris *v.* Munitions Minister (1920), 90 L. J. K. B. 1312.

3953. —— Appeal against award of partial incapacity.]—A workman was injured by accident. The employer admitted liability & was paying the man 12*s.* 6*d.* a week compensation when the man applied to review & increase the payments to 35*s.* per week on the basis of total incapacity. The county ct. judge made an award for the payment to him of 17*s.* 6*d.* per week, & ordered the employer to pay the arrears, making up the payments of 12*s.* 6*d.* per week to 17*s.* 6*d.* per week. Payments under this award were consequently made by the employer & accepted by the workman, but the workman appealed against the award on the ground that the award should have been for total incapacity. A preliminary objection was, however, taken in the Ct. of Appeal that this was an attempt by the workman to approbate & reprobate the award:—*Held:* the preliminary objection prevailed & the appeal must be dismissed.—HARRIS *v.* MINISTER OF MUNITIONS (1920), 90 L. J. K. B. 1312; 124 L. T. 489; 13 B. W. C. C. 324, C. A.

Annotation:—**Folld.** Reeves *v.* Smith (1922), 15 B. W. C. C. 190.

3954. —— ——.]—A workman was injured by accident in the course of his employment. He claimed compensation & the county ct. judge made an award in his favour on the basis of partial incapacity. There was some delay in drawing up the award, but on the day following that on which the award was made, but before it was drawn up, the employers sent the workman a cheque covering five weeks' payments under the award. They asked for a receipt & informed the workman that they would send him a cheque every four weeks in future. The cheque was cashed & the workmen's solr. said that he would send a formal receipt after seeing the award. In due course the employers sent a second cheque, covering four weeks' payments under the award. In the meantime a notice of appeal against the award on the ground of inadequacy was served on the employers, & the workman's solr. returned the employers' second cheque together with a cheque for the amount of their first cheque which had been cashed:—*Held:* the workman had approbated the award by the acceptance of the first payment & the return of the money by the workman's solr. came too late. The appeal therefore failed.—REEVES *v.* SMITH (S.) & SONS (1922), 15 B. W. C. C. 190, C. A.

SUB-SECT. 6.—PRACTICE AND PROCEDURE.

A. Time for Appealing.

(a) When Time Begins to Run.

See R. S. C., Ord. 58, r. 20, & 59, r. 12.

3955. From time of signing award—Not from date of delivery.]—CLAYTON *v.* JONES' SEWING MACHINE CO., LTD., [1908] W. N. 253, C. A.

3956. Two decisions forming part of one proceeding—From date of last decision.]—FOX *v.* BATTERSEA BOROUGH COUNCIL, No. 3071, *ante*.

(b) Extension of.

See R. S. C., Ord. 58, r. 20, & 59, r. 16.

3957. Who may grant—Not county court judge.]—On Feb. 22, 1923, the county ct. judge ordered a memorandum of agreement of settlement for a lump sum to be recorded on the assumption that he had no jurisdiction to consider the adequacy of the sum. *Russell* v. *Rudd*, No. 3588, *ante*, which ultimately showed that such jurisdiction existed, was not decided until Mar. 20, 1923, after the time for appeal from the judge's order had expired. On Apr. 11 an order was made by the county ct. judge on the application of the workman, extending the time for entering an appeal. On Apr. 27, notice of appeal against the award of Feb. 22, 1923, was served on resp. At the hearing in the Ct. of Appeal counsel on behalf of the employers took the preliminary objection that the notice of appeal was out of time:—*Held:* the county ct. judge had no power to extend the time for appeal, & applt., who had delayed to give notice of appeal until after the decision of the House of Lords in *Russell* v. *Rudd*, No. 3588, *ante*, & now raised a case thereunder which was not put forward at the trial, should not be given extension of time for appealing.—CHADBOURNE *v.* BARBER, WALKER & CO., LTD. (1923), 16 B. W. C. C. 147, C. A.

3958. All relevant facts must be stated.]—(1) When either party to an award, made upon a state of facts agreed & considered correct by

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PART XIV. SECT. 23, SUB-SECT. 6.—A. (a).

f. From time of signing award—Date on award conclusive as to time of signing.]—*Re* HOOLACHAN, [1917] S. C. 195; 54 Sc. L. R. 174.—**SCOT.**

PART XIV. SECT. 23, SUB-SECT. 6.—A. (b).

g. Who may grant.]—R. *v.* MURRAY & CORMIE, ETC., *Ex p.* THE COMMONWEALTH (1916), 22 C. L. R. 437. —**AUS.**

h. ——.]—RANKIN *v.* OLDCROFT (1920), 54 I. L. T. 106.—**IR.**

both parties at the time of the making of the award, seeks to obtain the setting aside of the award on the ground of mistake as to the state of facts, the ct. will exercise the greatest care & consideration before availing itself of its power to allow an appeal of that nature. An "award" was made in favour of resps., but the county ct. judge died before signing it. Later a further application was made for compensation based on the same facts. This was dismissed on the grounds of *res judicata*, all parties being under the impression that the original award was valid. An appeal from this was dismissed for the above reasons.

The award of July 29, 1920, referred to in this order which is appealed from was never in fact made, in this sense, that although the county ct. judge had heard the application, & had dismissed it, the formal award had never been drawn up & signed by the judge, & sealed with the seal of the ct. Therefore in law there was no effective award (WARRINGTON, L.J.).

(2) On an application for leave to appeal when the time for appealing has expired, all relevant facts, *e.g.* that appct. has accepted an *ex gratiâ* payment of £100 on the understanding that the employers' liability was at an end, must be stated to the ct. by the applt. Leave was granted in this case, but probably would have been refused if the Ct. of Appeal had known of the *ex gratiâ* payment.—PELLETT *v.* HOVE CORPN. (1921), 14 B. W. C. C. 213, C. A.

3959. Grounds for granting or refusing—Adverse opinion of legal adviser.]—The fact that the legal adviser of a workman was of opinion that it was impossible in the circumstances successfully to appeal against a certain order made under Workmen's Compensation Act, 1897 (c. 37), is no ground for subsequently extending the time for appealing from the order.—NICHOLSON *v.* PIPER (1907), 24 T. L. R. 16; 51 Sol. Jo. 823, C. A.

3960. —— Order for security for costs—Subsequent leave to defend in formâ pauperis.]—PERRY & CO., LTD. *v.* LACEY (1911), 5 B. W. C. C. 1, C. A.

3961. —— Failure of judge to supply copy of notes.]—Application for extension of time for appeal granted on the ground that the county ct. judge had not furnished appcts. with a copy of his notes within the time given for appealing, although frequently requested to do so.—ROGERS *v.* HOLBORN METROPOLITAN BOROUGH (1913), 7 B. W. C. C. 10, C. A.

3962. —— Application to appeal from original award—After several intervening applications dismissed.]—In Mar. 1909, a county ct. judge awarded an injured workman 6*s.* a week compensation for six months. This being a prospective award, could have been set aside on appeal. No appeal, however, was made, &, the six months having expired, compensation was stopped. In Mar. 1910, the workman applied for a review, but this was dismissed, on the ground that there were no weekly payments to review. Further applications were made in 1912 & 1913; both, however, were dismissed. In 1914 an original application was made, crediting compensation received. This was also dismissed. The workman appealed from this. In appealing he applied for extension of time to appeal from the award of 1909:—*Held:* the application & appeal must be dismissed.

That was an award that ought not to have been made. I do not regard it as a question of jurisdiction. He ought not to make a prospective award & such an award will be set aside on appeal, but it is not quite accurate to say there is no jurisdiction. There is a difference between a wrong order & an order which a judge has no jurisdiction to make (LORD COZENS-HARDY, M.R.).—EVANS *v.* BARROW HÆMATITE STEEL CO., LTD. (1914), 7 B. W. C. C. 681, C. A.

3963. —— New point raised.]—CHADBOURNE *v.* BARBER, WALKER & CO., LTD., No. 3957, *ante*.

B. Notice of Appeal.

3964. Must state grounds of appeal.]—In your notice of appeal, you have not stated your grounds of appeal (FLETCHER MOULTON, L.J.).—BARTON *v.* SCOTT & HODGSON (1910), 4 B. W. C. C. 15, C. A.

3965. May be withdrawn.]—Employers wished to withdraw a notice of appeal. They had paid the taxed costs of the arbitration. The workman refused except on condition that the employer paid certain further costs. The employers thereupon made an application to the Ct. of Appeal for leave to withdraw:—*Held:* the employers were entitled to leave to withdraw & the costs of the application. The workman was entitled only to taxed costs up to the time of the employers' notice of withdrawal, such costs to be set off against the costs of the application to withdraw.—STEPHENS *v.* VICKERS, LTD. (1913), 6 B. W. C. C. 469, C. A.

C. Setting down Appeal.

3966. What must be filed—Three copies of application & answer.]—PRACTICE NOTE, [1907] W. N. 245, C. A.

3967. —— Signed copy of judge's note—Before case appears in list.]—ASTON COAL CO. *v.* STANCIL (1926), 43 T. L. R. 99; 70 Sol. Jo. 1181, C. A.

D. Security for Costs of Appeal.

See Sect. 21, sub-sect. 2, A., *post*.

E. Appearance in formâ pauperis.

See, generally, R. S. C., Ord. 16, rr. 22–31 H.

3968. Leave to oppose appeal granted—Without counsel's opinion.]—Resp. to an appeal may in a proper case appear *in formâ pauperis*. The opinion of counsel need not be obtained to support an application for leave to oppose *in formâ pauperis* an appeal.—HANDFORD *v.* CLARKE (GEORGE), LTD., [1907] 1 K. B. 181; 76 L. J. K. B. 76; 96 L. T. 175; 23 T. L. R. 127; 51 Sol. Jo. 100; 9 W. C. C. 136, C. A.

Annotation:—**Apld.** Merriman *v.* Geach, [1913] 1 K. B. 37.

F. Compromise of Appeal.

3969. Where applicants infants—Necessity for approval of Official Solicitor.]—Employers appealed from an award in favour of dependants, some of whom were infants. The appeal was compromised by the parties. The Ct. sent the matter to the Official Solr. for his consideration, & on his report approved the compromise.—COULSON *v.* DRAPERS' CO. (1911), 5 B. W. C. C. 136, C. A.

G. Remitting Case to Different Judge.

See R. S. C., Ords. 58, r. 20; 59, r. 10.

3970. Discretion of court to send to another judge.]—JESSOP *v.* MACLAY & M'INTYRE, No. 3928, *ante*.

3971. ——.]—SMITH *v.* HARDMAN & HOLDEN, LTD., No. 3899, *ante*.

3972. ——.]—SAMBROOK *v.* NEW SHARLSTON COLLIERIES CO., LTD., No. 3931, *ante*.

Sect. 23.—*Appeals: Sub-sect.* 6, *G. & H.; sub-sect.* 7. *Sect.* 24: *Sub-sect.* 1, *A.*]

3973. ——.]—A workman lost the sight of one eye by accident & it was removed & a glass eye fitted. He was paid full compensation for some six months, when the employers, believing he was capable of resuming his work, applied to review & terminate or diminish the compensation. The workman said that he suffered much pain, & was unable to work. Medical evidence was given on both sides, & the case adjourned. The county ct. judge ultimately dismissed the application, basing his decision on the workman's own account of his symptoms given to the judge alone at an examination in his private room:—*Held:* there must be a new trial, &, as the learned judge's mind at a re-hearing would necessarily be influenced by his previous unjudicial private examination, it should be before a new judge.—EARLE'S SHIPBUILDING & ENGINEERING CO., LTD. *v.* WALKER (1916), 10 B. W. C. C. 73, C. A.

3974. ——.]—MORPETH *v.* EYRE SMELTING CO., No. 3926, *ante*.

3975. ——.]—POSTMASTER-GENERAL *v.* BUTLER, No. 3922, *ante*.

3976. ——.] — SLATER *v.* MACONOCHIE BROTHERS, LTD., No. 3199, *ante*.

II. Remitting Case heard by Deputy Judge.

3977. Power to direct rehearing by judge.]—On an appeal from an award in an arbn. under the Workmen's Compensation Act, 1906 (c. 58), made in favour of the employer by a deputy county ct. judge, the award was set aside, & a new trial directed between the parties. On the matter coming before the judge of the county ct. he declined jurisdiction on the ground that he had no power to conduct a new trial; that his only power under the Act was to act as arbitrator; & that the Ct. of Appeal could not properly direct him to conduct a new trial or to rehear an arbn. which had been heard by another arbitrator, whose award had been wholly set aside. On a motion to amend the order of the Ct. of Appeal:—*Held:* the ct. had power to direct a rehearing by the judge, notwithstanding that the arbn. had been originally dealt with by his deputy. The form of the order, however, was inaccurate, & must be amended by directing a rehearing instead of a new trial.—HUNTER *v.* SIMNER, [1922] 2 K. B. 170; 91 L. J. K. B. 581; 127 L. T. 342; 66 Sol. Jo. 487; 15 B. W. C. C. 91, C. A.

SUB-SECT. 7.—APPEAL FROM COURT OF APPEAL.

3978. Order of House of Lords—May be made order of Court of Appeal.]—HODGSON *v.* WEST STANLEY COLLIERY (OWNERS) (1910), 3 B. W. C. C. 392, C. A.

SECT. 24.—**COSTS.**

SUB-SECT. 1.—IN COUNTY COURT.

A. Discretion of Judge.

See Workmen's Compensation Act, 1925 (c. 84), s. 7 (1).

3979. Whether Court of Appeal will interfere—Exercised upon proper grounds.] — An injured workman, in receipt of 1*s.* per week, applied for a review under Workmen's Compensation Act, 1906 (c. 58), sched. I. (16). The employer denied liability, & in the alternative submitted to an award of 5*s.* weekly. After the opening of the case the 5*s.* was unconditionally offered to appct. & accepted. The county ct. judge held that the terms of resp.'s denial & submission were ambiguous, & therefore ordered resp. to pay all the costs up to & including those of the hearing:—*Held:* the judge had exercised his discretion in the matter, & the ct. would not interfere with his decision.—NICHOLSON *v.* THOMAS (1910), 3 B. W. C. C. 452, C. A.

3980. —— ——.]—Applt. was a metal polisher & while working for resp. on Mar. 3, 1922, had his right eye injured & was paid compensation by resps. On Apr. 29, 1922, resp.'s doctor reported that applt. had recovered from his injury, but on May 2, applt.'s own doctor told him he would be fit for work in two months' time. No compensation was paid to applt. after May 2, 1922, & on May 22 resps. wrote to him & offered to reinstate him in his old job & to pay him compensation from May 2 if he accepted the work. Applt. did not reply to this letter, & on June 30, 1922, made an application for compensation from May 2 until June 30, 1922. The county ct. judge found as a fact that applt. was fit to work on July 3, 1922, & made an award of compensation in his favour as from May 2 to July 2, 1922, but deprived him of his costs, on the ground that to have made the application for compensation without replying to the offer of resps. to reinstate him was unnecessary, & negligent litigation. On appeal by the workman on the question of costs:—*Held:* the discretion given of depriving a successful party of his costs must be judicially exercised, so that some ground must be shown for its exercise, but if any ground exist, as it clearly did exist in this case, this ct. would not interfere with such a discretion so exercised.—PITKIN *v.* SANDERS & FORSTER, LTD. (1923), 128 L. T. 789; 16 B. W. C. C. 5, C. A.

3981. —— ——.]—A workman was paid 35*s.* a week compensation on the basis of total incapacity. On Sept. 17, 1924, the employer applied for a review on the ground that the workman had ceased to be totally incapacitated. The workman having obtained light work at 15*s.* a week on Oct. 10, 1924, by his answer agreed that compensation should be reduced to 13*s.* 6*d.* from that date. The county ct. judge, on the hearing on Dec. 10, made an award of 13*s.* 6*d.* a week from Oct. 10, 1924, until the date of the award & 10*s.* per week thereafter, & ordered the employer

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PART XIV. SECT. 23, SUB-SECT. 7.

k. When appeal lies.]—AUSTIN *v.* COAL CLIFF COLLIERIES, LTD. (1919) 20 S. R. N. S. W. 617; 37 N. S. W. W. N. 46.—**AUS.**

l. ——.]—In a case where an accident happened after the passing of the Act of 1906, but before it came into operation, & after it had come into operation the sheriff directed a reference to a medical referee:—*Held:* a subsequent appeal from the award of the sheriff to the Ct. of Session was not a "proceeding consequential on" the report of the medical referee, so as to make the Act of 1906 apply to the case, & give an appeal to the House of Lords from the decision of the Ct. of Session.—MACKAY *v.* ROSIE (1911), 105 L. T. 682, H. L.—**SCOT.**

PART XIV. SECT. 24, SUB-SECT. 1. —A.

3979 *i. Whether Court of Appeal will interfere — Exercised upon proper grounds.*]—An arbitrator, on the ground of divided success, found no expense due to or by either party. In an appeal at the instance of the workman, who maintained that, having been successful in obtaining compensation, he was entitled to expenses, held that, as there was no evidence that the arbitrator had failed to exercise his discretion as to expenses judicially & legally, his finding did not fall to be disturbed. — BRESLIN *v.* BARR & THORNTON, [1923] S. C. 90.—**SCOT.**

to pay the costs. The employer appealed from the order as to costs on the ground that he was the successful litigant:—*Held:* costs were in the discretion of the county ct. judge, & as that discretion had not been exercised contrary to any judicial principles the Ct. of Appeal would not interfere.—SWAIN *v.* CHILDS (1925), 18 B. W. C. C. 20, C. A.

3982. —— Not judicially exercised.]—A workgirl met with an accident on Aug 17, 1916, whereby her hand was severely injured. The employers paid compensation up to Jan. 17, 1917. Then, when the doctor reported that she was fit for some kinds of light work, the employers stopped paying compensation. Subsequently her finger had to be amputated, & other minor operations had to be performed. She did not inform her solr. of this, & these matters were not stated in the particulars. But the correspondence showed that resps. were informed that her hand was in a serious condition, & that her own doctor & the infirmary doctor were of opinion that the girl was not able to undertake light work. The county ct. judge awarded for appct., but found that the employers had been misled, & ordered appct. to pay the costs of the county ct. hearing: —*Held:* the judge's discretion as to costs had not been exercised judicially, & the order as to costs must be set aside.—FAWCETT *v.* HALEY & SONS (1917), 10 B. W. C. C. 381, C. A.

3983. —— Specific reasons not supporting decision—Cannot be upheld on other grounds.]—Where a judge has given specific reasons for depriving a successful litigant of his costs & such reasons do not support his decision, then the decision cannot be upheld upon other grounds.

An award was made in favour of an injured workman on the ground that certain work offered by the employers was not suitable, but the county ct. judge refused to make an order giving the workman costs, stating the following reasons:—(*a*) that the workman ought to have tried the work offered; (*b*) that the workman commenced proceedings while a settlement was being negotiated; (*c*) that compensation was still being paid when proceedings were commenced:—*Held:* the reasons given showed that the judge had not exercised his discretion as to costs judicially. As to (*a*) the judge had found the work to be unsuitable & there would have been no use in the workman trying it; as to (*b*) the employers refused the offer made for settlement; & as to (*c*) this was admittedly not the fact.—PATTESON *v.* BIGRIGG MINING CO., LTD. (1915), 9 B. W. C. C. 24, C. A.

Annotation:—**Apld.** Temperton *v.* Fletcher & Fearnall (1924), 132 L. T. 135.

3984. What is proper exercise of discretion—Ordering successful party to pay costs of opponent.]—A county ct. judge has no power to order a successful deft. to pay the costs of pltf.—ANDREW *v.* GROVE, [1902] 1 K. B. 625; 71 L. J. K. B. 439; 86 L. T. 720; 50 W. R. 524; 18 T. L. R. 455; 46 Sol. Jo. 380, D. C.

3985. —— ——.]—A workman met with an accident, while at work, causing loss of sight in one eye, which had to be removed. Full compensation was paid for six months, when the employers discontinued it, & offered the man suitable work at the same rate of wages as before the accident, as they were advised that the incapacity had ceased. The workman refused to try the work, & made a claim on the basis of total incapacity. The county ct. judge dismissed the claim, holding that he was able to earn the same rate of wages as before the accident, but made a declaration of liability on the ground that such ability was only temporary, depending on the present scarcity of labour. He also awarded costs to the workman. The employers appealed as to costs: —*Held:* this was not a judicial exercise of discretion as to costs. The employers were successful on the issues raised, & could not be made to pay appct.'s costs.—KLOOSTERMAN *v.* VICKERS, LTD. (1918), 87 L. J. K. B. 754; 118 L. T. 795; 11 B. W. C. C. 14, C. A.

3986. —— Incorrect view of result of trial.]—An infant, injured at work on Sept. 23, 1911, claimed compensation on Sept. 10, 1912. The employers admitted liability, & paid into ct. the amount claimed up to July 19, 1912, & stated that they had then offered suitable light work, & that the workman was only entitled to 2*s.* 1½*d.* a week from that date. They paid into ct. 2*s.* 1½*d.* a week to Sept. 10, 1912, & submitted to an award of 2*s.* 1½*d.* a week. The hearing was fixed for Oct. 10, 1912. The county ct. judge made an award of 2*s.* 10*d.* a week from July, 1912, & gave the workman costs up to the date of payment in & the employers costs subsequent to that date. The workman appealed on the ground that, being wholly successful, he was entitled to all the costs. The employers stated, on appeal, that the hearing before the county ct. judge was treated as a review under Workmen's Compensation Act, 1906 (c. 58), sched. I. (16), by consent between the solrs. & that the 2*s.* 10*d.* a week was awarded on that basis. The solr. for the workman denied this consent:—*Held:* the case must be remitted for the proper exercise of discretion as to costs according to the correct circumstances. Costs of appeal to be paid by resps., the employers.—WILLIAMS *v.* CAEPONTHREN COLLIERY CO., LTD. (1913), 6 B. W. C. C. 122, C. A.

Annotation:—**Expld.** Haynes *v.* Aldridge Colliery Co. (1923), 130 L. T. 282.

3987. —— Each party partly successful.]—Workman who sustained permanent injuries to two fingers was awarded full compensation for some months. Afterwards it was reduced to 4*s.* a week, which was continued for two years. The employers then discontinued payments. Six months or more later the workman applied for leave to issue execution on the award, & the employers met this by an application to terminate or reduce the award to 1*d.* a week, as from the date of the last payment on the ground that the incapacity had ceased. The county ct. judge reduced the existing award from 4*s.* to a 1*d.* a week, only as from the date of the arbn., & ordered the workman to pay the costs. The workman appealed as to costs:—*Held:* each side had partly succeeded & partly failed & this was a judicial exercise of discretion as to costs.—PORT OF LONDON AUTHORITY *v.* WALLACE (1916), 9 B. W. C. C. 552, C. A.

Annotation:—**Consd.** Turner *v.* Lee (1925), 133 L. T. 67.

3988. —— ——.]—A workman, who had been suffering from miner's nystagmus, commenced arbn. proceedings in the county ct. for compensation. In the course of the proceedings the representatives of the respective parties entered into a controversial correspondence from which it appeared that each party sought to evade arriving at a clear definition of the issue between them: —*i.e.* whether the proceedings were based on the footing of partial or total incapacity. The county ct. judge made an award in favour of appct., but made no order as to costs. Appct. appealed:—*Held:* the county ct. judge, in making no order as to costs, had apparently arrived at the conclusion that the workman was partially incapacitated & that the employers had failed in

Sect. 24.—*Costs: Sub-sect.* 1, *A., B., C., D. & E.*]

saying that he was not; while, on the other hand, the workman had spent a great deal of time in trying to prove that he was totally incapacitated & had failed; & the judge had material before him justifying him in exercising his discretion as to costs, & the appeal failed.—HAYNES *v.* ALDRIDGE COLLIERY CO., LTD. (1923), 130 L. T. 282; 16 B. W. C. C. 183, C. A.

Annotation:—**Refd.** Temperton *v.* Fletcher & Fearnall (1924), 17 B. W. C. C. 165.

—— **Party entirely successful.**]—*See* Sub-sect. 1, C., *post.*

3989. —— **Incorrect finding that applicant had misled respondent.**]—FAWCETT *v.* HALEY & SONS, No. 3982, *ante.*

3990. —— ——.]—(1) On Dec. 10, 1923, a workman, who was a fitter's mate in the employment of resps., fell 15 feet, reaching the ground on his feet & injuring his right foot. He commenced arbn. proceedings on the ground that he was totally incapacitated owing to injury to his right ankle & foot. During the course of the case it became clear that no actual injury existed in the foot, & reliance was placed on the contention that incapacity was due to a neurasthenic condition resultant from the accident & shock. As this was a fresh aspect of the case the judge offered resps. an adjournment, which offer, was however not accepted. Resps. then called evidence to the effect that the man had entirely recovered & was malingering. The county ct. judge, sitting with a medical referee, made an award in favour of appct., but made no order as to costs, on the ground that no indication had been given to resps. that the case for appct. was to be that the disability was due to nervous disorder. Appct. appealed against the order as to costs:—*Held:* there was no evidence before the county ct. judge that appct. had failed to do anything which he ought to have done, or that he had misled resps. The discretion as to costs had not been judicially exercised, & the appeal must be allowed.

(2) Appct. must state the nature of the injury, but he is not bound to state the effect of the injury. All the workman has to do is to state the nature of the injury (POLLOCK, M.R.).—TEMPERTON *v.* FLETCHER, SON & FEARNALL, LTD. (1924), 132 L. T. 135; 17 B. W. C. C. 165, C. A.

—— **On recording memorandum of redemption.**]—*See* Sub-sect. 1, *post.*

B. Conduct of Party.

3991. Conduct rendering litigation necessary—Refusal to pay compensation—Where applicant legally entitled.]—CLATWORTHY *v.* GREEN (R. & H.), LTD., No. 2087, *ante.*

3992. —— **Obstruction to medical examination.**]—The employers of an injured workman asked that an order should be made ending weekly payments unless the workman submitted himself to an examination under an anæsthetic.

The learned county ct. judge held that the proper application would have been that the weekly payments should cease unless the workman consented to be examined properly & without obstruction on his part.

Accordingly, the judge dismissed the application; but as he considered the difficulty of examination had arisen solely from the man's own conduct, he refused to make any order for costs:—*Held:* the question of costs was in the discretion of the county ct. judge.—LOWESTOFT CORPN. *v.* ALDRIDGE (1912), 5 B. W. C. C. 329, C. A.

3993. —— **Matter referred to medical referee—Workman re-opening matter.**]—On a claim for compensation coming on for hearing the parties agreed to refer the matter to the medical referee & abide by his decision, liability being admitted. The medical referee found partial incapacity. The workman was dissatisfied, the matter was then re-opened, & on a second hearing the county ct. judge made an award in favour of the workman on the basis of total incapacity, but refused to allow the workman the costs of the second hearing on the ground that he could have obtained an award at the first hearing if he had not agreed to abide by the decision of the medical referee. The workman appealed on the question of costs:—*Held:* the county ct. judge had exercised his discretion judicially.—RADNAGE *v.* POSTMASTER-GENERAL (1922), 15 B. W. C. C. 125, C. A.

3994. Additional costs occasioned by adjournment.]—CROSS *v.* WHITEHEAD AIRCRAFT CO., LTD., No. 3374, *ante.*

Misleading opponent.]—*See* Nos. 3982, 3990, *ante.*

C. Of Successful Party.

3995. Primâ facie entitled to costs.]—WILLIAMS *v.* CAERPONTHREN COLLIERY CO., LTD., No. 3986, *ante.*

3996. Cannot be ordered to pay costs—If no misconduct alleged.]—KIERSON *v.* THOMPSON (JOSEPH L.) & SONS, LTD., No. 4019, *post.*

3997. ——.]—The only question in dispute at an arbn. was the amount of the weekly compensation. The employers had previously offered 13*s.* 11*d.*, which had been accepted by the workman's solr., subject to a proper memorandum of agreement being filed. The employers objected to the wording of the memorandum put forward by the workman's solr., who thereupon withdrew his acceptance as to the amount & commenced proceedings for £1 a week compensation. The employers wrote saying they intended to submit to an award for 13*s.* 11*d.* At the hearing an award was made for 13*s.* 11*d.*, but the employers were ordered to pay the costs:—*Held:* the employers having been entirely successful on the only issue raised, the order for them to pay the costs was not a judicial exercise of the judge's discretion as to costs.—GOLBOURN *v.* PORT OF LONDON AUTHORITY (1916), 9 B. W. C. C. 457, C. A.

D. Acts Ending Dispute—Submission to Award, etc.

3998. Tender.]—SMITH *v.* ABBEY PARK STEAM LAUNDRY CO., LTD., No. 3093, *ante.*

PART XIV. SECT. 24, SUB-SECT. 1.—C.

3995 i. *Primâ facie entitled to costs.*]—Where a party has been completely successful an arbitrator ought always to award expenses, unless he has some materials before him upon which he can judicially pronounce that in his opinion the usual rule should not be followed.—FIFE COAL CO., LTD. *v.* FEENEY, [1918] S. C. 197; [1918] 1 S. L. T. 129.—**SCOT.**

3995 ii. ——.]—An injured workman was offered compensation at the rate of 13*s.* per week on the basis of partial incapacity; he claimed compensation for total incapacity. The arbitrator found the man was fit for light work offered by the employers & awarded compensation at the rate of 10*s.* a week. He made no order as to costs:—*Held:* discretion as to costs had not been exercised judicially & the employers being entirely successful were entitled to costs.—MURPHY *v.* FARME COAL CO., LTD. (1919), 12 B. W. C. C. 480.—**SCOT.**

3995 iii. ——.] O'NEILL *v.* GIFFNOCK COLLIERIES, [1921] S. C. 376.—**SCOT.**

3995 iv. ——.]—SUMMERS *v.* BAIRD (WM.) & CO., LTD. (1925), 18 B. W. C. C. 714.—**SCOT.**

PART XIV. SECT. 24, SUB-SECT. 1.—D.

3998 i. *Tender.*]—In the course of arbitration proceedings under Workmen's Compensation Act, 1906, the

3999. Payment into court.]—Employers stopped compensation, alleging that the workman was completely recovered. The workman brought proceedings, & the employers paid into ct. a sum representing compensation which they admitted to be due for certain weeks prior to the date of recovery, & had not paid through an oversight. The county ct. judge awarded the workman the sum paid into ct., & found that he was completely recovered at the date when the employers stopped compensation. He ordered the workman to pay the employers' costs:—*Held:* the judge had jurisdiction so to order.—THOMAS *v.* CORY BROTHERS & CO., LTD. (1911), 5 B. W. C. C. 5, C. A.

4000. —— Sum paid out slightly too small.]—A workman who had been receiving compensation for an injury to his foot was examined by a doctor on behalf of the employers, who certified that he was fit for light work. When the man next came for compensation he was told he could not have it unless he produced a doctor's certificate. He applied again without a certificate, & compensation was refused. An application for arbn. was then filed. The following day the man again applied for compensation, & this time produced a certificate & was promptly paid. The application was not withdrawn, & the employers paid £3 13*s.* into ct., in satisfaction of any claim. The county ct. judge awarded £1 17*s.* 6*d.* in excess of the £3 13*s.*, but made no order as to costs. The workman appealed as to costs on the ground that as he had recovered more than was paid into ct., he was entitled to costs:—*Held:* the judge had exercised his discretion as to costs judicially.—MANCLARK *v.* ROTAX MOTOR ACCESSORIES CO., LTD. (1918), 11 B. W. C. C. 46, C. A.

4001. Submission to award.]—A workman met with an accident fracturing his wrist, & was paid compensation. Later he returned to work at 2*d.* an hour less than his old wages. The reduction was due to his injured wrist. This went on for some time until the employers went into voluntary liquidation & discharged him. He thereupon applied for compensation & upon the hearing resps. proved that he was, on account of doing overtime, getting better wages than before the accident. They had paid £10 into ct. to satisfy anything that might be found due to him. The county ct. judge found nothing was due to him, & made no order beyond a declaration of liability, which resps. had offered to submit to, & directed that appt. should pay all the costs of the proceedings. Appt. appealed on the question of costs only:—*Held:* the judge had exercised his discretion judicially.—BLACKLEY *v.* THRUPP & MABERLY, LTD. (1920), 13 B. W. C. C. 247, C. A.

4002. —— Whether payment into court also necessary.]—On Oct. 14, 1921, appt. met with an accident arising out of & in the course of his employment by resps. & was paid compensation down to Apr. 21, 1922. On June 2, 1922, he filed a request in the Mayor's & City of London Ct. for arbn. claiming compensation of £1 per week from Apr. 21, 1922, & a declaration of liability. On June 22, 1922, resps. filed their answer denying liability, but stating in their particulars (*inter alia*) that whilst denying that they were liable to any payment of compensation subsequent to Apr. 21, 1922, they were ready & willing to submit to an award for payment of £1 per week from that date up to June 21, 1922. They did not, however, pay any sum into ct. The assistant judge by his award ordered resps. to pay to appt. the sum of £8 13*s.* 4*d.*, being the amount of the weekly payments of £1 per week calculated from Apr. 21 to June 21, 1922, & to pay the costs of the arbn. On an appeal by resps. from so much of the award as ordered them to pay the costs of the arbn. subsequent to the filing of their submission:—*Held:* (1) the award to which resps. had submitted being in respect of both past & future payments did not fall within either para. (i) or para. (ii) of r. 19 (1) (*a*) of Workmen's Compensation Rules, 1913–1917, & therefore there was no obligation on resps. to pay the money into ct.; (2) as appt. had not recovered a greater sum than that which resps. had submitted to pay, resps. were only liable under r. 19 (8) to pay the costs of the arbn. up to the date of the filing of their submission & the award must be set aside so far as it ordered them to pay the costs subsequent to that date.—KEMPLEY *v.* POOLE (H. H.) & CO., [1923] 1 K. B. 195; 92 L. J. K. B. 247; 128 L. T. 241; 15 B. W. C. C. 251, C. A.

4003. Division of compensation among dependants—Employer brought to court.]—RHODES *v.* SOOTHILL WOOD COLLIERY CO., LTD., No. 3567, *ante*.

E. Finding of Partial Incapacity.

4004. Total incapacity set up—Workman cannot be ordered to pay costs.]—An injured workman in receipt of full compensation was offered light work by his employers & compensation was reduced from 19*s.* 7½*d.* to 5*s.* 6*d.* After a trial of a few weeks, the workman gave it up & claimed full compensation. The county ct. judge found that the workman was entitled to full wages for a month during the time he was only receiving 5*s.* 6*d.* & after that date he was entitled to 6*s.*, being fit for light work. He, however, ordered him to pay the employers' costs as he considered the workman had failed in the substantial point of proving he was totally incapacitated:—*Held:* the judge had no jurisdiction to make a successful appt. pay resp.'s costs. Issues may be separated & costs of one set off against the other at the discretion of the judge.

I think, therefore, that the award, in so far as it deals with the costs, must be set aside, & the matter must be referred back to the learned county ct. judge to make such order as to costs as he in his discretion, & within the proper limits of his discretion, may think fit (COZENS-HARDY, M.R.) —EVANS *v.* GWAUNCAEGURWEN COLLIERY CO., LTD. (1912), 106 L. T. 613; 5 B. W. C. C. 443, C. A.

Annotations:—**Apld.** Williams *v.* Caeponthren Colliery Co. (1913), 6 B. W. C. C. 122. **Consd.** Haynes *v.* Aldridge Colliery Co. (1923), 130 L. T. 282.

4005. —— Workman may be allowed costs.]—DONOVAN *v.* NICHOLSON'S WHARVES, LTD., No. 3222, *ante*.

4006. —— ——.]—On Sept. 23, 1924, T. made an application for arbn. in respect of an accident met with by her while in the employment of resp. on July 9, 1924. She stated that her average weekly earnings were 18*s.* a week, & made her claim on the basis of total incapacity. Resp. by his answer denied liability, but on Oct. 16, 1924, paid a sum of £9 18*s.* into ct., & on the hearing admitted liability, the only question being the amount of compensation to which T. was entitled.

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employers renewed orally an offer of compensation made to the workman, & refused by him, prior to the arbitration. The arbitrator awarded compensation at the rate offered by the employers; but found no expenses due to or by either party, his reason for refusing the employers their expenses being that no formal tender of compensation had been made on record:—*Held:* the arbitrator was bound to award expenses to the employers.—MURPHY *v.* BAIRD & CO., LTD., [1921] S. C. 891.—**SCOT.**

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The county ct. judge found that there was total incapacity up to Sept. 17 &, on the basis of the weekly earnings being 14*s.* a week, awarded 10*s.* 6*d.* a week to that date, & that since then there was partial incapacity, & awarded 3*s.* a week during partial incapacity. The costs were given to T., appct., except the costs of proving the issue of the amount of compensation after the date of the payment made into ct. From that decision as to costs appct. appealed:—*Held:* it had not been shown that in the circumstances the county ct. judge had not exercised a judicial discretion as to the costs, having regard to the fact that appct. put her case too high, & his discretion as to the costs had accordingly been properly exercised.—TURNER *v.* LEE (1925), 133 L. T. 67; 18 B. W. C. C. 24, C. A.

F. Declaration of Liability.

4007. Total incapacity set up—Employer cannot be ordered to pay costs.]—A work girl met with an accident & was paid compensation until the employers considered she had ceased to be incapacitated. They then offered her her old work, which she refused. The girl applied for compensation to be continued, on the ground that she was still totally incapacitated. This was the only question in dispute. The county ct. judge found she was not incapacitated, but made a suspensory award of 1*d.* a week. He ordered the employers to pay the costs:—*Held:* it was not competent to make such order as to costs when the employers had been successful in the only issue raised.—SNELL *v.* GROSS, SHERWOOD *v.* HEALD, LTD. (1913), 6 B. W. C. C. 242, C. A.

Annotation:—**Refd.** Higgins *v.* Higgins, [1916] 1 K. B. 640.

4008. —— ——.]—A workman claimed compensation for total incapacity. The employers, by their answer, said incapacity had ceased, but did not submit to a declaration of liability. At the hearing they agreed they were liable to a declaration, which was all the judge gave the workman, but he allowed the workman the costs:—*Held:* the judge had not exercised his discretion as to costs judicially.—DERBYSHIRE *v.* HETHERINGTON (JOHN) & SONS, LTD. (1914), 7 B. W. C. C. 677, C. A.

Annotation:—**Refd.** Higgins *v.* Higgins, [1916] 1 K. B. 640.

4009. —— ——.]—A workman having met with an accident in consequence of which he was ruptured, his employers admitted liability under Workmen's Compensation Act, 1906 (c. 58), & paid him compensation for thirteen weeks, when they discontinued it on the ground that the incapacity had ceased. The workman applied for arbn., alleging that the question which had arisen was "as to the amount, or duration, of the compensation payable" to him by his employers under the Act of 1906; & he claimed full compensation upon the ground that he was still partially incapacitated & likely to be so for some months. The parties agreed to refer to a medical referee the questions as to his condition & fitness for employment, & whether his incapacity, if any, was due to the accident. The referee reported that the rupture was caused by the accident, but that appct. was fit for his former work if he wore a belt. The employers thereupon filed answers in which they denied incapacity & their liability to pay further compensation. Appct. insisted that his incapacity still continued. The matter came before the county ct. judge, who, at appct.'s request & without objection on the part of the employers granted to appct. a declaration of liability but nothing more, & ordered the employers to pay his costs:—*Held:* under Workmen's Compensation Act, 1906 (c. 58), sched. II., para. 7, the costs were in the discretion of the arbitrator just in the same way as costs in the High Ct. were in the discretion of the judge; but it was settled that to make this discretion effective there must be materials on which the discretion could be exercised. Here there were no such materials & the employers had been successful throughout so that there had been no judicial exercise of the judge's discretion, & the order on the employers to pay the costs must be discharged.—HIGGINS *v.* HIGGINS (L.) & Co., [1916] 1 K. B. 640; 85 L. J. K. B. 1224; 114 L. T. 59; 9 B. W. C. C. 122, C. A.

Annotations:—**Apld.** Kloosterman *v.* Vickers (1918), 87 L. J. K. B. 754. **Consd.** Ritter *v.* Godfrey, [1920] 2 K. B. 47; Haynes *v.* Aldridge Colliery Co. (1923), 130 L. T. 282; Turner *v.* Lee (1925), 133 L. T. 67.

4010. —— ——.]—A workman met with an accident while at work, which caused an injury to his hip. He was paid full compensation down to a time when he had so far recovered that he was able to do light work at which he earned as much as before the accident, & compensation was stopped. After working for some time he left to take up other employment elsewhere. He then made a claim on the basis of total incapacity. The employers denied that they were liable, but during the hearing intimated they would not oppose an application for a suspensory award. The county ct. judge held that the claim for compensation failed, & by consent made a declaration of liability, but ordered the employers to pay the costs of the arbn. The employers appealed as to costs:—*Held:* the employers had succeeded on the only issue raised & could not be ordered to pay appct.'s costs.—FORD *v* GILBERTSON & CO., LTD. (1919), 12 B. W. C. C. 32, C. A.

4011. —— ——.]—KLOOSTERMAN *v.* VICKERS, LTD., No. 3985, *ante*.

4012. Partial incapacity set up—Workman may be ordered to pay costs.]—WEBSTER *v.* HARRISON, TOWNSEND & CO., LTD., No. 3379, *ante*.

G. Employer's Application for Review.

4013. Reduction of compensation ordered—Reduction less than that claimed—Employer to pay costs.]—An injured workman was in receipt of 10*s.* a week as compensation. On his obtaining work the employers applied to review & diminish to 2*s.* a week. The county ct. judge diminished to 7*s.* 6*d.* a week, & ordered the employers to pay the costs:—*Held:* the judge had exercised his discretion as to costs in a proper manner.—CONNOR *v.* MEADS (1912), 5 B. W. C. C. 435, C. A.

Annotation:—**Refd.** Swain *v.* Childs (1925), 18 B. W. C. C. 20.

4014. —— **Workman setting up total incapacity—Workman to pay costs.**]—SECRETARY OF STATE FOR WAR *v.* WILLOUGHBY, No. 3294, *ante*.

4015. Reduction of compensation refused—Employer to pay costs.]—A miner in the employment of applts. having obtained from a certifying surgeon a certificate to the effect that he was disabled through miner's nystagmus from earning full wages at his work, was, on Nov. 6, 1924, after arbn. proceedings, awarded full compensation in respect of total incapacity. On Jan. 6, 1925, the employers applied for a reference to a medical referee, averring that the workman was fit for light surface work, & as the result of the reference the medical referee found that the workman was not yet fit for light work at a colliery The workman then

lodged a minute craving an award of the expenses incurred by him in the reference proceedings, in respect that the medical referee had sustained his contention. The sheriff-substitute held that he had no warrant to award expenses, but at the request of the workman stated a case for the opinion of the ct.:—*Held:* the arbn. was still alive, & the costs in respect of which the application was made were costs incidental to the arbn. The arbitrator was therefore entitled, under Workmen's Compensation Act, 1906 (c. 58), sched. II. (7), to award to the workman the expenses incurred by him in connection with the reference.—WILLIAM BAIRD & Co., LTD. *v.* SUMMERS (1926), 19 B. W. C. C. 17, H. L.

See, also, Nos. 3981, 3987, *ante*.

H. Alternative Remedies.

4016. Failure of alternative claim by workman—Under Employers' Liability Act, 1880 (c. 42)—Whether power to award costs.]—Where all the costs, with one immaterial exception, have been caused by pltf. having brought an unsuccessful action, it is right that he should not receive any costs in respect of the assessment of compensation under above Act, sect. 1 (4).

Qu.: whether there is power to give an unsuccessful pltf. any costs under that sub-sect.—SKEGGS *v.* KEEN (1899), 1 W. C. C. 35, C. A.

Annotation:—**Refd.** Cattermole *v.* Atlantic Transport Co., [1902] 1 K. B. 204.

4017. —— —— Discretion as to costs.]—Where an action is brought under the Employers' Liability Act, 1880 (c. 42), & dismissed, & the county ct. judge, on an application by pltf. under Workmen's Compensation Act, 1897 (c. 37), s. 1 (4), assesses the compensation payable under that Act, he has power to give pltf. the costs of the proceedings.—CATTERMOLE *v.* ATLANTIC TRANSPORT CO., [1902] 1 K. B. 204; 71 L. J. K. B. 173; 85 L. T. 513; 66 J. P. 4; 50 W. R. 129; 18 T. L. R. 102; 46 Sol. Jo. 83; 4 W. C. C. 28, C. A.

Annotations:—**Consd.** Cribb *v.* Kynoch (No. 2), [1908] 2 K. B. 551. **Refd.** Burdon *v.* Gregson (1906), 95 L. T. 45; Bennett *v.* Whitehead, [1926] 2 K. B. 380.

4018. —— At common law—Costs deducted from compensation.]—A workman brought an action against his employers at common law in the High Ct. for damages for injuries caused to him by the alleged negligence of defts. The jury having returned a verdict for defts., pltf. applied to the judge to assess compensation under Workmen's Compensation Act, 1897 (c. 37):—*Held:* an award of compensation should be made, but the costs occasioned by bringing the action would be deducted from the amount payable to the workman.—COHEN *v.* SEABROOK BROTHERS (1908), 25 T. L. R. 176; 2 B. W. C. C. 155.

J. Recording Memorandum of Redemption.

4019. Application carried to judge—Both parties supporting application.]—A workman who was in receipt of a weekly payment of 13*s.* 5*d.* from his employers as compensation for an accident within the meaning of Workmen's Compensation Act, 1906 (c. 58), entered into an agreement to accept £100 in satisfaction of the employers' liability. The workman applied to the registrar to have a memorandum of the agreement recorded. The registrar, being dissatisfied as to the amount of the commutation, referred the matter to the judge. Both parties appeared & supported the agreement. The judge overruled the objection as to quantum, & directed the memorandum to be recorded, ordering the employers to pay the costs. The employers appealed from the order as to costs:—*Held:* assuming that the county ct. judge had a discretion as to costs, it was not a judicial exercise of that discretion to order a party who had been completely successful & against whom no misconduct was alleged to pay the costs of the proceedings.—KIERSON *v.* THOMPSON (JOSEPH L.) & SONS, LTD., [1913] 1 K. B. 587; 82 L. J. K. B. 920; 108 L. T. 236; 29 T. L. R. 205; 57 Sol. Jo. 226; 6 B. W. C. C. 58, C. A.

4020. —— Workmen's objection overruled.]—The parents of a seaman, drowned at sea, agreed to accept a certain sum in redemption of compensation, but later objected, on the ground of the inadequacy, to a memorandum being recorded. The registrar refused to record, & referred the matter to the judge. The judge overruled the objection, but ordered the employers to pay the costs:—*Held:* this was not a judicial exercise of discretion as to costs.—REED *v.* S.S. WYMERIC & Co., LTD. (1914), 7 B. W. C. C. 421, C. A.

4021. —— Workman abrogating agreement.]—A lad who worked as a baker's assistant met with an accident to his hand. He was paid compensation & then went back to his former work. He was nearly eighteen, & liable soon to be called to serve with the colours, & his mother, as next friend, asked his employer to agree to pay a lump sum in settlement of all claims, & this the employer agreed to do & offered £20 down.

The agreement was signed by the boy & his mother, who then applied to have a memorandum of the same recorded. The registrar, however, was not satisfied the £20 was enough, & referred it to the judge. By this time both the boy & his mother had changed their minds about accepting the £20, & appeared before the judge & opposed the application to record. The judge being of opinion that £20 was too little, refused to order the memorandum to be recorded, & ordered the employer to pay all the costs. The employer appealed from the order as to costs:—*Held:* in ordering the employer to pay the costs in these circumstances, the judge had not exercised his discretion judicially. The order as to costs must be varied, & appt. ordered to pay costs both in county ct. & on appeal.—CAMBRIDGE *v.* TAYLOR (1917), 10 B. W. C. C. 618, C. A.

Annotation:—**Folld.** Scott *v.* Shilling (1920), 13 B. W. C. C. 9.

4022. —— —— —.]—A workman sustained an injury arising out of & in the course of his employment, & was paid compensation for a certain period. An agreement was then come to between the workman & the employers, under which the latter agreed to pay him a lump sum of £40 in addition to the compensation he had already received, in full settlement of the claim. The agreement was drawn up & sent to the registrar, who, however, refused to record it as being

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PART XIV. SECT. 24, SUB-SECT. 1. —H.

4018 l. *Failure of alternative claim by workman—At common law—Costs deducted from compensation.*]—Except where special circumstances are shown, a workman who brings an unsuccessful action independently of the Act should have deducted from the compensation awarded him under the Act the costs which he compelled deft. to waste by his improper demand.—PERRY *v.* CANADIAN PACIFIC RY. CO., [1922] 2 W. W. R. 1116; 67 D. L. R. 446; 15 Sask. L. R. 501.—**CAN.**

m. —— —— *Liability for compensation admitted.*]—Where after the dismissal of an action for damages, the ct. assesses compensation under Workmen's Compensation Act, deft. having filed an admission of liability under the Act, deft. is entitled to the costs of the action, & pltf. to the costs of an undefended proceeding under the Act.—WILSON *v.* KELLY (1909), 14 B. C. R. 436.—**CAN.**

Sect. 24.—Costs: Sub-sect. 1, J., K., L., M., N., O. & P.; sub-sect. 2, A. (a) & (b).]

inadequate in amount & referred it to the judge. The workman then went to his solr. & said he should prefer the weekly payments to continue, & when the matter was before the judge he repeated this statement, giving as his reason that he had not been feeling so well lately. The county ct. judge refused to record the agreement, & ordered the employers to pay the costs:—*Held:* in ordering the employer to pay the costs in these circumstances the judge had not exercised his discretion judicially, & so much of the order as dealt with the costs must be set aside.

I do not accept the proposition that . . . a county ct. judge has no jurisdiction, when he refuses to record an agreement, to give costs, unless there is some sort of malpractice by the party who is asking for the agreement to be recorded (LORD STERNDALE, M.R.).—SCOTT (JOHN A.), LTD. *v.* SHILLING (1920), 13 B. W. C. C. 9, C. A.

K. Set-Off.

4023. Costs of appeal—Against costs of arbitration.]—CASE *v.* COLONIAL WHARVES, LTD. (1905), 53 W. R. 514; 49 Sol. Jo. 515; 8 W. C. C. 114, C. A.

4024. ——— Only if awarded in any event.]—The registrar of the county ct. ordered the employers to answer interrogatories delivered by the workman. The county ct. judge reversed this order. The workman appealed to the Ct. of Appeal, but his appeal was dismissed with costs. The employers then consented to an award being made in the arbn. in favour of the workman. The county ct. judge refused to set off the taxed costs of the employers in the Ct. of Appeal against the costs of the workman in the arbn.:—*Held:* a county ct. judge has no jurisdiction to set off costs awarded to an employer on an interlocutory appeal by the Ct. of Appeal against the costs of the workman in the subsequent arbitration, unless the Ct. of Appeal order that the costs awarded to the employer on appeal shall be the employer's costs in the arbn. in any event.—SUTTON *v.* GREAT NORTHERN RY. CO. (No. 2) (1910), 3 B. W. C. C. 160, C. A.

4025. ——— Order made cannot be varied.]—BARNETT *v.* PORT OF LONDON AUTHORITY (No. 2), No. 4062, *post.*

4026. Costs of separate issues.]—EVANS *v.* GWAUNCAEGURWEN COLLIERY CO., LTD., No. 4004, *ante.*

4027. Costs of successful employer—May be deducted from compensation.]—PORTER *v.* WHITBREAD & CO., No. 3398, *ante.*

4028. —— Not recoverable by judge impounding compensation.]—KIRK & RANDALL, LTD. *v.* BOURKE, No. 3911, *ante.*

L. Lump Sum.

4029. Whether jurisdiction to award.]—Arbitrator can award a lump sum for costs without taxation.—WELLAND *v.* GREAT WESTERN RY. CO. (1900), 16 T. L. R. 297; 2 W. C. C. 145, C. A.

Annotation:—**Reld.** Turner *v.* Kingsbury Collieries, [1921] 3 K. B. 169.

4030. ——.]—Having regard to the words "shall be taxed" in Workmen's Compensation Act, 1906 (c. 58), Sched. II., s. 7, the county ct. judge has no jurisdiction to order payment of a lump sum as the costs of an arbitration under that Act; & the words of sect. 4 of the same Sched. "where" the county ct. judge "makes any order under this Act," render such an order the subject of appeal to the Ct. of Appeal.—BEADLE *v.* NICHOLAS (OWNERS) (1909), 101 L. T. 586; 3 B. W. C. C. 102, C. A.

Annotation:—**Mentd.** Golding *v.* Smith, [1910] 1 K. B. 462.

M. What Costs Allowed.

4031. Medical witness—Called to deny occurrence of accident.]—Where medical witnesses in a case arising under the Workmen's Compensation Act, 1906 (c. 58), gave evidence which was directly material & was believed, it was held that, having regard to the reasons assigned by the county ct. judge, he did not exercise his discretion judicially in disallowing the costs of those witnesses.—FINLAYSON *v.* CLINTON (OWNERS) (1914), 111 L. T. 915; 7 B. W. C. C. 710, C. A.

4032. —— Qualifying fee.]—A workman met with an accident & received compensation under Workmen's Compensation Act, 1906 (c. 58), during incapacity. He found himself unable to resume full work & his solrs. wrote to his employers asking for suitable work & compensation. The latter repudiated liability & the workman filed a request for arbn. After the letter but before the filing of the request appct. was examined by a doctor on behalf of the employers. The doctor gave evidence at the hearing & the judge made an award in favour of the employers & ordered appct. to pay the costs, including the qualifying fee of the doctor. Appct. appealed from the latter part of the order on the ground that the doctor's examination was made before proceedings were commenced & not with a view to giving evidence:—*Held:* there was no ground for saying that a qualifying fee could not be paid for an examination made before the filing of the request for arbn.; the question was within the discretion of the judge, & on the facts he was right.—JONES *v.* DAVIES (D.) & SONS, LTD., [1914] 3 K. B. 549; 83 L. J. K. B. 1531; 111 L. T. 769; 7 B. W. C. C. 488, C. A.

N. Taxation of Costs.

4033. General order as to taxation—All applications to review to be treated as interlocutory applications.]—A county ct. judge has no jurisdiction to give a general direction to the registrar that the costs of all applications under Workmen's Compensation Act, 1897 (c. 37), sched. I., clause 12, to vary the amount of compensation fixed by award or agreement shall be treated as though the application were a mere interlocutory application in the matter of the arbn., & not an original arbn. or proceeding.—RIGBY & CO. *v.* COX (No. 2), [1904] 2 K. B. 208; 73 L. J. K. B. 690; 91 L. T. 72; 68 J. P. 385; 20 T. L. R. 461; 6 W. C. C. 161, D. C.

4034. Time for taxation — Immediately after hearing.]—The proper officer of the ct. may tax the costs immediately at the termination of the hearing.—GARDNER *v.* COX (1910), 3 B. W. C. C. 245, C. A.

Necessity for.]—*See* Sub-sect. 1, L., *ante.*

O. Appeal as to Costs.

4035. Whether appeal lies—When order part of award.]—BEADLE *v.* NICHOLAS (OWNERS), No. 4030, *ante.*

—— When benefit of award taken.]—*See* Sect. 22, sub-sect. 5, *ante.*

See, also, Nos. 4000, 4001, 4006, 4010, 4021.

PART XIV. SECT. 24, SUB-SECT. 1.—M.

n. *Fee of medical referee.*]—ADDIE (ROBERT) & SONS COLLIERIES, LTD. *v.* M'KAIL, [1926] S. C. 308.—SCOT.

P. Other Cases.

4036. Insured employer may be awarded costs.]—An employer succeeded on an application to terminate an award; his case was conducted by or in the interest of an insurance co. It was contended that the employer was not personally liable for costs, & that therefore they should not be awarded to him. The judge said that there was no evidence that the employer was not liable, but if he was personally liable no doubt he was indemnified by the insurance co. On these facts the judge, in the exercise of his discretion, awarded costs to the employer:—*Held:* the judge had exercised his discretion in a way that was not contrary to any principle of law.—CORNISH *v.* LYNCH (1910), 3 B. W. C. C. 343, C. A.

4037. No priority for costs in bankruptcy.]—The costs of obtaining an award under Workmen's Compensation Act, 1906 (c. 58), are not payable in priority to all other debts in a bkpcy.—*Re* JINKS (1914), 112 L. T. 88; *sub nom. Re* JINKS, *Ex p.* THE TRUSTEE, 58 Sol. Jo. 741, D. C.

SUB-SECT. 2.—IN COURT OF APPEAL.

A. Security for Costs.

(a) In General.

See, generally, R. S. C., Ord. 58, rr. 15, 20; PRACTICE.

4038. Ordinary practice of the court followed.]—HALL *v.* SNOWDEN, HUBBARD & CO., No. 4044, *post.*

4039. —— Appeal not in nature of motion for new trial.]—An appeal against a decision of a county ct. judge upon an application for compensation under Workmen's Compensation Act, 1897 (c. 37), is not in the nature of a motion for a new trial, & applt. can be ordered to give security for the costs of the appeal.—*Re* HARWOOD & ABRAHAMS, [1901] 2 K. B. 304; 84 L. T. 857; *sub nom.* HARWOOD *v.* ABRAHAMS, 70 L. J. K. B. 746; 3 W. C. C. 205, C. A.

Annotation:—**Refd.** Wightwick *v.* Pope, [1902] 2 K. B. 99.

4040. Previous application to appellant should be made.]—Before applying to the ct. for security for the costs of an appeal under Workmen's Compensation Act, 1897 (c. 37), upon the ground of applt.'s poverty resp. ought first to apply to applt. for security.—STANLAND *v.* NORTH-EASTERN STEEL CO., LTD. (1906), 23 T. L. R. 1; 51 Sol. Jo. 12; 9 W. C. C. 133, C. A.

Annotations:—**Mentd.** Williams *v.* Ocean Coal Co., [1907] 2 K. B. 422; New Monckton Collieries *v.* Keeling, [1911] A. C. 648.

4041. Amount of security.] — MCLAUGHLIN *v.* CLAYTON (1899), 1 W. C. C. 116, C. A.

4042. ——.]—HORLOCK *v.* COQUET (OWNERS) (1913), 6 B. W. C. C. 939, C. A.

4043. Effect of non-compliance with order—Leave to proceed in formâ pauperis—Order not completed till time for security expired.]—PERRY & CO., LTD. *v.* LACEY (1911), 5 B. W. C. C. 1; C. A.

(b) Reasons for Granting or Refusing.

4044. Poverty of appellant—Unable to pay respondent's costs—If appeal dismissed.]—In an appeal from a county ct. judge to the Ct. of Appeal under Workmen's Compensation Act, 1897 (c. 37), if it appears that applt. will, if unsuccessful, be unable through poverty to pay resp.'s costs of the appeal, he will, in accordance with the ordinary practice of the Ct. of Appeal, be ordered to give security for such costs.—HALL *v.* SNOWDON, HUBBARD & CO., [1899] 1 Q. B. 593; 68 L. J. Q. B. 363; 80 L. T. 256; 47 W. R. 322; 15 T. L. R. 244; 43 Sol. Jo. 313; 1 W. C. C. 114, C. A.

Annotation:—**Refd.** Wilcox *v.* Wallis Crown Cork & Syphon Co. (1914), 58 Sol. Jo. 381.

4045. —— —— ——.]—Resps., employers, proved applt.'s want of means to pay costs, in the event of the appeal failing. They applied for security for costs:—*Held:* resp. to the appeal is entitled to an order for security on satisfying the ct. that applt. would not be in a position to pay the costs, if his appeal should be dismissed.—BRINE *v.* MAY, ELLIS, GRACE & CO. (1912), 6 B. W. C. C. 460, C. A.

4046. —— Unable to proceed in formâ pauperis.]—Security for the costs of appeal may be ordered where applt., though poor, is not able to make the affidavit required for appeals *in formâ pauperis.*—REES *v.* RICHARDS (1899), 1 W. C. C. 118, C. A.

4047. —— —— Poverty due to accident.]—Security for costs will not be ordered where the poverty of applt. is due to the accident, & the affidavit required for leave to appeal *in formâ pauperis* cannot be made.—SKEGGS *v.* KEEN (1899), 1 W. C. C. 119.

4048. Stay of execution granted pending appeal.]—Where an award was made in favour of the employers, but execution stayed pending an appeal, the ct. refused to order security for costs.—HUBBALL *v.* EVERITT & SONS, LTD. (1900), 16 T. L. R. 168; 5 W. C. C. 145, n., C. A.

Annotation:—**Distd.** Shea *v.* Drolenvaux (1903), 88 L. T. 679.

4049. ——.]—An order for security for the costs of an appeal under Workmen's Compensation Act, 1897 (c. 37), will be made in a proper case even if the county ct. judge has stayed execution with a view to an appeal.—SHEA *v.* DROLENVAUX (1903), 88 L. T. 679; 19 T. L. R. 473; 5 W. C. C. 141, C. A.

4050. Appellant's case supported by trade union—Proceedings conducted by union.]—The fact that a case is being run by a trade union does not affect the question of security for costs of appeal.—MCLAUGHLIN *v.* CLAYTON (1899), 1 W. C. C. 116, C. A.

4051. —— Costs of arbitration paid by union.]—Security for costs of appeal may be ordered, although the costs of the arbn. have been paid

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PART XIV. SECT. 24, SUB-SECT. 1.—P.

o. Security for costs.]—The object of r. 34 under Workmen's Compensation Act (Rules of 1904) is to make the proceedings under the Act subject to the same rules as an action; & where appct. resides out of the jurisdiction, resp. is entitled to security for costs.—CIZOWSKI *v.* WEST KOOTENAY POWER & LIGHT CO. (1906), 12 B. C. R. 63; 3 W. L. R. 515.—**CAN.**

p. ——.]—An application for security for costs in an arbitration under Workmen's Compensation Act should be made to the arbitrator & not to a judge in chambers, & should be made promptly.—KRZUS *v.* CROW'S NEST PASS COAL CO., LTD. (1909), 14 B. C. R. 385.—**CAN.**

q. Workmen's Compensation Board—Position as to costs.]—The Workmen's Compensation Board is a servant or agent of the Crown within Crown Costs Act, s. 2, so that the ct. cannot give costs for or against it—ROSEBERRY SURPRISE MINING CO., LTD. *v.* WORKMEN'S COMPENSATION BOARD, CUNNINGHAM *v.* WORKMEN'S COMPENSATION BOARD, STANDARD SILVER LEAD MINING CO., LTD. *v.* WORKMEN'S COMPENSATION BOARD, (B. C.), [1920] 2 W. W. R. 676; 51 D. L. R. 470.—**CAN.**

r. Irregular procedure—No power to award costs.]—GLASGOW IRON & STEEL CO., LTD. *v.* SNEDDON (1925), 18 B. W. C. C. 638.—**SCOT.**

PART XIV. SECT. 24, SUB-SECT. 2.—A. (a).

t. Whether security must be given.]—It is contrary to the policy of Workmen's Compensation Act, 1906, to require security from the workman for the costs of his appeal to the Ct. of Appeal.—HUTCHINSON *v.* NEW NORTHERN SPINNING & WEAVING CO., LTD. (1914), 7 B. W. C. C. 971.—**IR.**

Sect. 24.—*Costs: Sub-sect.* 2, *A.* (*b*), *& B. Sect.* 25: *Sub-sect.* 1, *A.*]

by a trades union.—HADDOCK *v.* HUMPHREYS (1899), 1 W. C. C. 117, C. A.

B. Costs of Hearing.

See R. S. C., Ord. 58, r. 4.

4052. Unreasonable appeal—By workman—No order.]—A boatman was seriously injured in his right hand. He signed a receipt for compensation for two months, based on average earnings of 30*s.* a week. The employers then stopped compensation on the ground that the man could do his full work. Proceedings were commenced, & the employers paid into ct. £5 5*s.*, with a denial of liability. The county ct. judge found that the man was entitled to £5 compensation, but was otherwise fit for his work. After signing his award, he made a note to the effect that, by inadvertence, he had not included a declaration of liability which he should have given without costs. The employers consented to this declaration, subject to their costs being paid after the time of payment into ct. The workman appealed for a declaration of liability, which was said to have been refused by the county ct. judge, & also attempted to appeal on the grounds that the average weekly earnings had been wrongfully assessed:—*Held:* the appeal was unreasonable &, as to the average weekly earnings, unfounded. The award should be altered to include a declaration of liability, with no order as to costs.—WEST *v.* FELLOWES, MORTON & CLAYTON, LTD. (1916), 10 B. W. C. C. 120, C. A.

4053. —— Alteration agreed to below.]—LOCK *v.* CHATHAM EDUCATION COMMITTEE, No. 3407, *ante*.

4054. Error by judge in court below—Want of jurisdiction.]—WILLIAMS *v.* MINISTER OF MUNITIONS, No. 3585, *ante*.

4055. —— Appeal useful to both sides—No order.]—SALSBURY *v.* GENERAL ELECTRIC CO. (1923), 16 B. W. C. C. 199, C. A.

4056. Case remitted—Wrong exercise of discretion as to costs below—Appeal allowed with costs.]—EVANS *v.* GWAUNCAEGURWEN COLLIERY CO., LTD., No. 4004, *ante*.

4057. —— —— ——.]—WILLIAMS *v.* CAEPONTHREN COLLIERY CO., LTD., No. 3986, *ante*.

4058. —— For new trial—All costs to be costs in second trial.]—TAYLOR *v.* WARD & CO., WORCESTER, LTD., No. 3934, *ante*.

4059. Against whom order may be made—Approved society proceeding in workman's name—National Insurance Act, 1911 (c. 55), s. 11 (2).]—CLAPP *v.* CARTER, No. 2941, *ante*.

4060. Withdrawal of appeal—Unnecessary opposition.]—STEPHENS *v.* VICKERS, LTD., No. 3965, *ante*.

4061. Refusal to withdraw appeal—& vary county court judge's order by consent.]—On an application to review a weekly payment a prospective award was made terminating the payments at a future date, but this was a slip, as such an award was bad. An appeal was lodged, but the solr. for resps. wrote that it was not necessary, & suggested that to save the costs, the appeal should be withdrawn & the matter settled by agreement varying the award of the county ct. judge; applt., however, was advised the only method of varying the award was by a judgment or order of the Ct. of Appeal. On the hearing of the appeal it was claimed that the appeal should be allowed but with no costs:—*Held:* the appeal must be allowed with the usual consequences, as, having been lodged, the more reasonable course was to proceed with it.—DEAKIN *v.* WARD (1926), 19 B. W. C. C. 130, C. A.

4062. Jurisdiction to vary order as to costs—Judgment specifically dealing with costs.]—The Ct. of Appeal cannot, after judgment has been given specifically dealing with costs, alter their judgment by ordering that the costs of the appeal shall be costs in an arbn. in the county ct. under Workmen's Compensation Act, 1906 (c. 58), so as to enable the appeal costs to be set off against costs in the arbn.—BARNETT *v.* PORT OF LONDON AUTHORITY (No. 2) (1913), 82 L. J. K. B. 918; 108 L. T. 944; 57 Sol. Jo. 577; 6 B. W. C. C. 466, C. A.

SECT. 25.—ALTERNATIVE REMEDIES.

SUB-SECT. 1.—AGAINST EMPLOYER.

A. In General.

See Workmen's Compensation Act, 1925 (c. 84), s. 29.

4063. Workman cannot receive double recompense—Compensation & wages.]—A workman engaged at a weekly salary, who has claimed & received compensation under Workmen's Compensation Act, 1897 (c. 37), in respect of partial incapacity for work resulting from injury received by him during the course of his employment, is not entitled to claim his wages during the time for which he has been incapacitated.—ELLIOTT *v.* LIGGENS, [1902] 2 K. B. 84; 71 L. J. K. B. 483; 87 L. T. 29; 50 W. R. 524; 18 T. L. R. 514; 4 W. C. C. 11, D. C.

Annotation:—**Refd.** Warburton *v.* Co-op. Wholesale Soc., [1917] 1 K. B. 663.

4064. —— Customary allowance of coal during incapacity—Not in nature of compensation.]—Pltf. was employed by defts. as a miner in their colliery. There was a custom in collieries in the district that a miner was entitled, in addition to his wages, to a load of allowance coal every twenty-four turns while in work, & a load of allowance coal every five weeks during incapacity caused by accident. Pltf., having been incapacitated for work by an accident arising out of & in the course of his employment, was awarded a weekly payment during incapacity as compensation under Workmen's Compensation Act, 1906 (c. 58). In an action to recover the allowance coal for the period since the date of the accident or its value:—*Held:* the right to the allowance coal under the

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PART XIV. SECT. 24, SUB-SECT. 2.—B.

a. *Special case.*]—Where a special case is stated by an arbitrator under Workmen's Compensation Act, 1902, & determined by a judge of the Supreme Ct., that judge has power, under r. 42, to dispose of the costs of the special case; & these costs were allowed to appel.—*Re* DARNLEY & CANADIAN PACIFIC RY. CO. (1910), 15 W. L. R. 179; 12 W. L. R. 67.—**CAN.**

PART XIV. SECT. 25, SUB-SECT. 1.—A.

b. *Workman cannot receive double recompense.*]—MCCOLL *v.* CANADIAN PACIFIC RY. CO. (1922), 39 T. L. R. 19, P. C.—**CAN.**

c. ——.]—A workman sustained injury by accident arising out of & in the course of his employment, & was paid compensation by his employers in respect thereof for three years, when he died. His father thereafter, averring that the death was the result of the injury, brought an action of damages for the loss caused to himself by the death of his son against a person other than the employer, by whose fault, he alleged, the accident had been caused:—*Held:* the action was incompetent, the workman having elected to accept compensation from his employers.—GRAY *v.* NORTH BRITISH RY. CO. (1914), 8 B. W. C. C. 373.—**SCOT.**

d. *Election—What amounts to.*]—ROGERS *v.* SCHULTZ (1921), 21 S. R.

custom formed one of the terms of pltf.'s contract of employment & was not in the nature of compensation for the injury, & therefore he was not debarred by Workmen's Compensation Act, 1906 (c. 58), s. 1 (2) (*b*), from maintaining the action.—SIMMONDS *v.* STOURBRIDGE GLAZED BRICK & FIRE CLAY CO., LTD., [1910] 2 K. B. 269; 79 L. J. K. B. 997; 102 L. T. 732; 26 T. L. R. 430, D. C.

4065. Election of remedy—What amounts to election—Acceptance of scheme in substitution for statutory provisions.]—A workman who had joined a scheme duly certified by the Registrar of Friendly Societies under Workmen's Compensation Act, 1897 (c. 37), s. 3 (1), received fatal injuries, alleged to have been caused by the personal negligence of his employers, or of some person for whose act or default his employers were responsible. After the workman's death his legal personal representatives brought an action to recover damages under Employers' Liability Act, 1880 (c. 42):—*Held:* the contract by the workman that the provisions of the scheme should be substituted for the provisions of Workmen's Compensation Act, 1897 (c. 37), was an exercise of the option given to him by Workmen's Compensation Act, 1897 (c. 37), s. 1 (2) (*b*), to claim compensation under Workmen's Compensation Act, 1897 (c. 37), & was a bar to the claim to the recovery by his representatives of damages under Employers' Liability Act, 1880 (c. 42).—TAYLOR *v.* HAMSTEAD COLLIERY CO., [1904] 1 K. B. 838; 73 L. J. K. B. 469; 90 L. T. 363; 68 J. P. 300; 52 W. R. 417; 20 T. L. R. 338; 48 Sol. Jo. 328; 6 W. C. C. 34, C. A.

Annotations:—**Apld.** Cribb *v.* Kynoch (No. 2), [1908] 2 K. B. 551. **Refd.** Howell *v.* Bradford (1911), 104 L. T. 433; Harrison *v.* Wythemoor Colliery Co., [1922] 2 K. B. 674; Bennett *v.* Whitehead, [1926] 2 K. B. 380.

4066. —— —— Claim for compensation withdrawn — Subsequent action for damages.] — A workman injured by accident in the course of his employment claimed compensation from his employer under Workmen's Compensation Act, 1897 (c. 37), & filed a request for arbn. The employer having filed his answer, the workman gave notice withdrawing his claim for compensation, & subsequently brought an action for damages under Employers' Liability Act, 1880 (c. 42), in respect of the same accident:—*Held:* the claim made under Workmen's Compensation Act, 1897 (c. 37), was not a bar to the subsequent action for damages under Employers' Liability Act, 1880 (c. 42).—ROUSE *v.* DIXON, [1904] 2 K. B. 628; 73 L. J. K. B. 662; 91 L. T. 436; 68 J. P. 406; 53 W. R. 237; 20 T. L. R. 553; 48 Sol. Jo. 508; 6 W. C. C. 44, D. C.

Annotations:—**Consd.** Cribb *v.* Kynoch (No. 2), [1908] 2 K. B. 551. **N.F.** Harrison *v.* Wythemoor Colliery Co., [1922] 2 K. B. 674. **Consd.** Bennett *v.* Whitehead, [1926] 2 K. B. 380. **Refd.** Codling *v.* Mowlem, [1914] 2 K. B. 61.

4067. —— —— Consent to compensation award —By widow on behalf of children.]—Pltf. who was the widow of a workman killed by accident arising out of & in the course of his employment, brought an action under Fatal Accidents Act, 1846 (c. 93), against defts., who had been his employers, charging them with negligence causing her husband's death. The statement of claim alleged that the deceased workman left as dependants pltf. & six children; that all the dependants except pltf. had claimed under Workmen's Compensation Act, 1906 (c. 58), against defts., & that an award had been made apportioning the total sum of £300 equally between the children. Defts. by their defence, after denying the alleged negligence, pleaded that pltf. had by letters from her solr. made a claim on them on behalf of herself & her children for compensation in respect of the death of her husband; that defts. having by letter admitted liability under Workmen's Compensation Act, 1906 (c. 58), had paid into the county ct. the maximum amount payable under the Act, namely, £300; that the children by their next friend had applied to the county ct. for an order for the investment & allotment of the sum of £300 between the dependants, & that the county ct. judge by his award had allotted £50 to each of the children & directed that £45 out of each sum of £50 should be invested, & out of the residue the sum of 18*s.* a week together with the interest on the invested money should be paid to pltf. for the benefit of the children; that pltf. throughout was cognisant of the facts & approved of & concurred in the application & attended the hearing & thereat renounced her rights & interest in the sum of £300 in favour of her children, & that the award was made with her consent. The defence stated that defts. would therefore contend that this action was barred & was not maintainable by reason of Workmen's Compensation Act, 1906 (c. 58), s. 1 (2) (*b*). It appeared that in the application for allotment the next friend named pltf. as a dependant, but applied for a division among the children only & expressly stated that pltf. did not claim under Workmen's Compensation Act, 1906 (c. 58). An order having been made in chambers for the decision in the first instance of the point of law raised on the pleadings:—*Held:* on the facts as stated pltf. had made herself a party to the claim for compensation under Workmen's Compensation Act, 1906 (c. 58), & was therefore precluded by Workmen's Compensation Act, 1906 (c. 58), s. 1 (2) (*b*), from claiming damages against the defts. independently of the Act.—CODLING *v.* MOWLEM (J.) & CO., LTD., [1914] 3 K. B. 1055; 83 L. J. K. B. 1727; 111 L. T. 1086; 30 T. L. R. 677; 58 Sol. Jo. 783; 7 B. W. C. C. 786, C. A.

Annotations:—**Refd.** Harrison *v.* Wythemoor Colliery Co., [1922] 2 K. B. 674; Bennett *v.* Whitehead, [1926] 2 K. B. 380. **Mentd** Anderson *v.* Equitable Life Assce. Soc. of United States (1926), 134 L. T. 557.

N. S. W. 731; 38 N. S. W. W. N. 229. —**AUS.**

e. —— ——.]—Where a workman has sustained an injury arising out of & in the course of his employment, & has made an agreement with his employer to accept weekly payments of £3, being compensation as specified in the Workmen's Compensation Acts, such workman has exercised the option given him by Workmen's Compensation Act, 1916, s. 5.—BARKER *v.* STONEHAM & WILSON, LTD. (1922), 22 S. R. N. S. W. 512; 39 N. S. W. W. N. 183.—**AUS.**

f. —— —— *Claim for damages erroneously disallowed.*]—KLUKAS *v.* THOMPSON (1915), 31 W. L. R. 438; 8 W. W. R. 778.—**CAN.**

g. —— ——.]—BOWLEY *v.* BOOTH & CO., LTD., [1918] N. Z. L. R. 77.—**N.Z.**

h. —— —— ——.]—LITTLE *v.* MACLELLAN (1900), 2 F. (Ct. of Sess.) 387.—**SCOT.**

k. —— ——.] — A claim for compensation for accidental injuries brought under Workmen's Compensation Act, 1897, was refused by the arbitrator on the ground that appct. had been guilty of serious & wilful misconduct; thereafter he brought an action at common law against his employers for damages for personal injuries sustained in the accident:—*Held:* that having elected to claim compensation under the Act, & having obtained a final judgment upon that claim, he was barred from suing an action of damages at common law.—BURTON *v.* CHAPEL COAL CO., LTD., [1909] S. C. 430; 46 Sc. L. R. 375; [1909] 1 S. L. T. 111; 2 B. W. C. C. 120.—**SCOT.**

l. —— ——.] — *Held:* the intimation of a claim for compensation did not constitute a final election by the workman as between his rights under the Act, & independently of it.—KING *v.* EDINBURGH COLLIERIES CO., [1924] S. C. 167.—**SCOT.**

m. —— ——.] — Where a party has the choice of one of two remedies & to the knowledge of the persons concerned, does an act which would be justifiable, if he had elected one remedy, & would not be justifiable, if he had elected the other, the fact of his having done such an unequivocal act is deemed to be an election.—

Sect. 25.— Alternative remedies: Sub-sect. 1, A. & B.]

4068. —— —— Claim for damages withdrawn — Subsequent claim for compensation.]— A workman employed by a firm of builders, who were doing repairs to certain business premises under a contract with the owners, was injured by an accident arising out of & in the course of his employment. He brought an action in the county ct. against his employers in which he made three alternative claims: (*a*) for damages under Employers' Liability Act, 1880; (*b*) for damages for negligence at common law; & (*c*) for compensation under Workmen's Compensation Acts. He discontinued that action, & then commenced fresh proceedings against his employers for compensation only under Workmen's Compensation Acts:— *Held:* Workmen's Compensation Act, 1906 (c. 58), s. 1 (2) (*b*), did not debar him from proceeding with his claim for compensation.—BENNETT *v.* WHITEHEAD (L. & W.), LTD., [1926] 2 K. B. 380; 135 L. T. 329; 42 T. L. R. 598; 19 B. W. C. C. 133, C. A.

4069. —— On behalf of infant—Election not for infant's benefit—Set aside.]—An option to accept compensation under Workmen's Compensation Act, 1897 (c. 37), instead of damages, exercised on behalf of an infant, will be set aside if it be not for his benefit.—FORD *v.* WREN & DUNHAM (1903), 5 W. C. C. 48.

4070. —— —— —— Subsequent alternative proceedings not barred.]—A workman who was an infant was injured through the negligence of his employers. He claimed compensation under Workmen's Compensation Act, 1897 (c. 37), & the employers agreed to pay & he agreed to accept the maximum amount payable under the Act during his incapacity for work. The workman subsequently brought an action, by his next friend, to recover damages for negligence:—*Held:* the agreement to accept compensation was not for the infant workman's benefit, & he was not bound by it, & therefore, he was not debarred from bringing the action for negligence. Workmen's Compensation Act, 1897 (c. 37), by including apprentice in the definition of "workman" in sect. 7 (2), does not alter the general law applicable to contracts entered into by infants.—STEPHENS *v.* DUDBRIDGE IRONWORKS CO., [1904] 2 K. B. 225; 73 L. J. K. B. 739; 90 L. T. 838; 68 J. P. 437; 52 W. R. 644; 20 T. L. R. 492; 48 Sol. Jo. 474; 6 W. C. C. 48, C. A.

Annotation:—**Distd.** Cribb *v.* Kynoch (No. 2), [1908] 2 K. B. 551.

Compare No. 4071, *post.*

4071. —— Option binding only in case of success.]—The "option" given to a workman by Workmen's Compensation Act, 1897 (c. 37), s. 1 (2) (*b*), either to claim compensation under the Act or take other proceedings cannot be confined to an option binding only in the case of success. The procedure prescribed by Workmen's Compensation Act, 1897 (c. 37), s. 1 (4), must be strictly followed, & that sub-sect. has no application except when proceedings based on the common law liability of the employer have been commenced within six months from the occurrence of the accident. A workman cannot give the notice required by sect. 2 (1), as a foundation for future proceedings under the Act, in the event of a common law action commenced after the expiration of six months from the occurrence of the accident being unsuccessful.

Pltf., a girl under age, who had been injured by an accident arising out of & in the course of her employment, gave notice of the accident & of a claim for compensation within the prescribed time, but took no further proceedings under Workmen's Compensation Act, 1897 (c. 37); thirteen months after the accident, an unsuccessful action to recover damages against the employers was brought. After the dismissal of this action, an application was made to the county ct. judge, pursuant to the aforesaid notice, for compensation under Workmen's Compensation Acts:—*Held:* on the construction of sect. 1 (2) (*b*) & (4), read together, this application for compensation could not now be entertained.—CRIBB *v.* KYNOCH, LTD. (No. 2), [1908] 2 K. B. 551; 77 L. J. K. B. 1001; 99 L. T. 216; 24 T. L. R. 736; 52 Sol. Jo. 581; 1 B. W. C. C. 43, C. A.

Annotations:—**Followed.** Harrison *v.* Wythemoor Colliery Co., [1922] 2 K. B. 674. **Consd.** Bennett *v.* Whitehead, [1926] 2 K. B. 380. **Refd.** Page *v.* Burtwell (1908), 77 L. J. K. B. 1060; Codling *v.* Mowlem, [1914] 2 K. B. 61; King *v.* Edinburgh Collieries Co. (1923), 17 B. W. C. C. 324.

B. Where Action for Damages Unsuccessful.

See Workmen's Compensation Act, 1925 (c. 84), s. 29.

4072. Right to assessment of compensation—Application for assessment—To be made to trial judge — Subsequent arbitration proceedings.] — Where a workman, who has been injured by an accident arising out of & in the course of his employment, brings an unsuccessful action to recover damages against his employer, & is desirous of having compensation for his injury assessed under Workmen's Compensation Act, 1897 (c. 37), he must follow the procedure prescribed by sect. 1 (4) of that Act, & must apply then & there to the judge trying the action for an assessment of compensation; he cannot at a subsequent date initiate independent proceedings against his employer by a request for arbitration under that Act.—EDWARDS *v.* GODFREY, [1899]

CHURCHYARD *v.* REDPATH, BROWN & CO., LTD., [1911] W. L. D. 125.—**S. AF.**

n. —— ——.] — GWILLIAM *v.* DURBAN CORPN (1926), 47 N. L. R. 153.—**S. AF.**

o. —— *Binding only in case of success.*]—Where an injured workman has the right in respect of an injury sustained by him either to bring an action at law or a claim for compensation under Workmen's Compensation Act, 1916, against his employer the only bar to the latter remedy arises if he has recovered a judgment against his employer at law in respect of the injury.—ERICKSON *v.* AUSTRALIAN STEAMSHIPS, LTD. (1919), 19 N. S. W. L. R. 132; 36 N. S. W. W. N. 54.—**AUS.**

p. —— ——.] — KING *v.* KING, [1920] V. L. R. 443.—**AUS.**

q. —— ——.] — When a workman has proceeded to have compensation for his injuries assessed under Workmen's Compensation Act, 1897, & is defeated by reason of a ruling that his case does not come within the provisions of the Act, he is not thereby prevented from instituting subsequent proceedings independently of the Act, to enforce any previously existing remedy to which he may have been entitled.—BECKLEY *v.* SCOTT & CO., [1902] 2 I. R. 504.—**IR.**

r. —— *Right to.*] — Pltf. who was injured upon the business premises of his employer on Jan. 23, 1915, which was after the coming into force of Workmen's Compensation Act, brought an action against his employer to recover damages for his injuries:—*Held:* he had a right of action, his remedy not being confined to an application to the Workmen's Compensation Board under the Act.—GARMENT *v.* CHARLES AUSTIN CO., LTD. (1915), 9 O. W. N. 47; 34 O. L. R. 417.—**CAN.**

t. *Statement of claim — Must not combine claim for damages & compensation.*]—Where a pltf. claiming under Workmen's Compensation Act sought to recover damages for injuries sustained by reason of defect in the condition of the tackle:—*Held:* the statement of claim was embarrassing as attempting to combine a claim for damages for negligence under Employers' Liability Act with a claim for compensation under the Workmen's Compensation Act.—BUTTEN *v.* ANGLO-NFLD DEV'MENT CO. (1911), 9 Nfld. L. R. 487.—**NFLD.**

2 Q. B. 333; 68 L. J. Q. B. 666; 80 L. T. 672; 47 W. R. 551; 15 T. L. R. 365; 43 Sol. Jo. 491; 1 W. C. C. 32, C. A.

Annotations:—**Consd.** Isaacson *v.* New Grand (Clapham Junction), [1903] 1 K. B. 539; Rouse *v.* Dixon, [1904] 2 K. B. 628; Taylor *v.* Hamstead Colliery Co., [1904] 1 K. B. 838. **Foll.** Neale *v.* Electric & Ordnance Accessories Co., [1906] 2 K. B. 558. **Consd.** Cribb *v.* Kynoch (No. 2), [1908] 2 K. B. 551. **Foll.** Harrison *v.* Wythemoor Colliery Co., [1922] 2 K. B. 674. **Consd.** Bennett *v.* Whitehead, [1926] 2 K. B. 380. **Refd.** Cattermole *v.* Atlantic Transport Co., [1902] 1 K. B. 204; Codling *v.* Mowlem, [1914] 2 K. B. 61.

4073. —— —— —— —— ——.]— CRIBB *v.* KYNOCH, LTD. (No. 2), No. 4071, *ante*.

4074. —— —— ——.]—Where, upon the dismissal of an action brought by a workman under age, by his next friend, against his employers to recover damages in respect of personal injuries occasioned to pltf. by an accident arising out of & in the course of his employment, an application was made to the judge who tried the action to assess compensation to pltf. under Workmen's Compensation Act, 1897 (c. 37), s. 1 (4), & the judge accordingly awarded such compensation:—*Held:* pltf. was estopped by the election to take such compensation & the award thereupon made from proceeding further with the action, & therefore a subsequent application by him for judgment or a new trial in the action could not be entertained.—NEALE *v.* ELECTRIC & ORDNANCE ACCESSORIES CO., LTD., [1906] 2 K. B. 558; 75 L. J. K. B. 974; 95 L. T. 592; 22 T. L. R. 732; 8 W. C. C. 6, C. A.

Annotations:—**Consd.** Cribb *v.* Kynoch (No. 2), [1908] 2 K. B. 551. **Foll.** Harrison *v.* Wythemoor Colliery Co., [1922] 2 K. B. 674. **Consd.** Bennett *v.* Whitehead, [1926] 2 K. B. 380. **Refd.** Codling *v.* Mowlem, [1914] 2 K. B. 61.

4075. —— —— **Whether appeal from dismissal of action barred.**]—Where upon the dismissal of an action under Employers' Liability Act, 1880 (c. 42), an application is made under Workmen's Compensation Act, 1897 (c. 37), s. 1 (4), for an assessment of compensation under that Act, the making of that application does not amount to the exercise of an option on the part of pltf. so as to estop him from appealing against the dismissal of the action under Employers' Liability Act, 1880 (c. 42), & pltf. is entitled to appeal against both decisions.—ISAACSON *v.* NEW GRAND (CLAPHAM JUNCTION), LTD., [1903] 1 K. B. 539; 72 L. J. K. B. 227; 88 L. T. 291; 19 T. L. R. 150; 47 Sol. Jo. 222; 5 W. C. C. 35; 67 J. P. Jo. 40, D. C.

Annotations:—**Consd.** Neale *v.* Electric & Ordnance Accessories Co., [1906] 2 K. B. 558. **N.F.** Harrison *v.* Wythemoor Colliery Co., [1922] 2 K. B. 674. **Consd.** Bennett *v.* Whitehead, [1926] 2 K. B. 380. **Refd.** Codling *v.* Mowlem, [1914] 2 K. B. 61.

4076. —— —— ——.]—Where a workman takes common law or statutory proceedings by way of action against his employer, he elects that remedy & can only obtain compensation under Workmen's Compensation Act, 1906 (c. 58), by following the exact procedure prescribed in sect. 1 (4) of that Act. The application must be made to a ct. of first instance &, once made, further proceedings in the action are barred; certainly if the application results in a certificate, the fact that it purports to be asked for & made "without prejudice" being immaterial. The case of appct. succeeding in the first ct. & failing on appeal is not provided for by the Act:—*Held:* (1) pltf. was barred by her election to take the compensation & by the certificate from appealing in the action, a certificate awarding compensation was final & the judge had no jurisdiction to grant it "without prejudice" to pltf.'s right of appeal; (2) the words "determined in such action" in Workmen's Compensation Act, 1906 (c. 58), s. 1 (4), meant determined in the ct. of first instance in which the action was tried.—HARRISON *v.* WYTHEMOOR COLLIERY CO., [1922] 2 K. B. 674; 91 L. J. K. B. 832; 127 L. T. 629; 38 T. L. R. 694; 66 Sol. Jo. 632; 15 B. W. C. C. 98, C. A.

Annotation:—*As to* (1) **Consd.** Bennett *v.* Whitehead, [1926] 2 K. B. 380.

4077. —— **Deduction of costs of unsuccessful action—Appeal to Court of Appeal.**]—WILLIAMS *v.* ARMY & NAVY AUXILIARY CO-OPERATIVE SOCIETY, LTD., No. 3861, *ante*.

4078. —— ——.]—COHEN *v.* SEABROOK BROTHERS, No. 4018, *ante*.

4079. —— **Certificate of award—From what court obtainable.**]—HARRISON *v.* WYTHEMOOR COLLIERY CO., No. 4076, *ante*.

4080. —— —— **Certificate "without prejudice."**]—HARRISON *v.* WYTHEMOOR COLLIERY CO., No. 4076, *ante*.

4081. —— **Unsuccessful proceedings brought more than six months after accident.**]—CRIBB *v.* KYNOCH, LTD. (No. 2), No. 4071, *ante*.

4082. —— **Action brought under Fatal Accidents Act, 1846 (c. 93).**]—(1) By Workmen's Compensation Act, 1906 (c. 58), s. 1 (1), "If within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, & it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the ct. in which the action is tried shall, if pltf. so choose, proceed to access such compensation":—*Held:* an action under Fatal Accidents Act, 1846 (c. 93), was an action "for injury caused by any accident" within Workmen's Compensation Act, 1906 (c. 58), s. 1 (4).

(2) On Jan. 7, 1913, a workman met with an

PART XIV. SECT. 25, SUB-SECT. 1.—B.

4074 i. *Right to assessment of compensation—Application for assessment—To be made to trial judge.*]—QUINN *v.* BROWN (JOHN) & CO., LTD. (1906), 8 F. (Ct. of Sess.) 855.—**SCOT.**

a. —— —— —— *At time of trial.*]—BAIRD *v.* HIGGINBOTHAM & CO. (1901), 3 F. (Ct. of Sess.) 673.—**SCOT.**

b. —— —— —— —— .]—M'GOWAN *v.* SMITH, [1907] S. C. 548.—**SCOT.**

c. —— —— —— ——.]—PERTH GENERAL STATION COMMITTEE *v.* STEWART (1924), 17 B. W. C. C. 393.—**SCOT.**

4075 i. —— —— *Whether appeal from dismissal of action barred.*]—If on dismissal of an action brought by an employee against his employer for damages for injury alleged to have been sustained through the employer's negligence, the employee applies to have assessed to him damages under Workmen's Compensation Act & such damages are assessed & judgment entered therefor with costs, the employee has thereby elected to take such compensation & is estopped from appealing against the dismissal of his original action.—DALRYMPLE *v.* CANADIAN PACIFIC RY. CO. (Sask.), [1920] 3 W. W. R. 820.—**CAN.**

4075 ii. —— —— ——.]—O'DONNELL *v.* CANADIAN NATIONAL RYS. (Sask.) (1922), 63 D. L. R. 719.—**CAN.**

4075 iii. —— —— ——.]—GRIGORI *v.* CANADIAN NATIONAL RYS. (Alta.), [1923] 1 D. L. R. 606; [1923] 1 W. W. R. 190.—**CAN.**

d. —— *Application must be made by plaintiff.*]—*Held:* the privilege of having compensation assessed given by Workmen's Compensation Act, 1906, is a privilege personal to the pursuer in the action for damages, & other persons, who have not claimed compensation within six months, are not entitled to be sisted as parties to the compensation proceedings.—M'GINTY *v.* KYLE, [1911] S. C. 589.—**SCOT.**

e. —— *After appeal—Action unsuccessful—Appeal allowed.*]—*Held:* the effect of the reversal of the original judgment was to place the parties back in the position they would have been in at the trial if the trial judge had given the judgment which the Ct. of Appeal held should have been given, when pltfs. would be entitled to ask for an assessment under the Act.—MCCORMICK *v.* KELLIHER LUMBER CO.

Sect. 25.—Alternative remedies: Sub-sect. 1, B.; sub-sect. 2, A.]

accident through a door falling on his head & causing him to bite his tongue. He immediately reported the matter verbally to the foreman of the works, but stated that he was not severely injured. The accident was also reported to one of the employers who happened to be present at the works at the time. On Jan. 11, the workman was attended by his own doctor, who found that he was suffering from an open discharging wound in the tongue. The doctor continued to attend the workman from time to time. The difficulty of taking food increased, but the workman continued to work until July 14. On July 22, he died of cancer in the tongue resulting from the original injury. No notice of the accident beyond that above stated was given by the workman to the employers. His widow subsequently brought an action against the employers under Fatal Accidents Act, 1846 (c. 93), for the benefit of herself & her children. At the trial the jury returned a verdict for the employers on the ground that the deceased man had been guilty of contributory negligence. Application was thereupon made to the judge to assess compensation under Workmen's Compensation Act, 1906 (c. 58), s. 1 (4):—*Held:* no "reasonable cause" within Workmen's Compensation Act, 1906 (c. 58), s. 2, had been shown for the failure of the workman to give notice of the accident to his employers, & the widow was therefore not entitled to compensation under the Act.

Semble: the only two grounds which the ct. will accept as evidencing a "reasonable cause" for failure to give the notice of the accident to the employer as required by Workmen's Compensation Act, 1906 (c. 58), s. 2, are either that the injury from the accident was latent or that the accident was of so trivial a nature that it would be unreasonable to expect the workman to give notice of it.—POTTER *v.* WELCH (JOHN) & SONS, LTD., [1914] 3 K. B. 1020; 83 L. J. K. B. 1852; 112 L. T. 7; 30 T. L. R. 644; 7 B. W. C. C. 738, C. A.

SUB-SECT. 2.—AGAINST EMPLOYER AND THIRD PARTY.

A. In General.

See Workmen's Compensation Act, 1925 (c. 84), s. 30.

4083. Workman cannot recover double compensation.]—A workman, having been injured in the course of his employment by the negligence of a third person, obtained an award under Workmen's Compensation Act, 1897 (c. 37), against his employer. He then brought an action against the third person claiming damages for pain & suffering, & the expenses he had been put to, & the balance of his wages:—*Held:* the action would not lie by virtue of Workmen's Compensation Act, 1897 (c. 37), s. 6.—TONG *v.* GREAT NORTHERN RY. Co. (1902), 86 L. T. 802; 66 J. P. 677; 18 T. L. R. 566; 4 W. C. C. 40.

4084. ——.]—VIVASH *v.* GROUNDS & NEWTON (1911), 46 L. Jo. 556.

4085. —— Payment of compensation—Award of damages in respect of capacity other than workman.]—By Workmen's Compensation Act, 1906 (c. 58), s. 6, "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—The workman may take proceedings both against that person to recover damages & against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages & compensation."

A workman employed by a colliery co. also carried on the occupation of farming a small farm. Whilst acting in his employment by the colliery co. he was injured by the negligence of the servants of defts., L. & N. W. Ry. Co., in shunting a train. He made a claim for compensation from the colliery co. & received from it thirty-four weekly payments knowing & appreciating that he was receiving compensation under Workmen's Compensation Act, 1906 (c. 37). He subsequently brought an action against defts. to recover damages for the injuries caused by the negligence of defts.' servants. At the trial the jury gave a verdict for pltf. for £275 as damages, of which amount they found that £100 was in respect of the damages which he had suffered as a farmer. For the purposes of the case it was assumed that his earnings as a farmer could not be included in his claim for compensation from his employers:—*Held:* (1) in the circumstances pltf. had recovered compensation from his employers under Workmen's Compensation Act, 1906 (c. 58); (2) having recovered compensation from his employers he was not entitled to recover the £100 damages from defts.

The word "injury" in Workmen's Compensation Act, 1906 (c. 58), s. 6, means physical injury or hurt, & is not a translation of the juristic term "*injuria.*"—WOODCOCK *v.* LONDON & NORTH WESTERN RY. Co., [1913] 3 K. B. 139; 82 L. J. K. B. 921; 109 L. T. 253; 29 T. L. R. 566; 6 B. W. C. C. 471.

4086. What amounts to election of remedy—"Proceedings"—Notice to employer of accident.]—Pltf., a sawyer, who worked for J. Bros., met with an accident caused by the negligence of a servant in the employment of deft. Having given notice of the accident to his employers, J. Bros., they continued to pay pltf. the same wages as before, & no further steps were taken by him to obtain compensation under Workmen's Compensation Act, 1897 (c. 37). In a common law action against deft. for damages:—*Held:* the action was maintainable, because a mere notice of an accident given under Workmen's Compensation Act, 1897

(1913), 23 W. L. R. 10; 3 W. W. R. 722; 9 D. L. R. 392; 18 B. C. R. 57. —**CAN.**

f. —— —— ——.] — LILJA *v.* GRANBY CONSOLIDATED MINING, ETC. CO. (1915), 8 W. W. R. 690; 9 W. W. R. 662; 21 B. C. R. 384.—**CAN.**

g. —— —— ——.] — SLAVIN *v.* TRAIN & TAYLOR, [1912] S. C. 754; 49 Sc. L. R. 93; [1912] 1 S. L. T. 349; 5 B. W. C. C. 525.—**SCOT.**

h. —— —— *Action & appeal unsuccessful — Further appeal to Supreme Court.*]—Where upon dismissal of the action in the Appellate Div. pltf. appeals to the Supreme Ct. of Canada, he is not required to apply at once for an assessment under the Act & to have his claim for compensation stand over until the judgment on such appeal or be entertained.—GREEN *v.* GRAND TRUNK PACIFIC RY. (Alta.), [1917] 3 W. W. R. 251.—**CAN.**

k. —— —— *Action successful — Appeal allowed.*]—PERRY *v.* CANADIAN PACIFIC RY. Co., [1922] 2 W. W. R. 1116; 67 D. L. R. 446; 15 Sask. L. R. 501.—**CAN**

PART XIV. SECT. 25, SUB-SECT. 2. —A.

4083 i. *Workman cannot recover double compensation.*]—Where a workman applies for & obtains compensation under Workmen's Compensation Act, 1922, he cannot maintain an action for damages for the same injury even though deft. is a person other than his employer.—MCCLENAGHAN *v.* EDMONTON (Alta.), [1926] 1 D. L. R. 1042; [1926] 1 W. W. R. 449.—**CAN.**

4083 ii. ——.] — GRAY *v.* NORTH BRITISH RY. Co., [1915] S. C. 211.—**SCOT.**

(c. 37), s. 2, to the employer was not a "proceeding" against the employer within the meaning of sect. 6 & did not, therefore, preclude pltf. from bringing an action against a person, other than his employer, whose negligence caused the injury. —PERRY *v.* CLEMENTS (1901), 49 W. R. 669; 17 T. L. R. 525; 45 Sol. Jo. 521; 3 W. C. C. 56.

Annotations:—**Refd.** Oliver *v.* Nautilus S.S. Co. (1903), 89 L. T. 318; Thompson *v.* North Eastern Marine Engineering Co., [1903] 1 K. B. 428.

4087. —— —— Only if resulting in compensation paid.]—(1) Where, as between an employer & his workman who has received personal injuries in the course of his employment, there is a payment of money to & a receipt given by the workman under Workmen's Compensation Act, 1897 (c. 37), & the receipt is not qualified either in terms or by a consideration of the surrounding circumstances, that is sufficient to bring the case within the operation of Workmen's Compensation Act, 1897 (c. 37), s. 6, & to put the workman in the position of having exercised the option given him by the sect. (of proceeding, either at law for damages against the person legally liable for the injury, or against the employer for compensation under the Act, but not against both) & so to preclude him from suing the person legally liable. *Semble:* proceedings by a workman against his employer, under Workmen's Compensation Act, 1897 (c. 37), s. 6, for compensation for personal injuries, should not be held to irrevocably bind the workman in the exercise of the option given him by the sect. unless they have resulted in some compensation, as such, being paid to & received by the workman in such a manner as to bind both parties.

(2) A workman who had been injured in the course of his employment, gave notice of his injury to his employer, but without formally claiming compensation. The employer, by an agent, then made a first weekly payment, for which the workman, who was then in hospital, signed a receipt stating that the sum paid had been received "on account of compensation which may be or become due to me under Workmen's Compensation Act, 1897 (c. 37), in respect of the accident which occurred to me on," etc. Upon the employer's agent bringing him the second payment, the workman stipulated that he would only accept that & all future payments "without prejudice." To this the agent assented, whereupon the second & subsequent payments were accepted by the workman, he giving on each occasion a receipt in the same form as before, but not stating in terms that the payment was "without prejudice." Eventually he refused to accept any further payments from his employer, & brought an action for damages against the person legally liable for his injury.—*Held:* in the circumstances, the reservation of "without prejudice" was applicable to the first as well as to all subsequent payments, so that the first did not irrevocably bind pltf. as an exercise of the option given him by Workmen's Compensation Act, 1897 (c. 37), s. 6, & thus preclude him from bringing his action against the other person & recovering damages.—OLIVER *v.* NAUTILUS STEAM SHIPPING CO., [1903] 2 K. B. 639; 72 L. J. K. B. 857; 89 L. T. 318; 52 W. R. 200; 19 T. L. R. 607; 47 Sol. Jo. 671; 5 W. C. C. 65; 9 Asp. M. L. C. 436, C. A.

Annotations:—*As to* (1) **Apld.** Page *v.* Burtwell, [1908] 2 K. B. 758. **Refd.** Howell *v.* Bradford (1911), 104 L. T. 433. *As to* (2) **Consd.** Page *v.* Burtwell, [1908] 2 K. B. 758. **Apld.** Wright *v.* Lindsay (1911), 5 B. W. C. C. 531. **Refd.** Huckle *v.* L. C. C. (1910), 26 T. L. R. 580; Howell *v.* Bradford (1911), 104 L. T. 433. *Generally*, **Refd.** Thompson *v.* North Eastern Marine Engineering Co., [1903] 1 K. B. 428.

4088. —— —— Not confined to legal proceedings actually taken—Claim made & acknowledged.]—(1) "Circumstances creating a legal liability" in Workmen's Compensation Act, 1906 (c. 58), mean, not merely circumstances which in fact create a legal liability, but circumstances which are alleged to create a legal liability, which would be the foundation of an action for negligence.

(2) The meaning of "proceedings" in Workmen's Compensation Act, 1906 (c. 58), s. 6 (1), is not to be confined to legal proceedings actually taken, but is satisfied if a claim is made against some person other than the employer for negligence.

(3) To "recover" compensation does not necessarily mean to recover by means of legal proceedings: it is sufficient if the workman has claimed compensation & received it.

A workman who had been injured in the course of his employment made a claim for compensation against a person other than his employer whom he alleged to be under liability for negligence, & received various payments in satisfaction of his claim without having resort to legal proceedings, though legal liability was not admitted:—*Held:* the workman was precluded by sect. 6 (1), from obtaining compensation from his employer under Workmen's Compensation Act, 1906 (c. 58).—PAGE *v.* BURTWELL, [1908] 2 K. B. 758; 77 L. J. K. B. 1060; 99 L. T. 542; 1 B. W. C. C. 267, C. A.

Annotations: *As to* (3) **Consd.** Howell *v.* Bradford (1911), 104 L. T. 433; Tuckwood *v.* Rotherham Corpn., [1921] 1 K. B. 526.

4089. —— Receipt given for compensation—Receipt "without prejudice."]—OLIVER *v.* NAUTILUS STEAM SHIPPING CO., No. 4087, *ante*.

4090. —— —— Receipt not conclusive evidence.] —Pltf., who met with an accident in the course of his employment, owing, as he alleged, to the negligence of defts.' servants, defts. not being pltf.'s employers, accepted several weekly payments from his employers & gave them receipts therefor in the following terms: "Received under Workmen's Compensation Act, 1906 (c. 58) . . . the

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4088 i. *What amounts to election of remedy—"Proceedings"—Not confined to legal proceedings actually taken—Claim made & acknowledged.*]—An injured workman made a claim for damages at common law against a person other than his employers, &, without having taken legal proceedings, received a payment in settlement of his claim:—*Held:* he had "proceeded" against a third party, & therefore, he had exercised his option & was barred from claiming compensation against his employers.—MULLIGAN *v.* DICK & SON (1903), 6 F. (Ct. of Sess.) 126; 41 Sc. L. R. 77; 11 S. L. T. 433.—**SCOT.**

4089 i. —— *Receipt given for compensation—Receipt "without prejudice."*]—MURRAY *v.* NORTH BRITISH RY. (1904), 6 F. (Ct. of Sess.) 54.—**SCOT.**

4089 ii. —— —— ——.]—A workman was injured by the negligence of third parties. He received compensation from his employers, expressly reserving his rights against third parties. It was understood that, if he succeeded against the third parties, he would repay his employers the compensation he had received from them. He brought an action against the third parties:—*Held:* the workman had not "recovered" compensation, & the action was not barred.—WRIGHT *v.* LINDSAY, [1912] S. C. 189; 49 Sc. L. R. 210; [1911] 2 S. L. T. 444; 5 B. W. C. C. 531.—**SCOT.**

I. —— —— *Receipt conclusive.*]—An injured workman received weekly payments from his employers. His receipt for the first payment bore that it was "compensation for accident sustained." Nearly a year later the receipts began to reserve claims against third parties. In an action at common law against a third party he averred that at the date of the first payment he was a minor, had no legal advice, & was in ignorance of his legal rights. In the event of success he offered to refund the money received from his employers:—*Held:* the action was barred in respect that the

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sum of 12*s.* 8*d.*, being compensation at the rate of one-half my average weekly earnings up to . . . in respect of an accident which occurred to me on or about Apr. 17, 1909." Subsequently pltf. repaid to his employers the amounts he had received from them & then sued defts. for damages. At the trial pltf. stated that he did not understand the nature & terms of the receipts he had signed. The county ct. judge nonsuited pltf. holding as a matter of law that pltf. had recovered compensation within Workmen's Compensation Act, 1906 (c. 58), s. 6, & that his action was therefore barred: —*Held:* the county ct. judge was wrong in nonsuiting pltf. as it was a question for the jury whether pltf. understood the nature & effect of the receipts he had signed.—HUCKLE *v.* LONDON COUNTY COUNCIL (1910), 27 T. L. R. 112; 4 B. W. C. C. 113, C. A.

4091. —— Compensation claimed & received without legal proceedings.]—PAGE *v.* BURTWELL, No. 4088, *ante*.

4092. —— —— Ex gratia payment.]—VIVASH *v.* GROUNDS & NEWTON (1911), 46 L. Jo. 556.

4093. "Circumstances creating legal liability" —What amounts to.]—PAGE *v.* BURTWELL, No. 4088, *ante*.

B. Right of Employer to Indemnity.

(a) In General

See Workmen's Compensation Act, 1925 (c. 84), s. 30; Workmen's Compensation Rules, 1926, rr. 25–27.

4094. When indemnity recoverable—Negligence of employer's servants & third party.]—Where an accident, in respect of which an employer has been compelled under Workmen's Compensation Act, 1906 (c. 58), to pay compensation, was caused by the combined negligence of another person & of his own servants, the employer cannot maintain an action for indemnity against that other person under Workmen's Compensation Act, 1906 (c. 58), s. 6.

A steamer belonging to pltfs. was approaching a staith, which was being used by & under the control of defts., for the purpose of taking a cargo of coal there from defts. Two workmen employed by pltfs. were in attendance on the steamer in a boat for the purpose of taking a rope from the steamer to the staith. In consequence of pltfs.' servants in charge of the steamer complying with a direction given by the staith-master employed by defts., the propeller was set in motion, with the result that the boat was upset, one of the workmen being drowned & the other injured. Pltfs. having been compelled to pay compensation in respect of the accident under Workmen's Compensation Act, 1906 (c. 58), brought an action against defts. for indemnity under Workmen's Compensation Act, 1906 (c. 58), s. 6. A comr. of assize by whom the action was tried found that both the staith-master & those in charge of the ship had been negligent, the former in giving the direction that he did, & the latter in complying with it, without ascertaining whether it was safe to do so, & that their combined negligence had caused the accident; & upon these findings he held that pltfs. through their servants, having been guilty of negligence which contributed to the accident, could not maintain the action:—*Held:* the judgment of the comr. was correct.—CORY & SON, LTD. *v.* FRANCE, FENWICK & CO., LTD., [1911] 1 K. B. 114; 80 L. J. K. B. 341; 103 L. T. 649; 27 T. L. R. 18; 55 Sol. Jo. 10; 11 Asp. M. L. C. 499, C. A.

Annotations:—**Distd.** Paul *v.* G. E. Ry. (1920), 36 T. L. R. 344. **Refd.** Smith's Dock Co. *v.* Readhead (1912), 5 B. W. C. C. 449; The Molière, [1925] P. 27. **Mentd.** *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560.

4095. —— Compensation paid to dependant of workman—Unable to sue under Lord Campbell's Act.]—A workman while working in the employment of pltfs. sustained injuries from which a few days later he died. The injuries were caused by the negligence of defts.' servants. The workman left as his sole dependant an illegitimate daughter. Pltfs. having paid her compensation under Workmen's Compensation Act, 1906 (c. 58), sued defts. under s. 6 of that Act for an indemnity in respect of the compensation so paid by them. For defts. it was contended that, as no action could be maintained under Lord Campbell's Act for the benefit of the illegitimate daughter, s. 6 did not apply:—*Held:* (1) the provisions of that sect. did not require that the person recovering the compensation & the person to whom the wrongdoer was liable to pay damages should be the same person; (2) as there was an interval of time between the infliction of the injury & the death of the workman there was during that time a legal liability to pay damages to him; (3) the fact of the liability so created being subsequently abated by his death did not prevent the application of the sect.; & pltfs. were entitled to recover.—SMITH'S DOCK CO. *v.* READHEAD (JOHN) & SONS, [1912] 2 K. B. 323; 81 L. J. K. B. 808; 106 L. T. 843; 28 T. L. R. 397; 5 B. W. C. C. 449.

Annotation:—*As to* (1) **Apprvd.** Tuckwood *v.* Rotherham Corpn., [1921] 1 K. B. 526.

4096. From whom recoverable—Fellow workman of injured party.]—The doctrine of common employment does not apply as between fellow workmen. Where injury has been caused to a workman by the negligence of fellow workman in committing a breach of statutory regulations imposed for the protection of the workmen, there, if the injured workman has recovered compensation against his employer under Workmen's Compensation Act, 1906 (c. 58), the employer is entitled to be indemnified by the fellow workmen whose breach of the statutory regulations caused the injury.—LEES *v.* DUNKERLEY BROTHERS, [1911] A. C. 5; 80 L. J. K. B. 135; 103 L. T. 467; 55 Sol. Jo. 44; 4 B. W. C. C. 115,

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workman had *de facto* recovered compensation.—ALDIN *v.* STEWART, [1916] S. C. 13.—**SCOT.**

4091 l. —— *Compensation claimed & received without legal proceedings.*]—The words "proceed against," in Workers' Compensation for Accident Act, 1900, s. 16, do not mean the taking legal or formal action, or even any isolated step towards such action.—HEATH *v.* UNION S.S. CO., LTD. (1904), 23 N. Z. L. R. 637.—**N.Z.**

m. —— *Acceptance of compensation—Agreement to refund if damages received from third party.*]—An injured workman received from his employers weekly payments based on Workmen's Compensation Act, 1906, s. 6 (1), under an agreement with them to refund all sums received, if successful in a claim at common law against a third party:—*Held:* an action against the third party was not barred, the workman not having *de facto* recovered compensation.—KELLY *v.* NORTH BRITISH RY. CO., [1916] S. C. 19.—**SCOT.**

n. —— —— ——.]—FRAME *v.* TAYLOR, [1918] S. C. 343.—**SCOT.**

o. *Election withdrawn on terms—Compensation Board subrogated to rights of workman.*]—HUTTON *v.* TORONTO RY. CO. (1919), 45 O. L. R. 550; 49 D. L. R. 216; 16 O. W. N. 236.—**CAN.**

PART XIV. SECT. 25, SUB-SECT. 2. —B (a).

p. *Action for indemnity — Defences to—Negligence of employer & third party.*]—An employer liable under Workmen's Compensation Act & apart from negligence to pay compensation to the dependants of a deceased workman cannot maintain an

H. L.; *affg.* S. C. *sub nom.* GIBSON *v.* DUNKERLEY BROTHERS, 102 L. T. 587, C. A.

4097. Intention to claim indemnity—Necessity for notice.]—APPLERY *v.* HORSELEY CO., LTD., No. 3326, *ante*.

4098. ——— ———.]—Notice of intention to claim indemnity must be served, although the other person be already a resp. in the proceedings.—HOWARD *v.* DRIVER (1903), 5 W. C. C. 153.

4099. ——— ———.]—Where a workman has recovered compensation under Workmen's Compensation Act, 1906 (c. 58), from his employer in respect of an accident which was caused by the negligence of a third party, it is not a condition precedent to the employer's right to maintain an action for indemnity against the third party under Workmen's Compensation Act, 1906 (c. 58), s. 6, that he should have filed & served on the third party a formal notice of his claim under Workmen's Compensation Rules, 1907, r. 24.—NETTLEINGHAM & CO. *v.* POWELL & CO., [1913] 3 K. B. 209; 82 L. J. K. B. 911; 108 L. T. 912; 29 T. L. R. 577; 57 Sol. Jo. 593; 6 B. W. C. C. 478, C. A.

Annotation:—**Mentd.** Tuckwood *v.* Rotherham Corpn., [1921] 1 K. B. 526.

4100. Action for indemnity—Defences to—Injury not due to defendant.]—Compensation which is paid after notice of injury, & of a claim for compensation, & under an agreement, a memorandum of which has been duly recorded, is paid under Workmen's Compensation Act, 1897 (c. 37), s. 6.

A person against whom an employer claims indemnity may plead: (*a*) that the injury was not caused by his fault; (*b*) that the compensation was not paid under the Act; (*c*) that the compensation was greater than the amount permitted by the Act; & (*d*) that the amount paid, though within the limits set by the Act, was not an amount which it was reasonable for the employer to agree to pay.—THOMPSON & SONS *v.* NORTH EASTERN MARINE ENGINEERING CO., LTD., [1903] 1 K. B. 428; 72 L. J. K. B. 222; 88 L. T. 239; 19 T. L. R. 206; 47 Sol. Jo. 256; 5 W. C. C. 71.

Annotation:—**Refd.** Howard *v.* Driver (1903), 5 W. C. C. 153.

4101. ——— ——— **Compensation not paid in accordance with Act.**]—THOMPSON & SONS *v.* NORTH EASTERN MARINE ENGINEERING CO., LTD., No. 4100, *ante*.

4102. ——— ——— **Compensation unreasonable.**]—THOMPSON & SONS *v.* NORTH EASTERN MARINE ENGINEERING CO., LTD., No. 4100, *ante*.

4103. ——— ——— **Contributory negligence of workman.**]—Pltfs. claimed an indemnity against defts. under Workmen's Compensation Act, 1906 (c. 53), s. 6, for the compensation which pltfs. had had to pay to the dependants of a workman who had been killed by the negligence of defts.' servants during shunting operations. Defts. set up the plea of contributory negligence on the part of the deceased workman, & also on the part of pltfs., who had employed deceased workman on defts.' lines during the shunting although he was stone deaf:—*Held*: with regard to the plea of contributory negligence by defts., under above enactment the question of contributory negligence ought not to receive any different treatment from that which it would receive as between the person causing & the person suffering the injury, & as a legal liability had been established pltfs. were entitled to the indemnity claimed.—PAUL (R. & W.), LTD. *v.* GREAT EASTERN RY. CO. (1920), 36 T. L. R. 344.

4104. ——— **Limitation of time.**]—Where a workman in the employment of pltf. was injured by an accident caused by the negligence of a servant of deft. corpn. in driving a tramcar on a tramway owned & worked by the corpn., & the workman recovered compensation from pltf., & an action was brought by pltf. against the corpn. under Workmen's Compensation Act, 1906 (c. 58), s. 6 (2), to recover an indemnity in respect thereof:—*Held*: Public Authorities Protection Act, 1893 (c. 61), s. 1 (*a*), did not apply, & therefore the action need not be commenced within six months next after the act, neglect, or default complained of, namely, the act of negligence in driving the tramcar.—TUCKWOOD *v.* ROTHERHAM CORPN., [1921] 1 K. B. 526; 90 L. J. K. B. 341; 124 L. T. 522; 85 J. P. 101; 19 L. G. R. 69; 13 B. W. C. C. 327, C. A.

Annotations:—**Refd.** Venn *v.* Tedesco, [1926] 2 K. B. 227. **Mentd.** Huyton & Roby Gas Co. *v.* Liverpool Corpn., [1926] 1 K. B. 146.

4105. ———.]—Pltfs. employed a man to drive their motor vans. Whilst driving, he collided with one of defts.' motor vans & was killed. Pltfs. paid the widow full compensation under Workmen's Compensation Act, 1906 (c. 58), & then brought an action for indemnity against defts. on the ground of the negligent driving of defts.' servant. On the jury finding the accident was solely caused by the negligence of defts.' servant, judgment was entered for pltfs. for the full amount claimed including all costs.—DAILY NEWS, LTD. *v.* MCNAMARA & CO., LTD. (1913), 7 B. W. C. C. 11.

4106. What included in indemnity—Compensation awarded—Costs of compensation proceedings.]—Where an employer is entitled, under Workmen's Compensation Act, 1897 (c. 37), s. 6, to indemnity from a third person in respect of compensation payable to a workman for an injury for which that third person is liable, the indemnity includes the cost of the compensation proceedings as well as the amount of the compensation awarded.—GREAT NORTHERN RY. CO. *v.* WHITEHEAD & CO., LTD. (1902), 18 T. L. R. 816; 4 W. C. C. 39.

(b) Circumstances Creating a Legal Liability.

See Workmen's Compensation Act, 1925 (c. 84), s. 30.

4107. Obligation of defendant to plaintiff—Demise of room with power—Power not fit for purpose.]—Defts., who were the lessees of a factory, demised to pltfs. a room therein & agreed to supply to them power from an engine for working a machine in the room demised at a yearly rent of £100. The engine was under the control & in the possession of defts. While the engine was working the machine, owing to a defect in the governor, it went too fast, with the result that part of the machine in pltfs.' room became heated & broke, & killed a workman employed by pltfs. Pltfs., having paid the widow compensation under Workmen's Compensation Act, 1897 (c. 37), sued defts. to recover the amount so paid. The jury found that defts. had not supplied power which was reasonably fit for the purpose of working the machine:—*Held*: apart from the demise of the room, there was a contract by defts. to supply to pltfs. power for working the machine; this was a contract of purchase & sale; there was therefore an obligation to supply power reasonably fit for the purpose; & pltfs. were entitled to

action of indemnity against a stranger under sect. 8 of the Act where the combined acts of the employer & stranger if negligent or unlawful are a cause of the accident, giving rise to the claim for compensation.—CANADIAN PACIFIC RY. *v.* ALBERTA CLAY PRODUCTS (1914), 29 W. L. R. 989; 7 W. W. R. 948.—CAN.

Sect. 25.—*Alternative remedies: Sub-sect.* 2, *B.* (*b*). *Sect.* 26: *Sub-sect.* 1, *A.*]

recover.—BENTLEY BROTHERS *v.* METCALFE & Co., [1906] 2 K. B. 548: 75 L. J. K. B. 891; 95 L. T. 596; 22 T. L. R. 676, C. A.

4108. Accident not direct or natural consequence of defendant's acts.]—The driver of a motor car, when nearing a cart & horse, knowing that his hooter was out of order, slowed down to six miles an hour. When abreast of the cart the horse became frightened & bolted. The driver was thrown & fatally injured. The dependant claimed compensation from the master, who brought in the driver of the motor car as a third party. The county ct. judge found that the damage to the hooter was not the cause of the accident, & that it was not negligence on the part of the driver of the car to continue running on the road with the hooter silent. The widow of the deceased could not therefore have maintained an action under Fatal Accidents Act, 1846 (c. 93), against the owner of the motor car for the loss of her husband. Accordingly he dismissed resps.' claim for indemnity:—*Held:* there was evidence to support the county ct. judge's findings of fact. The mere breach of regulations made under Motor Car Act, 1903 (c. 36), is not necessarily evidence of negligence.—LANKESTER *v.* MILLER (1910), 4 B. W. C. C. 80, C. A.

4109. ——.]—In the course of his employment a workman was killed by the kick of a horse belonging, not to his employers, but to third parties, by whose servant it was brought upon the employers' premises & left there unattended. Upon a claim by the dependants of the workman for compensation under Workmen's Compensation Act, 1906 (c. 58), the employers admitted liability, but claimed contribution against the third parties under Workmen's Compensation Act, 1906 (c. 58), s. 6. The county ct. judge held that the question of *scienter* on the part of the owners of the horse was immaterial, that the bringing of the horse upon the employers' premises was a trespass, & by reason of negligently leaving it there unattended they were liable to indemnify the employers:—*Held:* it was not in the ordinary course of things that a horse not known to be vicious should kick a man. Assuming trespass, the damage in the present case did not naturally flow from it; it was too remote. The injury to deceased was not sufficiently connected with the trespass or negligence to be the natural or probable consequence of it. The award against the third parties was therefore wrong.—BRADLEY *v.* WALLACES, LTD., [1913] 3 K. B. 629; 82 L. J. K. B. 1074; 109 L. T. 281; 29 T. L. R. 705; 6 B. W. C. C. 706, C. A.

Annotation:—**Refd.** Heath's Garage *v.* Hodges, [1916] 2 K. B. 370.

4110. ——.]—Pltfs., who were the charterers of a ship from defts., the shipowners, gratuitously removed some hatch beams at the implied request of the shipowners. While the beams were being removed by pltf.'s servants, one of pltf.'s servants engaged in the work was accidentally killed. Pltfs. paid to his dependants compensation in accordance with Workmen's Compensation Act, 1906 (c. 58). Pltfs. claimed to recover the sum paid as compensation from defts. on the ground that defts. had impliedly undertaken to indemnity pltfs. for loss or damage occasioned by the discharge of the cargo:—*Held:* there was no evidence of an implied undertaking by defts. to indemnify pltfs. The accident was not the direct or natural consequence of doing the discharging of the cargo, but was a consequence of the manner in which the discharging was done.—CORY (W.) & SON, LTD. *v.* LAMBTON & HETTON COLLIERIES, LTD. (1916), 86 L. J. K. B. 401; 115 L. T. 738; 10 B. W. C. C. 180; 13 Asp. M. L. C. 530, C. A.

4111. Obligation of third party to workman—Workman a licencee of defendant.]—A painter was employed to do work for the owners on the top story of a dock warehouse, owned by the Corpn. of Hull, & in the occupation of defts. By the corpn. rules all workmen were required, on the sounding of a buzzer at noon, to leave the premises, which were then locked up during the dinner hour & re-opened at 1 p.m. The workman, having heard the buzzer, left off work within a few minutes, put his tools together, & proceeded downstairs, with the intention of leaving. On reaching the ground floor, which had no windows, he found the doors by which he had entered locked & the place in darkness. He endeavoured to find his way in the dark to doors on the other side of the building, &, in doing so, fell down a hatchway, found at the trial to be insufficiently guarded, & was injured. In an action for indemnity by the employer against the occupiers of the warehouse:—*Held:* the workman was a licencee, whose licence did not expire until he left the premises, for which purpose a reasonable time must be allowed after work ceased at noon, & the occupiers were guilty of a breach of duty towards him (*a*) in leaving an open hatchway unguarded & in darkness; (*b*) in locking up the premises without having ascertained that there was no one left inside who might fall into the trap, &, therefore, were liable to indemnify the employer against the compensation paid by him to the workman.—DICKSON *v.* SCOTT (J. A.), LTD. (1914), 30 T. L. R. 256; 7 B. W. C. C. 1007, C. A.

4112. —— ——.]—In Mar. 1915, a workman was employed by pltfs. as a tallyman to check the cargo being loaded into one of pltfs.' ships lying at a quay in defts.' dock. The work was usually done at the quayside, but as the night of Mar. 16 to 17 was cold & the man had been at work for many hours, he elected to go & work in a warehouse belonging to defts., from which the goods were being taken. While there he fell down the well hole of a lift, & was injured. The workman having obtained an award of compensation under Workmen's Compensation Act, 1906 (c. 58), against pltfs., pltfs. brought this action under Workmen's Compensation Act, 1906 (c. 58), s. 6, against defts., as owners of the premises, claiming to be indemnified on the ground that the accident was attributable to the negligence of defts. in breach of their duty to the workman. The jury, by the answers to questions left to them at the trial, found (*inter alia*) that persons using the warehouse were not reasonably protected from falling into the lift well, owing to the negligence of defts.' servants, but that the lift well was not a concealed danger at the time of the accident:—*Held:* the workman was not an invitee to defts.' warehouse, but at most a licencee, &, as there was no concealed danger, defts. had not been guilty of any breach of duty towards the workman, & the action failed.—WILSON SONS & CO., LTD. *v.* BARRY RY. CO. (1916), 86 L. J. K. B. 432; 116 L. T. 71; 10 B. W. C. C. 24, C. A.

4113. ——.]—A constable on duty, while entering defts.' private warehouse, was injured by falling into a saw-pit. He was paid compensation by pltfs. under Workmen's Compensation Act, 1906 (c. 58), & the pltfs. claimed under Workmen's Compensation Act, 1906 (c. 58), s. 6 (2), indemnity from the deft.:—*Held:* deft.

was under no legal obligation towards the constable, & was not liable to indemnify pltfs. in respect of the injury.—GREAT CENTRAL RY. CO. *v.* BATES, [1921] 3 K. B. 578; 90 L. J. K. B. 1269; 126 L. T. 61; 37 T. L. R. 948; 65 Sol. Jo. 708; 19 L. G. R. 649, D. C.

4114. ——.]—A woman employed as a refreshment bar assistant whilst so employed was coming down some stairs when a large dog owned by the tenant of a flat above the refreshment rooms, but not accompanied by any one, knocked against her leg, causing her to fall & fracture her ankle. She claimed £1 per week compensation from her employer, who admitted liability under Workmen's Compensation Acts, but claimed indemnity against the owner of the dog, whom he joined as a third party. The county ct. judge awarded appct. £1 per week during the total or partial incapacity. There was no evidence as to how the dog escaped on to the stairs, but the county ct. judge held it was the duty of the owner to keep his dog on his own premises & not to let it escape or use the staircase unless it was under control, & therefore appct. had a right of action against the owner, & resp. was entitled to indemnity by the owner: —*Held:* there was no evidence of any breach of duty or negligence on the part of the owner of the dog, who was accordingly not liable to indemnify the employer.—HINES *v.* TOUSLEY (1926), 95 L. J. K. B. 773; 135 L. T. 296; 70 Sol. Jo. 732; 19 B. W. C. C. 216, C. A.

4115. Negligence of defendant — Question of fact.]—A cattle drover was knocked down & killed by a motor car. His dependant claimed compensation from the employer, & the third party, the motorist, consented to the question of his liability to indemnify the employer being settled by arbn. under Workmen's Compensation Act, 1906 (c. 58). The county ct. judge awarded compensation, &, finding that the negligence of the third party had caused the accident, ordered him to indemnify the employer. The third party appealed on the ground that there was no evidence of negligence:—*Held:* there was evidence to support the finding.—BATE *v.* WORSEY (1912), 5 B. W. C. C. 276, C. A.

4116. —— ——.]—A lad employed to attend to a horse & cart was sent to the Hull docks, where he was knocked down by an engine, belonging to the North-Eastern Railway Co., running on a rail along the dockyard road. The employer of the lad admitted the claim under the Act, but joined the railway co. as third parties, claiming indemnity on the grounds of their negligence. By consent of the parties the question of the indemnity was dealt with by arbn. The county ct. judge awarded in favour of the employers, finding that the railway co. were negligent & that the lad was guilty of no contributory negligence:—*Held:* these were questions of fact, & as they were decided upon by an arbitrator under the Act & there being some evidence to support the findings, the Ct. of Appeal had no jurisdiction to interfere.—CUTSFORTH *v.* JOHNSON (1913), 108 L. T. 138; 6 B. W. C. C. 28, C. A.

4117. —— ——.]—A workman was killed by accident arising out of & in the course of his employment, while unloading hay from a railway truck in the goods yard of a railway co. The employers paid £300 into ct. & that sum was dealt with by the county ct. judge in favour of the dependants in accordance with Workmen's Compensation Act, 1906 (c. 58). The employers made the railway co. third parties, alleging that the accident was caused by the negligence of the servants of the railway co. This question was tried by the consent of the parties under Workmen's Compensation Act, 1906 (c. 58), s. 6 (2). The county ct. judge found on the facts that the negligence of the servants of the railway co. was the effective cause of the injury which caused the workman's death & gave judgment for the employers against the third parties. The third parties appealed to the Ct. of Appeal merely on the question of negligence:—*Held:* there was evidence to support the award & no misdirection. —SAIES *v.* BRITISH PETROLEUM CO., LTD. & GREAT WESTERN RY. CO. (1920), 90 L. J. K. B. 1289; 124 L. T. 436; 13 B. W. C. C. 253, C. A.

—— **Contributory negligence of workman.**]—*See* No. 4103, *ante*.

Collision between ships.]—*See* ADMIRALTY, Vol. I., p. 115, Nos. 521, 522.

SECT. 26.—**CONTRACTING OUT OF ACT.**

SUB-SECT. 1. APPROVED SCHEME.

A. In General.

See Workmen's Compensation Act, 1925 (c. 84), s. 31.

4118. Meaning of "scheme"—Not arrangement between number of employers & workmen.]—The scheme referred to Workmen's Compensation Act, 1897 (c. 37), s. 3, is one entered into between a particular employer & his workmen & not between a number of employers & workmen in a district.—REES *v.* OWEN (1907), 9 W. C. C. 35.

4119. Agreement by workman to accept—What amounts to—Writing not necessary.]—A workman applied for compensation under Workmen's Compensation Act, 1906 (c. 58). The employers contended that by filling up a form & paying one-third of an insurance premium the workman had agreed to accept the benefits of a certified scheme in place of those of the Act. This the workman denied. The judge held that this was the intention of the workman, & that there was a sufficient contract to satisfy the provision of sect. 3. He therefore dismissed the application:—*Held:* (1) the decision was right; (2) such a contract need not be in writing.—BERRY *v.* CANTEEN & MESS CO-OPERATIVE SOCIETY, LTD. (1910), 3 B. W. C. C. 449, C. A.

4120. Validity of scheme—Rules must be certified.]—MOSS *v.* GREAT EASTERN RY. CO., No. 3858, *ante*.

4121. —— **Ousting jurisdiction of court.**]—GODWIN *v.* ADMIRALTY COMRS., No. 4123, *post*.

4122. Re-certification of scheme — Whether workman bound Necessity for acceptance—Renewal scheme.]—A scheme of compensation was certified in Nov. 1898, by the Registrar of Friendly Societies under Workmen's Compensation Act, 1897 (c. 37), s. 3, as applicable to defts.' workmen, & pltf., who was a workman in defts.' employment, agreed to come in under the scheme. The scheme expired at the end of 1903, & in Dec. 1903, a renewal scheme was certified by the Registrar, & defts. posted up a notice that workmen might enrol under the scheme. The course adopted at defts.' works was that a month's notice should be given if a workman wished to withdraw from the scheme. The workman had not given notice of withdrawal, but he did not enrol under the renewal scheme. Defts. deducted a certain sum from his wages as his contribution under the renewal scheme, upon the ground that the workman was bound by the renewal scheme until he gave notice that he would not be bound by it:—*Held:* the original scheme

Sect. 26.—Contracting out of Act: Sub-sect. 1, A. & B.; sub-sect. 2.]

having expired, the workman was not bound by the renewal scheme unless defts. proved that the workman had agreed to accept the new scheme. —WILSON *v.* OCEAN COAL CO., LTD., TREHARNE *v.* OCEAN COAL CO., LTD. (1905), 21 T. L. R. 621; 49 Sol. Jo. 597; 7 W. C. C. 34, C. A.

Annotation:—**Refd.** Godwin *v.* Admiralty Comrs. (1911), 81 L. J. K. B. 532.

4123. —— Necessity for ballot of workmen.]—(1) A scheme of compensation under Workmen's Compensation Act, 1906 (c. 58), is not bad because it purports to oust the jurisdiction of the arbitrator under the Act, & a workman who has agreed to accept the provisions of a duly certified scheme cannot resort to any of the provisions of the Act.

(2) On re-certification under Workmen's Compensation Act, 1906 (c. 58), s. 15, of a scheme of compensation which has been certified under Workmen's Compensation Act, 1897 (c. 37), it is not necessary that a ballot of the workmen shall be taken before the registrar can recertify.—GODWIN *v.* ADMIRALTY COMRS., [1913] A. C. 638; 82 L. J. K. B. 1126; 109 L. T. 428; 29 T. L. R. 774; 6 B. W. C. C. 788, H. L.

Annotation:—*As to* (1) **Refd.** Howarth *v.* Knowles, [1913] 3 K. B. 675.

4124. —— Right of workman to benefits of new rules.]—A contracting-out scheme under Workmen's Compensation Act, 1906 (c. 58), s. 3, was embodied in rules which provided (*inter alia*) that every workman in case of injury arising out of his employment should while unable to work receive as compensation a specified sum per week. The scheme & rules were duly certified by a certificate of the Registrar of Friendly Societies dated Dec. 18, 1907, which stated that if not renewed they were to expire on June 30, 1913; & these rules were printed in book form. On June 12, 1912, while that scheme & rules were in operation, one of the workmen sustained an injury by an accident which incapacitated him from work, & he thereupon commenced & continued to receive compensation in accordance with these rules. Pursuant to a resolution of the members of the scheme under these rules, a scheme & rules were adopted which were for the most part identical with the original scheme & rules, but differed from them in certain particulars & (*inter alia*) in providing that every workman should receive compensation on a somewhat higher scale as from the date of the accident. The later scheme & rules were certified by a certificate dated June 30, 1913, which after referring to the original scheme certificate stated that: "The certificate & the foregoing scheme as modified is hereby renewed until June 13, 1918"; & the rules as altered were separately printed in book form. The workman's weekly contributions to the scheme were in fact of the same amount both before & after June 30, 1913:—*Held:* the scheme & rules which were certified on June 30, 1913, were not a new scheme & rules, but merely a continuation of the original scheme & rules with alterations affecting (*inter alia*) the scale of compensation, & the workman, although injured by an accident which had happened before that date, was entitled as from that date to be paid compensation on the higher scale under the scheme & rules as altered.—*Re* BEARD & WEST YORKSHIRE COLLIERIES OF CHARLESWORTH (J. & J.), LTD. (1917), 87 L. J. K. B. 385; 118 L. T. 83; 10 B. W. C. C. 707, C. A.

4125. Meaning of "accident" in scheme—Application of the Act—Industrial disease.]—LEAF *v.* FURZE, No. 3800, *ante*.

B. Effect of Acceptance by Workman.

4126. Whether proceedings can be taken—To determine question of fact under rules.]—Under a scheme of compensation the affairs & the business of a society were to be managed by the officers & a committee of management. The committee were empowered to stop payment of allowances should an injured member fail to go to work when able to do so. One of the rules was as follows:—"In all cases of doubt or difference as to the construction of these rules, & in the event of any circumstance occurring which is not provided for thereby, the decision of the committee shall be conclusive & final, & there shall be no appeal therefrom." After making inquiries & hearing a member in receipt of a weekly allowance, the committee decided that he had failed to go to work when able to do so, & thereupon stopped the allowance:—*Held:* a court of law had jurisdiction to hear & determine the question of fact whether the member had failed to go to work when able to do so.—HAWORTH *v.* ANDREW KNOWLES & SONS, LTD. ACCIDENT SOCIETY (1903), 19 T. L. R. 658; *sub nom.* HOWARTH *v.* ANDREW KNOWLES & SONS, LTD. ACCIDENT SOCIETY, 5 W. C. C. 57, C. A.

Annotation:—**Distd.** Allen *v.* G. E. Ry., [1914] 2 K. B. 243.

4127. —— Under Employers' Liability Act, 1880 (c. 42).]—TAYLOR *v.* HAMSTEAD COLLIERY CO., No. 4065, *ante*.

4128. —— Under Workmen's Compensation Acts.]—A workman who has agreed to come under a scheme of compensation which has been certified by the Registrar of Friendly Societies as complying with the conditions required by Workmen's Compensation Act, 1906 (c. 58), s. 3 (1), is outside the provisions of the Act altogether.

A tinsmith employed in a Govt. dockyard signed a contract by which he agreed to accept the provisions of a duly certified scheme of compensation in substitution for the provisions of the Act. The scheme provided that when it was established to the satisfaction of the Treasury that the death of a workman had resulted from an injury within the provisions of the Act, remuneration according to the scale therein mentioned should be payable to his dependants. The tinsmith died from lead poisoning, & his widow claimed compensation from the Lords Comrs. of the Admlty. They at first denied liability, but on the hearing of an application by her for arbitration under the Act they admitted liability to pay compensation under the scheme. The county ct. judge made an award in favour of appct. for the amount admitted to be due:—*Held:* deceased had contracted himself out of the Act, the liability of the employers was to be determined by the scheme solely, & consequently the jurisdiction of the county ct. judge was entirely ousted.—HORN *v.* ADMIRALTY LORDS COMRS., [1911] 1 K. B. 24; 80 L. J. K. B. 278; 103, L. T. 614; 27 T. L. R. 84; 4 B. W. C. C. 1, C. A.

Annotations:—**Folld.** Godwin *v.* Admiralty Comrs., [1913] A. C. 638; Howarth *v.* Knowles, [1913] 3 K. B. 675. **Consd.** Leaf *v.* Furze, [1914] 3 K. B. 1068.

4129. —— ——.]—GODWIN *v.* ADMIRALTY COMRS., No. 4123, *ante*.

q. *Whether proceedings can be taken*].—THOMPSON *v.* R. (1921), 20 Exch. C. R. 467; 69 D. L. R. 170.—CAN.

4130. —— ——.]—A workman, having entered into an agreement with the Admlty. subjecting himself to the conditions of an authorised scheme for compensation in lieu of the provisions of Workmen's Compensation Act, 1906 (c. 58), was injured & awarded compensation under the scheme. He then sought to withdraw from the scheme, & applied for arbn. under the Act. The county ct. judge dismissed the application, on the ground that he had no jurisdiction to hear it: — *Held:* the decision of the county ct. judge was correct.—BARTON *v.* ADMIRALTY LORDS COMRS. (1917), 10 B. W. C. C. 314, C. A.

4131. —— —— **Invalid scheme.**]—MOSS *v.* GREAT EASTERN RY. CO., No. 3858, *ante*.

4132. —— —— **Where scheme terminated.**]—Where a workman had accepted a scheme of compensation duly certified under Workmen's Compensation Act, 1897 (c. 37), s. 3, & had met with an accident in the course of his employment, in respect of which he received weekly payments from 1901 to 1912, when the funds of the society were exhausted, the scheme having been terminated in consequence of not being re-certified under Workmen's Compensation Act, 1906 (c. 58):—*Held:* the workman, having accepted the scheme, was outside the provisions of the Act altogether, & could not successfully claim compensation thereunder.—HOWARTH *v.* KNOWLES (A.) & SONS, LTD., [1913] 3 K. B. 675; 82 L. J. K. B. 1325; 109 L. T. 278; 29 T. L. R. 667; 57 Sol. Jo. 728; *sub nom.* HAWORTH *v.* KNOWLES (ANDREW) & SONS, LTD., 6 B. W. C. C. 596, C. A.

4133. —— —— **Workman not heard orally by committee.**]—DOWLING *v.* GREAT EASTERN RY. CO., No. 4136, *post*.

4134. —— **To recover amount claimed under scheme.**]—LEAF *v.* FURZE, No. 3800, *ante*.

4135. —— —— **Where power to committee to determine all questions.**]—Under a scheme formed by deft. co. pursuant to Workmen's Compensation Act, 1906 (c. 58), s. 3, & managed by an accident committee, certain allowances were to be made "in case of the death of a member through an injury arising out of & in the course of his duties in the co.'s service." The scheme (*inter alia*) provided that "any question with regard to what is an injury within the meaning of that term as used in the scheme, as to who are dependants, as to which dependants are entitled to receive payments due from the fund, & the amount or amounts of such payments, shall be determined by the committee." Further, that "if any question (other than such as the committee, or the board of directors, are hereby expressly empowered to decide) shall arise with respect to the scheme . . . or with respect to the construction or meaning of the scheme, or the rules framed in connection therewith, or any variation or alteration thereof respectively, such question shall be settled by the committee, whose decision shall be final & conclusive."

A workman in the employment of the co., who had become a party to the scheme, met with an accident in the goods depot of the co., & died from his injuries. His widow claimed compensation under the scheme as a dependant, but the committee declined to admit the claim without giving any reasons for their decision. In an action by the widow against the co. & the accident committee claiming a declaration that the death of her husband was caused by an injury arising out of & in the course of his duties in deft. co.'s service, & £195 compensation:—*Held:* (1) having regard to whole scheme, which was intended to be in substitution for the rights of workmen under Workmen's Compensation Act, 1906 (c. 58), the committee had power to determine all claims arising under the scheme, & such determination was final; (2) pltf. having failed to obtain an allowance of her claim by the committee, could not sustain the action.—ALLEN *v.* GREAT EASTERN RY. CO., [1914] 2 K. B. 243; 83 L. J. K. B. 898; 110 L. T. 498; 7 B. W. C. C. 986, C. A.

4136. Right of workman to mandamus—Against tribunal appointed under scheme—Where claim improperly determined.]—Where a scheme of compensation for the workmen of an employer has been certified under Workmen's Compensation Act, 1906 (c. 58), s. 3, & therefore substituted for the provisions of the Act, & a particular workman has joined the scheme, the fact that he is not heard orally on a claim by him for compensation under the scheme does not confer any jurisdiction to deal with his case under the Act. His only remedy is in a proper case to apply for *mandamus* against the tribunal constituted by the scheme to hear & determine his claim in accordance with substantial principles of justice.—DOWLING *v.* GREAT EASTERN RY. CO. (1919), 88 L. J. K. B. 380; 120 L. T. 460; 12 B. W. C. C. 12, C. A.

SUB-SECT. 2.—CONTRACTING OUT CONTRARY TO ACT.

See Workmen's Compensation Act, 1925 (c. 84), s. 1 (3).

4137. What amounts to—Penal clause.]—An injured workman made a written agreement with his employers under which he accepted the full compensation due to him under Workmen's Compensation Act, 1906 (c. 58), as long as he was totally disabled by the accident. He also agreed that he would submit himself under certain circumstances to the medical referee of the district in the event of any dispute arising as to his fitness for employment, & that if he refused to assist in the application for examination by the medical referee all further rights to compensation in respect to the accident should cease:—*Held:* the penal clause at the end of the agreement was a contracting out of the Act, contrary to Workmen's Compensation Act, 1906 (c. 58), s. 3 (1).—BRITISH & SOUTH AMERICAN STEAM NAVIGATION CO., LTD. *v.* NEIL (1910), 3 B. W. C. C. 413, C. A.

—— **Agreement to accept lump sum.**]—*See* Sect. 15, sub-sect. 3.

Part XV.—Apprenticeship.

SECT. 1.—THE CONTRACT OF APPRENTICESHIP.

SUB-SECT. 1.—COMPARISON WITH CONTRACT OF SERVICE.

A. Intention of Parties.

4138. Decisive of nature of contract.] — The intention of the parties at the time must decide, whether a contract be in the nature of an apprenticeship or of a hiring & service. They are not convertible.—R. *v.* LITTLE BOLTON (INHABITANTS) (1783), Cald. Mag. Cas. 367.

Annotations:—**Dbtd.** R. *v.* Laindon (1799), 8 Term Rep. 379. **Folld.** R. *v.* Eccleston (1802), 2 East, 298. **Apld.** R. *v.* Burbach (1813), 1 M. & S. 370. **Distd.** R. *v.* Mountsorrell (1814), 2 M. & S. 460. **Refd.** R. *v.* Shinfield (1811), 14 East, 541; R. *v.* St. Margaret's, King's Lynn (1826), 6 B. & C. 97; R. *v.* Crediton (1831), 2 B. & Ad. 493; R. *v.* Newtown (1834), 1 Ad. & El. 238; R. *v.* Great Wishford (1835), 4 Ad. & El. 216.

4139. ——.]—Where the pauper agreed with a weaver to serve him for a year & a half & the master was to teach him to weave & the pauper was to have half his earnings & find himself in everything under which contract the pauper served his master for above a year:—*Held:* he thereby gained a settlement as by hiring & service it being the apparent intention of the parties to create the relation of master & servant & not that of master & apprentice.—R. *v.* ECCLESTON (INHABITANTS) (1802), 2 East, 298; 102 E. R. 382.

Annotations:—**Distd.** R. *v.* Shinfield (1811), 14 East, 541; R. *v.* Crediton (1831), 2 B. & Ad. 493; R. *v.* Newtown (1834), 1 Ad. & El. 238. **Dtbd.** R. *v.* Great Wishford (1835), 4 Ad. & El. 216.

4140. ——.]—R. *v.* COMBE (INHABITANTS), No. 4151, *post*.

4141. —— **To be collected from whole instrument.**]—(1) Whether a contract be a contract of apprenticeship or of hiring & service must depend on the intention of the parties which is to be collected from the whole of their agreement.

(2) If the relation of master & servant be created by the contract of the parties, though they do not use the very words "master & apprentice" yet if they use words tantamount it is sufficient (LORD KENYON, C.J.).

(3) The first question is . . . on the admissibility of the parol evidence. This parol evidence was not offered to contradict the written agreement, but to ascertain an independent fact [payment of premium to master] & I think it was properly received in evidence (LORD KENYON, C.J.).—R. *v.* LAINDON (INHABITANTS) (1799), 8 Term Rep. 379; 2 Const. 378; 101 E. R. 1444.

Annotations:—*As to* (1) **Distd.** R. *v.* Eccleston (1802), 2 East, 298. **Refd.** R. *v.* Shinfield (1811), 14 East, 541. *As to* (2) **Refd.** *Re* Bush, *Ex p.* Fussell (1837), 2 Deac. 158. *As to* (3) **Folld.** R. *v.* Llangunnor (1831), 2 B. & Ad. 616. **Apld.** R. *v.* Stoke upon Trent (1843), 5 Q. B. 303.

4142. —— ——.]—R. *v.* ST. MARGARET'S, KING'S LYNN (INHABITANTS), No. 4159, *post*.

4143. —— **As shown by principal object of agreement.**]—An adult contracts to serve a plumber as an articled servant for four years, to learn his trade, at weekly wages; to be considered as an out-apprentice; to do gardening or any other work his master set him about; &, when ill, not to receive wages; the master agreeing to teach him his trade. This is not a contract of hiring & service, but an imperfect contract of apprenticeship.

The master undertook to teach the pauper his trade, so that the learning a trade was clearly one great object of the parties to the contract. There is a provision in the instrument, that if the pauper should be ill the master should not pay him any wages during the time of his illness. That is by no means an improper stipulation in a bargain for an apprenticeship, but in the case of a hiring & service the law imposes on the master the obligation of providing for a servant during illness (BAYLEY, J.).—R. *v.* TIPTON (INHABITANTS) (1829), 9 B. & C. 888; 4 Man. & Ry. K. B. 703; 2 Man. & Ry. M. C. 415; 8 L. J. O. S. M. C. 52; 109 E. R. 330.

4144. —— ——.]—R. *v.* GREAT WISHFORD (INHABITANTS), No. 4172, *post*.

4145. —— ——.]—The justices were quite right in regarding this as a *bonâ fide* contract of apprenticeship, meaning that the real object of the contract was that he should be taught to be a riding groom, & not merely that he should be employed as a stable-boy for a term of years (LORD ALVERSTONE, C.J.).—HORAN *v.* HAYHOE, [1904] 1 K. B. 288; 73 L. J. K. B. 133; 90 L. T. 12; 68 J. P. 102; 52 W. R. 231; 20 T. L. R. 118; 48 Sol. Jo. 117, D. C.

4146. —— —— **Subordinate service in other capacity.**]—K. was "clubbed" with R. for three years at so much per week, & also agreed to do any work that R. set him about. The term "clubbing," signifies, contracting to serve for the purpose of being taught some art or trade, & to have less wages on account of learning it.

There is an hiring & service to give the pauper a settlement. The doubt at the sessions was raised from the agreement's stating that the pauper was hired for a length of time, & was to learn a trade from his master. But the concluding sentence puts it beyond question, that it was intended that he should be an hired servant, & not an apprentice, "for the pauper was to do any work his master put him about" (LORD KENYON, C.J.).—R. *v.* COLTISHALL (INHABITANTS) (1793), Nolan, 214; 5 Term Rep. 193; 101 E. R. 109.

Annotations:—**Distd.** R. *v.* Laindon (1799), 8 Term Rep. 379. **Folld.** R. *v.* Martham (1801), 1 East, 239.

4147. —— —— ——.]—A man who was a carpenter & occupier of land, was applied to by another to permit him to succeed a then apprentice he had. The master said he would take no more apprentices unless they would work on the land as well as at the trade, & that he would take him to do work as a servant. It was agreed, that the pauper should live with the master for three years, & learn the business of a carpenter, & do any other work he required him to do. The master was to pay weekly wages, & for over-work:—*Held:* this was a defective contract of apprenticeship, & not a contract of hiring & service.—R. *v.* IGHTHAM (INHABITANTS) (1836), 4 Ad. & El. 937; 2 Har. & W. 7; 6 Nev. & M. K. B. 320; 3 Nev. & M. M. C. 589; 5 L. J. M. C. 105; 111 E. R. 1036.

4148. —— —— **Deductions for illness, etc.**]—A. clubbed with B., which signifies serving another for the purpose of learning a trade, for three years at a certain rate of weekly wages with a proviso that if he were prevented from working by bad weather, illness or want of employment there should be a proportionate deduction of wages:—*Held:* A. gained a settlement by serving a year under this agreement though occasional deductions

on these accounts were made.—R. *v.* MARTHAM (INHABITANTS) (1801), 1 East, 239; 102 E. R. 93.
Annotations:—**Distd.** R. *v.* Edgmond (1819), 3 B. & Ald. 107; R. *v.* Polesworth (1824), 4 Dow. & Ry. K. B. 258.

4149. —— —— **Instruction incidental to service.**]—R. *v.* NORTHOWRAM (INHABITANTS), No. 4166, *post*.

4150. —— **Contract void for want of stamp.**]—R. *v.* HIGHNAM (INHABITANTS), No. 4229, *post*.

B. Instruction the Primary Object.

4151. General rule.]—A pauper was "hired" by his uncle, a carpenter, "to learn his trade," & "was to do any other work as well as that of a carpenter." His uncle was to find him part of his food & clothing, but he was to lodge with his father. Pauper served his uncle on these terms five years. At the end of two years it was proposed to draw up indentures, to exempt pauper from the militia; but none ever were drawn up:—*Held:* this was not a contract of hiring & service, but an imperfect contract of apprenticeship.

In determining what is the true nature of the contract, the intention of the parties is principally to be regarded (LORD TENTERDEN, C.J.).

The parents proposed to send the pauper out to service; but the uncle suggested that it would be better that he sould go & learn his trade. The object, therefore, clearly, from that moment was to put the pauper with his uncle as a pupil & apprentice, & not as a servant (LORD TENTERDEN, C.J.).—R. *v.* COMBE (INHABITANTS) (1828), 8 B. & C. 82; 2 Man. & Ry. K. B. 30; 1 Man. & Ry. M. C. 283; 6 L. J. O. S. M. C. 105; 108 E. R. 973.
Annotations:—**Folld.** R. *v.* Edingale (1830), 10 B. & C. 739. **Refd.** R. *v.* Tipton (1829), 9 B. & C. 888.

4152. ——.]—Where the substantial object of the parties to a contract is to learn, & not to serve, the contract should be deemed one of apprenticeship & not one of hiring & service (BAYLEY, J.).—R. *v.* EDINGALE (INHABITANTS) (1830), as reported in 10 B. & C. 739; 109 E. R. 624.

4153. ——.]—Where teaching & learning are the principle object of the parties, though there is a service the contract is considered to be one of apprenticeship (TAUNTON, J.).—R. *v.* CREDITON (INHABITANTS) (1831), as reported in 2 B. & Ad. 493; 109 E. R. 1226.
Annotations:—**Folld.** R. *v.* Newtown (1834), 1 Ad. & El. 238. **Refd.** R. *v.* Great Wishford (1835), 4 Ad. & El. 216.

4154. ——.]—R. *v.* GREAT WISHFORD (INHABITANTS), No. 4172, *post*.

4155. ——.]—HORAN *v.* HAYHOE, No. 4145; *ante*.

4156. Express contract to teach.]—Where the father agreed with R. that R. should take his son for six years, to teach him the trade of a framework knitter, & he was to allow R. 9*s*. a week for the first three years, for teaching him & his board & lodging:—*Held:* this was a defective contract of apprenticeship, & therefore the son did not gain a settlement under it.—R. *v.* MOUNTSORRELL (INHABITANTS) (1814), 2 M. & S. 460; 105 E. R. 452.

4157. ——.]—Where by a parol contract the master agreed to teach the pauper to make stockings during the year, for which he was to receive two guineas, & the pauper was to have his earnings, paying his master for the use of the frame, etc., & the pauper continued in the service a year & a half:—*Held:* the pauper did not gain a settlement by hiring & service.

The only agreement was that the master should teach the pauper for a year (LORD ELLENBOROUGH, C.J.).—R. *v.* BILBOROUGH (INHABITANTS) (1817), 1 B. & Ald. 115; 106 E. R. 43.
Annotations:—**Folld.** R. *v.* St. Mary, Kidwelly (1824), 2 B. & C. 750; R. *v.* Crediton (1831), 2 B. & Ad. 493. **Refd.** R. *v.* Newtown (1834), 1 Ad. & El. 238.

4158. ——.]—The father of a pauper aged fourteen years agreed by parol to give a shoemaker a guinea for teaching his trade to the pauper for twelve months. The son served the twelve months under the agreement. At the end of that period the father agreed that his son should work for the shoemaker for twelve months making shoes at 3*d*. per pair for the first six months & 4*d*. per pair for the last six months under this latter agreement the pauper served six months only:—*Held:* this latter service could not be connected with the service of the former year so as to give a settlement inasmuch as the first agreement created the relation of teacher & scholar & not that of master & servant & the whole year's service required to confer a settlement must be under a contract or contracts creating the relation of master & servant.—R. *v.* ST. MARY, KIDWELLY (INHABITANTS) (1824), 2 B. & C. 750; 4 Dow. & Ry. K. B. 309; 2 Dow. & Ry. M. C. 291; 107 E. R. 562.
Annotation:—**Consd.** R. *v.* Crediton (1831), 2 B. & Ad. 493.

4159. ——.]—(1) The question of intention is to be collected from all the circumstances; no particular form of words being necessary to create an apprenticeship.

(2) A premium to the master is not a necessary ingredient; though the giving of a premium may be a strong circumstance to infer an intended apprenticeship.

A shoemaker proposed to the mother of a pauper to take him to learn his business. The boy was to serve four years, was to board & lodge with his mother, & was to have half of what he earned. The mother consented, & the boy served four years upon those terms. No indentures were executed, on account of the poverty of the mother; & no premium was paid:—*Held:* this was not a contract of hiring & service, but a defective contract of apprenticeship.—R. *v.* ST. MARGARET'S, KING'S LYNN (INHABITANTS) (1826), 6 B. & C. 97; 9 Dow. & Ry. K. B. 160; 4 Dow. & Ry. M. C. 260; 5 L. J. O. S. M. C. 18; 108 E. R. 388.
Annotations:—*As to* (1) **Apld.** R. *v.* Combe (1828), 8 B. & C. 82; R. *v.* Edingale (1830), 10 B. & C. 739. **Consd.** R. *v.* Great Wishford (1835), 4 Ad. & El. 216. **Refd.** R. *v.* Newtown (1834), 1 Ad. & El. 238. *Generally*, **Refd.** R. *v.* Ightham (1836), 2 Har. & W. 7.

4160. ——.]—R. *v.* TIPTON (INHABITANTS), No. 4113, *ante*.

4161. ——.]—The pauper by an unstamped memorandum, to which his father was a party, hired himself in the service of T. W. to labour at the art & mystery of a cotton weaver for three years; & he promised T. W. that his secrets he would keep, all his lawful commands strictly obey, & serve him faithfully for the said term. By the same memorandum the master undertook, as a reward for pauper's labours, to give him half his just earnings; & further covenanted, as a complete compensation for his industrious services, to instruct him in all the art & mystery of a cotton weaver, to the utmost of his power, in the above term:—*Held:* the agreement with T. W. was a defective contract of apprenticeship.—R. *v.* NETHER KNUTSFORD (INHABITANTS) (1831), 1 B. & Ad. 726; 9 L. J. O. S. M. C. 52; 109 E. R. 957.

4162. ——.]—J. S. agreed with a flannel manufacturer for 12 months, to learn the art of weaving flannel, he receiving one-half of what he earned, & finding himself in meat, drink, & lodging, & the master to have the other half for teaching him:—*Held:* a defective contract of apprenticeship, & not a contract of hiring & service.—R. *v.* NEWTOWN (INHABITANTS) (1834), 1 Ad. & El.

Sect. 1.—*The contract of apprenticeship: Sub-sect.* 1, *B., C. & D.; sub-sects.* 2 & 3, *A., B. & C.* (*a*).]

238; 3 Nev. & M. K. B. 306; 2 Nev. & M. M. C. 226; 3 L. J. M. C. 79; 110 E. R. 1196.

Annotation:—**Refd.** R. v. Great Wishford (1835), 4 Ad. & El. 216.

4163. —— For no fixed period.]—A master workman employed in a trade within 5 Eliz. c. 4, a person who had never before worked in it, under a parol agreement to teach him the business, in consideration of a premium & to pay him weekly wages. This is not an apprenticeship within the statute.

There is no instrument to constitute the relation of master & apprentice; there is no evidence of any term being fixed; & he was to be paid weekly wages from the moment of his being set to work (LORD ELLENBOROUGH).—BEALE *v.* GEALE (1809), 2 Camp. 1; 170 E. R. 1060, N. P.

4164. —— Terms in contract negativing apprenticeship.]—By an agreement in writing deft. engaged pltf. who was of full age, as an "improver" to the trade of watch repairing, & undertook to teach pltf. or cause him to be taught for two years. Pltf. paid a premium & was paid a weekly wage & undertook to employ himself industriously & to the best of his abilities. The agreement also provided that pltf. should work the weekly standard hours, & that any short time occasioned by pltf. either by sickness or any other cause should be deducted from his weekly wage in proportion to the loss of time, & that any overtime worked should be paid for in the same ratio. Annexed to the agreement were the following terms: "Improvers are required on trial one week. No wages paid during time of trial. Improvers must supply their own tools. If improver's time is completed at or under twenty-one years of age he must be articled as an apprentice, but if his term commences after the age of twenty-one, a written & stamped agreement must be drawn up & duly signed." Pltf. having been dismissed for gross misconduct during the currency of the agreement, sued deft. for damages for breach of contract:—*Held*: on the construction of the agreement, it was not a contract of apprenticeship, & deft. was entitled to dismiss pltf.—JAMES *v.* KRAUTH (1910), 26 T. L. R. 240, D. C.

4165. Payment to master in consideration of teaching.]—Where the father of the pauper contracted with J. S. that his son should be with him, & should work with him for two years, & have what he got, & should allow 2*s.* per week out of his gains to J. S. viz. 1*s.* for teaching him the business of a frame-knitter, 9*d.* for the rent of a frame, & 3*d.* for the standing:—*Held*: this was a contract of hiring & service, & not an apprenticeship.—R. *v.* BURBACH (INHABITANTS) (1813), 1 M. & S. 370; 105 E. R. 139.

Annotations:—**Distd.** R. v. Bilborough (1817), 1 B. & Ald. 115. **Refd.** R. *v.* St. Margaret's, King's Lynn (1826), 6 B. & C. 97; R. *v.* Edingale (1830), 5 Man. & Ry. K. B. 648; R. *v.* Newtown (1834), 1 Ad. & El. 238.

4166. ——.]—A contract between master & servant is not necessarily a contract of apprenticeship, because it contains a stipulation about the servant being "taught" or "instructed in" his work. By agreement between A., B., & C., A. agreed to hire B. for three years to dress silk, at a certain rate per week in proportion to the work done. There was then a stipulation that C. should receive from A. a sum per week for "superintending & instructing" B. to be a competent workman:—*Held*: this was a contract of hiring & service.—R. *v.* NORTHOWRAM (INHABITANTS) (1846), 9 Q. B. 24; 2 New Sess. Cas. 437; 15 L. J. M. C. 140; 7 L. T. O. S. 183; 11 J. P. 4; 10 Jur. 1003; 115 E. R. 1184.

4167. No contract to teach.]—Three months after a pauper, under age, had hired himself generally to a brick maker for a year, they entered into a written contract, unstamped & without seals, whereby the pauper covenanted & agreed to serve his master for three years, to learn to make bricks, etc., on condition of his master finding him in board, lodging, & clothes, & for him to be decently clothed at the end of the three years, on condition of his attending the kiln at nights:—*Held*: this contract was no proof of an apprenticeship in the contemplation of the parties, but only of a new hiring, for the master did not bind himself to teach him the trade.—R. *v.* SHINFIELD (INHABITANTS) (1811), 14 East, 541; 104 E. R. 709.

4168. ——.]—The sessions sent up a case to the Ct. of K. B., which found certain facts, & set out this written agreement: "Memorandum, that the undersigned R. L. agrees on behalf of his son R. L. that he shall serve R. M., of etc., in his business of a wheelwright, from this time to May 27, 1830; the said R. M. paying, at the expiration of the said term, £5 to the said R. L. the younger; R. L. to find his son clothes, washing, & all other necessaries, & R. M. meat, drink, & lodging," & the case also stated that resps. proposed to give in evidence, conversations between the parties & at the time of signing the agreement, & also an indorsement on the paper on which the agreement was written, which evidence was rejected, & the case concluded by submitting to the ct., as a distinct question, whether the agreement was an agreement of hiring & service, but not submitting any question as to the admissibility of the evidence:—*Held*: this agreement was a contract of hiring & service.—R. *v.* BILLINGHAY (INHABITANTS) (1836), 5 Ad. & El. 676; 2 Har. & W. 419; 1 Nev. & P. K. B. 149; 1 Nev. & P. M. C. 29; 6 L. J. M. C. 38; 111 E. R. 1321.

Annotation:—**Refd.** R. v. Northowram (1846), 9 Q. B. 24.

C. Use of Technical Words.

4169. Not essential to contract—"Master" & "apprentice."]—R. *v.* LAINDON (INHABITANTS), No. 4141, *ante*.

4170. —— ——.]—A contract under seal, & stamped, to serve another for three years at so much per week, the master agreeing to learn the other a trade, & the latter agreeing if he lost any time to the prejudice of his master to abate so much per day, constitutes an apprenticeship.

No technical words are necessary to constitute relation of master & apprentice, nor is it necessary that there should be any premium given to the master (LORD KENYON, C.J.).—R. *v.* RAINHAM (INHABITANTS) (1801), 1 East, 531; 2 Const. 383; 102 E. R. 205.

Annotations:—**Consd.** R. v. Eccleston (1802), 2 East, 298. **Refd.** R. v. Tipton (1829), 8 L. J. O. S. M. C. 52.

4171. ——.]—R. *v.* ST. MARGARET'S, KING'S LYNN (INHABITANTS), No. 4159, *ante*.

4172. —— "Teach" & "learn."]—The true test, whether an agreement is a contract of hiring

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PART XV. SECT. 1, SUB-SECT. 1.—B.

4167 *i. No contract to teach.*]—The employment of pupil teachers & monitors in National schools in Ireland is an employment within National Insurance Act, 1911 (c. 55), & the Comrs. of National Education are the employers. It is not a contract of apprenticeship, because an essential element of apprenticeship, the right to receive instruction, is absent from the contract.—*Re* NATIONAL INSURANCE ACT, 1911 (PUPIL TEACHERS & MONITORS), [1913] 1 I. R. 219.—IR.

or of apprenticeship, is the apparent object of the parties, & if that object is for one party to teach & the other to learn, the agreement is a contract of apprenticeship.

It is not necessary that the precise words, to teach or to learn, should occur in the agreement, to constitute it a contract of apprenticeship.—R. *v.* GREAT WISHFORD (INHABITANTS) (1835), 4 Ad. & El. 216; 1 Har. & W. 489; 5 Nev. & M. K. B. 540; 3 Nev. & M. M. C. 367; 5 L. J. M. C. 25; 111 E. R. 768.

Annotations:—**Refd.** R. *v.* Ightham (1836), 4 Ad. & El. 937. **Mentd.** R. *v.* West Riding of Yorkshire JJ., Tollerton *v.* Idle (1842), 7 Jur. 15; *Ex p.* Tollerton Overseers (1842), 3 Q. B. 792.

D. Payment of Premium.

4173. Not essential to contract.]—R. *v.* RAINHAM (INHABITANTS), No. 4170, *ante*.

4174. ——.]—R. *v.* ST. MARGARET'S, KING'S LYNN (INHABITANTS), No. 4159, *ante*.

4175. Proof of payment—Admission of extrinsic evidence.]—R. *v.* LAINDON (INHABITANTS), No. 4141, *ante*.

Return of premium.]—*See* Sub-sect. 12, B.; Sub-sect. 13, M., *post*.

SUB-SECT. 2.—CAPACITY OF PARTIES.

4176. Who may be master—Infant.]—An apprentice bound to an infant gains settlement under indenture notwithstanding master's infancy.—R. *v.* ST. PETROX (INHABITANTS) (1791), 4 Term Rep. 196; 2 Bott. 6th ed. 401; 100 E. R. 970.

4177. —— **Different persons in succession.**]—R. *v.* LOUTH (INHABITANTS), No. 4230, *post*.

4178. —— **Corporation.**]—A contract of apprenticeship is not invalid by reason of the fact that the master to whom the apprentice is bound is a corpn.—BURNLEY EQUITABLE CO-OPERATIVE & INDUSTRIAL SOCIETY *v.* CASSON, [1891] 1 Q. B. 75; 60 L. J. M. C. 59; 63 L. T. 652; 55 J. P. 166; 39 W. R. 124; 7 T. L. R. 41, D. C.

4179. Who may be apprentice—Adult.]—R. *v.* TIPTON (INHABITANTS), No. 4143, *ante*.

4180. —— ——.]—There is nothing which prevents adult persons from binding themselves apprentice if they wish to do so (CHITTY, J.).—LANNER *v.* PALACE THEATRE, LTD., ECCARIUS & ARMSTRONG (1893), 9 T. L. R. 165.

—— **Infant.**]—*See, generally*, Sub-sect. 3, *post*.

SUB-SECT. 3.—CONTRACTS BY INFANTS.

A. When Binding.

See, generally, INFANTS, Vol. XXVIII., pp. 152 *et seq*.

4181. By custom.]—An infant cannot bind himself apprentice except by special custom.—WHITTINGHAM *v.* HILL (1618), as reported in Cro. Jac. 494; 79 E. R. 421.

Annotations:—**Refd.** Walter *v.* Everard (1891), 65 L. T. 443. **Mentd.** Corpe *v.* Overton (1833), 10 Bing. 252.

—— **Custom of London.**]—*See* Sub-sect. 3, B., *post*.

4182. As being for infant's benefit.]—An infant may bind himself apprentice by indenture, because it is for his benefit; &, though he be a pauper in the parish workhouse at the time of the binding, & the parish officers pay the premium, yet it is not necessary that they should sign the indenture, or that the justices should assent thereto, if the apprentice be not a parish apprentice within 43 Eliz. c. 2.—R. *v.* ARUNDEL (INHABITANTS) (1816), 5 M. & S. 257; 104 E. R. 1045.

4183. ——.]—In an action by the master of an apprentice upon a covenant in the apprenticeship deed by the apprentice, who was an infant at the date of the deed, for the payment of the balance of the premium three years & a half after that date, the jury found that the deed was a provident & proper arrangement for the infant, & necessary if he wished to learn the business to which he was apprenticed, that the premium was fair & reasonable, & that instruction had been given under the deed:—*Held*: the liability of the infant for necessary instruction duly provided stood upon the same footing as that for ordinary necessaries supplied to him, & consequently the fact that he had entered into a covenant under seal for the payment of the premium did not prevent him from being liable for the amount claimed.—WALTER *v.* EVERARD, [1891] 2 Q. B. 369; 60 L. J. Q. B. 738; 65 L. T. 443; 55 J. P. 693; 39 W. R. 676; 7 T. L. R. 469, C. A.

Annotations:—**Consd.** Gadd *v.* Thompson, [1911] 1 K. B. 304. **Refd.** Roberts *v.* Gray, [1913] 1 K. B. 520.

4184. When contract for infant's benefit—Not manifestly to his prejudice.]—COOPER *v.* SIMMONS, No. 4348, *post*.

Contracts not for infant's benefit.]—*See* Sub-sect. 3, D., *post*.

B. Custom of London.

See, generally, METROPOLIS.

4185. Capacity of infant to bind himself—Over fourteen.]—CODE *v.* HOLMES (1623), Palm. 361; 81 E. R. 1124.

4186. —— —— **& unmarried.**]—An infant unmarried, & above the age of fourteen years, may bind himself apprentice to a freeman of London; & by the custom of that city, the master shall have the same remedies against him on the covenants of the indenture as if he had been of full age.—HORN *v.* CHANDLER (1670), 1 Mod. Rep. 271; 86 E. R. 874.

4187. Procedure as to enrolment.]—CODE *v.* HOLMES (1623), Palm. 361; 81 E. R. 1124.

4188. Remedy for non-enrolment by master.]—CODE *v.* HOLMES (1623), Palm. 361; 81 E. R. 1124.

4189. Liable on covenant—As though of full age.]—By the custom of London an infant apprentice can bind himself by covenant, & be sued thereon as if he were of full age.—STANTON'S CASE (1583), Moore, K. B. 135; 72 E. R. 489.

Annotations:—**Mentd.** Caudell *v.* Shaw (1791), 4 Term Rep. 361; Beard *v.* Webb (1800), 2 Bos. & P. 93.

4190. —— ——.]—WALKER *v.* NICHOLSON (1599), Cro. Eliz. 652; 78 E. R. 891.

4191. —— —— ——.]—HORN *v.* CHANDLER, No. 4186, *ante*.

C. Remedies against Infant for Breach.

(a) Action on Covenant.

4192. Whether action lies—Covenant to serve honestly & faithfully.]—FLEMING *v.* PITMAN (1623), Win. 63; 124 E. R. 54.

4193. ——.]—(1) Breach of covenant will not lie against an infant apprentice upon his indentures.

(2) If he [the apprentice] misbehave himself, the master may correct him in his service (*per*

PART XV. SECT. 1, SUB-SECT. 3.—A.

4182. *As being for infant's benefit.*]—A minor may bind himself by a contract of apprenticeship if it be for his benefit.—POLLARD *v.* ROUSE (1910), I. L. R. 33 Mad. 288.—**IND.**

PART XV. SECT. 1, SUB-SECT. 3.—C. (a).

4193 i. *Whether action lies.*]—NEW-

Sect. 1.—*The contract of apprenticeship: Sub-sect.* 3, *C.* (*a*), (*b*) *&* (*c*), *D. & E.; sub-sect.* 4.]

CUR.).—GYLBERT *v.* FLETCHER (1629), Cro. Car. 179; 79 E. R. 757.

Annotations:—*As to* (1) **Apld.** De Francesco *v.* Barnum (1889), 43 Ch. D. 165; De Francesco *v.* Barnum (No. 2) (1890), 60 L. J. Ch. 63. **Distd.** Walter *v.* Everard, [1891] 2 Q. B. 369; Gadd *v.* Thompson, [1911] 1 K. B. 304. **Refd.** R. *v.* Chillesford, R. *v.* Winslow (1825), 3 L. J. O. S. K. B. 148. *As to* (2) **Refd.** Walter *v.* Everard, [1891] 2 Q. B. 369.

4194. ——.]—LYLLY'S CASE (1702), 7 Mod. Rep. 15; 87 E. R. 1066.

Annotation:—**Apld.** De Francesco *v.* Barnum (1889), 43 Ch. D. 165.

4195. —— **Covenant to pay premium—Necessary.**]—WALTER *v.* EVERARD, No. 4183, *ante.*

—— **By custom of London.**]—*See* Sub-sect. 3, B., *ante.*

(b) By Summary Proceedings.

See, generally, Employers & Workmen Act, 1875 (c. 90), ss. 5, 6.

4196. Remedy not available—Where stipulation to prejudice of infant—Proviso for cessation of wages—During turn out—Proviso entitling infant to earn money elsewhere.]—By an apprenticeship deed the master covenanted to find the apprentice fair & reasonable work during the term, & pay him wages at a certain rate during the term. The apprentice, an infant, & his father covenanted that the master should not be liable to pay any wages to the apprentice so long as his business should be interrupted by any turn out, i. the apprentice was expressly authorised by the deed, during any such turn out, to employ himself in any other manner or with any other person for his own benefit. The apprentice absented himself from work, & the master applied, under Employers & Workmen Act, 1875 (c. 90), for an order to compel him to return. The magistrate refused the application:—*Held:* the magistrate was right, as the deed was invalid, & incapable of being enforced against the infant, by reason of the clause providing for the cessation of wages, which was a stipulation necessarily to the prejudice of the infant. The proviso entitling the infant to earn money elsewhere did not alter the character of the preceding clause so as to make the whole deed equitable or capable of being upheld.—MEAKIN *v.* MORRIS (1884), 12 Q. B. D. 352; 53 L. J. M. C. 72; 48 J. P. 344; 32 W. R. 661, D. C.

Annotations:—**Apprvd.** Corn *v.* Matthews, [1893] 1 Q. B. 310. **Dbtd.** Green *v.* Thompson, [1899] 2 Q. B. 1. **Consd.** Morrison, Fleet *v.* Fletcher (1900), 17 T. L. R. 95. **Refd.** Farmers & Cloveland Dairies Co. *v.* Riley (1893), 9 T. L. R. 260.

4197. —— —— —— **During lock out—Liberty to get work elsewhere.**]—An infant was apprenticed by a deed containing a provision that the masters should not be liable to pay wages to the apprentice so long as their business should be interrupted or impeded by or in consequence of any turn out, & that the apprentice might during any such turn out, & for such reasonable time thereafter as might be necessary for him to enable him to determine such employment as thereinafter mentioned, employ himself in any other manner or with any other person for his own benefit, & that in case the apprentice should elect so to employ himself the masters should not, during the time he should so employ himself, be bound to teach or instruct him:—*Held:* this provision was so much to the detriment of the infant that the apprenticeship deed could not be enforced against him under the Employers & Workmen Act, 1875 (c. 90), ss. 5, 6.—CORN *v.* MATTHEWS, [1893] 1 Q. B. 310; 62 L. J. M. C. 61; 68 L. T. 480; 57 J. P. 407; 41 W. R. 262; 9 T. L. R. 183; 37 Sol. Jo. 190; 4 R. 240, C. A.

Annotations:—**Consd.** Clements *v.* L. & N. W. Ry., [1894] 2 Q. B. 482. **Distd.** Green *v.* Thompson, [1899] 2 Q. B. 1. **Consd.** Bromley *v.* Smith, [1909] 2 K. B. 235.

4198. —— —— —— **During accidental stoppage.**]—By a deed of apprenticeship of an infant it was provided that the apprentice should serve for a term of years, excepting the usual holidays & days on which the master's business should be at a standstill through accident beyond the control of the master, & that during the said term, excepting & subject as aforesaid, the master should pay the apprentice wages for her services:—*Held:* the provision that the master should not be liable to pay wages to the apprentice during the excepted period was not so disadvantageous to her as to render the apprenticeship deed incapable of being enforced against her under Employers & Workmen Act, 1875 (c. 90).—GREEN *v.* THOMPSON, [1899] 2 Q. B. 1; 68 L. J. Q. B. 719; 80 L. T. 691; 63 J. P. 486; 48 W. R. 31, D. C.

Annotation:—**Consd.** Morrison, Fleet *v.* Fletcher (1900), 17 T. L. R. 95.

(c) Injunction.

4199. Whether contract enforceable by injunction.]—As no action at law will lie on an apprenticeship deed against an infant apprentice, so this ct. will not grant an injunction against an infant apprentice to enforce a negative contract entered into by him in the apprenticeship deed.—DE FRANCESCO *v.* BARNUM (1889), 43 Ch. D. 165; 59 L. J. Ch. 151; 6 T. L. R. 59; *sub nom.* FRANCESCO *v.* BARNUM, 62 L. T. 40; 54 J. P. 420; 38 W. R. 187.

Annotation:—**Consd.** Evans *v.* Ware, [1892] 3 Ch. 502.

4200. —— **Covenant not to operate till after termination of apprenticeship.**]—The rule that an action will not lie to enforce a covenant entered into by an infant in an apprenticeship deed applies only to covenants which it is sought to enforce during the currency of the apprenticeship. A covenant to do or abstain from doing something after the apprenticeship shall have ceased may, provided that the deed as a whole was for the apprentice's benefit, be enforced against him by action.

By a deed of apprenticeship deft., an infant, bound himself apprentice to pltf. in his business as an architect & surveyor for the term of four years. The deed contained a covenant by deft. not to carry on within ten years after the expiration of the term the business of an architect or surveyor within ten miles of the town where the master resided. There was evidence that no architect in the town would accept as an apprentice a person who refused to enter into a similar restrictive covenant:—*Held:* (1) having regard to the impossibility of deft. obtaining instruction except upon the terms of his entering into the covenant, the covenant was reasonable; (2) as it did not come into operation until after the termination of the apprenticeship it was enforceable against deft. by injunction.—GADD *v.* THOMPSON, [1911] 1 K. B. 304; 80 L. J. K. B. 272; 103 L. T. 836; 27 T. L. R. 113; 55 Sol. Jo. 156, D. C.

Annotation:—*As to* (2) **Refd.** Roberts *v.* Gray, [1913] 1 K. B. 520.

D. Reasonable Covenants.

4201. Extraordinary & unusual covenant not enforceable.]—By an apprenticeship deed between an infant, her parent, & pltf. the infant was bound apprentice to pltf. for seven years, to be taught stage dancing, upon certain terms, by one of which the infant contracted that she would not accept any professional engagement or contract matrimony during the said term without the consent of her master. The deed also contained mutual covenants by the master & the parent that the master would properly instruct the infant, & make certain payments to her for all dancing engagements in this country, & in foreign or colonial countries; in return for which the infant's services were to be entirely at the disposal of the master. But there was no stipulation that the master should provide engagements for the infant or maintain her while unemployed. There was also a provision that the master might put an end to the apprenticeship if the infant should be found after fair trial unfit for the work of stage dancing, or should break any of the engagements of the deed, or in any way misconduct herself. The infant having made a professional engagement with defendant B. pltf. brought an action against B. the infant, & her parent, to enforce the provisions of the deed & for damages for breach of it:—*Held:* the provisions of the deed were unreasonable, & could not be enforced against the infant or her parent; & consequently no action would lie against B. for enticing her away from pltf.'s employment.—DE FRANCESCO *v.* BARNUM (1890), 45 Ch. D. 430; 60 L. J. Ch. 63; 63 L. T. 438; 39 W. R. 5; 6 T. L. R. 463.

Annotations:—**Apld.** Corn *v.* Matthews, [1893] 1 Q. B. 310. **Consd.** Clements *v.* L. & N. W. Ry., [1894] 2 Q. B. 482. **Apprvd.** Mackinlay *v.* Bathurst (1919), 36 T. L. R. 31. **Refd.** Whitwood Chemical Co. *v.* Hardman (1891), 39 W. R. 433; Roberts *v.* Gray, [1913] 1 K. B. 520.

4202. What covenants are reasonable & for benefit of infant—Covenant in restraint of trade.]—GADD *v.* THOMPSON, No. 4200, *ante*.

4203. —— Remuneration—Subsequent increase in cost of living.]—DILLINGHAM *v.* HARRISON, [1917] W. N. 305.

—— Cesser of wages during stoppage.]—*See* Sub-sect. 3, C. (*b*), *ante*.

E. Termination.

4204. Must be for infant's benefit.] — It is a general rule of law that an infant cannot do any act to bind himself unless it be manifestly for his benefit. Binding himself an apprentice has been considered such an act, & therefore it has been held that an infant is competent to make such a contract. If then it is for the benefit of the infant to bind himself an apprentice, it is impossible to say generally, that it is for his benefit to dissolve such a connection; such a position involves a contradiction (ABBOTT, C.J.).—R. *v.* GREAT WIGSTON, LEICESTER (INHABITANTS) (1824), 3 B. & C. 484; 5 Dow. & Ry. K. B. 339; 2 Dow. & Ry. M. C. 445; 3 L. J. O. S. K. B. 85; 107 E. R. 813.

Annotations:—**Consd.** Waterman *v.* Fryer, [1922] 1 K. B. 499. **Mentd.** Ellen *v.* Topp (1851), 6 Exch. 424.

4205. —— Repudiation.] — Where an infant bound himself apprentice for seven years by indenture, to which indenture he & his master were the only parties, & after serving some time, in consequence of the master's running away & leaving him, procured the indenture to be given up to him with the master's consent, & afterwards, during the seven years, hired himself as a yearly servant & served a year:—*Held:* he acquired a settlement by such hiring & service, for it was for the infant's benefit under the circumstances that he & his master should be at liberty to put an end to the indenture.—R. *v.* MOUNTSORREL (INHABITANTS) (1815), 3 M. & S. 497; 105 E. R. 697.

Annotations:—**Distd.** R. *v.* Great Wigston (1824), 3 B. & C. 484. **Mentd.** Ellen *v.* Topp (1850), 15 Jur. 451.

4206. —— ——.]—WATERMAN *v.* FRYER, No. 4255, *post*.

4207. Voidable as made to infant's prejudice—Not avoided by running away.]—R. *v.* EVERED, (1777), Cald. Mag. Cas. 26.

Annotation:—**Refd.** Gray *v.* Cookson (1812), 16 East, 13.

4208. —— ——.]—*Qu.:* whether an indenture of apprenticeship made by an infant, being for his benefit, is voidable by him; but it is not avoided by the act of his leaving his master's service, & going into the service of another.—ASHCROFT *v.* BERTLES (1796), 6 Term Rep. 652; 101 E. R. 753.

By consent of all parties.]—*See* Sub-sect. 13, B., *post*.

SUB-SECT. 4.—FORM OF CONTRACT.

4209. Whether deed necessary.] — A parol binding will not gain a settlement by apprenticeship.—R. *v.* KINGSWEARE (INHABITANTS) (1776), Burr. S. C. 839.

Annotation:—**Mentd.** Kirkby *v.* Taylor (1910), 102 L. T. 184.

4210. ——.]—If A. serve seven years as an apprentice, & there be no indenture, he cannot gain a settlement, either as an apprentice, or a yearly servant.—R. *v.* MARGRAM (INHABITANTS) (1793), 5 Term Rep. 153; Nolan, 174; 101 E. R. 88.

4211. ——.]—R. *v.* RAINHAM (INHABITANTS), No. 4170, *ante*.

4212. ——.]—BEALE *v.* GEALE, No. 4163, *ante*.

——.]—*See, now*, Apprentices Act, 1814 (c. 96), s. 2.

4213. —— Validity of contract not in writing.]—Resp. sold a bottle of a preparation coming within Medicines Stamp Act, 1812 (c. 180), sched., without a stamped label as required by sect. 2 of the Act. Resp.'s father had been a registered chemist, & resp., in pursuance of an oral agreement, became his apprentice & duly served him & was instructed by him for four years, afterwards succeeding to his business. Upon an information against resp. under sect. 2:—*Held:* in order to constitute an apprenticeship in law the contract must, with certain statutory exceptions, be in writing, & in the absence of such a written contract resp. did not come within the description in the schedule of a chemist who had served a "regular apprenticeship," & could not therefore claim the benefit of the exemption in favour of such persons.—KIRKBY *v.* TAYLOR, [1910] 1 K. B. 529;

PART XV. SECT. 1, SUB-SECT. 3.—D.

4201 i. *Extraordinary & unusual covenant not enforceable.*]—Articles of apprenticeship which require the apprentice during the term of four years of three hundred & ten working days of ten hours each, to give & devote to a firm, to whom he is apprenticed, ten hours each working day, or such number of hours as may be the regulation of the workshop for the time being, or as special exigencies of the business may require, are unreasonable & cannot be enforced against the infant, nor against a surety for him.—MACGREGOR *v.* SULLY (1900), 31 O. R. 535.—**CAN.**

4202 i. *What covenants are reasonable & for benefit of infant—Covenant in restraint of trade.*]—A covenant by an infant in an indenture of apprenticeship, that he will not carry on a trade within certain limits, is not binding on him.—R. *v.* HARRIS (1848), 1 All. 100.—**CAN.**

Sect. 1.—*The contract of apprenticeship: Sub-sects.* 4 & 5, *A. & B.; sub-sects.* 6, 7 & 8, *A.*]

79 L. J. K. B. 267; 102 L. T. 184; 74 J. P. 143; 26 T. L. R. 246, D. C.

Necessity for writing—As contract for more than a year—Statute of Frauds, s. 4.]—*See, generally,* CONTRACT, Vol. XII., pp. 118 *et seq.*, Nos. 768 *et seq.*

Misnomer of apprentice.]—*See* DEEDS, Vol. XVII., p. 234, No. 494.

SUB-SECT. 5.—EXECUTION OF CONTRACT.

A. In General.

See, generally, DEEDS, Vol. XVII., pp. 199 *et seq.*

4214. By apprentice.]—Covenant between the master & third person, the servant not being party, makes no apprenticeship.—CHESTERFIELD'S CASE (1697), 2 Salk. 479; 91 E. R. 412; *sub nom.* R. *v.* CHESTERFIELD (INHABITANTS), 5 Mod. Rep. 329; Skin. 671; *sub nom.* CHESTERFIELD *v.* WALTON (HAMLET), Carth. 400; *sub nom.* WALTON *v.* CHESTERFIELD (INHABITANTS), Fortes. Rep. 214; *sub nom.* JERRISON'S CASE, Comb. 445.

Annotations:—**Refd.** R. *v.* Crediton (1831), 2 B. & Ad. 493. **Mentd.** Wansworth Parish *v.* Putney Parish (1739), Sess. Cas. K. B. 219.

4215. ——.]—R. *v.* CROMFORD (INHABITANTS) (1806), 8 East, 25; 2 Bott. 6th ed. 407; 103 E. R. 253.

Annotation:—**Consd.** R. *v.* Arnesby (18 0), 3 B. & Ald. 584.

4216. —— Consent insufficient.]—An indenture binding an adult as an apprentice, which was not executed by herself, but only by her father in law & the master, though with her consent, does not constitute her an apprentice; & consequently no settlement can be gained by her under such indenture.—R. *v.* RIPON (INHABITANTS) (1808), 9 East, 295; 103 E. R. 586.

Annotation:—**Consd.** R. *v.* Arnesby (1820), 3 P. & Ald. 584.

4217. —— Apprentice an infant.]—A father has, at the common law, no authority to bind his infant son apprentice without his assent; & consequently, where an indenture of apprenticeship was executed by the master & the father of the apprentice, but not also by the apprentice himself:—*Held:* it was invalid, & no settlement could be gained under it.—R. *v.* ARNESBY (INHABITANTS) (1820), 3 B. & Ald. 584; 106 E. R. 775.

Annotation:—**Apld.** St. Nicholas, Rochester *v.* St. Botolph, Bishopsgate (1862), 12 C. B. N. S. 645.

4218. By master.]—Settlement may be gained where the apprentice is bound, though the indenture be not executed by the master.—R. *v.* ST. PETER'S-ON-THE-HILL (1741), 2 Bott. 6th ed. 394.

4219. —— Signature to counterpart.] — An apprentice legally bound shall not be prevented from gaining a settlement under the indentures, from the master not having signed the counterpart.—R. *v.* FLEET (1777), Cald. Mag. Cas. 31; 2 Bott. 6th ed. 396.

4220. ——.]—*Qu.:* whether, in order to enable a master to sue on the covenant in an indenture of apprenticeship, it is necessary that he should have executed the deed or a counterpart of it.—MILLERSHIP *v.* BROOKES (1860), 5 H. & N. 797; 29 L. J. Ex. 369; 157 E. R. 1399.

Annotations:—**Mentd.** Kidner *v.* Keith (1863), 15 C. B. N. S. 35; Watkins *v.* Nash (1875), L. R. 20 Eq. 263.

4221. On behalf of illiterate apprentice & parent.]—An indenture having been prepared for binding a boy apprentice, the apprentice & his father, being unable to write, desired a third person to write their names opposite two of the seals, & he did so. The indenture was not read to them. The apprentice immediately afterwards took the indenture to the master & left it with him; & afterwards stated that when he did so he considered himself bound; & he went into service under the indenture:—*Held:* the indenture was sufficiently executed & delivered.—R. *v.* LONGNOR (INHABITANTS) (1833), 4 B. & Ad. 647; 1 Nev. & M. K. B. 576; 1 Nev. & M. M. C. 128; 2 L. J. M. C. 62; 110 E. R. 599.

Annotation:—**Mentd.** Tupper *v.* Foulkes (1861), 9 C. B. N. S. 797.

4222. After date of indenture.] — A printed indenture of apprenticeship, which is ante dated, is not therefore void, although in the notice required to be given by 5 Geo. 3, c. 46, s. 19, & which is in fact printed under the indenture, it is stated that in such case the indenture will be void.—R. *v.* HARRINGTON (INHABITANTS) (1836), 4 Ad. & El. 618; 1 Har. & W. 747; 6 Nev. & M. K. B. 165; 3 Nev. & M. M. C. 576; 5 L. J. M. C. 83; 111 E. R. 919.

4223. —— Whether ordered in Chancery.]—In pursuance of an agreement, an indenture of apprenticeship was prepared between pltf. an apprentice, the father of pltf., & deft. a master. The indenture was signed by pltf. & his father, & was left with deft.'s solr. Pltf. went to work with deft., & continued to do so for about seventeen months, when he was discharged for alleged misconduct. On a summons being taken out before the magistrates, requiring deft. to appear & show cause why he refused to teach pltf. his trade, it was found that the indenture was not executed. The magistrates called upon deft. to execute the deed, but he refused, & the summons was dismissed, the magistrates having no jurisdiction. Bill praying that deft. might be ordered to execute the deed, & take pltf. back again into his employ, refused, but without costs.—BROWN *v.* BANKS (1861), 3 Giff. 190; 4 L. T. 698; 7 Jur. N. S. 1273; 66 E. R. 377.

Parish apprentices.]—*See* Sect. 6, sub-sect. 2, *post.*

B. Proof.

4224. Execution by apprentice — Recital in counterpart.]—An averment in a declaration on 9 Ann. c. 9, against the master of an apprentice for not inserting the true consideration in the indenture, "that B. the apprentice, by a certain indenture executed on, etc., put himself apprentice to deft., etc.," may be proved by the production of that part of the indenture executed by deft., in which it is recited that B. had put himself apprentice, etc.—BURLEIGH *v.* STIBBS (1793), 5 Term Rep. 465; 101 E. R. 261.

Annotation:—**Mentd.** Paul *v.* Meek (1828), 2 Y. & J. 116.

4225. Proof by subscribing witnesses.] — On an indictment against an apprentice for enlisting himself as a soldier, the indentures must be proved by the subscribing witnesses.—R. *v.* JONES (1777), 1 Leach, 174; 168 E. R. 189.

——.]—*See, generally,* EVIDENCE, Vol. XXII., pp. 203 *et seq.*, Nos. 1769 *et seq.*

4226. When secondary evidence admissible.]—The examinations, which were sent with an order of removal under Poor Law Amendment Act, 1834 (c. 76), s. 79, made reference to certain indentures of apprenticeship, under which the

a. *By parent.*]—CONNELL *v.* OWEN (1854), 3 C. P. 249.—**CAN.**

b. *By one partner only.*]—R. *v.* MCNANEY (1871), 5 P. R. 438.—**CAN.**

settlement was claimed. It was not stated that the indentures were produced, nor was the evidence of the attesting witness taken, nor his absence accounted for so as to let in secondary evidence :— *Held:* the magistrates were not justified in receiving secondary evidence as to the indentures, & had no discretion on that point, & the order was bad accordingly.—R. *v.* LEEDS (INHABITANTS) (1843), 1 L. T. O. S. 107 ; 7 J. P. 255.

——.]—*See, generally,* EVIDENCE, Vol. XXII., pp. 211 *et seq.*, Nos. 1845 *et seq.*

SUB-SECT. 6.—STAMPS.

See, generally, Stamp Act, 1891 (c. 39), ss. 1, 25, Sched. I ; EVIDENCE, Vol. XXII., p. 262, Nos. 2465 *et seq.*

4227. Presumption of stamping.]—On parol evidence of existence of an indenture, sessions may presume that indenture was stamped & duty paid. —R. *v.* BADBY (1772), 1 Bott. 6th ed. 520.

4228. ——.]—The sessions presumed that an indenture of apprenticeship executed thirty years before, & under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, & proved to be lost, & when the parish in which he was settled under such indenture had relieved him for the last twelve years, was properly stamped in proportion to the apprentice fee of £12 received by the master ; although the deputy registrar & comptroller of the Stamp Duties proved that it did not appear in the office that any such indenture had been stamped or enrolled during that period, & the judgment of the justices was confirmed in K. B.—R. *v.* LONG BUCKBY (INHABITANTS) (1805), 7 East, 45 ; 3 Smith, K. B. 92 ; 103 E. R. 18.

Annotations :—**Refd.** Marine Investment Co. *v.* Haviside (1872), L. R. 5 H. L. 624. **Mentd.** Doe d. Howson *v.* Waterton (1819), 3 B. & Ald. 149 ; Hart *v.* Hart (1841), 1 Hare, 1 ; Crowther *v.* Solomons (1848), 6 C. B. 758.

——.]—*See, also,* EVIDENCE, Vol. XXII., p. 272, Nos. 2571–2577.

4229. Effect of omission to stamp.]—Where an apprenticeship is intended, but to save expense an unstamped agreement is entered into, whereby the pauper agrees to serve the master in his business of a carpenter for four years, it is a defective apprenticeship, & not a hiring & service.—R. *v.* HIGHNAM (INHABITANTS) (1785), 4 Doug. K. B. 238 ; Cald. Mag. Cas. 491 ; 2 Bott. 6th ed. 397 ; 99 E. R. 859.

Annotations :—**Consd.** R. *v.* Laindon (1799), 8 Term Rep. 379. **Refd.** R. *v.* Eccleston (1802), 2 East, 298 ; R. *v.* Billinghay (1836), 5 Ad. & El. 676.

4230. One stamp sufficient—Apprenticeship to two successive masters.]—An indenture, by which an apprentice was bound for seven years, to serve A. B. for the first four years, & his own father for the last three, to learn two different trades, is a valid indenture, & requires only one stamp.—R. *v.* LOUTH (INHABITANTS) (1828), 8 B. & C. 247 ; 2 Man. & Ry. K. B. 273 ; 1 Man. & Ry. M. C. 238 ; 6 L. J. O. S. M. C. 107 ; 108 E. R. 1036.

Exemptions in case of parish apprentices.]—*See* Sect. 6, *post.*

SUB-SECT. 7.—BYE-LAWS OF CORPORATIONS.

Validity—Payment of money on enrolling indenture.]—*See* CORPORATIONS, Vol. XIII., p. 328, No. 650.

—— **Restraining number of apprentices of one master.**]—*See* CORPORATIONS, Vol. XIII., p. 331, No. 693.

SUB-SECT. 8.—THE COVENANTS.

A. In General.

4231. Whether covenants of master & apprentice are independent—Breach of covenant to teach & provide—Misconduct of apprentice.]—WINSTONE *v.* LINN, No. 4267, *post.*

4232. —— —— ——.] — Covenant by the father of an apprentice against the master for not teaching & providing for the apprentice. Plea, that up to a certain time, deft. did teach, etc., & that then the apprentice, without leave, quitted deft.'s service, & never returned. Replication, that on, etc., deft. refused then or ever, to receive back the apprentice, & thereby discharged him from his service. Rejoinder, that the apprentice enlisted as a soldier, & that pltf. never requested deft. to receive back the apprentice when he was able to return to the service. Surrejoinder, that soon after the apprentice enlisted, deft. refused then, or ever, to take him back, & wholly discharged him from his service : *Held:* on demurrer, the surrejoinder was bad, not being a sufficient answer to the rejoinder, & the plea was good, as it disclosed a sufficient excuse for non-performance of deft.'s covenant.—HUGHES *v.* HUMPHREYS (1827), 6 B. & C. 680 ; 9 Dow. & Ry. K. B. 715 ; 4 Dow. & Ry. M. C. 484 ; 5 L. J. O. S. K. B. 270 ; 108 E. R. 601.

Annotation :—**Consd.** Waterman *v.* Fryer, [1922] 1 K. B. 499.

4233. —— —— ——.]—ELLEN *v.* TOPP, No. 4273, *post.*

4234. —— —— —— .]—PHILLIPS *v.* CLIFT, No. 4566, *post.*

4235. —— **Dispute as to wages—Apprentice absenting himself.**]—WINNIFRITH *v.* PANKHURST, No. 4405, *post.*

4236. Where contract void—Covenants unenforceable.]—If the indenture of apprenticeship is void, all the covenants entered into merely to secure performance of that indenture must, *a fortiori,* be void also (HOTHAM, B.).—GUPPY *v.* JENNINGS (1791), 1 Anst. 256 ; 145 E. R. 865.

Annotation :—**Refd.** Smedley *v.* Gooden (1814), 3 M. & S. 189.

4237. Money payable at end of term — Earlier death of apprentice.]—CHEYNEY *v.* SELL (1607), 1 Brownl. 97 ; 123 E. R. 689.

Express terms—Override custom.]—*See* CUSTOM & USAGES, Vol. XVII., p. 73, No. 744.

PART XV. SECT. 1, SUB-SECT. 8.—A.

c. *Whether covenants of master & apprentice are independent.*]—In an indenture of apprenticeship the covenant to teach, & the covenant to serve & remain in the service, are so far dependent one on the other, that failure or incompetence of the master to teach during a substantial part of the apprenticeship affords an excuse at law to the apprentice for quitting the service.—FLETCHER *v.* BUZOLICH (1881), 7 V. L. R. (L.) 348.—**AUS.**

d. ——.]—Deft. covenanted with pltf. to teach him the trade of a blacksmith, & pltf. covenanted to serve deft. faithfully for five years, & not to absent himself from deft.'s service without leave :—*Held:* these covenants were mutual & independent.—HUNTER *v.* GIFFORD (1849), 1 All. 701.—**CAN.**

e. ——.]—Pltf., an infant, had come from Jersey to Newfoundland under articles of indenture, a covenant of which prevented his marrying. He was dismissed by his employer for breach of the above covenant. In an action for wrongful dismissal :—*Held:* the covenant was an independent one, & its breach did not dissolve the articles of indenture, & his employers were bound to take him back.—MCKAY *v.* RENOUF, CLEMENT & CO. (1887), 7 Nfld. L. R. 229.—**NFLD.**

f. ——.]—The covenants in a deed of apprenticeship of the master to teach & of the apprentice to serve his term are not independent but dependent covenants, &, if the master does not perform his covenant to teach, the father of the apprentice is justified in refusing to allow him to continue his service.—MAUNDER *v.* TAYLOR (1907), 26 N. Z. L. R. 1091.—**N.Z.**

Sect. 1.—*The contract of apprenticeship: Sub-sect.* 8, *B. & C.; sub-sect.* 9, *A., B. & C.; sub-sect.* 10, *A., B., C. & D.*]

B. Covenant to Teach.

4238. What amounts to breach—Sale of business.]—WHITMORE *v.* OWEN (1854), 2 W. R. 432.

4239. —— Dissolution of partnership.]—COUCHMAN *v.* SILLAR, No. 4342, *post.*

4240. —— Change in business—Not preventing the tuition contracted for.]—By indenture between pltf. & deft., deft. covenanted to teach pltf. the art & mystery of an apothecary. At the time of the indenture being executed deft. kept a shop, making up his own prescriptions & those of other medical men. Deft. subsequently closed his shop & confined his business to that of a general practitioner, making up his own prescriptions, but not those of other medical men:—*Held:* this did not disqualify deft. from teaching pltf. the art & mystery of an apothecary, so as to entitle the latter to a direction in an action brought by him for breach of the covenant in the indenture.—BATTY *v.* MONKS (1805), 12 L. T. 832.

4241. Remedy for wrongful refusal—Specific performance not ordered—Nor cancellation of deed.]—(1) This ct. has no jurisdiction to order the cancellation of articles of apprenticeship & the return of a portion of the premium, on the ground of the wrongful refusal of the master to continue to instruct his apprentice in his trade, according to his agreement.

(2) A bill for the specific performance of articles of apprenticeship cannot be maintained.—WEBB *v.* ENGLAND (1860), 29 Beav. 44; 30 L. J. Ch. 222; 3 L. T. 574; 25 J. P. 292; 7 Jur. N. S. 153; 9 W. R. 183; 54 E. R. 541.

Annotations:—*As to* (1) **Refd.** Ferns *v.* Carr (1885), 54 L. J. Ch. 478. *Generally*, **Mentd.** Bush *v.* Trowbridge Waterworks Co. (1875), 33 L. T. 137.

4242. Defence to action for damages—Apprentice wilfully preventing teaching.]—To an action of covenant against the master for not teaching his apprentice, it is a good plea that the apprentice would not be taught, & by his own wilful acts prevented the master from teaching him.—RAYMOND *v.* MINTON (1866), L. R. 1 Exch. 244; 4 H. & C. 371; 35 L. J. Ex. 153; 14 L. T. 367; 30 J. P. 424; 12 Jur. N. S. 435; 14 W. R. 675.

Annotations:—**Apld.** Learoyd *v.* Brook, [1891] 1 Q. B. 431. **Consd.** Waterman *v.* Fryer, [1922] 1 K. B. 499.

4243. Proof of breach — Plaintiff must prove usual course of instruction.]—In an action by an apprentice against his master for neglecting to teach him judgment was entered for deft.; pltf. having giving no evidence as to what the usual & reasonable course of instruction was in the business.—CRIDLAN *v.* MARLER & BENNETT (1893), 9 T. L. R. 529, C. A.

C. Infants' Covenants.

See Sub-sect. 3, *ante.*

SUB-SECT. 9.—PERFORMANCE.

A. In General.

4244. "Duly & truly serve"—Employment with another master—With master's consent.]—An apprentice "duly & truly" serves his master if, with that master's consent, he is employed otherwise than actually by that master during the term of apprenticeship.—RICHARDSON *v.* COLNE FISHERY CO. (1897), 77 L. T. 501.

B. Place of Performance.

4245. Not outside kingdom—Unless sea apprentice.]—COVENTRY *v.* WOODHALL (1615), Hob. 134; 1 Brownl. 67; 80 E. R. 284.

Annotations:—**Consd.** Eaton *v.* Western (1882), 9 Q. B. D. 636. **Refd.** Baxter *v.* Burfield (1747), 2 Stra. 1266. **Mentd.** Somerset *v.* Stewart (1772), Lofft, 1.

4246. Whether stipulation implied—For performance at place of master's business at time of execution.]—A deed of apprenticeship contained the usual provision that the master should teach the apprentice, but no express provision as to the place where the contract was to be performed by the master:—*Held:* no stipulation could be implied that it was to be performed at the place where at the time of its execution the master carried on business & the parties to the deed resided.—ROYCE *v.* CHARLTON (1881), 8 Q. B. D. 1; 45 L. T. 712; 46 J. P. 197; 30 W. R. 274.

Annotation:—**Overd.** Eaton *v.* Western (1882), 9 Q. B. D. 636.

4247. —— —— Or within reasonable distance.]—EATON *v.* WESTERN, No. 4344, *post.*

Sea apprentices.]—*See* SHIPPING.

C. Excuses for Non-Performance.

4248. General rule.]—A person has a right to dismiss a servant for misconduct, but has no right to turn away an apprentice because he misbehaves; but the case of a young man seventeen years old, who, under a written agreement not under seal, is placed with a surgeon, as "pupil & assistant," & with whom a premium is paid, is a case between that of apprenticeship & service; & if such a person on some occasions come home intoxicated, this alone will not justify the surgeon in dismissing him. But if the "pupil & assistant" by employing the shop boy to compound the medicines, occasion real danger to the surgeon's practice, this would justify the surgeon in dismissing him.—WISE *v.* WILSON (1845), 1 Car. & Kir. 662, N. P.

Annotation:—**Refd.** Phillips *v.* Clift (1859), 4 H. & N. 168.

4249. Justification of dismissal by master—Gaming—Custom of London.]—By the custom of London, a master may justify turning away his apprentice, if he frequents gaming.—WOODROFFE *v.* FARNHAM (1693), 2 Vern. 291; 23 E. R. 788.

4250. —— Occasional intoxication.]—WISE *v.* WILSON, No. 4248, *ante.*

4251. —— Causing damage to master's practice—Pupil & assistant to surgeon.]—WISE *v.* WILSON, No. 4248, *ante.*

4252. —— Loose behaviour.]—LOCK *v.* BAKER (1851), 17 L. T. O. S. 81.

4253. —— Habitual stealing.]—If an apprentice, whose master's business lies in precious articles constantly lying about, is an habitual thief, the master may discharge him; & charges of theft made to his father will be privileged, but the master will be liable in slander for false charges made to third parties.—COX *v.* MATLEWS (1861), 2 F. & F. 397, N. P.

Annotations:—**Folld.** Learoyd *v.* Brook, [1891] 1 Q. B. 431. **Mentd.** Lewis *v.* Peacey (1862), 10 W. R. 797.

4254. —— ——.]—LEAROYD *v.* BROOK, No. 4296, *post.*

4255. —— Habitual criminal misconduct.]—Applt., an apprentice, an infant, by his conduct

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PART XV. SECT. 1, SUB-SECT. 8.—B.

g. *What amounts to breach.*]—MOORE *v.* GELLING (1839), Bluett, 179.—**I. of M.**

h. —— *Change in business.*]—BARTER *v.* JOHNSON (1817), 1 Nfld. L. R. 33.—**NFLD.**

PART XV. SECT. 1, SUB-SECT. 9.—C.

k. *Justification of dismissal by master—Degree of misconduct necessary.*]—In order to justify the determination of an apprenticeship by a master on the ground of misconduct of the apprentice, it must appear that the misconduct was such as to prevent the

forced his master to discharge him. The apprentice then sued the master for damages for wrongful dismissal:—*Held:* a master could not discharge his apprentice except for habitual criminal misconduct, & an infant apprentice could not repudiate his indentures unless to do so would be to his own benefit, & the case must be remitted to the judge for the determination of this question. If the rescission of the contract was for the benefit of pltf., there must be judgment for deft.; if not, there must be judgment for pltf.—WATERMAN *v.* FRYER, [1922] 1 K. B. 499; 91 L. J. K. B. 315; 126 L. T. 316; 38 T. L. R. 87; 66 Sol. Jo. 108; 20 L. G. R. 691.

4256. —— Habitual neglect of duties.]—To a declaration setting out an agreement by deft. to teach pltf.'s son a trade, & containing the following proviso: "Provided always that he obeys all commands, & gives his service entirely to the business during office hours," & alleging a wrongful dismissal, deft. pleaded justifying the dismissal on the ground that the son had habitually neglected his duties, etc.:—*Held:* a good plea.—WESTWICK *v.* THEODOR (1875), L. R. 10 Q. B. 224; 44 L. J. Q. B. 110; 32 L. T. 696; 39 J. P. 646; 23 W. R. 620.

Annotation:—**Refd.** James *v.* Krauth (1910), 26 T. L. R. 240.

4257. Wrongful dismissal—Measure of damages.]—In an action for the unlawful dismissal of an apprentice, the measure of damages is the loss or injury that has been incurred by the apprentice from the time of his dismissal to the time of action brought.—ADDAMS *v.* CARTER (1862), 6 L. T. 130, N. P.

4258. —— ——.]—By a deed of apprenticeship pltf. bound himself as apprentice to defts. to learn the business of a draper for the term of four years from May, 1887, & defts. covenanted to instruct pltf. & provide him with food & lodging during that term. It was provided by the deed that, if during the term pltf. showed want of interest in his work it should be lawful for defts. to cancel the deed upon giving him a week's notice. In Oct. 1888, defts. summarily & without any notice dismissed pltf., assigning as the reason of his dismissal that he had been guilty of frequent acts of insubordination, & had gone out at night without permission. Pltf. having brought an action for wrongful dismissal in breach of the apprenticeship deed, the jury found that he had not been guilty of the misconduct imputed, & that no grounds existed justifying defts. in dismissing him without notice, but that grounds did exist which would have justified them in dismissing him with a week's notice. On the question of the measure of the damages to which pltf. was entitled under those circumstances, the judge directed the jury that, although they might take into consideration as an element in the case the fact that defts. would have been justified in dismissing pltf. with a week's notice, they were not bound to limit the damages to the value of the week's notice which he had lost:—*Held:* this was no misdirection.—MAW *v.* JONES (1890), 25 Q. B. D. 107; 59 L. J. Q. B. 542; 63 L. T. 347; 54 J. P. 727; 38 W. R. 718.

Annotations:—**Distd.** Baker *v.* Denkera Ashanti Mining Corpn. (1903), 20 T. L. R. 37; Austwick *v.* Mid. Ry. (1909), 25 T. L. R. 728. **Consd.** Addis *v.* Gramophone Co., [1909] A. C. 488. **Refd.** Chaplin *v.* Hicks, [1911] 2 K. B. 786.

SUB-SECT. 10.—BREACHES OF CONTRACT AND REMEDIES THEREFOR.

A. Dismissal of Apprentice.

See Sub-sect. 9, C., *ante*.

B. Failure to Teach.

See Sub-sect. 7, B., *ante*.

C. Recovery of Salary by Apprentice.

4259. Right to bring action—Apprentice deserting service.]—Indentured apprentice deserting his service, & entering on board a ship, cannot maintain an action for wages.—BRIGHT *v.* LUCAS (1797), Peake, Add. Cas. 121; 170 E. R. 216, N. P.

4260. —— Apprentice alone.]—WILKINS *v.* GRANT (1848), 10 L. T. O. S. 421.

Remedy in rem by sea apprentice.] —*See* SHIPPING.

D. Apprentice Absenting himself.

4261. What amounts to—Absence through illness.]—There was no voluntary absenting. . . . If you take a young lad who has been used to outdoor work, & keep him in a confined room for several days together, it will have the effect of injuring his health. Pltf. should have been accustomed by degrees to the indoor business. . . . The question is, whether pltf.'s father, when he made all the inquiries into the state of deft.'s affairs, did not intend to say that his son was willing to return (LORD TENTERDEN, C.J.).—KING *v.* LOW (1829), 3 C. & P. 620.

4262. Will not avoid a voidable contract—Infant's contract.]—R. *v.* EVERED (1777), Cald. Mag. Cas. 26.

Annotation:—**Refd.** Gray *v.* Cookson (1812), 16 East, 13.

4263. ——.]—GRAY *v.* COOKSON, No. 4320, *post*.

4264. ——.] — It seems that contracts of apprenticeship which are voidable, are not avoided by the apprentice's absenting himself from the service.—SMEDLEY *v.* GOODEN (1814), 3 M. & S. 189; 105 E. R. 581.

4265. Action on covenant not to absent himself—Defence of licence.]—(1) If a master licence his apprentice to leave him, he cannot after recall that licence.

(2) If a master bring covenant for leaving his service at such a time, & deft. justifies by virtue of a licence at that time, the master cannot upon that declaration give evidence of a leaving him at another time, for there the time is material, & is not like a transitory matter in trespass.—ANON. (1703), 6 Mod. Rep. 69; 87 E. R. 828, N. P.

4266. —— —— What amounts to licence.]—RUSSELL *v.* SHINN, No. 4280, *post*.

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master from performing his covenant.—COKER *v.* BROWNE (1890), 7 Q. L. J. 71.—**AUS.**

4257 i. *Wrongful dismissal—Measure of damages.*]—The measure of damages in an action upon an apprenticeship deed for wrongful dismissal is the loss actually sustained by the specific breach of covenant complained of up to the time of action brought.—PARKER *v.* CATHCART (1866), 17 I. C. L. R. 778.—**IR.**

PART XV. SECT. 1, SUB-SECT. 10.—C.

1. *Right to bring action.*] — DUNCAN *v.* MOORE (JAMES) & SONS PROPRIETARY, LTD., [1917] V. L. R. 240.—**AUS.**

PART XV. SECT. 1, SUB-SECT. 10.—D.

4263 i. *Will not avoid a voidable contract.*]—The absenting of himself from his master's service by an apprentice is not an avoidance of the apprenticeship.—COGHLAN *v.* CALLAGHAN (1857), 7 I. C. L. R. 291.—**IR.**

4265 i. *Action on covenant not to absent himself—Defence of licence.*]—Pltf., in covenant against the father, alleged as a breach that the apprentice unlawfully absented himself on a certain day, & from thence hitherto remained & continued absent from the service of pltf. Plea, as to the absenting, that the apprentice did depart & absent himself by pltf.'s leave & licence:—*Held:* sufficient.—BLACK *v.* STEVENSON (1840), 3 U. C. R 160.—**CAN.**

Sect. 1.—*The contract of apprenticeship: Sub-sect.* 10, *D., E., F. & G.; sub-sects.* 11 *& 12, A. & B.*]

4267. Action on master's covenant—Defence of absenting—Must be for unreasonable time.]—(1) A tobacconist took a premium with an apprentice, & covenanted to instruct & maintain him. In an action on that covenant the master pleaded, that the apprentice refused to obey his orders, & left his house, saying that he would not return again. To which it was replied, that afterwards the apprentice returned & offered to obey his commands, but the master would not take him:—*Held:* if the apprentice had, under those circumstances, stopped away an unreasonable time, which ought to have been stated in a rejoinder, the master would have been justified in not taking him back; but he was not at liberty to turn away, or to refuse to admit his apprentice into his house for misconduct, & his absenting himself for a few days; but should have sued him on his covenant.

(2) By the indenture, the master covenants that he will for four years instruct & maintain the apprentice. . . . Such indentures generally contain reciprocal covenants by each party. Those covenants are not dependent, but are mutual & independent, entitling each party to his remedy for a breach of them. The master, therefore, is liable to an action for a breach of the covenant, to instruct & maintain the apprentice during the term agreed upon (BAYLEY, J. .

The master has at common law a complete remedy, if the apprentice misconducts himself, by an action for a breach of the covenants (BEST, J.).—WINSTONE *v.* LINN (1823), 1 B. & C. 460; 2 Dow. & Ry. K. B. 465; 1 Dow. & Ry. M. C. 327; 1 L. J. O. S. K. B. 126; 107 E. R. 171.

Annotations:—As to (1) **Refd.** Raymond *v.* Minton (1866), 12 Jur. N. S. 435. *As to* (2) **Apld.** Phillips *v.* Clift (1859), 4 H. & N. 168; Learoyd *v.* Brook, [1891] 1 Q. B. 431. **Refd.** Waterman *v.* Fryer, [1922] 1 K. B. 499. *Generally,* **Refd.** Westwick *v.* Theodor (1875), L. R. 10 Q. B. 224.

Summons before magistrate.]—*See* Sect. 4, *post.*

Remedy against parent or surety.]—*See* Sub-sect. 10, F., *post.*

E. Remedies in Equity.

4268. Specific performance.]—WEBB *v.* ENGLAND, No. 4241, *ante.*

4269. Cancellation of articles—On refusal to teach.]—WEBB *v.* ENGLAND, No. 4241, *ante.*

—— **Ill usage by master.**]—*See* Sect. 2, sub-sect. 3, B., *post.*

Order for return of premium.]—*See* Sub-sect. 12, B., *post.*

Infants' contracts.]—*See* Sub-sect. 3, C. (*c*), *ante.*

F. Action against Parent or Surety.

4270. Liability of parent.] — In a common indenture of apprenticeship, under 5 Eliz. c. 4, between the father, son, & master, the father is answerable for what is to be performed by the son.—BRANCH *v.* EWINGTON (1780), 2 Doug. K. B. 518; 99 E. R. 330.

Annotations:—**Folld.** Cuming *v.* Hill (1819), 3 B. & Ald. 59. **Refd.** Hughes *v.* Humphreys (1827), 6 B. & C. 680.

4271. —— Trivial offence.]—The staying out by an apprentice on a Sunday evening beyond the time allowed him is not such an unlawful absenting of himself as will enable his master to maintain an action of covenant against a person who became bound for the due performance of the indenture. If an apprentice absent himself from his master, & his master take him back, & an action be afterwards brought for such absenting, the taking back, to constitute a defence, must be specially pleaded.—WRIGHT *v.* GIHON (1829), 3 C. & P. 583, N. P.

4272. Defences—Master in default.]—A surgeon & apothecary having agreed with a father to take his son as an apprentice in consideration of a premium; after the son had served for seven months, the agreement was broken off on account of the refusal of the former to pay the expense of the stamp for the indentures. The master cannot recover damages for breach of the agreement; nor can he recover as for the board & lodging of the son.—KEENE *v.* PARSONS (1819), 2 Stark. 506, N. P.

4273. —— —— One of master's businesses relinquished.]—By the terms of an indenture of apprenticeship an infant was placed by his father, who was a party to the indenture, as apprentice to a master, described in the indenture as "an auctioneer, appraiser, & corn factor," "to learn his art, & with him after the manner of an apprentice to serve." After the making of the indenture & the commencement of the apprenticeship, the master wholly relinquished the trade of corn factor; whereupon the apprentice absented himself from his master's service:—*Held:* in an action on the indenture by the master against the father for the desertion of the apprentice, the relinquishment by the master of his trade of corn-factor was a good answer to the action.—ELLEN *v.* TOPP (1851), 6 Exch. 424; 20 L. J. Ex. 241; 17 L. T. O. S. 52; 15 Jur. 451; 155 E. R. 609.

Annotations:—**Refd.** Whitmore *v.* Owen (1854), 2 W. R. 432; Batty *v.* Monks (1865), 12 L. T. 832; General Billposting Co. *v.* Atkinson, [1909] A. C. 118. **Mentd.** Graves *v.* Legg (1854), 9 Exch. 709; Rolt *v.* Cozens (1856), 18 C. B. 673; White *v.* Beeton (1861), 7 H. & N. 42; Behn *v.* Burness (1863), 2 New Rep. 184; Carter *v.* Scargill (1875), L. R. 10 Q. B. 564; Moel Tryvan Ship Co. *v.* Kruger, [1907] 1 K. B. 809; Wallis & Wells *v.* Pratt & Haynes, [1911] A. C. 394; Cummings *v.* Stewart (1912), 30 R. P. C. 1.

4274. —— Claim for absence of apprentice—Master receiving apprentice back.]—An action lies upon a covenant, that an apprentice shall not absent himself from his master's service, although his master receive him after having absented himself.—HAWKINS *v.* EASTERBROOKE (1754), Say. 115; 96 E. R. 822.

4275. —— —— ——.]—WRIGHT *v.* GIHON, No. 4271, *ante.*

4276. —— —— Avoidance on coming of age.]—Covenant upon an indenture of apprenticeship, by the master against the father; breach, that the apprentice absented himself from the service; plea, that the son faithfully served till he came of age, & that he then avoided the indenture:—*Held:* this was no answer to the action.—CUMING *v.* HILL (1819), 3 B. & Ald. 59; 106 E. R. 585.

4277. —— —— Due to permanent illness—Notice to master of illness.]—To an action for breach of an apprenticeship deed, deft., the father, pleaded that the apprentice "was & is prevented by the act of God, to wit, by permanent illness, happening & arising after the making of the indenture, from remaining with or serving pltf. during all the said term":—*Held:* on demurrer, a good plea in excuse of performance, without any averment that pltf. had notice of the illness before the commencement of the action.—BOAST *v.*

PART XV. SECT. 1, SUB-SECT. 10.—F.

4270 1. *Liability of parent.*]—Where a father & his son, a minor, entered into articles, & the son by his father's orders refused to complete his apprenticeship:—*Held:* covenant against the father on the articles, & not case for enticing away, was the proper remedy.—DILLINGHAM *v.* WILSON (1841), 6 O. S. 85.—**CAN.**

FIRTH (1868), L. R. 4 C. P. 1; 38 L. J. C. P. 1; 19 L. T. 264; 17 W. R. 29.

Annotations:—**Apld.** Robinson *v.* Davison (1871), L. R. 6 Exch. 269. **Refd.** Whincup *v.* Hughes (1871), L. R. 6 C. P. 78. **Mentd.** Simeon *v.* Watson (1877), 46 L. J. Q. B. 679.

4278. —— —— Apprentice's fear of assault—Reasonable grounds for fear.]—To a statement of claim alleging that deft. had become surety on an indenture of apprenticeship for the faithful service of the apprentice, & that the apprentice had not faithfully served, but had absented himself, deft. pleaded that while the apprentice was in pltf.'s service, pltf. assaulted him & inflicted personal injury upon him, & threatened to do him grevious bodily harm, & that the apprentice fearing that grevious bodily harm would be inflicted upon him, left pltf.'s service:—*Held:* the statement of defence should be amended by adding an allegation that the apprentice had reasonable ground for such fear.—HALLIWELL *v.* COUNSELL (1878), 38 L. T. 176.

4279. Measure of damages—Loss of service to date of action.]—In an action on an apprenticeship deed, against the father, the breach being that the son absented himself, pltf. can only recover damage for the loss of service up to the time of action.—BERRI *v.* HOWARD (1861), 2 F. & F. 403, N. P.

4280. —— ——.]—When an apprentice has absented himself, the fact that the master declined to have any trouble taken to find him, & described him as worthless, though it will not sustain a plea of leave & licence, may be material in mitigation of damages, & the jury can only give the real value of his services up to the time of action.

Pltf. cannot recover damages up to the end of the term, but only for the period from the absenting to the bringing of the action. But if pltf. afterwards assented to the absence, you can give no damages from the time of such assent, & in any view you may consider what was the value of the apprentice's services, which might be the difference between his earnings & his keep (BYLES, J.).—RUSSELL *v.* SHINN (1861), 2 F. & F. 395, N. P.

4281. —— ——.]—An action was brought by the master against the father of an apprentice on an indenture of apprenticeship to serve the master for a period of five years from May 1, 1860, & it was alleged as a breach of covenant that the apprentice unlawfully absented himself from his master's service. It was proved that deft. took his son away from pltf. on Jan. 18, 1862, & the writ in the action issued on Feb. 10, 1862:—*Held:* pltf. was entitled to recover damages for the absence of his apprentice from Jan. 18 to Feb. 10, & was not entitled to prospective damages for the whole term of the apprenticeship.—LEWIS *v.* PEACHEY (1862), 1 H. & C. 518; 31 L. J. Ex. 496; 27 J. P. 40; 10 W. R. 797; 158 E. R. 989.

4282. —— Assent of master to absence.]—RUSSELL *v.* SHINN, No. 4280, *ante*.

G. Contracts by Infants.

See Sub-sect. 3, C., *ante*.

SUB-SECT. 11.—ASSIGNMENT.

See, generally, CHOSES IN ACTION, Vol. VIII., pp. 424 *et seq.*

4283. Not assignable in law.]—Apprentice in law is not assignable.—R. *v.* AICKLES (INHABITANTS) (1701), 12 Mod. Rep. 553; 88 E. R. 1513; *sub nom.* CASTOR (INHABITANTS) *v.* AICLES, 1 Salk. 68; *sub nom.* CAISTER PARISH *v.* ECCLES PARISH, 1 Ld. Raym. 683; 1 Const, 580.

Annotations:—**Refd.** Buckington *v.* St. Michael Sebington, Somersetshire (1724), 2 Ld. Raym. 1352. **Mentd.** Silvester & Ashton (1700), Fortes. Rep. 308; R. *v.* St. George Hanover Square (1734), Sess. Cas. K. B. 176; Mouldsdale *v.* Birchall (1771), 2 Wm. Bl. 820; Master *v.* Miller (1791), 4 Term Rep. 320.

4284. —— Except with consent of apprentice.]—A master cannot assign over his apprentice, as he may another chattel, but it must be with his own consent (HOLT, C.J.).—ANON. (1701), 12 Mod. Rep. 441; 88 E. R. 1438.

4285. Assignment by executrix of master—Presumption as to capacity.]—Where J. was bound apprentice by indenture in 1764 in the township of C., & upon the death of his master in 1769 was assigned by the widow by indorsement on the indenture whereby she acquitted & assigned over her apprentice J. for all the remainder of his apprenticeship, & J. served under such assignment in the township of K., which township for the last seven years had regularly relieved the family of J. whilst residing in another parish:—*Held:* this was evidence from which the sessions ought to have presumed, after such a distance of time, that the widow was extrix. & capable of assigning the apprentice.—R. *v.* BARNSLEY (INHABITANTS) (1813), 1 M. & S. 377; 105 E. R. 142.

Annotation:—**Mentd.** R. *v.* Holme St. Cuthbert (1817), 2 New Mag. Cas. 92.

Award ordering assignment.]—*See* ARBITRATION, Vol. II., p. 476, No. 1208.

On bankruptcy of master.]—*See* Bkpcy. Act, 1914 (c. 59), s. 34 (2).

Assignment of parish contract.]—*See* Sect. 6, sub-sect. 3, *post*.

Gaining settlement by transfer of service.]—*See* POOR LAW.

SUB-SECT. 12.—THE PREMIUM.

A. As Indication of Apprenticeship rather than of Service.

See Sub-sect. 1, D., *ante*.

B. Return on Termination.

4286. When ordered—Ill usage of apprentice.]—LOCKLEY *v.* ELDRIDGE (1674), Cas. *temp.* Finch, 124; 23 E. R. 68.

Annotation:—**Refd.** Webb *v.* England (1860), 29 Beav. 44.

4287. — Death of master.]—The master received £250 with an apprentice, & died within two years; decreed, that the exors. shall pay back the money as a debt upon simple contract after debts on specialties are paid.—SOAM *v.* BOWDEN (1678), Cas. *temp.* Finch, 396; 23 E. R. 216.

Annotations:—**Refd.** Webb *v.* England (1860), 29 Beav. 44; Whincup *v.* Hughes (1871), L. R. 6 C. P. 78; Ferns *v.* Carr (1885), 54 L. J. Ch. 478. **Mentd.** Churchill *v.* Bertrand (1842), 3 Q. B. 568.

4288. —— ——.]—WHINCUP *v.* HUGHES, No. 4353, *post*.

4289. —— Default of master.]—(1) The sessions may discharge an apprentice from his indentures on account of the default & ill-treatment of the master.

(2) The sessions, on discharging an apprentice may order a return of the apprentice fee.—R. *v.* DUHAMMEL (1683), 2 Show. 289; 89 E. R. 946; *sub nom.* DU HAMELL'S CASE, Skin. 108.

4290. — — Refusal to instruct apprentice.]—THERMAN *v.* ABELL (1688), 29 Beav. 58; 2 Vern. 64; 54 E. R. 547, L. C.

Annotations:—**N.F.** Webb *v.* England (1860), 29 Beav. 44. **Refd.** Hale *v.* Webb (1786), 2 Bro. C. C. 78. **Mentd.** Freeland *v.* Stansfield (1854), 2 Sm. & G. 479.

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4291. ——— ———.]—WEBB *v.* ENGLAND, No. 4241, *ante.*

4292. ——— **Apprentice absconding & enlisting—Willingness to return.**]—If an apprentice after serving two years of his time & without any misconduct on the part of the master, runs away of his own accord & enlists as a soldier, & afterwards is willing to return, but the master will not receive him again, the master is not compellable to return any part of the apprentice fee.—CUFF *v.* BROWN (1818), 5 Price, 297; 146 E. R. 613.

Annotations:—**Refd.** *Ex p.* Prankerd (1819), 3 B. & Ald. 257; Whincup *v.* Hughes (1871), L. R. 6 C. P. 78.

4293. ——— **Apprentice absconding—Refusal to take back.**]—The ct., in the exercise of its summary jurisdiction over its officers, has authority to order an attorney, who had refused, on the ground of misconduct, to take back an apprentice, who had run away from his service, to return to the parents of such apprentice a reasonable part of the premium received with him.—*Ex p.* PRANKERD (1819), 3 B. & Ald. 257; 106 E. R. 658; *sub nom. Ex p.* FISHER, 1 Chit. 694.

Annotations:—**Consd.** Ferns *v.* Carr (1885), 28 Ch. D. 409. **Refd.** St. Pancras, Parish *v.* Clapham, Parish (1860), 6 Jur. N. S. 700; Whincup *v.* Hughes (1871), L. R. 6 C. P. 78.

4294. ——— **Bankruptcy of master—How sum returnable calculated.**]—An apprentice where his master becomes a bkpt. shall come in as a creditor only upon the remaining sum, after deducting for the time he lived with bkpt.—*Ex p.* SANDBY (1745), 1 Atk. 149; 26 E. R. 97.

Annotations:—**Consd.** *Ex p.* Fussell (1837), 2 Deac. 158. **Refd.** Hirst *v.* Tolson (1850), 2 H. & Tw. 359; Webb *v.* England (1860), 29 Beav. 44.

——— ———.]—*See* BANKRUPTCY, Vol. IV., p. 479, Nos. 4326–4328; Bkpcy. Act, 1914 (c. 59), s. 31.

4295. ——— **Failure of health of apprentice—Special provision in deed.**]—A deed of apprenticeship contained a provision that in the event of the failure of the health of the apprentice, so as to incapacitate him from following the profession of a civil engineer, before Apr. 1, 1866, the master should refund to the father £50 of the premium; it being agreed that the production at any time before that day of a certificate signed by two duly qualified medical men, testifying as to the fact, should be conclusive evidence that the health of the apprentice had failed, so as to incapacitate him from following his profession. The health of the apprentice failed, & he died on Aug. 4, 1865. On Mar. 28, 1866, deft., the master, was served with a certificate in the terms of the condition, dated Mar. 24, but referring to the state of health of the apprentice in June, 1865:—*Held:* the certificate was a sufficient compliance with the condition to entitle the father to recover the £50.—DERBY *v.* HUMBER (1867), L. R. 2 C. P. 247; *sub nom.* HUMBER *v.* DERBY, 15 L. T. 538.

4296. ——— **Misconduct of apprentice.**] — An apprentice was discovered to be an habitual thief, & in consequence was dismissed by his master. On an action brought by the apprentice's guardians against the master for damages for breach of covenant, or alternatively for the return, in whole or in part, of the premium paid by them:—*Held:* (1) where an apprentice by his misconduct prevents his master from teaching him, such misconduct is a good defence by the master when sued for breach of covenant to keep, teach, & maintain the apprentice; (2) no portion of the premium paid could be recovered, there being no total failure of consideration.—LEAROYD *v.* BROOK, [1891] 1 Q. B. 431; 60 L. J. Q. B. 373; 64 L. T. 458; 55 J. P. 265; 39 W. R. 480; 7 T. L. R. 236.

Annotation:—*As to* (1) **Distd.** Waterman *v.* Fryer, [1922] 1 K. B. 499.

4297. ——— **Dissolution of partnership.**]—A. & B. were partners in a firm carrying on business as auctioneers & surveyors. A., without the knowledge or authority of his partner, entered into an agreement with pltfs., a father & son, by which the son was to become an articled pupil to the firm, & an indenture of apprenticeship was drawn up by the terms of which, in consideration of the payment of a premium, the son was to become the pupil of B. The indenture was never signed by A. or B. & B. was ignorant of its existence. The premium was duly paid by pltfs. to A. & by him handed over to B. in bank notes to be paid into the firm's banking account without any statement as to whence it came. B. took the money thinking that it was money due to the firm in connection with some partnership transaction. Subsequently the partnership was dissolved, & the business wound-up. In an action by pltfs. against B. for a return of the premium upon the ground that there had been a total failure of the consideration for which it was paid:—*Held:* pltfs. were entitled to recover the money.—COVELL *v.* SCAMELL (1910), 103 L. T. 535, D. C.

——— **Articled clerks of solicitors.**] — *See* SOLICITORS.

C. Recovery where Indenture Void.

4298. Recovery by master—Premium secured by note.]—No action can be maintained by pltf. on a note given to him by deft. as an apprentice fee with his son who was to be bound to pltf., if it appear that the indenture executed was void by 8 Ann. c. 9, for want of the insertion of such premium therein, & a proper stamp in respect of the same; although pltf. did in fact maintain the apprentice for some time & until he absconded.—JACKSON *v.* WARWICK (1797), 7 Term Rep. 121; 101 E. R. 888.

Annotation:—**Consd.** Westlake *v.* Adams (1858), 5 C. B. N. S. 248.

4299. ——— **Premium secured by I.O.U.**]—The premium stated in an indenture of apprenticeship was £20, but at the time of execution deft. agreed to give pltf., the master, four I.O.U.'s for £20 more, for which instruments deft., on the application of pltf., who feared that they were void promissory notes, afterwards substituted a single I.O.U. in a proper form; & on that the action was brought. The jury found the deed of apprenticeship, though void, was the very deed which deft. bargained for:—*Held:* pltf. was entitled to recover.—WESTLAKE *v.* ADAMS (1858), 5 C. B. N. S. 248; 27 L. J. C. P. 271; 31 L. T. O. S. 315; 22 J. P. 674; 4 Jur. N. S. 1021; 141 E. R. 99; *previous proceedings*, 1 F. & F. 183; 31 L. T. O. S. 101, N. P.

4300. ——— **Premium secured by bond.**]—Where an apprentice is bound for five years only, & a bond given conditioned for his service; the binding being void under 5 Eliz. as not being for seven years, the bond is also void.—BURNLY *v.* JENNINGS (1800), 6 Esp. 8; 170 E. R. 813, N. P.

4301. ——— ———.]—To debt on bond deft. pleaded, that the bond was given in pursuance of a corrupt & illegal agreement between the obligee & obligor that the obligee should take the obligor's son as his apprentice to learn the art, mystery, & profession of a surgeon apothecary & man-midwife, for the term of two years only, but that in the articles it should be made to appear that the son had been articled for the full term of five

years—in order that by such corrupt contrivance the parties might fraudulently & illegally procure the obligor's son to be admitted to examination for the purpose of practising as an apothecary upon serving an apprenticeship for two years, instead of an apprenticeship for five years, as required by 55 Geo. 3, c. 194, s. 15:—*Held:* the bond was void, & the plea a sufficient answer to the action.—PROLE *v.* WIGGINS (1836), 3 Bing. N. C. 230; 2 Hodg. 204; 3 Scott, 601; 6 L. J. C. P. 2; 132 E. R. 398.

4302. Recovery by parent—Plaintiff not an innocent party.]—Pltf. executed an indenture of apprenticeship to which was appended a printed notice for the insertion of the premium, etc., under 5 Geo. 3, c. 46, by which she bound her son apprentice to deft., & she paid a premium. The indenture did not contain any statement respecting the premium, & was not stamped. The indenture being void for want of such statement, & not having been stamped within time:—*Held:* pltf. was not an innocent party, & she could not recover the apprentice fee from deft., though paid without consideration, the indenture being void.—STOKES *v.* TWITCHEN (1818), 8 Taunt. 492; 2 Moore, C. P. 538; 129 E. R. 475.

Annotations:—**Consd.** Hirst *v.* Tolson (1850), 2 H. & Tw. 359; Whincup *v.* Hughes (1871), L. R. 6 C. P. 78. **Refd.** Covell *v.* Scamell (1910), 103 L. T. 535.

4303. —— Paid by bill.]—In an action by the indorsee of a bill of exchange against the acceptor, the latter proved that his son had been bound apprentice to the drawer in 1827 by indenture, & that a premium of £30 was agreed to be paid, for which the bill in question was given. The indenture had a £1 stamp impressed upon it. The apprentice served his master for five months, & a difference arising between the master & father, & it having been discovered that the stamp was insufficient, the apprentice left his master's service:—*Held:* as the apprentice was maintained & instructed by his master for five months, & might have compelled him to continue that maintenance & instruction, by causing the indenture to be properly stamped, pursuant to 20 Geo. 2, c. 45, s. 5, there was not a total failure of consideration for the bill, &, therefore, the circumstances would not be an answer to an action by the payee against the acceptor.—MANN *v.* LENT (1830), 10 B. & C. 877; L. & Welsb. 320; 5 Man. & Ry. K. B. 660; 8 L. J. O. S. K. B. 269; 109 E. R. 674; *previous proceedings* (1828), Mood. & M. 240, N. P.

Annotations:—**Refd.** Henniker *v.* Henniker (1852), 1 E. & B. 54; Westlake *v.* Adams (1858), 5 C. B. N. S. 248.

SUB-SECT. 13.—TERMINATION.

A. By Infant.

See, generally, Sub-sect. 3, E., *ante.*

Parish apprentice.]—*See* Sect. 6, *post.*

Termination by consent.]—*See* Sub-sect. 13, B., *post.*

B. By Consent.

4304. Whether consent discharges indentures—Infant apprentice.]—R. *v.* NOTTON (INHABITANTS) (1768), Burr. S. C. 629.

4305. —— ——.]—R. *v.* WEDDINGTON (INHABITANTS) (1774), Burr. S. C. 766.

4306. —— ——.]—The apprenticeship of an infant may be dissolved, with the consent of all parties concerned; & hiring & service for a year will gain a settlement, though part of the service be performed under a prior hiring for less than a year.—R. *v.* SPAWNTON (INHABITANTS) (1775), Burr. S. C. 801.

4307. —— ——.]—R. *v.* HINDRINGHAM (INHABITANTS), No. 4328, *post.*

4308. —— Necessity for cancellation.]—A son of twenty-one years of age was bound an apprentice to his father for seven years & served him for two or three years & they parted by consent; the father discharged his son & delivered him his indenture, but did not cancel it, & he lived as an hired servant in another place; & he was adjudged by the justices to be settled where he was an apprentice.

If the seal had been torn off, he had been discharged (HOLT, C.J.).—WHITLEY & THEERSLEY (INHABITANTS) (1705), Fortes. Rep. 312; 92 E. R. 867.

4309. —— ——.]—R. *v.* HINDRINGHAM (INHABITANTS), No. 4328, *post.*

4310. —— —— **Indentures with third party.**]—(1) Where the mother of an apprentice, whose time had not expired, applied to his master to give him up to her, & the master having consented to it, & all having agreed to part, the apprentice went away; but the indenture, which was in the hands of a third person, was never applied for nor given up: *Held:* the apprenticeship was not put an end to by this agreement, although the master said he would have given up the indenture if he had had it in his possession at the time, & afterwards refused to take back the apprentice.

(2) Where an unstamped indenture of apprenticeship recited that a premium of £12 had been paid; but added, that it was paid out of a charitable donation fund belonging to the parish, & the master being called, proved that the premium had been paid by the parish officers, who told him at the time of paying it that it was charity money: *Held:* the fact of payment being proved, the recital in the indenture, & the declarations of the parish officers, were not admissible in evidence, so as to bring the case within the exception in 11 Geo. 3, c. 98, s. 190, & the indenture, being unstamped, was void.—R. *v.* SKEFFINGTON (INHABITANTS) (1820), 3 B. & Ald. 382; 106 E. R. 702.

Annotation:—*As to* (2) **Refd.** R. *v.* Llangunnor (1831), 2 B. & Ad. 616.

4311. —— **Order of Mayor's Court.**]—HALE *v.* WEBB (1786), 2 Bro. C. C. 78; 29 E. R. 44.

Annotations:—**Consd.** Hirst *v.* Tolson (1850), 2 Mac. & G. 134. **Refd.** Webb *v.* England (1860), 29 Beav. 44.

C. By Money Payment.

4312. Accord & satisfaction—Payment to person in loco parentis.]—WARD *v.* PRIN (1648), Aleyn, 78; 82 E. R. 925.

4313. —— **By apprentice of full age.**]—Where a master receives money of an apprentice of full age to vacate his indentures, the relation is dissolved, though the indentures remain uncancelled.—R. *v.* DEVONSHIRE JJ. (1777), Cald. Mag. Cas. 32.

4314. Agreement for money payment—& discharge of indentures.]—A verbal agreement by a master, "upon being paid £3 to set his apprentice at liberty, & to give him up his indenture," does not discharge the indenture, so as to fix the settlement of the apprentice in the parish where he slept last before the making of such agreement.—R. *v.* WARDEN (INHABITANTS) (1828), 2 Man. & Ry. K. B. 24; 1 Man. & Ry. M. C. 277; 6 L. J. O. S. M. C. 72.

D. Cancellation of Deed.

4315. What amounts to—Seal torn off.]—WHITLEY & THEERSLEY (INHABITANTS), No. 4308, *ante.*

4316. —— Statement that indentures burnt.]—An apprentice cannot hire himself as *a servant,*

Sect. 1.—*The contract of apprenticeship: Sub-sect.* 13, *D., E., F., G., H., I., J. & K.*]

unless his indentures are legally cancelled; stating the declaration of the master, that they were burned, is not sufficient; but the justices, from this evidence, may find the fact.—ANMY CRUSIS PARISH *v.* BARNSLY (1722), 11 Mod. Rep. 365; 88 E. R. 1092.

4317. —— Delivery to new master.]—Indentures of apprenticeship are not cancelled by the master becoming a bkpt., or by his delivering the indentures to a person to whom the apprentice hires himself as a yearly servant.—BUCKINGTON PARISH *v.* SHEPTON BECHAMP PARISH (1724), 8 Mod. Rep. 235; 88 E. R. 169; *sub nom.* BUCKINGTON (INHABITANTS) *v.* ST. MICHAEL SEBINGTON (INHABITANTS), 2 Ld. Raym. 1352; 2 Const. 395; *sub nom.* PUCKINGTON PARISH *v.* CHEPTON BEENCHAMP PARISH, 1 Stra. 582; *sub nom.* R. *v.* PUCKINGTON & SIBINGTON (INHABITANTS), Fortes. Rep. 321; Sess. Cas. K. B. 80; *sub nom.* R. *v.* SHIPTON CURRY (INHABITANTS), Cas. Sett. 117.
Annotation:—**Refd.** R. *v.* St. George, Hanover Square (1734), Sess. Cas. K. B. 175.

4318. —— Exchange of indentures.]—Exchange of indentures between apprentice's father & master amounts to cancellation & determination of apprenticeship.—R. *v.* ST. MARY KALLENDAR, WINCHESTER (INHABITANTS) (1748), Burr. S. C. 274; 2 Bott. 6th ed. 433.
Annotation:—**Refd.** R. *v.* Weddington (1774), Burr. S. C. 766.

4319. —— ——.]—The delivery-up mutually of the indentures is a sufficient discharge of the apprenticeship without actual cancellation.—R. *v.* TITCHFIELD (INHABITANTS) (1763), Burr. S. C. 511; 2 Bott. 6th ed. 434.

4320. —— Indorsement on indenture.] — (1) Such indenture [of apprenticeship] cannot be avoided by the mere act of an apprentice absenting himself from his master's service, which is an offence under 20 Geo. 2, c. 19.

(2) Where the master had agreed by indorsement (unstamped) on the indenture to cancel it, "provided the apprentice made no engagement or entered into any person's service in the town of N.":—*Held:* the apprentice setting up a trade for himself in N. was a breach of the condition, which entitled the master to recall him back into his service.—GRAY *v.* COOKSON (1812), 16 East, 13; 104 E. R. 994.
Annotations:—*As to* (1) **Apld.** Grant *v.* Welchman (1812), 16 East, 207. **Refd.** R. *v.* Ickham (1843), 7 J. P. 529. *As to* (2) **Distd.** R. *v.* Barmston (1838), 7 Ad. & El. 858. *Generally*, **Mentd.** Brittain *v.* Kinnaird (1819), 1 Brod. & Bing. 432; Rogers *v.* Jones (1824), 3 B. & C. 409; Gimbert *v.* Coyney (1825), 3 Dow. & Ry. M. C. 323; Wickes *v.* Clutterbuck (1825), 2 Bing. 483; Dingsgale *v.* Clarke (1829), 8 L. J. O. S. M. C. 137; Hutchinson *v.* Lowndes (1832), 1 Nev. & M. K. B. 674; Kitchen *v.* Shaw (1837), 6 Ad. & El. 729; Fuller *v.* Brown (1849), 13 L. T. O. S. 301.

4321. Cancellation may be conditional.]—GRAY *v.* COOKSON, No. 4320, *ante*.

4322. Order for delivery up of indenture—Expiry of apprenticeship.]—BAKER *v.* SHELBURY (1666), 1 Cas. in Ch. 70; Freem. Ch. 184; 22 E. R. 700, L. C.
Annotation:—**Refd.** Boyse *v.* Rossborough (1854), 3 De G. M. & G. 817.

E. Apprentice attaining Majority.

Termination during infancy.]—*See* Sub-sect. 3, E., *ante*.

4323. Indentures voidable at election of apprentice.] — An apprentice of seventeen years of age & upwards, bound by indenture, which stated her to be fourteen, for seven years, is entitled to be discharged at twenty-one.

Every indenture of an infant is voidable at his election, & in such cases the master must trust to the covenant of those who engage for the infant (LORD KENYON, C.J.).—*Ex p.* DAVIS (1794), 5 Term Rep. 715; 101 E. R. 397.
Annotation:—**Refd.** *Ex p.* Gill (1806), 7 East, 376; Kirkby *v.* Taylor (1910), 102 L. T. 184.

4324. ——.]—W., then an infant of twenty years old, applied to be taken as an apprentice by A., & represented that he was of full age, & was bound without any premium for seven years, & received weekly wages. He continued working till two years after he attained majority, & then absented himself without cause:—*Held:* he was properly convicted under 4 Geo. 4, c. 34, for unlawfully absenting himself, for assuming he could have disaffirmed the contract after majority, he had not done so within a reasonable time.—WRAY *v.* WEST (1866), 15 L. T. 180; 31 J. P. 37.

4325. —— Right unaffected by Master & Servant Act, 1867 (c. 141).]—MOORE *v.* SMITH (1875), 39 J. P. Jo. 772.

4326. Necessity for election.]—Where, upon a *habeas corpus* to bring up the body of an apprentice, the keeper of the house of correction returned, with the body of the party, a regular conviction of him by two magistrates on 20 Geo. 2, c. 19, for a misdemeanor in absenting himself as an apprentice from his master's service; it is no answer to show by affidavit that the party had bound himself when an infant to serve till twenty-five, & that when he came of age he elected to avoid the indentures, after which the offence imputed had been committed; for this was proper matter to be shown to the magistrates below; who, if the matter shown to them were true, acted at their own peril in committing the party; but this ct. has no power to discharge an apprentice from his indentures; & is bound by the return of a regular conviction, where the objection does not appear on the face of the return, to remand the party.—*Ex p.* GILL (1806), 7 East, 376; 103 E. R. 146; *sub nom.* R. *v.* FENWICK, *Ex p.* GILL, 3 Smith, K. B. 369.

4327. —— Within reasonable time after attaining majority.]—WRAY *v.* WEST, No. 4324, *ante*.

4328. What amounts to election—Effect of enlisting—With master's approval.]—Supposing an infant binding himself by indentures of apprentice may avoid them at his election, yet the leaving his master's service & going into the King's service, with his master's approbation is not such an avoidance [if the indentures are not delivered up or cancelled].—R. *v.* HINDRINGHAM (INHABITANTS) (1796), 6 Term Rep. 557; 2 Bott. 6th ed. 438; 101 E. R. 701.
Annotations:—**Distd.** R. *v.* Mountsorrel (1815), 3 M. & S. 497. **Refd.** Clements *v.* L. & N. W. Ry., [1894] 2 Q. B. 482.

Liability of parent—On avoidance by apprentice.]—*See* Sub-sect. 10, F., *ante*.

Parish apprentices.]—*See* Sect. 6, *post*.

F. Marriage of Apprentice.

4329. General rule.]—TOWNSEND'S CASE (1662), 1 Lev. 91; 1 Keb. 458, 470, 659; T. Raym. 92; 1 Sid. 107; 83 E. R. 313.
Annotations:—**Mentd.** Merchants Adventurers *v.* Rebow (1686), Comb. 53; R. *v.* Gray's Inn Benchers (1780), 1 Doug. K. B. 353.

PART XV. SECT. 1, SUB-SECT. 13.—E.

4323 i. ***Indentures voidable at election of apprentice.***]—An apprentice bound by indenture for seven years, while under twenty-one is entitled to put an end to the apprenticeship when he attains that age, but must give to his master reasonable notice of his intention to do so.—COGHLAN *v.* CALLAGHAN (1857), 7 I. C. L. R. 291.—**IR.**

4330. ——.]—Marriage is not in itself a dissolution of a contract of service. It has been holden that marriage is not a good cause for discharging an apprentice (*per* CUR.).—R. *v.* TARDEBIGG (INHABITANTS) (1753), Say. 100; 96 E. R. 817.

4331. Custom of London.]—If an apprentice in London marries without his master's consent, the master cannot turn him away for that reason, but must sue his covenant. STEPHENSON *v.* HOULDITCH (1704), 2 Vern. 491: 23 E. R. 915.

G. Dismissal of Apprentice.

See Sub-sect. 10, A., *ante*.

H. Absence of Apprentice.

Contract not determined.]—*See* Sub-sect. 10, D., *ante*.

I. Ill Health of Apprentice.

4332. Contract not determined.]—The master of an apprentice is bound to keep him both in sickness & in health.—R. *v.* HALES-OWEN (INHABITANTS) (1718), 11 Mod. Rep. 278; 1 Stra. 99; 88 E. R. 1038.

4333. ——.]—KING *v.* LOW, No. 4261, *ante*.

4334. ——.]—Actual service is not necessary to show that a person bound as an apprentice is filling that character at a particular time. Accordingly, where an apprentice, being ill, was desired by his master to go to his mother, who lived in another parish, promising to come & agree with her for her son's board & maintenance; & accordingly the apprentice so went, & the master accordingly came there, promised to remunerate the mother, & took him to a medical gentleman for advice; & the pauper resided there eight weeks, but, during that time, did not perform any actual service for his master:—*Held:* nevertheless, he "inhabited" in the parish in the character of an apprentice.—R. *v.* LINKINHORNE (INHABITANTS) (1832), 3 B. & Ad. 413; 1 L. J. M. C. 42; 110 E. R. 148.

Annotations:—**Refd.** R. *v.* Banbury (1832), 3 B. & Ad. 706; R. *v.* Banbury (1833), 5 B. & Ad. 176; R. *v.* Sandhurst (1837), 6 Ad. & El. 130; R. *v.* Bursledon (1839), 11 Ad. & El. 52.

4335. ——.]—A carpenter's apprentice met with an accident, &, with the consent of his master, he went to his father's house, in an adjoining parish, & during the time that he was unable to work at his ordinary trade, & whilst he was residing with his father, his master employed him to sell lottery tickets in the neighbouring villages, in which the prizes were articles manufactured by his master; & the apprentice received 1*s.* for each of the tickets sold; but the master did not, in any other manner, contribute towards his maintenance, although he promised to pay the surgeon's bill:—*Held:* the relationship of master & apprentice continued.—R. *v.* SOMERBY (INHABITANTS) (1838), 9 Ad. & El. 310; 1 Per. & Dav. 180; 1 Will. Woll. & H. 697; 2 Jur. 1064; 112 E. R. 1230.

4336. ——.]—PATTEN *v.* WOOD, No. 4400, *post*.

J. Bankruptcy of Master.

See, now, Bankruptcy Act, 1914 (c. 59), s. 34.

4337. Whether indentures discharged.] — The failure of the master does not dissolve an apprenticeship.—BUCKINGTON (INHABITANTS) *v.* ST. MICHAEL SEBINGTON (INHABITANTS) (1724), 2 Ld. Raym. 1352; 92 E. R. 380; *sub nom.* BUCKINGTON PARISH *v.* SHEPTON BECHAMP PARISH, 8 Mod. Rep. 235; *sub nom.* PUCKINGTON PARISH *v.* CHEPTON BEENCHAMP PARISH, 1 Stra. 582.

Annotation:—**Mentd.** R. *v.* St. George, Hanover Square (1734), Sess. Cas. K. B. 175.

4338. ——— **Bankruptcy subsequently annulled.**]—A *fiat* of bkpcy. issued against the master of an apprentice, but was afterwards annulled, by means of a composition between the bkpt. & his creditors:—*Held:* the indentures of apprenticeship were discharged.—ALLEN *v.* COSTER (1838), 1 Beav. 274; 48 E. R. 945.

K. Masters in Partnership.

See, generally, PARTNERSHIP.

4339. Effect of death of one partner.]—A. is apprenticed to B. & C. partners. The partnership being dissolved B. removes & A. serves C. & C.'s new partner D. After the death of C., A. continues to serve D. It not being found by the sessions that the service under D. was with the consent of B., this ct. will not refer the service to the apprenticeship. No settlement is therefore gained by A., in the parish in which he served & resided with D.—R. *v.* ST. MARTIN'S, EXETER (INHABITANTS) (1835), 2 Ad. & El. 655; 1 Har. & W. 69; 4 Nev. & M. K. B. 388; 2 Nev. & M. M. C. 555; 4 L. J. M. C. 51; 111 E. R. 252.

4340. Effect of dissolution—Release of parent.]—Where, to an action of covenant on an indenture of apprenticeship against the father, for breaches by the apprentice, deft. being under terms of pleading issuably, pleaded that pltfs. carried on the business of engineers as co-partners, that the covenants were made with them as such co-partners; & that before any breach of duty, they dissolved partnership:—*Held:* the plea was an issuable one, & ought not to be set aside.—LLOYD *v.* BLACKBURN (1842), 9 M. & W. 363; 1 Dowl. N. S. 647; 11 L. J. Ex. 210; 152 E. R. 151.

Annotations:—**Consd.** Brook *v.* Dawson (1869), 20 L. T. 611. **Refd.** Brace *v.* Calder (1895), 59 J. P. 693.

4341. — **Release of apprentice.**]—Applt. was, on Apr. 8, 1865, bound apprentice to resp. & J., no premium being paid, for the term of five years. On Dec. 9 in the same year resp. & his partner dissolved partnership, resp. continuing to carry on the business. At the time of the dissolution applt. was told that he would have to serve out his apprenticeship with resp., which he agreed to do, & he continued to serve as such apprentice until Aug. 3, 1868, when he absented himself. Upon a complaint for such misconduct:—*Held:* by the dissolution of partnership applt. ceased to be under any obligation to continue to serve resp.—BROOK *v.* DAWSON (1869), 20 L. T. 611; 33 J. P. 726.

4342. ——— **Amounts to breach of agreement to teach.**]—To an action upon an agreement of apprenticeship against defts., who were partners, for not teaching pltf.'s son, defts. pleaded that they were always ready & willing to perform the agreement, but that pltf.'s son absented himself from the service of defts., & thereby prevented defts. from performing the said agreement on their part, & refused to permit them to do so. Pltf. newly assigned, & defts. pleaded that before the alleged breaches the partnership between defts. was dissolved, & defts. ceased to carry on the business of tea & general colonial brokers in partnership, & the said business was therefoer carried on as before, & as in the agreement in the

—A surviving partner is bound by the covenant of himself & his deceased partner to teach an apprentice until the end of the term for which he was apprenticed.—CONNELL *v.* OWEN (1855), 4 C. P. 113.—**CAN.**

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declaration referred to, by one of defts. alone, & he was always ready & willing to teach & instruct pltf.'s son in the said business, & gave him every facility for acquiring a full knowledge of the same, & in all respects to the utmost of his power helped pltf.'s son to a thorough knowledge of the said business in pursuance of the agreement set out in the declaration:—*Held:* the plea to the declaration was good, but the plea to the new assignment was bad.—COUCHMAN *v.* SILLAR (1870), 22 L. T. 480; 18 W. R. 757.

4343. —— Recovery of premium.]—COVELL *v.* SCAMELL, No. 4297, *ante*.

4344. Division of business—Business not carried on in its entirety.]—Pltf. was bound apprentice to defts. & their partners & successors in business in the trade of an engineer; & his father covenanted to provide him with board, lodging, & other necessaries. At the date of the indenture the business was carried on by the former defts. in London, where also the father of the apprentice resided, but there was no stipulation in the indenture as to the place where the business should be carried on. Before the term of the apprenticeship expired defts.' partnership was dissolved & two firms established, one in London, consisting of two of defts., & the other at Derby, consisting of the other two, the manufacturing part of the old business being carried on at Derby, & the selling part in London. Defts. called on pltf. to attend at the place of business at Derby:—*Held:* (1) there was an implied stipulation that the contract was to be performed at the place where the business was carried on & the parties resided at the date of the indenture; & the direction to the apprentice to go to Derby was an unreasonable command which he was not bound to obey; (2) as the business was not carried on in its entirety by either of the two new firms, neither of them was the successor of the original firm, or entitled to the services of the apprentice. *Royce* v. *Charlton*, No. 4246, *ante*, overd.—EATON *v.* WESTERN (1882), 9 Q. B. D. 636; 52 L. J. Q. B. 41; 47 L. T. 593; 47 J. P. 196; 31 W. R. 313, C. A.

Annotations:—*As to* (1) **Consd.** Burnley Equitable Co-op. & Industrial Soc. *v.* Casson (1890), 63 L. T. 652. *As to* (2) **Consd.** Burnley Equitable Co-op. & Industrial Soc. *v.* Casson (1890), 63 L. T. 652.

L. Death.

4345. How far executor of master bound.]—They [exors. of master] ought to see the apprentice taught his trade & if they are not of the same trade, they ought to assign him to another who is of the trade, for that he may be taught according to the covenant (*per* CUR.).—WALKER *v.* HULL (1665), 1 Lev. 177; 83 E. R. 357.

Annotations:—**Dbtd.** Baxter *v.* Burfield (1747), 2 Stra. 1266. **Refd.** R. *v.* Peck (1698), 1 Salk. 65.

4346. ——.]—(1) Order of justices, that exor. shall keep testator's apprentice, quashed.

(2) By custom of London, exor. shall place testator's apprentice to another master of the same trade.—R. *v.* PECK (1698), 1 Salk. 66; 91 E. R. 61; *sub nom.* PECK'S CASE, 3 Salk. 41.

Annotation:—*As to* (1) **Apld.** R. *v.* Eakring (1753), Say. 88.

4347. —— Customs of London.]—R. *v.* PECK, No. 4346, *ante*.

4348. —— Covenant extending to representative.]—By indenture, an infant, with the consent of his father, bound himself apprentice to a tradesman "his exors. & administrators, such exors. or administrators carrying on the same trade or business & in the town of W.," & with him & them to serve for the term of seven years; & the master, in consideration of the service of the apprentice, covenanted to teach & instruct him, or cause him to be taught & instructed, during the term:—*Held:* (1) upon the death of the master, the apprentice was bound to serve his widow, who was his extrix. whilst she carried on the same business in the town of W.; & she was bound to teach the apprentice; (2) it was no answer to an information against the apprentice for absenting himself from the service of the extrix. that he had consulted an attorney, who advised him that the apprenticeship was determined by the death of the master, & that he had acted on the *bonâ fide* belief that the advice was correct.

(3) Where an infant is bound apprentice, the indenture will not be void merely because it is not manifestly for his benefit, but only where it is manifestly to his prejudice.—COOPER *v.* SIMMONS (1862), 7 H. & N. 707; 31 L. J. M. C. 138; 5 L. T. 712; 26 J. P. 486; 8 Jur. N. S. 81; 10 W. R. 270; 158 E. R. 654.

Annotations:—*Generally*, **Refd.** Walter *v.* Everard, [1891] 2 Q. B. 369.

4349. How far apprentice bound to executor of master.]—Apprentice is not bound to serve the exor. of the master.—BAXTER *v.* BURFIELD (1747), 2 Stra. 1266; 1 Bott. 6th ed. 542; 93 E. R. 1172.

Annotations:—**Apld.** Pearce *v.* Chamberlain (1750), 2 Ves. Sen. 33. **Consd.** R. *v.* Stockland (1779), Cald. Mag. Cas. 60. **Apld.** Cooper *v.* Simmons (1862), 7 H. & N. 707.

4350. —— Covenant extending to representative.]—COOPER *v.* SIMMONS, No. 4348, *ante*.

4351. Whether death of master determines apprenticeship.]—WADSWORTH *v.* GYE (1664), 1 Sid. 216; 1 Keb. 820; 82 E. R. 1066.

Annotations:—**Refd.** R. *v.* Prat (1692), 12 Mod. Rep. 27; R. *v.* Peck (1698), 1 Salk. 65; Baxter *v.* Burfield (1747), 2 Stra. 1266.

4352. ——.]—R. *v.* CHIRK (1774), Burr. S. C. 782.

4353. —— No covenant to serve representatives.]—By an apprenticeship deed A. was to serve B., & B. teach A. for a term of years; there was no provision as to service to B.'s exors. or return of premium; B. died before the expiration of the term:—*Held:* no action for damages, or for money had & received lay against B.'s exors. for a return of portion of the premium.—WHINCUP *v.* HUGHES (1871), L. R. 6 C. P. 78; 40 L. J. C. P. 104; 24 L. T. 76; 19 W. R. 439.

Annotations:—**Apld.** Ferns *v.* Carr (1885), 28 Ch. D. 409. **Refd.** Learoyd *v.* Brook, [1891] 1 Q. B. 431; Covell *v.* Scamell (1910), 103 L. T. 535. **Mentd.** Cornwall *v.* Henson, [1899] 2 Ch. 710; Lloyd Royal Belge Soc. Anon. *v.* Stathatos (1917), 33 T. L. R. 390.

4354. Effect of death of either party.]—An apprenticeship is determined by the death of either master or apprentice.—R. *v.* EAKRING (INHABITANTS) (1753), Say. 88; 96 E. R. 813.

M. Return of Premium.

See Sub-sect. 12, B., *ante*.

N. Trading on Own Account.

4355. Custom of London.]—NESSON *v.* FINCH (1698), 1 Ld. Raym. 382; 91 E. R. 1152.

SECT. 2.—RIGHTS, DUTIES AND LIABILITIES OF MASTER.

SUB-SECT. 1.—RIGHT TO APPRENTICE'S EARNINGS.

4356. General rule.]—Apprentice's master entitled to what apprentice earns.—ANON. (1700), 12 Mod. Rep. 415; 88 E. R. 1419.

Annotation:—**Refd.** Morison *v.* Thompson (1874), L. R. 9 Q. B. 480.

4357. ——.]—Whatever apprentice gains belongs to the master, & he may have action for it. —BARBER *v.* DENNIS (1703), 1 Salk. 68; 6 Mod. Rep. 69; 91 E. R. 63.

Annotations: **Consd.** Foster *v.* Stewart (1814), 3 M. & S. 191; Evans *v.* Walton (1867), L. R. 2 C. P. 615. **Refd.** St. Nicholas *v.* St. Peters (1736), Lee *temp.* Hard. 323; R. *v.* Closworth (1837), 6 L. J. M. C. 71; Morison *v.* Thompson (1874), L. R. 9 Q. B. 480.

4358. ——.]—If an apprentice works for another person who receives the money arising from such work, the master may maintain an action for the money.—AYNSWORTH *v.* WOOD (1728). Sess. Cas. K. B. 84; 93 E. R. 85; *sub nom.* AYNESWORTH *v.* WOOD, 1 Barn. K. B. 312.

4359. ——.]—A master stipulating for 4*d.* out of every 1*s.* of the earnings of his apprentice is no benefit to him within the statute of Anne, for which an additional duty is to be paid; being by law entitled to the whole.—R. *v.* WANTAGE (INHABITANTS) (1801), 1 East, 601; 102 E. R. 233.

4360. ——.]—The master of an apprentice is by law entitled to the whole of his earnings (LORD ELLENBOROUGH, C.J.).—R. *v.* BRADFORD (INHABITANTS) (1813), 1 M. & S. 151; 105 E. R. 57.

4361. Though apprentice quits before time.]—Master has a right to earnings of his apprentice who quits him.—MERITON *v.* HORNSBY (1717), 1 Ves. Sen. 48; 27 E. R. 883.

Annotation: **Refd.** Hill *v.* Allen (1718), 1 Dick. 131.

4362. —— ——.]—The ct. will not relieve against a master's legal right to all the earnings of his apprentice who quitted his service before his time.—HILL *v.* ALLEN (1748), 1 Ves. Sen. 83; 1 Dick. 130; 27 E. R. 906.

4363. —— Though earned on warship.]—The master of an apprentice is entitled to the wages earned by him in a man of war; & may recover them from the captain, although the latter had no notice of the apprenticeship beyond the assertion of the apprentice.—EADES *v.* VANDEPUT (1781), 1 Doug. K. B. 1; 5 East, 38, n.; 99 E. R. 736.

Annotation: **Consd.** Foster *v.* Stewart (1814), 3 M. & S. 191.

4364. Master not entitled to prize money.]—The prize money gained by an apprentice, serving on board a letter of marque ship, does not belong to the master of the apprentice, the usage being proved to be that such money is the property of the apprentice.—CARSAN *v.* WATTS (1781), 3 Doug. K. B. 350; 99 E. R. 691.

SUB-SECT. 2.—CHASTISEMENT OF APPRENTICES.

4365. Whether moderate chastisement permitted — Improper conduct.]—GYLBERT *v.* FLETCHER, No. 4193, *ante*.

4366. —— ——.]—In the simple relation of master & servant, the servant is bound to obey all the lawful commands of his master, & if he commits any unlawful act the master may dismiss him. But if an apprentice misbehaves himself the master has the power of correcting him by personal chastisement, provided it be moderate; & the whole control as regards his morals is also with the master. . . . The apprentice may have taken sweetmeats from a jar, or a shilling from a till, for which offences he might be corrected by personal chastisement or kept in confinement, but the master has no right to dissolve the contract (WATSON, B.).—PHILLIPS *v.* CLIFT (1859), 4 H. & N. 168; 28 L. J. Ex. 153; 32 L. T. O. S. 282; 23 J. P. 120; 5 Jur. N. S. 74; 7 W. R. 205; 157 E. R. 801.

Annotations: **Refd.** Westwick *v.* Theodar (1875), 39 J. P. 616; Learoyd *v.* Brook, [1891] 1 Q. B. 431; Waterman *v.* Fryer, [1922] 1 K. B. 499.

4367. ——.]—The girls upon whom the assaults were committed were apprenticed to applt. A book of faults seems to have been kept by him in which entries were made from time to time, & after a certain number of entries were made the apprentice to whom they related was punished. There does not appear to have been punishment which carried any serious pain to the girls in question, but there can be no doubt that applt. had no right to chastise the girls in the way he did, nor has any one who employs apprentices any right to do what applt. claims he could do by way of correction (LORD READING, C.J.).—R. *v.* JOSEPHSON (1914), 110 L. T. 512; 30 T. L. R. 243; 24 Cox, C. C. 128; 10 Cr. App. Rep. 8; 78 J. P. Jo. 10, C. C. A.

Criminal liability for immoderate chastisement.]—*See* CRIMINAL LAW, Vol. XV., p. 828, No. 9066.

SUB-SECT. 3.—PHYSICAL WELL-BEING OF APPRENTICE.

A. In General.

4368. Provision of board & lodging—No indentures executed Recovery of costs by master—Apprentice dismissed without reason.]—If a person take a lad a month on liking, with the intention of his being bound as an apprentice, if he & the lad suit one another, & the lad stay several months without any indenture being executed. If no fresh agreement were entered into he is not entitled to charge for the board & lodging of the lad whom he employed in his trade, & by consequence he is not entitled to set it off in an action by the lad's father for money lent.—WILKINS *v.* WELLS (1825), 2 C. & P. 231, N. P.

Annotation: **Distd.** Earratt *v.* Burghart (1828), 3 C. & P. 381.

4369. Apprentice dismissed for misconduct.]—If a lad goes on liking with a view to his being bound an apprentice, his intended master cannot charge for his board & lodging for the first month, nor perhaps for so long time as he conducts himself properly. But if he stays for many months, behaving ill after complaints to his father of his misconduct, it will be for the jury to say whether there was any contract, either express or implied, that his father should pay for his board & lodging. EARRATT *v.* BURGHART (1828), 3 C. & P. 381, N. P.

Annotation: **Distd.** Harrison *v.* James (1862), 7 H. & N. 804.

4370. Whether contract implied a question of fact.]—A. placed his son with B., a chemist & druggist, who intended to pass his examination at Apothecaries' Hall, but was delayed in so doing by ill health. It was intended that A.'s son should be apprenticed to B., but he stayed for five years with B., having his board & lodging, & being taught the business of a chemist & druggist, & he then left B., & was never apprenticed to him: *Held:* (1) to entitle B. to recover for the board, lodging & teaching of A.'s son, the jury must be satisfied that A.'s son was placed with B. upon an agreement or understanding that B. was to be paid for his board & lodging

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PART XV. SECT. 2, SUB-SECT. 2.

4367 i. ***Whether moderate chastisement permitted.***]—The master of a ship is entitled to chastise an apprentice, & the ct., on a claim for damages being made on the apprentice's behalf, will not inquire whether the master was right or wrong, provided his act was truly an act of chastisement, & not an act of wanton cruelty.—WIGHTS *v.* BURNS (1883), 11 R. (Ct. of Sess.) 217; 21 Sc. L. R. 160.—**SCOT.**

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& for teaching him; (2) but if the jury were not so satisfied, or if they thought that A.'s son was not to be paid for till B. had passed his examination at Apothecaries' Hall, & that A.'s son was then to be apprenticed to B. as an apothecary, B. was not entitled to recover anything for the board & lodging & teaching during the five years. —ATTWATERS *v.* COURTNEY (1841), Car. & M. 51, N. P.

4371. —— —— —— Apprentice removed by father.]—Deft. being desirous of apprenticing his son to pltfs., it was verbally agreed between them, that the son should go on trial for a month, &-if the parties were satisfied, he should be bound apprentice for four years, deft. to pay a premium of £100 by instalments. The son went on trial & remained above sixteen months, when deft. removed him. No deed of apprenticeship was executed, or any part of the premium paid:—*Held:* pltfs. could not recover for the son's board & lodging during any part of the time he remained with them.—HARRISON *v.* JAMES (1862), 7 H. & N. 804; 31 L. J. Ex. 248; 158 E. R. 693.

4372. Provision of washing—Subsequent variation of contract.]—The father of an apprentice covenanted in the indenture to provide his son with washing, etc.; after that the master suggested that the father should allow the son £20 a year, & the master supply the son with washing, etc., & the son pay him for it. This was acceded to, & the master accordingly supplied the washing, etc.:—*Held:* the master could not recover in an action of covenant on the indenture against the father for his not providing the son with washing, etc., if the master provided the washing, etc., by agreement on the credit of either the father or the son; &, in an action on the covenant, a plea of performance by the father was supported by proof of these facts.—BLACKBURNE *v.* DAVIS (1843), Car. & Kir. 107; 1 L. T. O. S. 647, N. P.

4373. Duty to provide medicines.]—A master is bound during the illness of his apprentice, to provide him with proper medicines.—R. *v.* SMITH (1837), 8 C. & P. 153.

B. Ill Usage.

4374. Discharge of indenture—Whether ordered by court.]—LOCKLEY *v.* ELDRIDGE (1674), Cas. *temp.* Finch, 124; 23 E. R. 68.

Annotation:—**Refd.** Webb *v.* England (1860), 29 Beav. 44.

4375. —— ——.]—Pltf.'s son was put apprentice to deft. for seven years, but quitted him on being misused, & on deft.'s proceeding at law, on a bond given by pltf., he brings a bill for an injunction, & for the delivery of the bond.

A ct. of equity has no jurisdiction in matters of this nature, but belongs to justices of peace, & therefore pltf. ordered to pay costs at law, & in this ct.

Misuser of an apprentice is not a foundation for coming into equity, for if an action is brought by a master against the father of an apprentice, for a breach of covenant in quitting his service, if misuser appears, this is no breach.—ARGLES *v.* HEASEMAN (1739), 1 Atk. 518; 26 E. R. 327, L. C.

Annotation:—**Apld.** Webb *v.* England (1860), 29 Beav. 44.

—— By magistrate.]—*See* Sect. 4, *post.*

Criminal liability.]—*See* CRIMINAL LAW, Vol. XV., pp. 792, 793, 827, Nos. 8562, 8572, 9049.

SUB-SECT. 4.—RIGHTS AGAINST THIRD PARTIES —REMEDIES FOR HARBOURING APPRENTICE.

4376. Whether action lies.]—VALLEY *v.* RICHMOND (1603), Noy, 105; 74 E. R. 1071.

Annotation:—**Refd.** R. *v.* Callingwood (1704), 2 Ld. Raym. 1116.

4377. ——.]—Trespass lies for the taking an apprentice.—CHAMBERLAIN *v.* HARVEY (1696), 1 Ld. Raym. 146; Carth. 396; 5 Mod. Rep. 182; 91 E. R. 994.

Annotation:—**Refd.** Forbes *v.* Cochrane (1824), 2 B. & C. 448.

4378. ——.]—An indictment will not lie against a man for enticing an apprentice to leave his master's service; for it is of a private nature, & to the prejudice of a single person only; the remedy is by action on the case.—R. *v.* DANIELL (1704), 6 Mod. Rep. 99, 182; Holt, K. B. 316; 1 Salk. 380; 3 Salk. 191; 87 E. R. 856, 937.

Annotations:—**Expld.** R. *v.* Callingwood (1705), 2 Ld. Raym. 1116. **Consd.** R. *v.* Higgins (1801), 2 East, 5. **Refd.** R. *v.* Rowlands (1851), 2 Den. 364. **Mentd.** R. *v.* Rowed (1842), 11 L. J. M. C. 74; Mogul S.S. Co. *v.* McGregor, Gow (1889), 23 Q. B. D. 598.

4379. ——.]—(1) The ct. will not, at the prayer of the master, grant a *habeas corpus* to bring up an apprentice impressed, he being willing to enter into the King's service.

(2) If the party himself, being of competent years of discretion, do not complain, we cannot issue the writ on the prayer of the master, who has his remedy by action if his apprentice has been improperly taken away from him (LORD ELLENBOROUGH, C.J.).—*Ex p.* LANDSDOWN (1804), 5 East, 38; 102 E. R. 983.

4380. ——.]—Debt upon a contract of Sept. 1834, whereby pltf., in consideration of £7,800 did sell, assign, transfer, & set over all his right, etc., in & to the services & labour of one hundred and fifty-three apprenticed labourers in favour of deft., to the use of his plantations, with a warranty of the quiet possession of the services of such labourers according to law; & deft. engaged to pay pltf. the sum of £7,800 in six instalments, & that in case of failure in any of such instalments, pltf. might reclaim, & the services of the labourers should revert to pltf., deft. remaining liable for such sums as should be then due for the hire of such labour during such period as he should have received the services. Breach assigned: non-payment of the two last instalments.

Plea, that before the expiration of the period of service, & before the instalment was due, pltf. removed the labourers out of the plantations of deft. to his own premises, & deft. ceased to receive their services, & he declined to pay the instalment, & therefore the services reverted to pltf.:—*Held:* the plea set out what might have given deft. a cross remedy against pltf. for a trespass, but was no defence in this action.—FULLARTON *v.* MITTELHOLZER (1845), 6 Q. B. 1022; 4 L. T. O. S. 376; 115 E. R. 385, Ex. Ch.

4381. —— Action for loss of service for residue of term—Term not expired.]—Pltf. declared for procuring his apprentice to depart from his service, & for the loss of his service, for the whole residue of the term of his apprenticeship, & the jury assessed damages generally, judgment was arrested, because it appeared that the term was not expired.—HAMILTON *v.* VERE (1670), 2 Keb. 693, 697; 1 Lev. 299; 84 E. R. 436, 439; *sub nom.* HAMBLETON *v.* VEER, cited in 5 Mod. Rep. at p. 287; T. Raym. 200; 2 Wms. Saund. 169.

Annotations:—**Refd.** Hodsoll *v.* Stallebrass (1840), 11 Ad. & El. 301. **Mentd.** Acton *v.* Eels (1695), 2 Salk. 662; Leveridge *v.* Hoskins (1709), 11 Mod. Rep. 257; Griffiths *v.* Lewis (1846), 8 Q. B. 841.

4382. —— Proof of enticing not essential.]—Case for retaining his servant departed without licence.

The action lies without incitement by defts., they having notice that he was the hired servant of another (*per* CUR.).—FAWCET *v.* BEAVRES (1672), 2 Lev. 63; 83 E. R. 451.

Annotation:—**Refd.** Aynesworth *v.* Wood (1729), 1 Barn. K. B. 312.

4383. ——.]—ASHCROFT *v.* BEETLES (1796), 6 Term Rep. 652; 101 E. R. 753.

4384. —— Necessity for valid contract of apprenticeship.]—No action can be maintained for harbouring an apprentice as such, if the master to whom he was bound was then not a housekeeper, & of the age of 24 years. *Qu.:* whether in an action by a master for harbouring his apprentice it is necessary for him to prove that he has made oath that the premium mentioned in the indentures is the whole premium he has received.—GYE *v.* FELTON (1813), 4 Taunt. 876; 128 E. R. 577.

Annotation:—**Refd.** Stewart *v.* Lawton (1823), 1 Bing. 374.

4385. ——.]—No action will lie for enticing away an apprentice, unless there be a valid contract of apprenticeship.—COX *v.* MUNCEY (1859), 6 C. B. N. S. 375; 141 E. R. 502.

4386. ——.]—DE FRANCESCO *v.* BARNUM. No. 4201, *ante*.

4387. Habeas corpus.]—R. *v.* PARKINS (1758), 2 Keny. 295; 96 E. R. 1188.

4388. —— To discharge apprentice from man of war.]—If an apprentice of the age of eighteen voluntarily enter into the sea service, his master is not entitled to sue out a *habeas corpus* to bring him up.—R. *v.* REYNOLDS (1795), 6 Term Rep. 497; 101 E. R. 667.

Annotation:—**Consd.** R. *v.* Edwards (1798), 7 Term Rep. 745.

4389. ——.]—If an apprentice be impressed into the sea service, the master cannot sue out a *habeas corpus* to bring him up to be discharged, though the apprentice may. But the Lord Chief Justice may issue a warrant to bring him up on the application either of the master or the apprentice.—R. *v.* EDWARDS (1798), 7 Term Rep. 745; 101 E. R. 1231.

4390. ——.]—*Ex p.* LANDSDOWN, No. 4379, *ante*.

4391. ——.]—*Habeas corpus* refused, to discharge an apprentice from a king's ship, where the apprentice did not allege that he was detained against his own consent. The master, however, may have a warrant to the commander of the vessel to have the apprentice discharged.—*Ex p.* GROCOT (1825), 5 Dow. & Ry. K. B. 610; 2 Dow. & Ry. M. C. 594.

4392. Action for harbouring waived—Action for work & labour done by apprentice.]—The master of an apprentice, who has been seduced from his service to work for another person, may waive his action for the tort, & bring an action of *indebitatus assumpsit* for work & labour done by his apprentice, against the person who tortiously employed him.—LIGHTLY *v.* CLOUSTON (1808), 1 Taunt. 112; 127 E. R. 774.

Annotations:—**Folld.** Foster *v.* Stewart (1814), 3 M. & S. 191. **Consd.** Phillips *v.* Homfray (1883), 24 Ch. D. 439.

4393. ——.]—Where pltf.'s apprentice deserted from pltf.'s ship & went on board deft.'s & secreted himself until deft.'s ship sailed, when he discovered himself to deft., who carried him to H., to which place he worked his passage, receiving his food, & during their passage to H. pltf.'s & deft.'s ships were within hail, but deft. did not make known to pltf. that he had the apprentice on board, & on the arrival of deft.'s ship at H. the apprentice wished to leave her, but deft. persuaded him to remain, promising him either wages or clothes & pocket money, under which persuasion the apprentice sailed with him to E. & did duty as one of the crew, but received no wages, or clothes or pocket money:—*Held:* pltf. was entitled to waive the tort, & bring *assumpsit* against deft. for the work & labour of his apprentice, & to recover a reasonable compensation for the services of the apprentice from H. to E.—FOSTER *v.* STEWART (1814), 3 M. & S. 191; 105 E. R. 582.

Annotations:—**Refd.** Chamberlain *v.* Hazelwood (1839), 9 L. J. Ex. 87; Cornish *v.* Abington (1859), 7 W. R. 504: Phillips *v.* Homfray (1883), 24 Ch. D. 439.

4394. Action for penalties—Under private Act.]—CUTLER'S CO. IN YORKSHIRE *v.* RUSLIN (1693), Skin. 363; 90 E. R. 161.

Annotations:—**Consd.** College of Physicians *v.* Harrison (1829), 9 B. & C. 521. **Refd.** Plymouth Corpn. *v.* Werring (1743), Willes, 440.

4395. Injunction.]—RICHARDS *v.* WHITNEY (1556), cited in 1 Spence 698.

Annotation:—**Consd.** Webb *v.* England (1860), 29 Beav. 44.

Whether indictment lies.]—*See* CRIMINAL LAW, Vol. XIV., p. 208, No. 1898.

SUB-SECT. 5.—LIABILITIES TO THIRD PARTIES.

4396. Trover—For goods delivered to apprentice.] Trover lies against master for goods delivered to the apprentice.—MEAD *v.* HAMOND (1722), 1 Stra. 505; 93 E. R. 663.

4397. ——.]—ARMORY *v.* DELAMIRIE (1722), 1 Stra. 505; 93 E. R. 664.

Annotations: **Refd.** Ancona *v.* Marks (1862), 7 H. & N. 686. **Mentd.** Webb *v.* Fox (1797), 7 Term Rep. 391; Lupton *v.* White, White *v.* Lupton (1808), 15 Ves. 432; Sutton *v.* Buck (1810), 2 Taunt. 302; Burton *v.* Hughes (1824), 9 Moore, C. P. 334; Mortimer *v.* Cradock (1843), 12 L. J. C. P. 166; Taylor *v.* Haygarth (1841), 8 Jur. 135; Whitehead *v.* Harrison (1844), 6 Q. B. 423; Bridges *v.* Hawkesworth (1851), 21 L. J. Q. B. 75; White *v.* Mullett (1851), 6 Exch. 713; Dean *v.* Thwaite (1855), 21 Beav. 621; Gray *v.* Haig, Haig *v.* Gray (1855), 20 Beav. 219; Broadbent *v.* Imperial Gas Co. (1857), 7 De G. M. & G. 436; Chowne *v.* Baylis (1862), 31 Beav. 351; R. *v.* Gardner (1862), 1 New Rep. 107; Buckley *v.* Gross (1863), 3 B. & S. 566; Williams *v.* Williams (1863), 33 Beav. 306; Wentworth *v.* Lloyd (1864), 10 H. L. Cas. 589; Bourne *v.* Fosbrooke (1865), 18 C. B. N. S. 515; Hammersmith, etc. Ry. *v.* Brand (1869), L. R. 4 H. L. 171; Taunton Petn. (1869), 21 L. T. 169; Wilson *v.* Northampton & Banbury Junction Ry. (1874), 43 L. J. Ch. 503; Mussammat Sundar *v.* Mussammat *Parbati* (1889), 5 T. L. R. 683; Keighley, Maxsted *v.* Durant, [1901] A. C. 240; The Winkfield, [1902] *P.* 42; Plasycoed Collieries Co. *v.* Partridge Jones (1912), 81 L. J. K. B. 723; Eastern Construction Co. *v.* National Trust Co. & Schmidt, [1914] A. C. 197; Daniel *v.* Rogers, [1918] 2 K. B. 228; Coldman *v.* Hill, [1919] 1 K. B. 443; Smith *v.* G. W. Ry., [1921] 2 K. B. 237.

4398. Fraud of apprentice.]—Master liable for fraud of apprentice.—GRAMMAR *v.* NIXON (1725), 1 Stra. 653; 93 E. R. 761.

Annotations:—**Consd.** The Druid (1842), 1 Wm. Rob. 391. **Refd.** A.-G. *v.* Siddon (1830), 1 Tyr. 41; Udell *v.* Atherton (1861), 7 H. & N. 172.

SECT. 3.—**AUTHORITY OF APPRENTICE.**

See, generally, AGENCY, Vol. I., pp. 295 *et seq.*

4399. To receive payment on behalf of master—Not in usual course of business.]—*Semble:* a payment made to an apprentice in his master's counting house, not in the usual course of business, but on a collateral transaction, is not a good payment to the master; as, where a deposit is paid by a stakeholder to the apprentice of the party who makes the deposit, at his counting-house.—

Sect. 3.—*Authority of apprentice.* *Sects.* 4, 5 & 6: *Sub-sects.* 1, 2 & 3.]

SANDERSON *v.* BELL (1834), 2 Cr. & M. 301; 4 Tyr. 244; 3 L. J. Ex. 66; 149 E. R. 776.

Annotations:—**Mentd.** Steadman *v.* Hockley (1846), 10 Jur. 819; Castellain *v.* Thompson, Thompson *v.* Castellain (1862), 13 C. B. N. S. 105; Webb *v.* Smith (1885), 30 Ch. D. 192.

SECT. 4.—PROCEEDINGS BEFORE MAGISTRATES.

See, now, Employers & Workmen Act, 1875 (c. 90), ss. 5-7.

4400. Jurisdiction of magistrates—To order payment of wages—For period of illness.]—P. was by deed apprenticed in 1881 for seven years to W., a plumber, & in the fifth year W. covenanted to pay 14*s.* per week. In that year P. had a tumour in his right hand & was in hospital, & claimed wages while so absent & incapable of work under Employers & Workmen Act, 1875 (c. 90), s. 5:—*Held:* the magistrate was wrong in refusing to make an order on W. to pay the wages during such illness of P.— PATTEN *v.* WOOD (1887), 51 J. P. 549, D. C.

—— **Infant's contract.**]—*See* Sect. 1, sub-sect. 3, *ante.*

4401. Former jurisdiction of sessions—Discharge of apprentice—Default & ill treatment of master.]—R. *v.* DUHAMMEL, No. 4289, *ante.*

4402. —— - — **Must be upon reason assigned.**]—R. *v.* DAVIE (1726), 2 Stra. 704; Sess. Cas. K. B. 81; 93 E. R. 795.

Annotation:—**Refd.** Arglis *v.* Heaseman (1735), Lee *temp.* Hard. 101.

4403. —— —— **"Using unkindly" not sufficient.**]—The sessions have an original jurisdiction in respect of discharging an apprentice. But an apprentice cannot be discharged without appearance or summons of the master. "Using" the apprentice "unkindly" not a sufficient reason for discharging him.—ARGLIS *v.* HEASEMAN (1735), Lee *temp.* Hard. 101; Cunn. 157; 95 E. R. 63; *sub nom.* R. *v.* EASMAN, 2 Stra. 1013 *sub nom.* R. *v.* HEASMAN, Sess. Cas. K. B. 176; *subsequent proceedings* (1739), 1 Atk. 518, L. C.

4404. —— **Committal of apprentice—Defences—Acting on legal advice.**]—COOPER *v.* SIMMONS, No. 4348, *ante.*

4405. —— —— —— **Breach of covenant by master.**]—In an apprentice indenture, a master entered into a covenant to pay wages varying each year of the service, & near the close of the service the apprentice & master differed about the correct sum then payable, according to the indenture, & because the master would not pay what the apprentice claimed, the latter left the service:—*Held:* as the covenant to pay wages was quite independent of the apprentice's covenant to serve, & there was a remedy against the master for breach of this covenant, the apprentice had no just cause to absent himself & the justices ought to have convicted him.—WINNIFRITH *v.* PANKHURST (1864), 28 J. P. 823.

4406. —— —— **Infant avoiding indenture as prejudicial.**]—R. *v.* EVERED (1777), Cald. Mag. Cas. 26.

Annotation:—**Apld.** Gray *v.* Cookson (1812), 16 East, 13.

4407. Effect of order discharging apprentice—Discharge of master's covenants.]—An order of session to discharge an apprentice from his master virtually discharges the master from the covenants of the indenture.—R. *v.* GATELY (1695), 5 Mod. Rep. 138; Carth. 366; Comb. 353; 2 Salk. 471; Sett. & Rem. 133; 87 E. R. 569.

Annotation:—**Mentd.** R. *v.* Bartlet (1734), 2 Barn. K. B. 462.

SECT. 5.—PARTICULAR TRADES AND PROFESSIONS.

4408. Huntsman.]—R. *v.* WHITCHURCH (INHABITANTS) (1726), 3 Vin. Abr. 31.

Annotation:—**Refd.** St. Pancras Parish *v.* Clapham Parish (1860), 6 Jur. N. S. 700.

4409. Housewifery.]—R. *v.* ST. PETROX (INHABITANTS) (1745), Burr. S. C. 248.

Annotations:—**Refd.** R. *v.* Barnsley (1813), 1 M. & S. 377; R. *v.* Barleston (1822), 5 B. & Ald. 780; St. Pancras *v.* Clapham (1860), 2 E. & E. 742.

4410. Chimney sweeps.]—28 Geo. 3, c. 48, s. 4, makes void all indentures whereby children under eight years of age are bound apprentices to chimney sweepers, & no settlement can be gained by serving under them.—R. *v.* HIPSWELL (INHABITANTS) (1828), 8 B. & C. 466; 2 Man. & Ry. M. C. 474; 2 Man. & Ry. K. B. 474; 7 L. J. O. S. M. C. 4; 108 E. R. 1116.

Annotations:—**Apld.** R. *v.* Gravesend (1832), 3 B. & Ad. 240. **Distd.** R. *v.* St. Gregory (1834), 2 Ad. & El. 99. **Consd.** R. *v.* Epsom (1855), 4 E. & B. 1003. **Mentd.** Pearse *v.* Morrice (1834), 2 Ad. & El. 84.

— — —.]—*See, now,* Chimney Sweepers & Chimneys Regulation Act, 1840 (c. 85), s. 3.

4411. Watermen.]—By 10 Geo. 2, c. 31, s. 5, any contract to take an apprentice, entered into by such freeman or widow, not being an occupier of some house, etc., or having already two apprentices, was prohibited; &, therefore, where a pauper bound himself by indenture of apprenticeship to serve the widow of a waterman, she not having such house, etc., but it being understood that he was to live at the house of a freeman of the co., which he did, & to serve him conformably to the indenture, he having two other apprentices at the time, such indenture was absolutely void.—R. *v.* GRAVESEND (INHABITANTS) (1832), 3 B. & Ad. 240; 1 L. J. M. C. 20; 110 E. R. 90.

Annotations:—**Distd.** R. *v.* St. Gregory (1834), 2 Ad. & El. 99. **Refd.** R. *v.* Barmston (1838), 7 Ad. El. 858. **Mentd.** Pearse *v.* Morrice (1834), 2 Ad. & El. 84; Cundell *v.* Dawson (1847), 4 C. B. 376.

Articled clerks to solicitors.]—*See* SOLICITORS.

SECT. 6.—PARISH APPRENTICES.

SUB-SECT. 1.—IN GENERAL.

See Poor Law Amendment Act, 1844 (c. 101), s. 12; Poor Law Apprentices Act, 1851 (c. 11); General Consolidated Order, 1847 (Statutory Rules & Orders Rev., Vol. X., Poor, England, pp. 74 *et seq.*); General Order (Apprenticeship of Pauper Children) 1898 (Statutory Rules & Orders Rev., Vol. X., Poor, England, p. 233); Relief Regulation Order, 1911, Art. XIV.

4412. Lower age at which apprentice may be bound.]—The person to whom a parish appoint an apprentice is concluded by signing the indenture nor can parol evidence be admitted of any prior informality in such indenture.

Parish apprentice may be appointed at any age beyond that of nurture, except perhaps in case of husbandry.—R. *v.* SALTREN (1784), Cald. Mag. Cas. 444.

4413. Cannot be bound to serve in foreign parts.]—Binding a poor child to serve as an apprentice in foreign parts is unlawful.—R. *v.* SWIMMER (1753), Say. 103; 96 E. R. 818.

SUB-SECT. 2.—THE INDENTURE.

See, generally, DEEDS, Vol. XVII., pp. 199 *et seq.*

4414. Compliance with statutory provisions—Local.]—A local statute enacted that certain guardians of the poor should have power to bind children apprentices, "provided such children be not bound for a longer term than until they shall have attained the respective ages following": viz. a boy the age of twenty-two, & a girl that of twenty:—*Held:* an indenture binding a boy for a longer term than that allowed by the Act was not absolutely void, but only voidable.—R. *v.* ST. GREGORY (INHABITANTS) (1834), 2 Ad. & El. 99; 2 Nev. & M. M. C. 440; 4 Nev. & M. K. B. 137; 4 L. J. M. C. 9; 111 E. R. 38.

4415. —— ——.]—By a local Act certain revenues were vested in the guardians of the poor of C. in trust for the maintenance & employment of the poor of that city: & the guardians were required to give bond under their common seal, for themselves & their successors, for ever thereafter to provide for, clothe, & maintain sixteen poor boys of the said city, to be called Bluecoat Boys, & cause the said sixteen boys to be instructed, etc., & put them & every of them respectively out apprentices after they & every of them respectively should have attained their respective ages of thirteen years, & before their said ages of fifteen years, etc.:—*Held:* this gave the guardians no authority to apprentice the boys against their will, or after the age of fifteen; where, therefore, a boy was apprenticed by the guardians at seventeen, but did not execute the indenture.—ST. NICHOLAS, ROCHESTER (CHURCHWARDENS & OVERSEERS) *v.* ST. BOTOLPH-WITHOUT-BISHOPSGATE (CHURCHWARDENS & OVERSEERS) (1862), 12 C. B. N. S. 645; 31 L. J. M. C. 258; 6 L. T. 495; 9 Jur. N. S. 101; 142 E. R. 1296.

4416. —— **Regulations of Poor Law Commissioners—Only directory.**]—An indenture binding a poor child purported on its face to be signed by the apprentice "without aid or assistance" & there was a certificate of a magistrate at the foot as required by the rules issued by the Poor Law Comrs. for regulating the binding of parish apprentices. There was nothing on the face of the indenture, nor was any evidence adduced, to show whether the indenture had been executed in duplicate or the apprentice or his parents had consented to the binding, nor was any cause of such consent being dispensed with stated in the indenture: *Held:* these regulations were merely directory, & the omission to comply with them, if established, would not affect the validity of the indenture.—R. *v.* ST. MARY MAGDALEN (INHABITANTS) (1853), 2 E. & B. 809; 2 C. L. R. 223; 23 L. J. M. C. 1; 22 L. T. O. S. 96; 18 J. P. 21; 17 Jur. 1075; 2 W. R. 35; 118 E. R. 970.

4417. Execution by apprentice As showing consent.]—R. *v.* ST. NICHOLAS, NOTTINGHAM (INHABITANTS) (1789), 2 Term Rep. 726; 2 Bott. 6th ed. 398; 100 E. R. 391.

Annotation:—**Refd.** R. *v.* St. George, Exeter (1835), 3 Ad. & El. 373.

4418. —— ——.]—The consent of the apprentice is not requisite in the case of a parish apprenticeship.—R. *v.* ST. GEORGE, EXETER (INHABITANTS) (1835), 3 Ad. & El. 373; 1 Har. & W. 372; 5 Nev. & M. K. B. 61; 3 Nev. & M. M. C. 208; 4 L. J. M. C. 100; 111 E. R. 455.

4419. Execution by parish officers—Premium paid by parish Apprentice not a parish apprentice.]—R. *v.* ARUNDEL (INHABITANTS), No. 4182, *ante.*

4420. Misdescription of parties.]—A local Act incorporated certain persons by the name of "The guardians of the poor within the hundred of Stow, in the county of Suffolk"; there was a power to the body at large to elect directors & acting guardians, for putting the powers of the Act in execution; the directors & acting guardians were empowered to bind out poor children:—*Held:* such binding should be in the name of the corpn. by its corporate name; & a binding, by deed, by "the directors & acting guardians," to which deed the corporate seal was affixed, was invalid.—R. *v.* HAUGHLEY (INHABITANTS) (1833), 1 B. & Ad. 650; 1 Nev. & M. K. B. 525; 1 Nev. & M. M. C. 122; 2 L. J. M. C. 56; 110 E. R. 601.

Annotation:—**Consd.** R. *v.* Isle of Wight Union Grdns. (1861), 1 New Rep. 92.

4421. —.] By a local Act the "guardians of the poor within the Isle of Wight" were constituted a corpn. with a common seal, & the Act contained provisions for the appointment of certain persons from among the guardians as "directors & acting guardians" who were empowered (*inter alia*) with the consent of two justices to bind out poor children as apprentices. By an indenture intended to be in pursuance of this Act, & purporting to be made between the guardians of the poor within the Isle of Wight, of the one part, & E. of the other part, it was witnessed that "the directors & acting guardians of the poor within the Isle of Wight, by virtue of the local Act & by & with the consent of two justices" put, placed, & bound S. a poor girl apprentice to the said E. The covenants in the deed were made with the "guardians" & it was executed by the guardians with their common seal:—*Held:* this indenture was valid by virtue of 3 & 4 Will. 4, c. 63, s. 2, by which its defects were cured.—R. *v.* ISLE OF WIGHT UNION GUARDIANS (1861), 1 New Rep. 92; 10 L. T. 370; 28 J. P. 821; 12 W. R. 741.

4422. Admissibility of extrinsic evidence.]—R. *v.* SALTREN, No. 4412, *ante.*

4423. Exemption from stamp duty Premium paid out of charity.]—R. *v.* SKEFFINGTON (INHABITANTS), No. 1310, *ante.*

SUB-SECT. 3.—ASSIGNMENT.

4424. Whether apprenticeship assignable By master.]—Sessions cannot set aside an assignment & the master of a parish apprentice may assign him over as well as any other (PARKER, C.J.).

R. *v.* BARNES (1717), 1 Sess. Cas. K. B. 34; 1 Stra. 48; 93 E. R. 31.

4425. —— —.]—R. *v.* ST. PETROX (INHABITANTS) (1745), Burr. S. C. 218.

Annotations:—**Consd.** R. *v.* Barleston (1822), 5 B. & Ald. 780. **Refd.** R. *v.* Barnsley (1812), 1 M. & S. 377. **Mentd.** St. Pancras *v.* Clapham (1360), 2 E. & E. 742.

4426. —— — — **Execution by master.**]—To constitute a valid assignment of a parish apprentice, under 32 Geo. 3, c. 57, there must be, at least, an express authority, by the original master to another person, authorising him to assign the apprentice. *Qu.:* whether the master must himself execute the assignment.

Accordingly, where the master of a parish apprentice resided, permanently, abroad, his steward, having the general management of his estate, executed, in the master's name, an assignment of such apprentice, & charged the expenses in his accounts, which were subsequently allowed by the master; but the master had given no previous direction on the subject: *Held:* whether the execution by the master was necessary or not,

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this was not a valid assignment by the master. —R. *v.* SPREYTON (INHABITANTS) (1832), 3 B. & Ad. 818; 1 L. J. M. C. 79; 110 E. R. 300.

4427. Misnomer in assignment.]—The assignment & acceptance of a parish apprentice, in one instrument, were in the following words:—"Thomas Melhuish does hereby assign the said Elizabeth Matthews, & M. P. doth hereby agree to accept the said Elizabeth Melhuish:—*Held:* the misnomer did not vitiate the acceptance.—R. *v.* EXMINSTER (INHABITANTS) (1837), 6 Ad. & El. 598; 1 Nev. & P. K. B. 603; Nev. & P. M. C. 253; Will. Woll. & Dav. 244; 6 L. J. M. C. 82; 1 J. P. 103; 112 E. R. 229.

Consent of guardians.]—*See* General Consolidated Order, 1847 (Statutory Rules & Orders Rev., Vol. X., Poor, England, p. 81).

4428. Exemption from stamp duty.]—An unstamped assignment of a parish apprentice stated that D., the new master, in consideration of £3 10*s.* paid him by H., the old master, agreed to accept the apprentice, etc.:—*Held:* (1) parol evidence was admissible to show that the money paid on the assignment of the apprentice was parish money; (2) the instrument did not require a stamp.—R. *v.* LLANGUNNOR (INHABITANTS) (1831), 2 B. & Ad. 616; 9 L. J. O. S. M. C. 90; 109 E. R. 1272.

Annotation:—*As to* (1) **Refd.** R. *v.* Billinghay (1836), 5 Ad. & El. 676.

4429. —— What funds within exemption.]—J., in 1720, devised property to trustees, who were to employ the proceeds in apprenticing, at stated intervals, a certain number of boys of his wife's family; &, failing that family, to make up the number from among the inhabitants of a certain parish & two wards; &, failing those, out of the neighbouring parishes. No failure occurred in the family named by testator, & boys of that family were apprenticed, according to the will, with premiums from the devised funds. *Qu.:* whether the indentures were free from stamp duty under the clause of 55 Geo. 3, c. 184, Sched. Part I., Title Apprenticeship, which exempts indentures for apprenticing poor children at the sole charge of any public charity?

A boy was apprenticed as above to a tinman for seven years, the master binding himself to teach the apprentice, & to pay his father a weekly sum during the term. At the end of three years the master, at the boy's desire, consented that he should serve the rest of his time with his own brother, a plumber & glazier; & agreed "to give the brother £6 as part of the premium on the binding of the apprentice, for taking him." There was no contract in writing, & the trustees under the will were not parties to the agreement. The £6 were paid, & the boy went to, & served, his brother:—*Held:* this transfer did not come within the second part of the above exempting clause as an assignment of such poor apprentice without valuable consideration given to the new master or mistress, "other than what may have been or shall be given by any parish or township, or by any public charity."—R. *v.* FAKENHAM (INHABITANTS) (1835), 2 Ad. & El. 528; 1 Har. & W. 222; 4 Nev. & M. K. B. 553; 3 Nev. & M. M. C. 50; 4 L. J. M. C. 77; 111 E. R. 204.

4430. —— Admission of extrinsic evidence.]—R. *v.* LLANGUNNOR (INHABITANTS), No. 4428, *ante*.

See, also, Sect. 1, sub-sect. 12, *ante*.

SUB-SECT. 4.—TERMINATION OF APPRENTICESHIP.

4431. By agreement of apprentice & master—Infant apprentice—Consent of guardians.]—R. *v.* AUSTREY (INHABITANTS) (1758), Burr. S. C. 441; 2 Bott. 6th ed. 446.

Annotations:—**Folld.** R. *v.* Langham (1781), Cald. Mag. Cas. 126. **Refd.** R. *v.* Crediton (1800), 1 East, 59.

4432. —— —— ——.]—Infant parish apprentice & his master cannot by themselves vacate their indenture.—R. *v.* LANGHAM (INHABITANTS) (1781), Cald. Mag. Cas. 126.

4433. —— —— ——.]—Being a minor he [the apprentice] could not agree to the discharge of the indentures without the consent of the parish officers (WILLES, J.).—R. *v.* SANDFORD (INHABITANTS) (1786), 1 Term Rep. 281; 2 Bott. 6th ed. 153; 99 E. R. 1095.

Annotations:—**Consd.** R. *v.* Holy Trinity (1790), 3 Term Rep. 605. **Refd.** R. *v.* Brightholmston (1793), 5 Term Rep. 188; R. *v.* Chipping Warden (1799), 8 Term Rep. 108.

4434. —— —— ——.]—*Qu.:* whether a parish apprentice under age is capable of assenting to the cancellation of his indenture of apprenticeship.—R. *v.* GWINEAR (INHABITANTS) (1834), 1 Ad. & El. 152; 3 Nev. & M. K. B. 297; 2 Nev. & M. M. C. 216; 110 E. R. 1165.

—— —— ——.]—*See, now*, General Consolidated Order, 1847 (Statutory Rules & Orders, Rev., Vol. X., Poor, England, p. 81, Art. 72).

4435. —— Apprentice of full age.]—Parish apprentice may agree with his master to cancel his indentures at twenty-one, though bound till twenty-four, without the consent of the parish. —ECCLESAL BIERLOW *v.* WARSLOW (1766), 1 Wm. Bl. 592; 96 E. R. 342; *sub nom.* R. *v.* ECCLESAL BIERLOW, Burr. S. C. 562; 2 Bott. 6th. ed. 434.

4436. —— ——.]—The assent of authorities is not necessary to cancelling parish indentures after apprentice atttained twenty-one; & if therefore after that age apprentice purchase of the master the remainder of his time the apprenticeship is dissolved, though indentures neither given up nor cancelled.—R. *v.* HARBERTON (INHABITANTS) (1786), 1 Term Rep. 139; 2 Bott. 6th ed. 436; 99 E. R. 1017.

Annotations:—**Distd.** R. *v.* Gwinear (1834), 1 Ad. & El. 152. **Refd.** R. *v.* Foulness (1817), 6 M. & S. 351; Ellen *v.* Topp' 1851), 6 Exch. 424.

SECT. 7.—AGREEMENTS CONTEMPLATING APPRENTICESHIP.

4437. Contract may be terminated by consent—Unless proposed apprentice prejudiced.]—In consideration of £100 paid by pltf.'s father to A., the latter covenanted to maintain & apprentice pltf. & that he should take a specified interest in all the real & personal estate which A. should possess at his death; the conditions in life of pltf. not having been altered, & no expectation on his part having been defeated:—*Held:* this contract might be put an end to by agreement between pltf.'s father & A.

Semble: if there had been part performance of the agreement altering the condition in life of pltf., then the ct. would not have permitted the father to take him back to his prejudice, & would have compelled a complete performance in his favour.—HILL *v.* GOMME (1839), 1 Beav. 540; 8 L. J. Ch. 350; 3 Jur. 744; 48 E. R. 1050; *affd.*, 5 My. & Cr. 250, L. C.

Annotation:—**Mentd.** Green *v.* Paterson (1886), 32 Ch. D. 95.

4438. Liability of master—Improper refusal to bind.]—Deft. agreed with pltf.'s father to receive pltf., who was a minor, into his service on trial, & to take him as apprentice if approved of. Pltf. went into the service, & worked for deft. nearly two years. After several applications made during that time by the father, deft. told the father that pltf. should serve out the two years, & then be bound, the father paying deft. £10. This was agreed to, but deft. shortly after quarrelled with pltf., & told him to go home about his business. Pltf. went home, & on the father applying to deft. for an explanation, the latter told him to go & do his worst. The father then caused a letter to be written to deft. by his attorney, requiring him either to take pltf. as his apprentice, or recompense him for his work; but no satisfactory answer was given, & pltf., by his next friend, brought an action to recover compensation for his service. The judge put it to the jury on these facts, whether or not deft.'s conduct was such as warranted the father in considering the contract for an apprenticeship as rescinded; & he further stated, that if they thought it was, they were to give pltf. such compensation for his work as they thought proper. The jury found a verdict for pltf., with damages by way of compensation for his services:—*Held:* the direction was right, & the verdict not to be disturbed.—PHILLIPS *v.* JONES (1834), 1 Ad. & El. 333; 110 E. R. 1233.

Annotation:—**Mentd.** Hopkins *v.* Richardson (1841), 14 L. J. Q. B. 80.

4439. Liability of parent—If master ready & willing to execute—Whether notice of readiness necessary.]—The declaration stated that it was agreed between A., pltf., & B., deft., that A., B. & C. should, at the expiration of a reasonable time, execute an indenture binding C. as an apprentice to A., & that B. should pay to A. a premium of £60, £5 on the execution of the indenture, & the residue by certain bills, to be drawn by pltf. & accepted by deft.; averment, that, although a reasonable time for B. & C. to execute the indenture, & for B. to pay the £5, & to accept the bills, had elapsed, & although A. had always been ready & willing to execute such indenture, & to receive C. as such apprentice, & although A., at the expiration of such reasonable time, requested B. to execute such indenture, & to pay the £5 & accept & deliver to him the said bills, yet B. did not nor would execute the indenture or pay the £5, or accept, & deliver to A., the said bills, but wholly refused so to do, & then wholly exonerated & discharged A. from tendering such indenture for execution, & such bills for acceptance, etc. Plea, that B. did not exonerate & discharge A. from tendering the indenture to him for execution, or the bills for acceptance. The issue having been found for deft.:—*Held:* upon motion for judgment *non obstante veredicto*, the declaration would have been clearly bad without the averment of dispensation; & therefore the issue taken thereon was not an immaterial one, though, by reason of the want of an averment that B. had notice of A.'s readiness & willingness to execute the indenture, the declaration would be insufficient to support a judgment for pltf.—DOGGOOD *v.* ROSE (1850), 9 C. B. 132; 19 L. J. C. P. 246; 14 L. T. O. S. 350; 137 E. R. 842.

Annotation:—**Mentd.** Cobbold *v.* Peto (1872), 27 L. T. 130.

MASTER OF THE SUPREME COURT.

See COURTS.

MATRIMONIAL CAUSES.

See HUSBAND AND WIFE.

MAYOR.

See ELECTIONS; LOCAL GOVERNMENT.

MAYOR'S AND CITY OF LONDON COURT.

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Part I.—The Court.

See Mayor's & City of London Court Act, 1920 (c. cxxxiv), ss. 1, 6, 12.

1. Inferior court.]—The Lord Mayor's Ct. is an inferior ct., within Solicitors Act, 1843 (c. 73), s. 27, notwithstanding its peculiar customs & jurisdiction.

Every attorney duly qualified is entitled to be admitted an attorney therein, although there is not & never has been a roll of the attorneys of that ct.—R. *v.* LONDON CORPN. (1847), 13 Q. B. 1; 2 New Pract. Cas. 52; 16 L. J. Q. B. 185; 8 L. T. O. S. 536; 11 Jur. 867; 116 E. R. 1163; *revsd.* on other grounds, *sub nom.* LONDON CORPN. *v.* R. (1848), 13 Q. B. 30; 17 L. J. Q. B. 330; 13 J. P. 3; 13 Jur. 33; *sub nom.* LONDON CORPN. *v.* ASHURST, 11 L. T. O. S. 271, Ex. Ch.

Annotations:—**Consd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239. **Refd.** Morris *v.* Lautour (1864), 9 L. T. 767; Cooke *v.* Gill (1873), L. R. 8 C. P. 107. **Mentd.** Skelton *v.* Rushby (1849), 4 Exch. 545; R. *v.* S. E. Ry. (1853), 4 H. L. Cas. 471.

2. ——.]—The Lord Mayor's Ct. is a ct. of record, but it is an inferior ct., & its jurisdiction may be questioned (MONTAGUE SMITH, J.). MATTHEY *v.* WISEMAN (1865), 18 C. B. N. S. 657; 34 L. J. C. P. 216; 12 L. T. 816; 11 Jur. N. S. 603; 13 W. R. 914; 144 E. R. 603.

Annotations:—**Refd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239; Cooke *v.* Gill (1873), L. R. 8 C. P. 107.

3. ——.]—LONDON CORPN. *v.* COX, No. 48, *post.*

4. ——.]—COOKE *v.* GILL, No. 9, *post.*

5. Court of record.]—MATTHEY *v.* WISEMAN, No. 2, *ante.*

Judges.]—*See* Mayor's & City of London Court Act, 1920 (c. cxxxiv), ss. 2, 3, 4, 12 (1); Local Government Act, 1888 (c. 41), s. 42 (14).

Officers.]—*See* Mayor's & City of London Court Act, 1920 (c. cxxxiv), s. 5; Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 41; Mayor's Court of London Rules, 1892, Ord. 10, r. 3; Common Law Procedure Act, 1852 (c. 76), s. 91, &, *generally*, PRACTICE.

Sittings.]—*See* Borough & Local Courts of Record Act, 1872 (c. 86), s. 4; Statutory Rules & Orders Rev., Vol. IV., p. 971.

Part II.—Jurisdiction.

SECT. 1.—**CUSTOMARY JURISDICTION.**

SUB-SECT. 1.—LEGAL JURISDICTION.

See Mayor's & City of London Court Act, 1920 (c. cxxxiv), ss. 8, 9; &, *generally*, COURTS, Vol. XVI., pp. 104 *et seq.*

6. General rule—Whole cause of action must arise within city.]—No agreement of counsel to abstain from making the objection can alter the law of the land, which says that an inferior ct. can only hold plea where the cause of action arises within the local limits to which its jurisdiction by charter or custom is confined (LORD CAMPBELL, C.J.).—DE HABER *v.* PORTUGAL (QUEEN) (1851), 17 Q. B. 196; 8 State Tr. N. S. 53; 20 L. J. Q. B. 488; 16 Jur. 164; 117 E. R. 1246; *sub nom.* R. *v.* LONDON (LORD MAYOR), *Re* WORDSWORTH *v.* SPAIN (QUEEN), DE HABER *v.* PORTUGAL (QUEEN), 18 L. T. O. S. 39.

Annotations:—**Consd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239. **Refd.** Westoby *v.* Day (1853), 2 E. & B. 605; Frith *v.* Guppy (1866), L. R. 2 C. P. 32; Cooke *v.* Gill (1873), L. R. 8 C. P. 107; Whinney *v.* Schmidt (1873), L. R. 8 C. P. 118; Worthington *v.* Jeffries (1875), L. R. 10 C. P. 379. **Mentd.** Portsmouth & Partridge *v.* Inclosure Comrs. (1861), 3 L. T. 779; Kingsford *v.* G. W. Ry. (1864), 10 Jur. N. S. 804; The Charkieh (1873), L. R. 4 A. & E. 59; The Parlement Belge (1880), 5 P. D. 197; Mighell *v.* Johore, [1894] 1 Q. B. 149; The Broadmayne, [1916] 1 P. 64.

7. —— ——.]—While an action was pending in the Ct. of Common Pleas for a cause of action which arose out of the City of London, pltfs. commenced an action for the same cause of action in the Mayor's Ct., & attached moneys of defts. in the hands of their attorneys, who carried on business in the City of London:—*Held:* as the cause of action did not arise within the City of London, the Mayor's Ct. had no jurisdiction, & the proceedings in that ct. were therefore vexatious, & a rule was made absolute to stay the action in this ct. unless pltfs. within a week elected to abandon the proceedings in the Mayor's Ct.—FRITH *v.* GUPPY (1866), L. R. 2 C. P. 32; 36 L. J. C. P. 45; 15 L. T. 616; 12 Jur. N. S. 1011; 15 W. R. 280.

8. —— ——.]—LONDON CORPN. *v.* COX, No. 48, *post.*

9. —— ——.] The Mayor's Ct. of London being an inferior ct., the whole cause of action must arise within its jurisdiction, & therefore, where a material fact necessary to be proved in order to sustain pltf.'s case occurs out of the jurisdiction of such ct., the garnishee against whom process of foreign attachment has been issued to attach moneys owing by him to deft., is entitled to a prohibition against such ct. proceeding with the suit.—COOKE *v.* GILL (1873), L. R. 8 C. P. 107; 42 L. J. C. P. 98; 28 L. T. 32; 21 W. R. 334.

Annotations: **Followed.** Broad *v.* Perkins (1888), 4 T. L. R. 515; Johnstone *v.* Benham (1888), 4 T. L. R. 313. **Refd.** Whinney *v.* Schmidt (1873), L. R. 8 C. P. 118; Quartly *v.* Timmins (1874), L. R. 9 C. P. 416; Jacobs *v.* Britt (1875), L. R. 20 Eq. 1; Cowan *v.* O'Connor (1888), 57 L. J. Q. B. 401; Read *v.* Brown (1888), 22 Q. B. D. 128; Whitehead *v.* Butt (1891), 7 T. L. R. 609; Northey Stone Co. *v.* Gidney (1893), 42 W. R. 99; Payne *v.* Hogg, [1900] 2 Q. B. 43. **Mentd.** Coburn *v.* Colledge (1897), 66 L. J. Q. B. 462; Isaacs *v.* Salbstein, [1916] 2 K. B. 139; Goldrei, Foucard *v.* Sinclair & Russian Chamber of Commerce in London, [1918] 1 K. B. 180; Cheshire County Council *v.* Hopley (1923), 130 L. T. 123; The Koursk, [1924] P. 140; Venn *v.* Tedesco, [1926] 2 K. B. 227.

10. —— ——.]—An action having been brought in the Mayor's Ct., London, upon a guarantee given by defts. for an attorney's bill, upon showing cause against a rule for a prohibition obtained before declaration on the ground that the whole of pltf.'s cause of action did not arise within the City of London, certain of the charges in the bill being for attendances at Westminster, pltf. consenting altogether to abandon his claim in respect of those items. The ct. discharged the rule, but without costs.—ELLIS *v.* FLEMING (1876), 1 C. P. D. 237; 45 L. J. Q. B. 512.

Sect. 1.—*Customary jurisdiction: Sub-sects.* 1 & 2. *Sects.* 2 & 3: *Sub-sects.* 1, 2 & 3, *A.*]

11. —— ——.]—JOHNSTONE *v.* BENHAM (1888), 4 T. L. R. 313.

Annotation:—**Refd.** Cowan *v.* O'Connor (1888), 57 L. J. Q. B. 401.

12. —— ——.]—BROAD *v.* PERKINS (1888), 4 T. L. R. 545, C. A.

See, also, Nos. 18, 19, *post,* & *compare* Sect. 2, sub-sect. 3, B., *post.*

13. When cause of action arises within City—Goods ordered from abroad—From merchant residing within City—Shipped outside City.]—If a merchant abroad orders goods of a shopkeeper residing within the City of London, to be put on board a ship lying beyond the limits of the City & the shopkeeper sends them from his shop to be shipped in pursuance of the order, the price of the goods may be sued for in the Mayor's Ct. as a debt arising within the City.—HUXHAM *v.* SMITH (1809), 2 Camp. 19; 170 E. R. 1067, N. P.

Annotations:—**Refd.** Crosby *v.* Hetherington (1843), 4 Man. & G. 933; Westoby *v.* Day (1853), 2 E. & B. 605; Borthwick *v.* Walton (1855), 15 C. B. 501; Cooke *v.* Gill (1873), 42 L. J. C. P. 98. **Mentd.** Magrath *v.* Hardy (1838), 4 Bing. N. C. 782.

14. —— Debtor entering debt in deed of arrangement—Affidavit within City that schedule correct—Whether account stated within City.]—Money in the hands of an army agent belonging to L., was attached by C., who had sued L. in the Lord Mayor's Ct., under a foreign attachment issuing out of that ct. It was subsequently attached under a garnishee order made by a judge of a superior ct., on the application of M., a judgment creditor of L. The debt from L. to C. was not contracted within the limits of the City of London, & both C. & the garnishee resided out of the city. L. had become bkpt. in London, & had signed & filed in the Ct. of Bkpcy. in London a schedule of his debts, including C.'s debt, & the proceedings in bkpcy. had been signed by C. as a creditor. It was contended that this was a statement of account within the city sufficient to give the Lord Mayor's Ct. jurisdiction:—*Held:* without deciding the question whether the Lord Mayor's Ct. had jurisdiction to attach money in the hands of a garnishee residing out of the City, where the cause of action arose within the City, there was no sufficient evidence of a statement of account within the city to support the action in the Lord Mayor's Ct., &, therefore, the attachment from that ct. was overridden by the judge's order.—MORRIS *v.* LANTOUR (1864), 3 New Rep. 475; 9 L. T. 767.

15. —— Freight payable within City—Effect of delivery of cargo within City.]—Where process had issued out of the Lord Mayor's Ct. against garnishees, &, on cause being shown against a rule for a prohibition, it appeared that the claim against the original defts. was for extra freight due on a charterparty in respect of a voyage from the Chincha Islands to the Victoria Docks, not within the City of London, & that neither defts. nor the garnishees resided within the City of London:—*Held:* the prohibition must issue, although, by the terms of the charterparty, payment of the freight was to be made within the City of London.

Semble: if the cargo had been delivered within the City of London, it would have made no difference.—BYRNE *v.* GUANO CONSIGNMENT CO. (1872), 25 L. T. 935; 1 Asp. M. L. C. 196.

16. —— Judgment of superior court—Signed within City.]—All the proceedings in an action at law in one of the superior cts. are deemed to be taken before the ct. itself; & although the master's office of the Q. B. is situate in the City of London, yet a judgment signed thereat is in contemplation of law a step in a suit taken before the ct. itself sitting at Westminster; therefore a judgment of that ct. does not create a cause of action within the City of London, upon which a suit in the Mayor's Ct. can be founded.—TAPP *v.* JONES (1874), L. R. 9 C. P. 418; 43 L. J. C. P. 250; 30 L. T. 499; 22 W. R. 632.

17. —— Action for libel—Letter written within City—To person outside City.]—BROAD *v.* PERKINS (1888), 4 T. L. R. 545, C. A.

Cause of action—Definition of.]—*See* ACTION, Vol. I., p. 13, Nos. 104–108.

Actions on negotiable instruments.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 461, 462, Nos. 2948–2951.

Contracts made through post or by telegram.]—*See* CONTRACT, Vol. XII., pp. 75, 76, Nos. 435, 436.

Issue of judgment summons.]—*See* BANKRUPTCY, Vol. V., p. 1032, Nos. 8440, 8441.

SUB-SECT. 2.—EQUITABLE JURISDICTION.

18. General rule—Whole cause of action must arise within City.]—(1) The Mayor's Ct., London, has no equitable jurisdiction, unless the whole cause of action has arisen within its jurisdiction.

(2) Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 12, does not apply to a suit on the equity side of that ct.—R. *v.* LONDON CORPN. (1892), 61 L. J. Q. B. 329; 8 T. L. R. 298, D. C.

19. —— ——.]—Pltf. brought an action on the equity side of the Mayor's Ct. of London for specific performance of an agreement to transfer to him a certain number of shares in a co. to be formed, or in the alternative for damages exceeding £50. The bill of complaint alleged the formation of the co., which, as appeared by the affidavits, had been registered in Scotland:—*Held:* proof of the formation of the co. being a material part of the claim both for specific performance & for damages, the whole cause of action did not arise within the jurisdiction, & defts. were entitled to a prohibition.—BOWLER *v.* BARBERTON DEVELOPMENT SYNDICATE, [1897] 1 Q. B. 164; 66 L. J. Q. B. 144; 75 L. T. 620; 45 W. R. 162; 13 T. L. R. 106; 41 Sol. Jo. 126, C. A.

See, also, Nos. 7–12, *ante.*

20. Proceedings in nature of discovery.]—R. *v.* PORSON, R. *v.* COSTER (1843), 2 L. T. O. S. 213.

21. Not affected by Mayor's Court Act, 1857 (c. clvii), s. 12.]—R. *v.* LONDON CORPN., No. 18, *ante.*

SECT. 2.—**FOREIGN ATTACHMENT.**

Attachment of debts, generally.]—*See* EXECUTION, Vol. XXI., pp. 617 *et seq.*

22. Process personal—Not applicable to corporation aggregate.]—(1) The process against a garnishee, to enforce obedience to the jurisdiction of the Lord Mayor's Ct. in foreign attachment, is personal, & cannot be applied to a corpn. aggregate. Where, therefore, a corpn. aggregate was cited, as garnishee, to appear in the Lord Mayor's Ct., it was held entitled to maintain prohibition.

(2) The suit of foreign attachment is founded upon ancient custom, & in itself is perfectly valid. The process by which it is sought to be enforced must be strictly pursued according to the custom. Fictitious summonses & returns will render the suit invalid.—LONDON CORPN. *v.* LONDON JOINT

STOCK BANK (1881), 6 App. Cas. 393 ; 50 L. J. Q. B. 594 ; 45 L. T. 81 ; 29 W. R. 870, H. L. ; *affg.* S. C. *sub nom.* LONDON JOINT STOCK BANK *v.* LONDON CORPN. (1880), 5 C. P. D. 494, C. A. ; & *affg.* (1875), 1 C. P. D. 1.

Annotations :—As to (2) **Refd.** *Re* Price, *Ex p.* Scar (1881), 17 Ch. D. 74 ; Martin *v.* Nadel, [1906] 2 K. B. 26. *Generally,* **Mentd.** St. Leonard's, Shoreditch, Grdns. *v.* Franklin (1878), 47 L. J. Q. B. 727 ; Vickers *v.* Stevens & La Conception Gold Mining Co. (1881), 44 L. T. 679 ; R. *v.* Tyler & International Commercial Co., [1891] 2 Q. B. 588 ; Robson *v.* Smith (1895), 72 L. T. 559.

23. Must be pursued strictly according to custom —Suit rendered invalid by fictitious summonses & returns.]—LONDON CORPN. *v.* LONDON JOINT STOCK BANK, No. 22, *ante.*

NOTE.—*The effect of the above decision has been to render the process of foreign attachment practically obsolete. Cases on foreign attachment decided prior to* 1881 *have therefore been omitted.*

SECT. 3.—STATUTORY JURISDICTION.

SUB-SECT. 1.—IN GENERAL.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 12.

24. Effect of Mayor's Court of London Procedure Act, 1857 (c. clvii), ss. 12, 15—Extension of jurisdiction—Claim of fifty pounds or under.] —(1) Deft. for valuable consideration indorsed to pltf. a cheque for £10, payable at a bank in the City of London ; the cheque was dishonoured upon presentation ; the indorsement was at S. in Yorkshire. Pltf. having sued in the Mayor's Ct., London, to recover the amount of the cheque, deft.'s attorney applied to this ct. for a prohibition : —*Held :* the dishonour of the cheque within the City of London did not give the Mayor's Ct. jurisdiction, a prohibition ought to issue & appet. for the same was entitled to costs.

(2) The circumstance of the debt or damage being under £50 does not prevent this ct. from issuing a prohibition to the Lord Mayor's Ct. where the cause of action arose without its jurisdiction. ROBINSON *v.* EMANUEL (1874), L. R. 9 C. P. 414 ; 43 L. J. C. P. 244 ; 30 L. T. 500.

Annotations : As to (1) **Consd.** Hawes *v.* Paveley (1876), 46 L. J. Q. B. 18. *Generally,* **Refd.** Evans *v.* Nicholson (1) (1875), 32 L. T. 664. **Mentd.** R. *v.* County of London J.J. & L. C. C., [1894] 1 Q. B. 453.

25. ——— ——— ———.]—(1) The effect of above sects. is to extend the jurisdiction of the Mayor's Ct. in cases within sect. 12, & consequently a prohibition cannot be granted to prohibit an action in the Mayor's Ct. for a sum of less than £50, deft. carrying on business, & part of the cause of action having arisen, within the City.

(2) The effect of above sect. (sect. 15) I have already held, after very careful consideration, to be that deft. must, if he object in the Mayor's Ct. to the jurisdiction, do it by way of plea, & not in any other way (JESSEL, M.R.).

(3) If there is no jurisdiction, then there must be express words taking away the right of prohibiting from the superior ct., or it will remain (MELLISH, L.J.).—HAWES *v.* PAVELEY (1876), 1 C. P. D. 418 ; 46 L. J. Q. B. 18 ; 34 L. T. 836 ; 24 W. R. 895, C. A.

26. ——— ——— ———.] — WILLIAMSON *v.* COTTERELL (1880), 70 L. T. Jo. 24, C. A.

27. ——— ——— ———.]—If pltf. had claimed £50 or less he would not have had to show that the whole cause of action arose within the City (LINDLEY, L.J.).—BROAD *v.* PERKINS (1888), 21 Q. B. D. 533 ; 57 L. J. Q. B. 638 ; 60 L. T. 8 ; 53 J. P. 39 ; 37 W. R. 44 ; 4 T. L. R. 775, C. A.

Annotations :— **Mentd.** Farquharson *v.* Morgan, [1894] 1 Q. B. 552 ; R. *v.* Speyer, R. *v.* Cassel, [1916] 1 K. B. 595.

28. ——— ——— **Not applicable to suit on equity side.**]—R. *v.* LONDON CORPN., No. 18, *ante.*

SUB-SECT. 2.—"DWELLING OR CARRYING ON BUSINESS WITHIN CITY."

29. "Carry on business"—Meaning of—General superintendence & management.]—The place where a railway co. carries on its business within Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 12, is where the general superintendence & management of the business takes place. Where, therefore, it appeared that defts. had a chief office, which was also a terminal station, in London, but that their business was managed at Victoria Station, which was not within the City : *Held :* they carried on their business at Victoria Station, & not within the City.—ROGERS *v.* LONDON, CHATHAM, & DOVER RY. CO. (1877), 26 W. R. 192.

30. ——— ——— **Principal office & substantial business conducted outside City.**]—The South Eastern Ry. Co. have a station in Cannon Street, City, where a considerable portion of their business is transacted. Their principal station, where the meetings of the directors are held & the general & substantial business of the co. is conducted, is without the City :—*Held :* the co. do not "carry on business" within the jurisdiction of the Mayor's Ct., within Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 12.—LE TAILLEUR *v.* SOUTH EASTERN RY. CO. (1877), 3 C. P. D. 18.

Annotations :— **Refd.** *Re* Bowie, *Ex p.* Breull (1880), 50 L. J. Ch. 381 ; Graham *v.* Lewis (1888), 57 L. J. Q. B. 376.

31. ——— ——— **Persons carrying on trade—Clerk employed in solicitor's office.**]—A clerk employed by a solr. at offices in the City of London does not "carry on business" there within Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 12, so as to be subject to the jurisdiction of the Mayor's Ct.

I am of opinion, looking at this Act of Parliament, that we ought to give the words their primary business sense, already well known in the City, namely, the carrying on of business by the person whose business it is. The Act meant to extend the jurisdiction of the Mayor's Ct. to persons who carry on some trade—not to persons who merely obey orders (LORD ESHER, M.R.).—GRAHAM *v.* LEWIS (1888), 22 Q. B. D. 1 ; 58 L. J. Q. B. 117 ; 53 J. P. 166 ; 5 T. L. R. 21 ; *sub nom.* LEWIS *v.* GRAHAM, 37 W. R. 73, C. A.

Annotation :— **Mentd.** *Re* Clark, *Ex p.* Pope & Owles, [1914] 3 K. B. 1095.

See, also, COUNTY COURTS, Vol. XIII., pp. 458 *et seq.*

"Dwell" — **Meaning of.**] — *See, generally,* COUNTY COURTS, Vol. XIII., pp. 457 *et seq.*

SUB-SECT. 3.—"WHOLE OR PART OF CAUSE OF ACTION ARISING WITHIN CITY."

A. In General.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 12.

32. Sale of lease, goodwill & fixtures—One counterpart signed by defendant outside City—Other subsequently signed by plaintiff within City.] —The terms of a sale of the lease, goodwill & fixtures of a business carried on in Surrey having

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been agreed upon orally, two counterpart documents were drawn up, embodying such terms. One of these was signed by the purchaser at Bow in the county of Middlesex. The other was subsequently signed by the vendor in the City of London. The two documents were then exchanged between the parties, & the deposit was paid at the office of the purchaser's solr. in the City of London. The sum of £50, part of the purchase-money, being unpaid, the vendor sued for the same in the Mayor's Ct.:—*Held:* the cause of action did not in part arise within the jurisdiction of the Mayor's Ct., & therefore a writ of prohibition must issue.—ALDERTON *v.* ARCHER (1884), 14 Q. B. D. 1; 54 L. J. Q. B. 12; 51 L. T. 661; 33 W. R. 136.

33. Assignment of debt—Made within City.]—The assignment of a debt in accordance with Jud. Act, 1873 (c. 66), s. 25 (6), is a part of the cause of the assignee's action for its recovery within Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 12, & such an assignment therefore within the City of London or the liberties thereof is sufficient to found the jurisdiction of the Mayor's Ct.—READ *v.* BROWN (1888), 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131; 5 T. L. R. 97, C. A.

Annotations:—**Refd.** Bennett *v.* White, [1910] 2 K. B. 643. **Mentd.** Whitehead *v.* Butt (1891), 7 T. L. R. 609; Coburn *v.* Colledge, [1897] 1 Q. B. 702; Goldrei, Foucard & Son *v.* Sinclair & Russian Chamber of Commerce in London, [1918] 1 K. B. 180; *Re* Pain, Gustavson *v.* Havilland, [1919] 1 Ch. 38; Cheshire County Council *v.* Hopley (1923), 130 L. T. 123; The Koursk, [1924] P. 140; Venn *v.* Tedesco, [1926] 2 K. B. 227.

B. Account Stated within City.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 12.

34. Letter received within City—Posted outside City.]—Deft. in an action in the Mayor's Ct., had written a letter addressed to & received by pltf. in the City, but posted out of the City, in which there was a distinct admission of the debt afterwards sued for.

A rule *nisi* having been obtained for a prohibition to the Mayor's Ct., it was held that upon a claim on an account stated the prohibition could not issue, as the Mayor's Ct. had jurisdiction; that by the receipt of the letter in the City an account was stated in the jurisdiction, &, therefore, a complete cause of action arose there:—*Held:* the statement of an account is analogous to the acceptance of a contract, & an account was here stated by deft. at the moment when he posted the letter, but the statement was continuous until it reached pltf., at which time it was an account stated to him at the place where he received it.—EVANS *v.* NICHOLSON (1875), 45 L. J. C. P. 111, n.; 32 L. T. 778; *previous proceedings*, 32 L. T. 664.

Annotations:—**Apld.** Taylor *v.* Jones (1875), 1 C. P. D. 87. **Folld.** Taylor *v.* Nicholls (1876), 1 C. P. D. 242. **Apld.** R. *v.* Rogers (1877), 3 Q. B. D. 28. **Folld.** Bennett *v.* Cosgriff (1878), 38 L. T. 177; Grundy *v.* Townsend (1888), 36 W. R. 531. **Refd.** Wallace *v.* Allen (1875), 32 L. T. 830.

35. —— ——.]—R. *v.* LONDON (LORD MAYOR) (1886), 30 Sol. Jo. 538 D. C.

36. —— ——.]—Pltf.'s solr., who carried on business within the jurisdiction of the Mayor's Ct. of London, wrote to deft. demanding payment of £7 6*s.* 6*d.* for goods sold & delivered by pltf. to deft. Neither of the parties resided or carried on business, nor was the contract entered into, within the jurisdiction. Deft., in a letter written to pltf.'s solr., posted outside, but received within, the jurisdiction, admitted that he owed £5 6*s.* 6*d.* to pltf. Pltf. having brought an action in the Mayor's Ct. to recover £7 6*s.* 6*d.* for goods sold & delivered, deft. obtained a writ of prohibition staying proceedings therein. Pltf. then brought a second action to recover £5 6*s.* 6*d.* on an account stated, & deft. obtained a second writ of prohibition:—*Held:* the admission of deft. & the bringing of the second action amounted to an account stated; the account was stated within the jurisdiction of the Mayor's Ct.; pltf.'s solr. was his agent to receive the admission & to state the account; &, therefore, the Mayor's Ct. had jurisdiction to try the action.—GRUNDY *v.* TOWNSEND (1888), 36 W. R. 531; 4 T. L. R. 402, C. A.; *revsg.* S. C. *sub nom.* R. *v.* LONDON CORPN. & TOWNSEND, 4 T. L. R. 208, D. C.

Annotation:—**Refd.** Warwick *v.* Warwick (1918), 34 T. L. R. 475.

37. —— **Written outside City.**]—A superior ct. is not bound to prohibit an action in the Lord Mayor's Ct. unless it is satisfied that no one entire cause of action arose within the jurisdiction; & it makes no difference in law whether the application for such a prohibition be made before or after verdict. A sale had been effected & the goods delivered outside the jurisdiction; but a promise to pay for them, written outside, had been received by pltf. within the jurisdiction. The ct. refused to prohibit an action brought for goods sold & delivered & on accounts stated, since it was not clear that the Mayor's Ct. had not jurisdiction to hear & determine the *concessit solvere*.—TAYLOR *v.* NICHOLLS (1876), 1 C. P. D. 242; 45 L. J. Q. B. 455; 24 W. R. 673.

Annotations:—**Folld.** Grundy *v.* Townsend (1888), 36 W. R. 531. **Refd.** Rennie *v.* Ratcliff (1877), 35 L. T. 833; Davis *v.* Flagstaff Mining Co. (1878), 3 C. P. D. 228; Hall *v.* Launspach, [1898] 1 Q. B. 513.

C. Actions on Negotiable Instruments.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 12; &, *generally*, BILLS OF EXCHANGE, Vol. VI., pp. 461 *et seq.*

38. Drawn within City—Indorsed within City—Payable outside City.]—Pltf. sued deft. in the Mayor's Ct., London as drawer of two cheques upon the Huddersfield branch of the Midland Banking co. In answer to a rule for a prohibition it was sworn that the cheques were drawn & indorsed by the payee to pltf. in London, that the drawer had no effects in the hands of the Midland Banking co. & that he had long since had notice from the bank that cheques drawn by him would not be paid unless previously provided for:—*Held:* there being no obligation on pltf. to prove presentment & dishonour, there was no ground for a prohibition.—WIRTH *v.* AUSTIN (1875), L. R. 10 C. P. 689; 32 L. T. 669.

Annotation:—**Refd.** *Re* Bethell, Bethell *v.* Bethell (1887), 34 Ch. D. 561.

39. —— **Defendant residing outside City.**]—HAWKINS *v.* JEFFREYS (1876), 34 L. T. 837 C. A.

40. Drawn outside City—Discounted within City.]—R. *v.* LONDON CORPN. & LEWIS (1887), 3 T. L. R. 648, D. C.

41. Indorsed outside City—Dishonoured within City.]—ROBINSON *v.* EMANUEL, No. 24, *ante*.

42. Delivered to indorsee within City—Drawn & accepted outside City.]—WILLIAMSON *v.* COTTERELL (1880), 70 L. T. Jo. 24, C. A.

See, also, No. 53, *post*.

D. Sale of Goods.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 12.

43. Goods ordered outside City—Delivered to carrier named by buyer—Partly within & partly without City.]—Orders were given for goods at

Poplar to be delivered to a carrier named by the buyer, & to be paid by him. The goods were received by the carrier, on delivery orders handed to him by the seller in the City of London, partly within & partly without the City. An action having been brought for the price in the Lord Mayor's Ct. :—*Held :* part of the cause of action arose out of the jurisdiction of the Ct., & therefore deft. was entitled to a prohibition.—GOLD *v.* TURNER (1874), L. R. 10 C. P. 149 ; 23 W. R. 732.

Annotations :—**Refd.** Evans *v.* Nicholson (1875), 32 L. T. 664 ; Ellis *v.* Fleming (1876), 1 C. P. D. 237 ; Hawes *v.* Paveley (1876), 46 L. J. Q. B. 18 ; R. *v.* London Corpn. (1892), 61 L. J. Q. B. 329.

Compare No. 25, *ante*.

44. — — Order received at place of business within City.]—In an action brought in the Lord Mayor's Ct. for the price of goods sold, it was sworn that part of the goods for the price of which pltf. sued were ordered by a letter posted in Liverpool, & received by the deft. at his house of business in London.

Rule for a prohibition discharged, on the ground that the latter was a continuing order, & spoke in the place where it was received, & therefore that part of the cause of action arose within the jurisdiction.—BENNETT *v.* COSGRIFF (1878), 38 L. T. 177, D. C.

45. —— Sent from within City.]—SPARGOE *v.* HUGHES (1887), 3 T. L. R. 515, D. C.

46. Goods ordered from outside City—By person carrying on business within City—Delivery within City.]—Deft., who carried on business in the City of London, posted a letter there containing an order for goods, addressed to pltf. in Surrey. No letter was sent accepting the offer ; but the goods were taken by a servant of pltf. & delivered to deft. in London :—*Held :* the whole cause of action arose in the City.—TAYLOR *v.* JONES (1875), 1 C. P. D. 87 ; 45 L. J. Q. B. 110 ; 34 L. T. 131.

Annotations : **Refd.** Bennett *v.* Cosgriff (1878), 38 L. T. 177 ; Pletts *v.* Beattie, [1896] 1 Q. B. 519.

SUB-SECT. 4.—MODE OF OBJECTION TO JURISDICTION.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 15.

47. By plea within court—Whether right to prohibition barred.]—Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 15, enacts that "no deft. shall be permitted to object to the jurisdiction of the ct. in or by any proceeding whatsoever, except by plea." An ordinary action of debt having been commenced in the ct. to which deft. did not appear, a foreign attachment was issued at the instance of pltfs. Deft. having obtained a rule *nisi* for a prohibition, upon the ground that the cause of action did not arise within the jurisdiction of the ct., which the affidavits in support of the motion *primâ facie* showed was the case :—*Held :* under sect. 15, objection to the jurisdiction could be taken only by pleading to the action, & the rule must be discharged.

Qu. : whether, independently of the enactment above a prohibition at the instance of a deft. would be granted before appearance.—MANNING *v.* FARQUHARSON (1860), 30 L. J. Q. B. 22 ; 6 Jur. N. S. 1300 ; *sub nom. Re* MANNING, MANNING *v.* FARQUHARSON, 3 L. T. 378 ; *sub nom. Ex p.* FARQUHARSON, 9 W. R. 107.

Annotations :—**Consd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239. **Dbtd.** Quartly *v.* Timmins (1874), L. R. 9 C. P. 416, n. **N.F.** Jacobs *v.* Brett (1875), L. R. 20 Eq. 1 ; Oram *v.* Brearey (1877), 2 Ex. D. 346. **Refd.** Frith *v.* Guppy (1866), 36 L. J. C. P. 45 ; Bridge *v.* Branch (1876), 1 C. P. D. 633 ; Hawes *v.* Pavely (1876), 34 L. T. 836.

48. —— ——.]—(1) The Lord Mayor's Ct. in London is an inferior ct.

(2) Where an inferior ct. proceeds in a cause properly within its jurisdiction, no prohibition can be awarded till the pleadings raise some issue which the ct. is incompetent to try. But where the foundation for the jurisdiction is itself defective, a prohibition may be applied for at once. When, therefore, process had issued out of that ct. against C. as a garnishee, & he declared in prohibition, a plea which set up the custom of foreign attachment, but did not allege, & the fact did not warrant any such allegation, that the original debt, or the debt alleged to be due from the garnishee to deft., arose within the City, or that any one of the parties to the suit was a citizen, or was resident within the City, the plea was held insufficient to show the existence of jurisdiction, & consequently the garnishee was at liberty in such a case to proceed in prohibition without first putting in a plea in the Lord Mayor's Court setting forth the facts which showed the want of jurisdiction.

Where the defect is not apparent & depends upon some fact in the knowledge of appct., which he had an opportunity of bringing forward in the ct. below & he has thought proper without excuse to allow that ct. to proceed to judgment without setting up the objection & without moving for a prohibition in the first instance, considering that the writ though of right is not of course the ct. would decline to interfere except perhaps upon an irresistible case & an excuse for the delay such as disability, malpractice or matter newly come to knowledge of appct. (WILLES, J.).—LONDON CORPN. *v.* COX (1867), L. R. 2 H. L. 239 ; 36 L. J. Ex. 225 ; 16 W. R. 41, H. L. ; *affg.* S. C. *sub nom.* COX *v.* LONDON CORPN. (1863), 2 H. & C. 401, Ex. Ch. ; (1862), 1 H. & C. 338.

Annotations :—*As to* (1) **Refd.** Appleford *v.* Judkins (1878), 3 C. P. D. 489. *As to* (2) **Apld.** Banque de Credit Commercial *v.* De Gas (1871), L. R. 6 C. P. 142 ; Byrne *v.* Guano Consignment Co. (1872), 25 L. T. 935. **Consd.** Cooke *v.* Gill (1873), L. R. 8 C. P. 107 ; Jacobs *v.* Brett (1875), L. R. 20 Eq. 1. **Distd.** Hawes *v.* Paveley (1876), 1 C. P. D. 418. **Consd.** London Corpn. *v.* London Joint Stock Bank (1881), 6 App. Cas. 393 ; Combe *v.* De la Bere (1882), 22 Ch. D. 316. **Apld.** Broad *v.* Perkins (1888), 21 Q. B. D. 533. **Consd.** Farquharson *v.* Morgan, [1894] 1 Q. B. 552 ; McIntosh *v.* Simpkins (1901), 84 L. T. 21. **Refd.** Shea *v.* United Sick & Burial Soc. of St. Patrick (1867), 17 L. T. 176 ; Buccleuch *v.* Metropolitan Board of Works (1870), L. R. 5 Exch. 221 ; Quartly *v.* Timmins (1871), L. R. 9 C. P. 416 ; Chambers *v.* Green (1875), L. R. 20 Eq. 552 ; Wirth *v.* Austen (1875), 32 L. T. 669 ; Worthington *v.* Jeffries (1875), L. R. 10 C. P. 379 ; Bridge *v.* Branch (1876), 1 C. P. D. 633 ; Oram *v.* Brearey (1877), 2 Ex. D. 346 ; Serjeant *v.* Dale (1877), 2 Q. B. D. 558 ; Chadwick *v.* Ball (1885), 14 Q. B. D. 855 ; R. *v.* Shropshire County Court Judge (1887), 20 Q. B. D. 242 ; Read *v.* Brown (1888), 59 L. T. 605 ; Moore *v.* Gamgee (1890), 25 Q. B. D. 244 ; Payne *v.* Hogg (1900), 82 L. T. 584 ; R. *v.* Tristram, [1902] 1 K. B. 816 ; *Re* Cundall & Vavasour (1906), 95 L. T. 483 ; *Re* Clifford & O'Sullivan, [1921] 2 A. C. 570. *Generally*, **Mentd.** Webster *v.* Webster (1862), 8 Jur. N. S. 1017 ; Morris *v.* Lantour (1864), 3 New Rep. 475 ; Frith *v.* Guppy (1866), L. R. 2 C. P. 32 ; Atwood *v.* Sellar (1879), 4 Q. B. D. 342 ; British South Africa Co. *v.* Companhia de Moçambique, [1893] A. C. 602 ; Watson *v.* Pletts (No. 2), [1899] 1 Q. B. 430 ; Falkingham *v.* Victorian Rys. Comr., [1900] A. C. 452 ; Norwich Corpn. *v.* Norwich Electric Tram. Co., [1906] 2 K. B. 119 ; Board *v.* Board, [1919] A. C. 956 ; St. Magnus, etc. Parochial Church Council *v.* London Diocese Chancellor, [1923] P. 38.

49. —— —.]—Deft., wishing to object to the jurisdiction of the Mayor's Ct., must do so by plea, & not by application for a writ of prohibition.—BRENAN *v.* CRADLEY (1868), 17 L. T. 549 ; 16 W. R. 754.

50. —— ——.]—Deft. in an action in the Lord Mayor's Ct. may obtain a writ of prohibition, notwithstanding Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 15, the real effect of

Sect. 3.—*Statutory jurisdiction: Sub-sects.* 4 & 5. *Part III. Sects.* 1, 2, 3, 4 & 5.]

that sect. being only to limit the modes of objecting within the Lord Mayor's Ct. to the jurisdiction.—JACOBS *v.* BRETT (1875), L. R. 20 Eq. 1; 44 L. J. Ch. 377; 32 L. T. 522; 23 W. R. 556.

Annotations:—**Followed.** Bridge *v.* Branch (1876), 1 C. P. D. 633; Oram *v.* Brearey (1877), 2 Ex. D. 346. **Refd.** London Joint Stock Bank *v.* London Corpn. (1875), 1 C. P. D. 1; Hawes *v.* Paveley (1876), 46 L. J. Q. B. 18. **Mentd.** *Re* Macleay (1875), L. R. 20 Eq. 186.

51. —— ——.]—HAWES *v.* PAVELEY, No. 25, *ante*.

52. —— —— **Defendant undertaking to plead to issue.**]—MALLETT *v.* MILLWALL DOCK CO. (1871), 6 L. J. N. C. 106.

See, also, COURTS, Vol. XVI., pp. 202, 203, Nos. 1113–1115.

53. Effect of plea to jurisdiction—In action on bill of exchange.]—A plea to the jurisdiction in an action by *concessit solvere* in the Lord Mayor's Ct., London, by the indorsee against the acceptor of a bill of exchange made payable at a banker's in London, but not specially, admits the drawing, acceptance, indorsement, & dishonour of the bill, but not that either of them took place within the City of London.—SEWELL *v.* CHEETHAM (1874), L. R. 9 C. P. 420; 43 L. J. C. P. 239; 38 J. P. 696; 22 W. R. 695.

SUB-SECT. 5.—COUNTERCLAIMS.

See Jud. Acts, 1873 (c. 66), ss. 88, 90; 1884 (c. 61), s. 18.

54. Cause of action arising within jurisdiction—Counterclaim founded on claim arising outside jurisdiction—In excess of statutory amount.]—Under Jud. Act, 1873 (c. 66), ss. 89, 90, inferior cts., when pltf.'s cause of action arises within the jurisdiction, have power to entertain a counterclaim by deft., founded on a claim arising out of their jurisdiction locally, & in excess of the amount to which that jurisdiction extends, but they can entertain such counterclaim only so far as it constitutes an answer to pltf.'s claim.

Pltf. brought his action in the Mayor's Ct. on a cause of action arising within the jurisdiction. Deft. set up a counterclaim, founded on a claim arising out of the jurisdiction, & in excess of the amount to which the jurisdiction extended. The Ct. of Appeal refused to prohibit the Mayor's Ct. from entertaining the claim.—DAVIS *v.* FLAGSTAFF SILVER MINING CO. OF UTAH (1878), 3 C. P. D. 228; 47 L. J. Q. B. 503; 38 L. T. 769; 26 W. R. 431, C. A.

Annotation:—**Mentd.** Webster *v.* Armstrong (1885), 1 T. L. R. 213.

Procedure in counterclaim.]—*See* Mayor's & City of London Court Rules, 1921, Sched. I., Ord. 3, rr. 6–12.

Part III.—Practice and Procedure.

SECT. 1.—IN GENERAL.

See Mayor's & City of London Court Act, 1920 (c. cxxxiv), ss. 8, 9; Mayor's & City of London Court Rules, 1921.

55. Rules of Judicature Acts—Not applicable to Mayor's Court.]—PRYOR *v.* CITY OFFICES CO., No. 58, *post*.

SECT. 2.—BARRISTERS AND SOLICITORS.

See Mayor's & City of London Court Rules, 1921, Ord. 4; &, *generally*, BARRISTERS, Vol. III., pp. 319, 320; SOLICITORS.

56. Admission of solicitors.]—R. *v.* LONDON CORPN., No. 1, *ante*.

57. Liability of solicitors—Negligent conduct of proceeding.]—An attorney, before he takes upon himself to sue out a writ in a ct. of peculiar constitution, is bound to ascertain that the ct. has machinery to carry out the object of the action.

Deft. having insured in London goods on a voyage to Calcutta, & the goods having been damaged on the voyage, deft. instructed pltf., an attorney, to take steps to obtain compensation from the underwriters. Pltf. wrote letters to them demanding payment, & this being ineffectual, took out writs against them in the Mayor's Ct., &, after issue joined, applied for a commission to examine witnesses in India, which that Ct. had no power to grant, & the actions were accordingly discontinued. Pltf. having sued deft. for his costs:—*Held*: pltf., from the nature of deft.'s claim, must or ought to have known that it would be necessary to take the evidence of witnesses in India, & was bound to have ascertained before suing there that the Mayor's Ct. could issue a commission, & he was therefore guilty of such negligence as disentitled him from recovering his costs in the actions.—COX *v.* LEECH (1857), 1 C. B. N. S. 617; 26 L. J. C. P. 125; 28 L. T. O. S. 370; 3 Jur. N. S. 442; 5 W. R. 199; 140 E. R. 254.

SECT. 3.—JUDGMENT.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 51.

58. Under R. S. C., Ord. 40, r. 10—On motion for new trial—Judge not entitled to direct.]—The judge of the Mayor's Ct., London, has no power, on a motion before that Ct. for a new trial, to direct judgment to be entered for either of the parties in the action, as a judge of the High Ct. can do under above rule, no rules having been made for applying the rules of Jud. Acts to that Ct., & no such power being given to an inferior ct. by Jud. Act, 1873 (c. 66), s. 89. Where, notwithstanding such want of power, the judge of the Mayor's Ct. has acted as if he had such power, an appeal will lie to the Ct. of Appeal in respect of his having so erroneously acted.—PRYOR *v.* CITY OFFICES CO. (1883), 10 Q. B. D. 504; 52 L. J. Q. B. 362; 48 L. T. 698; 31 W. R. 777, C. A.

Annotations:—**Refd.** Darlow *v.* Shuttleworth, [1902] 1 K. B. 721. **Mentd.** Speers *v.* Daggers (1885), Cab. & El. 503; R. *v.* Selfe, [1908] 2 K. B. 121.

59. Must be entered in accordance with finding of jury—Trial of issue of fact.]—ROBERTS *v.* BANCROFT (1895), Glyn & Jackson's, Mayor's Court Practice, 3rd ed. pp. 139, 153, C. A.

60. Variation or alteration of judgment.]—The judge of the City of London Ct. having given judgment in a case has no power subsequently to vary or alter his judgment.—THE RECEPTA, as reported in, [1893] P. 255; 42 W. R. 73; 1 R. 644, C. A.; *sub nom.* THE RECEPTA, GORDON *v.* FRANCIS, 9 T. L. R. 535.

Annotations:—**Apld.** *Re* London Scottish Permanent Bldg. Soc. (1893), 63 L. J. Q. B. 112. **Refd.** Mowlem *v.* Dunne (1912), 106 L. T. 611.

61. ——.]—In the winding-up of a building society under Building Societies Act, 1874 (c. 42), under the supervision of the City of London Ct., the judge, without the consent & against the wishes of both parties to the application before him, ordered the reference of an issue to a layman, imposed terms as a condition precedent to the hearing of such reference, & subsequently discharged his own order of reference altogether owing to the refusal of either party to comply with the condition:—*Held:* inasmuch as the judge of the City of London Ct., acting under Building Societies Act, 1874 (c. 42), had no power to order a reference without the consent of parties, & also as he could not of his own motion vary or discharge any final order of his own, the judge had acted in excess of jurisdiction, & a writ of prohibition ought to issue.—*Re* LONDON SCOTTISH PERMANENT BUILDING SOCIETY (1893), 63 L. J. Q. B. 112; 42 W. R. 464; 38 Sol. Jo. 43, D. C.

Annotation:—**Refd.** R. *v.* North, *Ex p.* Oakey (1926), 43 T. L. R. 60.

62. Effect of judgment as estoppel—Same proceedings with different object.]—To oust the jurisdiction of the Ct. of Ch., it must be shown that, according to the custom of the City of London, the judgment of the Lord Mayor's Ct. in a suit between the same persons as are parties in the suit in this Ct., is conclusive. *Semble:* If the proceedings in this ct. be the same & between the same parties as in the Lord Mayor's Ct., but the object different, the proceedings in Lord Mayor's Ct. are not conclusive. BEHRENS *v.* SIEVEKING (1837), 2 My. & Cr. 602; 40 E. R. 769; *sub nom.* SIEVEKING *v.* BEHRENS, 1 Jur. 329, L. C.

Annotations:—**Refd.** Bainbrigge *v.* Baddeley (1847), 2 Ph. 705. **Mentd.** Osborne *v.* Eales (1861), 2 Moo. P. C. C. N. S. 125.

See, generally, ESTOPPEL, Vol. XXI., pp. 159 *et seq.*

Effect of nonsuit—When bar to subsequent action.]—*See* COUNTY COURTS, Vol. XIII., p. 506, No. 564.

Seal of court—Judicial notice.]—*See* EVIDENCE, Vol. XXII., p. 158, Nos. 1347, 1348.

SECT. 4.—ENFORCEMENT OF JUDGMENTS.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), ss. 8, 10, 48; Borough & Local Courts of Record Act, 1872 (c. 86), s. 6; &, *generally,* JUDGMENTS, Vol. XXX., pp. 166 *et seq.*

63. Removal of judgment into superior court For purposes of issuing execution.]—Under Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 48, pltf. who has recovered a judgment, in an action in the Mayor's Ct., against deft. having goods within the jurisdiction of that ct., is entitled, as of right, to remove such judgment into one of the superior cts., & to issue execution thereout against the goods of deft.; & such execution will not be set aside as an abuse of the process of the ct., notwithstanding that execution could have been issued out of the Mayor's Ct. with as full effect as out of the superior ct., & that the only object of removing the judgment into the superior ct. may have been to obtain the increased costs of such execution.—HAYWOOD *v.* SAINT (1875), 32 L. T. 566.

64. ——.]—By the Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 48, execution might be issued in a superior ct. upon a judgment obtained in the Mayor's Ct. By the Borough & Local Courts of Record Act, 1872 (c. 86), s. 6, where final judgment has been obtained in any local ct. for a sum not exceeding £20, "such ct. shall be at liberty to send a writ or precept for the recovery of the same to the registrar of any county ct. within the jurisdiction of which deft. may possess any goods or chattels . . . . & thereupon the high bailiff of such county ct. shall execute the same in the same manner as if such writ or precept had been issued out of such county ct.":—*Held:* the two statutes were not inconsistent, & Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 48, had not been repealed by the Borough & Local Courts of Record Act, 1872 (c. 86), s. 6; & notwithstanding the latter statute execution might be issued in the High Ct. of Justice upon a judgment for a sum not exceeding £20 obtained in the Mayor's Ct.—PAINE *v.* SLATER (1883), 11 Q. B. D. 120; 52 L. J. Q. B. 282; 31 W. R. 941, C. A.; *sub nom.* PAYNE *v.* SLATER, 48 L. T. 623.

65. —— **Jurisdiction of superior court to set aside—Want of jurisdiction of inferior court.**]—Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 48, enacts that a judgment removed from that ct. to a superior ct. shall have the same force & effect as a judgment recovered in the superior ct.:—*Held:* it was competent to the ct. to which such judgment is so removed to set it aside, if satisfied that it was obtained in a matter over which the inferior ct. had no jurisdiction.—BRIDGE *v.* BRANCH (1876), 1 C. P. D. 633; 34 L. T. 905.

66. Attachment of debts—Process to compel appearance—Operation of garnishee order not affected.]—The operation of a garnishee order made under the C. L. P. Act, 1854 (c. 125), is not suspended by the existence of an attachment in the Lord Mayor's Ct., the former being a process of execution, the latter merely a process to compel an appearance.—RICHTER *v.* LAXTON (1878), 48 L. J. Q. B. 184; 39 L. T. 499; 27 W. R. 214.

Annotation:—**Apld.** Levy *v.* Lovell (1880), 14 Ch. D. 234.

——*See, generally,* EXECUTION, Vol. XXI., pp. 617 *et seq.*

67. Notice of bankruptcy petition—To sergeant-at-mace.]—The "officer charged with the execution of process," included by Bkpcy. Act, 1883 (c. 52), s. 168, in the term "sheriff" is the officer analogous to the sheriff so charged by the constitution of cts. other than the High Ct. to whom notice of a bkpcy. petition must be given under sect. 46 (2) upon a sale under an execution for more than £20.

In a Mayor's Ct. action, the notice should be given at the office of the sergeant-at-mace to him or his representative; & a notice to sheriff's officers in possession of the debtor's goods under previous High Ct. writs to whom the sergeant-at-mace had entrusted the execution of his writ, given after they had paid over the proceeds to the sergeant-at-mace, was held insufficient.—*Re* HOLLAND, *Ex p.* WARREN (1885), 15 Q. B. D. 48; 54 L. J. Q. B. 320; 53 L. T. 68; 33 W. R. 572; 1 T. L. R. 430; 2 Morr. 142, C. A.

Annotation:—**Apld.** Bellyse *v.* M'Glinn, [1891] 2 Q. B. 227.

As to notice of act of bankruptcy generally, *see* BANKRUPTCY, Vol. V., pp. 919 *et seq.*

Enforcement of judgment & orders—By & against corporations.]—*See, generally,* CORPORATIONS, Vol. XIII., pp. 426 *et seq.*

SECT. 5.—COSTS.

See Mayor's & City of London Ct. Rules, 1921, Ord. 5, Sched. I, Ord. 19.

68. Taxation according to usage of court—Registrar's discretion to allow items & amounts—Subject to review by judge on appeal.]—The

Sect. 5.—Costs. Part IV. Sects. 1, 2, 3 & 4.]

Judge of the Mayor's Ct. has jurisdiction to give judgment for costs to be taxed according to the usage in that ct., which is to give the registrar discretion as to the items & amounts to be allowed on taxation, subject to review on appeal to the judge of that ct.—SMITHERS & SONS *v.* DEVEREUX (1890), 6 T. L. R. 249.

Review of taxation.]—*See* Mayor's Ct. of London Rules (Fees & Costs), 1890, r. 1.

69. Where no scale provided by rules—Inherent jurisdiction of court to order—Action for libel where less than five pounds recovered—Costs beyond court fees & witnesses' allowances.]—The fact that in a particular case no scale of costs is provided by the Mayor's Ct. of London Rules, 1890, is not in itself sufficient to show that that Ct. has no inherent jurisdiction to order costs in the cases not specifically provided for.

Semble: in actions for libel tried in the Mayor's Ct. of London, in which less than £5 is recovered, the Ct. has jurisdiction to order costs to be paid to pltf.; beyond ct. fees & allowances to witnesses, although no scale is provided by the rules for such a case.—HALL *v.* LAUNSPACH, [1898] 1 Q. B. 513; 67 L. J. Q. B. 372; 78 L. T. 243; 14 T. L. R. 215; 42 Sol. Jo. 251, C. A.

70. Certificate by judge for costs on higher scale—Costs of unsuccessful party taxed on higher scale.]—Where in an action in the Mayor's Ct. for £40 pltf. succeeded, & the judge, under Mayor's Ct. Rules, 1890, r. 13, certified for costs on the Mayor's Ct. scale applicable to cases in which an amount of or exceeding £50 has been recovered:—*Held:* upon taxation of the bill delivered by defts.' solicitors in respect of their costs in the action as between them & defts.' under Solicitors Act, 1843 (c. 73), the master was right in taxing upon the same scale.—*Re* BRIGGS (JAMES) & SON, [1903] 2 K. B. 156; 72 L. J. K. B. 644; 89 L. T. 7; 51 W. R. 577; 19 T. L. R. 501; 47 Sol. Jo. 535, C. A.

71. Recovery of costs by solicitor—Suit within month from delivery of bill of costs—Whether leave of High Court essential.]—*Re* DUCKERS (1906), 50 Sol. Jo. 441.

Part IV.—Appeals.

SECT. 1.—IN GENERAL.

72. From what decisions—Decision on trial—Not from interlocutory order.]—BERIRO *v.* THALHEIM (1891), 36 Sol. Jo. 44, D. J.

SECT. 2.—IN MAYOR'S AND CITY OF LONDON COURT.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), ss. 10, 12, 41; C. L. P. Act, 1854 (c. 125), s. 33.

73. Application for new trial—Power of judge to grant—Verdict against weight of evidence.]—Upon a rule for a *mandamus* to compel the Lord Mayor's Ct. to enter judgment for pltf., that ct. having granted a new trial on the ground that the verdict found for him was against the weight of evidence.

The Ct. of Q. B. expressed an opinion that the Lord Mayor's Ct. had power to grant a new trial on such ground, but, not being clear about the matter, they made absolute the rule for a writ to issue.—R. *v.* LONDON (LORD MAYOR), *Re* ROUX *v.* MERTON (1872), 27 L. T. 61.

74. —— —— Previous rule for nonsuit in superior court.]—Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 10, enables either party to a suit in that ct., if leave be given to him by the judge on the trial, to move in any of the superior cts. to enter a verdict or nonsuit, as the case may be, & gives the superior ct. power to make such order therein as it may think proper, & directs judgment to be entered accordingly:—*Held:* the disposal by the superior ct. of a rule to enter a nonsuit moved for under sect. 10, does not take away the jurisdiction of the judge of the Mayor's Ct. to entertain an application for a new trial.—LEBEAU *v.* GENERAL STEAM NAVIGATION CO. (1873), L. R. 8 C. P. 129; 42 L. J. C. P. 76; 21 W. R. 358.

—— No power to enter judgment under R. S. C., Ord. 40, r. 10.]—*See* No. 58, *ante*.

SECT. 3.—TO HIGH COURT.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), ss. 8, 9, &, *generally*, County Courts, Vol. XIII., pp. 525 *et seq.*

75. Right of appeal—R. S. C., Ord. 60, rr. 10–17.]—An appeal from any inferior ct. of record of civil jurisdiction, when there is no statute regulating the appeal, can now be brought to the K. B. Div. under above rules.—DARLOW *v.* SHUTTLEWORTH, [1902] 1 K. B. 721; 71 L. J. K. B. 460; 86 L. T. 524; 66 J. P. 516; 50 W. R. 668; 18 T. L. R. 419, D. C.

Annotation:—**Mentd.** R. *v.* Wiltshire JJ., *Ex p.* Jay (1912), 81 L. J. K. B. 518.

76. Leave to appeal—Whether essential—Claim over twenty pounds—R. S. C., Ord. 59, r. 10.]—By the Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 8, an appeal from the Mayor's Ct. to the superior cts. is given where the sum sought to be recovered exceeds £20, & by s. 9 such appeal is to be by special case. By s. 10 the parties in any case in the Mayor's Ct. may, if the judge grants leave, move in the superior cts. to set aside the verdict:—*Held:* above rule, which provides that all appeals from inferior cts. shall be by notice of motion, does not make it necessary where the sum sought to be recovered in the Mayor's Ct. exceeds £20, & a motion to set aside the verdict & judgment on the ground of misdirection is made in the High Ct., that the leave of the judge of the Mayor's Ct. should be obtained.—EDER *v.* LEVY (1887), 19 Q. B. D. 210; 56 L. J. Q. B. 650; 3 T. L. R. 623, D. C.

Annotation:—**Reld.** Darlow *v.* Shuttleworth, [1902] 1 K. B. 721.

77. —— Granted "upon trial of any issue"—Within reasonable time of trial—Two days.]—Mayor's Court of London Procedure Act, 1857 (c. clvii), ss. 9, 10, provides that in certain cases a party may appeal, if he give notice within two days of the decision, & give security; & that "if upon the trial" the judge gives him leave to move in a superior ct., he may move within the time limited for like motions in such ct. At the conclusion, on a Thursday, of a trial in the Lord Mayor's Ct., the judge refused to give pltf., who was nonsuited, leave to move, but on the ensuing Monday on application made to him granted such leave:—*Held:* he had no power to

do so, because, even if there had been no refusal, the leave must be given within a reasonable time, & that would be two days.—FOLKARD *v.* METROPOLITAN RY. CO. (1873), L. R. 8 C. P. 470; 42 L. J. C. P. 162; 29 L. T. 101; 21 W. R. 736.

78. ——— Appellant confined to leave reserved.]—In an action in the Mayor's Ct., the recorder directed a verdict for pltfs., with leave to deft. to move, for misdirection: *Held:* deft. was confined to the leave reserved, & was not entitled to insist on a new trial upon the ground that his own evidence had been improperly excluded.—ELLIS *v.* MARRIOTT (1860), 8 W. R. 192.

79. —— Right to proceed under—Where leave previously exhausted in Mayor's Court.]—Where a rule has been obtained to enter a nonsuit or for a new trial in the Mayor's Ct., London, under Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 22, it is not competent to the unsuccessful party afterwards, even with the leave of the judge, to move the Div. Ct. under sect. 10.—MEARS *v.* CHITTICK (1882), 9 Q. B. D. 35, D. C.

80. Mode of appeal—By notice of motion.]—EDER *v.* LEVY, No. 76, *ante*.

81. ——— ———.]—DARLOW *v.* SHUTTLEWORTH, No. 75, *ante*.

82. Notice of appeal—Time for entering in Crown Office list.]—Where a rule is obtained on a motion by way of appeal from an inferior ct. the appeal must be entered in the list at the Crown Office of the Q. B. Div. under R. S. C., Ord. 58, r. 19, before the day mentioned in the notice to show cause.—DONOVAN *v.* BROWN (1879), 4 Ex. D. 148; 48 L. J. Q. B. 156; 12 L. T. 30; 27 W. R. 648, D. C.

83. ——— Time for giving Cross appeal.]—WILLIAMS *v.* TAPERELL (1892), 27 L. J. N. C. 16; 92 L. T. Jo. 213; 8 T. L. R. 241, D. C.

84. ——— ——— Within two days—Jurisdiction to extend time.]—The provision in Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 8, that a party desiring to appeal shall, within two days of the determination or direction against which he appeals, give notice of appeal to the other party, is a condition precedent to the appeal, & the High Ct. has no power, under R. S. C., Ord. 69, r. 16, to extend the time for giving such notice.—KIRBY *v.* NORTH BRITISH & MERCANTILE INSURANCE CO., [1896] 2 Q. B. 99; 65 L. J. Q. B. 527; 74 L. T. 723; 60 J. P. 549; 44 W. R. 529; 12 T. L. R. 445, C. A.

Annotations:—**Refd.** Darlow *v.* Shuttleworth, [1902] 1 K. B. 721; Newman *v.* Klausner, [1922] 1 K. B. 228.

85. ——— ——— ———.] An appeal from the Mayor's & City of London Ct. in an "original Mayor's Ct. action" must still be brought within two days as required by Mayor's Ct. of London Procedure Act, 1857 (c. clvii), s. 8, which is not affected in this respect by the Mayor's & City of London Ct. Act, 1920 (c. cxxxiv), & the rules made thereunder. The High Ct. has no jurisdiction to extend the time.—NEWMAN *v.* KLAUSNER, [1922] 1 K. B. 228; 91 L. J. K. B. 125; 126 L. T. 288; 38 T. L. R. 53, D. C.

86. ——— ——— ——— Sunday excluded.]—By Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 8, notice of appeal from the determination or direction of the Ct. in point of law or upon the admission or rejection of any evidence shall be given "within two days after such determination or direction":—*Held:* if the period of two days expires on a Sunday the notice of appeal may be given on the following Monday.—MILCH *v.* FRANKAU & CO., [1909] 2 K. B. 100; 78 L. J. K. B. 560; 100 L. T. 1002; 25 T. L. R. 498; 53 Sol. Jo. 577, D. C.

87. Security for costs—Necessity for—Effect of R. S. C., Ord. 69, rr. 10–17.]—Mayor's Ct. of London Procedure Act, 1857 (c. clvii), s. 8, is not repealed by above rules, & security for costs has to be given before an appeal from the Mayor's Ct. in an action to recover more than £20 can be heard by the Div. Ct.—MORGAN *v.* BOWLES, [1894] 1 Q. B. 236; 63 L. J. Q. B. 84; 42 W. R. 269; 38 Sol. Jo. 43; 10 R. 62, D. C.

Annotations:—**Apld.** Kirby *v.* North British & Mercantile Insce., [1896] 2 Q. B. 99. **Refd.** Darlow *v.* Shuttleworth, [1902] 1 K. B. 721.

88. ——— Extent of—Limited to costs of appeal.]—Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 8, provides that in case of an appeal the party appealing shall give security within such time or times as the ct. shall direct for the costs of the appeal, whatever be the event of the appeal, & for the amount of the judgment if the party appealing be deft. & the appeal be dismissed. On an appeal by an unsuccessful pltf. in the Mayor's Ct., the judge directed that he should give security for the costs of the appeal & also for the costs of deft. at the trial:—*Held:* (1) the judge had no jurisdiction under the sect. to direct pltf. to give security for deft.'s costs in the trial in addition to giving security for the costs of the appeal; (2) the mere fact of pltf. giving security for deft.'s costs under the sect. does not operate as a stay of proceedings.—GREEN *v.* ISAACS (1906), 96 L. T. 122, D. C.

89. —— Effect of—Proceedings not stayed.]—GREEN *v.* ISAACS, No. 88, *ante*.

90. Costs of appeal—Abide event.]—In all cases of appeal from the Lord Mayor's Ct., the costs will go to the party in whose favour the ct. decide, unless the ct. make an exception to the contrary.—GREEN *v.* SICHEL (1860), 7 C. B. N. S. 747; 29 L. J. C. P. 213; 2 L. T. 715; 6 Jur. N. S. 827; 8 W. R. 663; 141 E. R. 1009.

SECT. 4.—TO COURT OF APPEAL.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 4; C. L. P. Acts, 1852 (c. 76), ss. 146–167, 1854 (c. 125), ss. 32, 41, 1860 (c. 126), ss. 4–11.

91. From Mayor's Court—When appeal lies—Error on face of record.]—The Ct. of Appeal from inferior cts. has no jurisdiction to hear & determine questions of law arising upon the records of the Mayor's Ct., London; the proper tribunal to entertain them is the Ct. of Appeal, under Jud. Act, 1873 (c. 66), s. 18 (4).—LE BLANCH *v.* REUTER'S TELEGRAM CO. (1876), 1 Ex. D. 408; 25 W. R. 115; *sub nom.* MORS LE BLANCHE *v.* REUTER'S TELEGRAM CO., LTD., 34 L. T. 691, C. A.

Annotation:—**Refd.** Darlow *v.* Shuttleworth, [1902] 1 K. B. 721.

92. ——— ——— ———.]—PRYOR *v.* CITY OFFICES CO., No. 58, *ante*.

93. ——— ——— ———.]—ROBERTS *v.* BANCROFT (1895), Glyn. & Jackson's Mayor's Court Practice, 3rd ed. pp. 139, 153, C. A.

94. From Divisional Court—Necessity for special leave—Judicature Act, 1873 (c. 66), s. 45.]—The Mayor's Ct. is an inferior ct. within above sect. & no appeal lies to the Ct. of Appeal from the decision of a Div. Ct. on appeal from the Mayor's Ct., unless special leave to appeal has been given under that sect.—APPLEFORD *v.* JUDKINS (1878), 3 C. P. D. 489; 47 L. J. Q. B. 615; 38 L. T. 801; 26 W. R. 731, C. A.

Part V.—Removal of Actions—Certiorari.

SECT. 1.—WHETHER AS OF RIGHT OR DISCRETIONARY.

Borough & Local Courts of Record Act, 1872 (c. 86), sched. r. 12; Statutory Rules & Orders, Rev. Vol. IV., 971.

95. Discretion of judge.]—An action brought in the Mayor's Ct. to recover more than £50 cannot be removed as a matter of right by writ of *certiorari* into the Q. B. Div., but it is a matter of discretion.—HOPE *v.* HUME-WEBSTER (1886), 2 T. L. R. 415.

96. —— "Fit to be tried"—Borough & Local Courts of Record Act, 1872 (c. 86), sched. r. 12.]—A party to an action in the Mayor's Ct. is not entitled as of right to remove the action by writ of *certiorari* into the High Ct., but can only do so by leave of a Judge of the High Ct. in a case where it shall appear to him that the action is one which is fit to be tried there.—CHERRY *v.* ENDEAN (1886), 55 L. J. Q. B. 292; 54 L. T. 763; 34 W. R. 458.

Annotations:—**Apld.** Simpson *v.* Shaw (1886), 56 L. J. Q. B. 92. **Consd.** Banks *v.* Hollingsworth, [1893] 1 Q. B. 442.

97. —— —— ——.]—Pltf. brought an action in the Lord Mayor's Ct. against deft., a stock broker, for alleged misconduct in connection with the purchase of certain shares, & claimed £110 as damages:—*Held:* the action was one which was "fit to be tried" in the superior cts., & deft. was accordingly entitled to a w it of *certiorari*.—SIMPSON *v.* SHAW (1886), 56 L. J. Q. B. 92; 56 L. T. 24; 3 T. L. R. 120.

Annotations:—**Distd.** Boize *v.* Edwards (1889), 5 T. L. R. 311. **Consd.** Banks *v.* Hollingsworth (1893), 41 W. R. 225.

98. —— —— ——.]—BOIZE *v.* EDWARDS (1889), 5 T. L. R. 341.

99. ——.] *Held:* Borough & Local Courts of Record Act, 1872 (c. 86), sched. r. 12, imposed a limitation on the previous right of deft. to have an action removed into the superior ct. under Mayor's Court of London Procedure Act, 1857 (c. clvii), & gave power to the judge in the exercise of his discretion to order the removal of any such action, but subject to the condition precedent that the judge should first be satisfied that the action was fit to be tried in the superior ct.

(2) The expression "case fit to be tried in the superior cts." must be taken to mean a case which "ought" to be tried there, or which is "more fit" to be tried there than in an inferior ct.—BANKS *v.* HOLLINGSWORTH, [1893] 1 Q. B. 442; 62 L. J. Q. B. 239; 68 L. T. 477; 57 J. P. 436; 41 W. R. 225; 37 Sol. Jo. 190; 4 R. 228, C. A.; *affg.* S. C. *sub nom.* BANKS *v.* BARCLAY (1892), 67 L. T. 861, D. C.

Annotations:—*As to* (2) **Apld.** Donkin *v.* Pearson, [1911] 2 K. B. 112. **Expld.** Direct Photo Engraving Co. *v.* Martin, [1921] 2 K. B. 187. **Refd.** Perry *v.* London General Omnibus Co., [1916] 2 K. B. 335.

100. Whether matter of right.]—Any action brought in the Mayor's Ct. to recover more than £50 may, as a matter of right, be removed by writ of *certiorari* into the Q. B. Div.—LILLEY *v.* DORIN (1885), 1 T. L. R. 455.

Annotation:—**Consd.** Cherry *v.* Endean (1886), 55 L. J. Q. B. 292.

SECT. 2.—THE APPLICATION FOR REMOVAL.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 17.

101. Time for making—Within one month of service of plaint—Or before action entered.]—With respect to actions in the Mayor's Ct. of London, Borough & Local Courts of Record Act, 1872 (c. 86), sched. r. 12, does not override Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 17, under which the writ of *certiorari* removing the cause into a superior ct. must be lodged within one month after the service of the plaint, or before the action shall have been entered for trial, & does not substitute the discretion of a judge for the strict limit of time imposed by that sect.—PRICE *v.* SHAW (1888), 59 L. T. 480.

102. —— —— ——.] — Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 17, gives alternative periods for lodging the writ & deft. can avail himself of whichever is the longer period.—PRIM *v.* SMITH (1880), 20 Q. B. D. 643; 57 L. J. Q. B. 336; 58 L. T. 606; 36 W. R. 530, C. A.

103. To whom application should be made—Whether to master of King's Bench.]—*Qu.:* whether an application for a writ of *certiorari* to remove a case from the Mayor's Ct. into the High Ct. can be made to a master of the K. B. Div.—DIRECT PHOTO ENGRAVING CO. *v.* MARTIN, [1921] 2 K. B. 187; 90 L. J. K. B. 727; 125 L. T. 284.

How made.]—*See* Nos. 106, 108, *post*, &, *generally*, CROWN PRACTICE, Vol. XVI., pp. 446 *et seq.*, Nos. 3131 *et seq.*

SECT. 3.—GROUNDS FOR REMOVAL.

104. Privilege of solicitor—To be sued in High Court.]—A solr. of the High Ct. who had also been admitted a solr. in the Mayor's Ct., was sued in the latter ct.:—*Held:* he was not entitled to have the action removed into the High Ct. on the ground of the privilege of a solr. of the High Ct. to be sued in that ct. only.—DAY *v.* WARD (1886), 17 Q. B. D. 703; 55 L. J. Q. B. 494; 55 L. T. 518; 35 W. R. 59.

Action "fit to be tried" in High Court.]—*See* Sect. 1, *ante*; Sect. 4, *post.*

SECT. 4.—REMOVALS FROM EQUITY SIDE OF COURT.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), s. 20; Jud. Act, 1873 (c. 66), ss. 16, 34; &, *generally*, CROWN PRACTICE, Vol. XVI., pp. 446 *et seq.*

105. Application for removal—May be made ex parte.]—JONES *v.* HEY, HEY *v.* BATE (1869), 17 W. R. 996, L. C. & V. C.

Annotation:—**Refd.** Tracy *v.* Open Stock Exchange (1871), L. R. 11 Eq. 556.

106. —— —— ——.]—Where a suit brought in the Mayor's Ct. was removed by writ of *certiorari* into the Ct. of Ch., & where it appeared upon the face of the bill in the Mayor's Ct. that some of pltfs. were out of the jurisdiction of that ct., an order was made *ex p.*, without further evidence, that the suit in the Mayor's Ct. be retained in this ct. An order was also made in the suit from the Mayor's Ct. that the registrar of that ct. might be at liberty to pay over to the credit of the cause in

this ct. the money paid into the Mayor's Ct.—TRACY *v.* OPEN STOCK EXCHANGE (1871), L. R. 11 Eq. 556 ; 40 L. J. Ch. 159 ; 19 W. R. 379.

——.]—*See, generally,* CROWN PRACTICE, Vol. XVI., pp. 446, 447, Nos. 3131 *et seq.*

107. Grounds for removal—Want of jurisdiction.]—A writ of *certiorari* will be issued to remove a suit out of the equity side of the Lord Mayor's Ct. into the Ct. of Ch. on a bill being filed for the purpose, & evidence being given that neither pltf. nor deft., not the subject-matter of the suit, were within the jurisdiction of the Lord Mayor's Ct., & that the cause of action did not arise there.—DAVIES *v.* MAC-HENRY (1867), 3 Ch. App. 200 ; 17 L. T. 307, L. C.

Annotations :—**Folld.** Jones *v.* Hey, Hey *v.* Bate (1869), 17 W. R. 996. **Refd.** R. *v.* Woodhouse, etc., Leeds JJ. (1906), 75 L. J. K. B. 745.

108. ——.]—JONES *v.* HEY, HEY *v.* BATE (1869), 17 W. R. 996, L. C. & V. C.

Annotation :—**Folld.** Tracy *v.* Open Stock Exchange (1871), L. R. 11 Eq. 556.

109. —— Plaintiffs outside jurisdiction.]—TRACY *v.* OPEN STOCK EXCHANGE, No. 106, *ante.*

110. —— Action not "fit to be tried" in Mayor's Court.]—Action in Lord Mayor's Ct. against two defts., one of whom was a corpn. aggregate. Application by deft. corpn. to have the action transferred to the Ch. Div. of the High Ct. on the grounds, (*a*) that accounts were required from persons who were not within the jurisdiction of the Mayor's Ct. ; (*b*) that it would be necessary to bring several persons into the action as third parties, which could not be effectually done if action remained in the Mayor's Ct. ; (*c*) that, according to recent decisions, a corpn. aggregate could not be made defts. in an action in the Mayor's Ct. :—*Held :* under these circumstances, it was "fit" that the whole proceeding be transferred from the inferior ct. to the High Ct.—VICKERS *v.* STEVENS & LA CONCEPTION GOLD MINING CO., LTD. (1881), 44 L. T. 679 ; 29 W. R. 562.

111. ——.]—*Re* SUIT DEPENDING IN MAYOR'S COURT, LONDON, BETWEEN FOSTER & MUTUAL RESERVE FUND LIFE ASSOCN. (1900), 44 Sol. Jo. 689.

SECT. 5.—**PROCEEDINGS AFTER REMOVAL.**

See, generally, CROWN PRACTICE, Vol. XVI., pp. 448, 449, Nos. 3166–3175.

112. Writ of precedendo—Matters not in dispute in Mayor's Court.]—RICE *v.* JAQUIS (1663), 1 Cas. in Ch. 31 ; 22 E. R. 678 ; *sub nom.* RICH *v.* JAQUES, 1 Eq. Cas. Abr. 80 ; Freem. Ch. 174, L. C.

113. —— Discretion of court.]—If upon a *certiorari* bill the cause is brought on to hearing the ct., if they think fit, may make a decree or send it back to the Mayor's Ct. to be determined there & sometimes the ct. sends it back after publication passed & a subpœna served to bear judgment & before the hearing.—STEPHENSON *v.* HOULDITCH (1704), 2 Vern. 491 ; 23 E. R. 915.

SECT. 6.—**COSTS.**

See, generally, CROWN PRACTICE, Vol. XVI., pp. 450 *et seq.*

114. Action removed by defendant · Whether plaintiff entitled to costs.]—Deft. who has removed a cause from the Lord Mayor's Ct. of London into one of the superior cts., is yet entitled to the benefit of 39 & 40 Geo. 3, c. 104, to deprive pltf. of his costs, if he recover less than £5.—COPLAND *v.* JACOBS (1830), 8 L. J. O. S. K. B. 321.

115. —— —— County Courts Act, 1867 (c. 142), s. 5.] Pltf. commenced an action in detinue in the Lord Mayor's Ct. At the instance of deft., it was removed by *certiorari* into the Ct. of Q. B., where pltf. recovered £3. The judge who tried the cause refused to certify under above sect. to give pltf. his costs : —*Held :* he was not entitled to his costs of the action.—PELLAS *v.* BRESLAUER (1871), L. R. 6 Q. B. 438 ; 40 L. J. Q. B. 161 ; 24 L. T. 762 ; 19 W. R. 779.

Annotation :—**Refd.** Flitters *v.* Allfrey (2) (1874), 31 L. T. 881.

Part VI.—Prohibition.

See Mayor's Court of London Procedure Act, 1857 (c. clvii), ss. 12, 15, &, *generally,* CROWN PRACTICE, Vol. XVI., pp. 372 *et seq.*

116. Who may apply · Stranger to suit.]—The Ct., at the instance of a stranger, made a rule absolute for a prohibition to the Lord Mayor's Ct., London, after verdict for pltf. notwithstanding that the claim was below £50, & that consequently there could be no plea to the jurisdiction.—QUARTLY *v.* TIMMINS (1874), L. R. 9 C. P. 416 ; 22 W. R. 488.

Annotations :—**Folld.** Robinson *v.* Emanuel (1871), L. R. 9 C. P. 414. **Refd.** Sewell *v.* Cheetham (1874), 22 W. R. 695 ; Jacobs *v.* Brett (1875), L. R. 20 Eq. 1 ; Hawes *v.* Pavely (1876), 46 L. J. Q. B. 18 ; R. *v.* London County JJ. & L. C. C., [1894] 1 Q. B. 153.

117. —— Defendant.]—Deft. in the suit in the Lord Mayor's Ct. cannot move for a writ of prohibition to stay the proceedings in a foreign attachment.—BAKER *v.* CLARK (1873), L. R. 8 C. P. 121.

Annotations :—**Consd.** Jacobs *v.* Brett (1875), L. R. 20 Eq. 1. **Expld.** Bridge *v.* Branch (1876), 1 C. P. D. 633. **Refd.** Hawes *v.* Pavely (1876), 34 L. T. 836.

118. ——.]—JACOBS *v.* BRETT, No. 50, *ante.*

——.]—*See, further,* CROWN PRACTICE, Vol. XVI., pp. 390, 391 ; Nos. 2327–2337.

Nature of writ Whether grantable ex debito justitiæ.]—*See* CROWN PRACTICE, Vol. XVI., pp. 372–374, Nos. 2101–2119.

Mode of application By defendant in person.]—*See* CROWN PRACTICE, Vol. XVI., p. 392.

Affidavit in support of application.]—*See* CROWN PRACTICE, Vol. XVI., pp. 392, 393, Nos. 2352–2368.

Pleadings.]—*See* CROWN PRACTICE, Vol. XVI., p. 394 ; Nos. 2376, 2377.

Costs.]—*See* CROWN PRACTICE, Vol. XVI., pp. 396, 397, Nos. 2403, 2413–2415.

119. Stage of proceedings at which writ granted—Whether after judgment.]—QUARTLY *v.* TIMMINS, No. 116, *ante.*

—— Want of jurisdiction apparent on record.]—*See* CROWN PRACTICE, Vol. XVI., p. 385, Nos. 2224–2245.

—— —— Want of jurisdiction not apparent on record.]—*See* CROWN PRACTICE, Vol. XVI., p. 386, Nos. 2257–2281.

——.]—*See, generally,* CROWN PRACTICE, Vol. XVI., pp. 383, 384 ; Nos. 2206–2216.

120. Grounds of prohibition — Attachment of shares —Attachment preventing registration of

transfer.]—The ct. will not grant a writ of prohibition to restrain the Lord Mayor's Ct. from proceeding upon an attachment of shares in a mining co., worked on the cost-book principle, upon the suggestion that such shares are not "goods & effects."—TREDINNICK *v.* OLIVER (1860), 5 H. & N. 780; 157 E. R. 1392; *sub nom.* TREDINNICK *v.* OLIVER, *Ex p.* BILL, 29 L. J. Ex. 466.

——.]—*See* CROWN PRACTICE, Vol. XVI., pp. 376 *et seq.*

121. Loss of right to prohibition—Whether by waiver or acquiescence—Submission to jurisdiction—Applicant's knowledge of want of jurisdiction.]—LONDON CORPN. *v.* COX, No. 48, *ante.*

122. —— —— Defendant obtaining time to plead—On terms to plead issuably.]—MALLETT *v.* MILLWALL DOCK CO. (1871), 6 L. J. N. C. 106.

——.]—*See, further,* CROWN PRACTICE, Vol. XVI., pp. 389, 390.

123. Statutory exclusion of prohibition—Necessity for express words.]—HAWES *v.* PAVELEY, No. 25, *ante.*

MEADOW AND ANCIENT PASTURE.

See AGRICULTURE.

MEASURE.

See MARKETS AND FAIRS; WEIGHTS AND MEASURES.

MEASURE OF DAMAGES.

See DAMAGES.

MEAT.

See FOOD AND DRUGS; SALE OF GOODS.

MECHANICS.

See FACTORIES AND SHOPS; MASTER AND SERVANT; TRADE AND TRADE UNIONS; WORK AND LABOUR.

MEDICAL MEN AND MEDICAL OFFICERS.

See FACTORIES AND SHOPS; LOCAL GOVERNMENT; MASTER AND SERVANT; MEDICINE AND PHARMACY; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

MEDICINE AND PHARMACY.

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Part I.—Physicians and Surgeons.

SECT. 1.—PHYSICIANS.

SUB-SECT. 1.—IN GENERAL.

Who may practise as physician.]—*See, now,* Medical Act, 1886 (c. 48), ss. 2, 6.

1. Practising without licence — Whether indictable offence.]—ANON. (1654), Sty. 433; 82 E. R. 839.

Right to sue for fees.]—*See* Part III., Sect. 4, *post.*

SUB-SECT. 2.—THE ROYAL COLLEGE OF PHYSICIANS.

A. In General.

2. Power to make bye-laws regulating admission of fellows.]—A doctor of physic, who has been licenced by the College of Physicians to practise physic in London & within seven miles, cannot claim as a matter of right to be examined by the College in order to his being admitted a fellow of the College. The College, who have power by their charter, confirmed by Act of Parliament, to make bye-laws, have made bye-laws respecting the qualifications of persons to be admitted into the College; by them it is ordained that no person shall be admitted into the class of candidates for admission into the College, unless he has taken a degree of M.D. at Oxford, Cambridge, or Dublin; except in two cases; in one of those cases, the president may propose, once in every other year, a doctor of physic of a certain standing, & if he be approved by the College he may be admitted a fellow; in the other, any fellow may propose a doctor of physic of a certain age & standing, & if approved at certain meetings he may be admitted a fellow:—*Held:* these were reasonable bye-laws. R. *v.* COLLEGE OF PHYSICIANS (1797), 7 Term Rep. 282; 101 E. R. 976.

Annotation:—**Mentd.** R. *v.* Saddlers' Co. (1863), 10 H. L. Cas. 404.

Power to relax bye-laws.]—*See* No. 6, *post.*

3. Books not liable to inspection — By non-members.]—R. *v.* WEST (*circa* 1748), cited in 1 Wils. at p. 240; 95 E. R. 596.

Right to sue in corporate name.]—*See* CORPORATIONS, Vol. XI., p. 280, Nos. 107, 112.

B. Grant of Licences, etc.

4. Power to grant licences.]—ANON. (1701), 12 Mod. Rep. 602; 88 E. R. 1518.

5. —— Grounds for granting.]—The College of Physicians are obliged, in conformity to the trust & confidence placed in them by the Crown & the public, to admit all that are fit; & to reject all that are unfit. For under the reason & spirit, & true construction of this charter & this Act of Parliament, no person ought to be suffered to practise physic, but such only as have skill & ability, & have diligently applied themselves to the study, & are well grounded in the knowledge of it: &, on the other hand, all persons who are so qualified, & have bestowed their time & money & labour, in the proper studies that tend to such qualifications, have a right to be admitted to exercise & practise their profession; & the public have also a right to the assistance of such a person, who has by his labour & studies rendered himself capable of serving the public by giving

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PART I. SECT. 1, SUB-SECT. 1.

a. *Restoration of name to college roll.*]—Applt. having learned there was dissatisfaction among miners at a certain place with regard to their physician, wrote to a miner previously known to him if he could get the recognition of the union as their physician, offering his friend some remuneration in case of success:—*Held:* this did not warrant erasure of applt.'s name from college roll, & his name was ordered to be reinstated thereon.—*Re* BECHTEL (1909), 10 W. L. R. 473.—**CAN.**

b. *College of Physicians — Power to grant degrees.*]—The charter of the College of Physicians empowered the President & Fellows to make such statutes, decrees, & ordinances for the regulation of the faculty of physic as to them might seem necessary, & to grant testimonials to all candidates presenting themselves for examination, as they might deem entitled to receive them:—*Held:* this did not imply the power to grant degrees.—A.-G. *v.* KING & QUEEN'S COLLEGE OF PHYSICIANS IN IRELAND (1863), 16 Ir. Jur. 362.—**IR.**

Sect. 1.—Physicians: Sub-sect. 2, B. & C. Sect. 2: Sub-sects. 1 & 2. Part II. Sect. 1: Sub-sects. 1 & 2, A. & B. (a) i.]

them proper advice & directions. It is true, that the judgment & discretion of determining upon this skill, ability, learning, & sufficiency to exercise & practise this profession is trusted to the College of Physicians; & this ct. will not take it from them, nor interrupt them in the due & proper exercise of it. But their conduct in the exercise of this trust thus committed to them ought to be fair, candid, & unprejudiced; not arbitrary, capricious, or biassed; much less, warped by resentment, or personal dislike. . . . Objections to persons applying for licences to practise physic may be grounded on a variety of reasons; & the ct. are to judge of such objections & the reasons of them. If they are insufficient, the ct. may grant a *mandamus* (LORD MANSFIELD, C.J.).—R. *v.* ASKEW (1768), 4 Burr. 2186; 98 E. R. 139.

Annotations:—**Refd.** R. *v.* College of Physicians (1797), 7 Term Rep. 282. **Mentd.** Rutter *v.* Chapman (1841), 8 M. & W. 1.

6. —— To compound medicines prescribed.]—The College of Physicians having, under their charter & divers Acts of Parliament, power to grant licences for the practice of physic, passed bye-laws restraining the licentiates of the college from selling medicines. Afterwards the Society of Apothecaries was established, & by an Act of Parliament passed in 1815, the right of supplying medicines in medical cases was vested exclusively in the Society of Apothecaries, & persons qualified by them, saving the rights of the College of Physicians. The College of Physicians having afterwards resolved to grant licences to practise physic to persons who should not be restricted by any bye-law from supplying medicines to their patients, an information was filed at the relation of the Society of Apothecaries to restrain them:—*Held:* the information could not be sustained, it being too doubtful whether the Act of 1815 had taken away the power of the College to relax its bye-laws in that respect, & it being clear that Medical Act, 1858 (c. 90), had not done so.—A.-G. *v.* ROYAL COLLEGE OF PHYSICIANS (1861), 1 John. & H. 561; 30 L. J. Ch. 757; 4 L. T. 356; 7 Jur. N. S. 511; 9 W. R. 590; 70 E. R. 868.

Annotation:—**Mentd.** Kennedy *v.* Broun (1863), 13 C. B. N. S. 677.

Right to licence—Mandamus.]—*See* No. 5, *ante*.

7. Power to grant diplomas in physic — Including surgery, medicine, & midwifery.]—The Royal College of Physicians of London is, & was at the passing of Medical Act, 1886 (c. 48), a medical corpn. qualified to grant independent diplomas in physic, including therein the practice of medicine, surgery, & midwifery.—ROYAL COLLEGE OF PHYSICIANS *v.* GENERAL MEDICAL COUNCIL (1893), 62 L. J. Q. B. 329; 68 L. T. 496; 57 J. P. 519; 9 T. L. R. 330; 37 Sol. Jo. 342; 5 R. 323.

C. Officers and Fellows of the College.

8. Presidency of College — Perpetuity of.]—The successor to the President of the College of Physicians may sue out a *sci. fa.* on a judgment recovered by his predecessor.—ATKINS *v.* GARDENER (1607), Cro. Jac. 159; 1 Roll. Abr. 515; 79 E. R. 140.

9. Fellowship of College — Admission to—Mandamus.]—A *mandamus* will not lie to the College of Physicians to admit an honorary fellow of the College.

No *mandamus* lies, for it is no place of profit, no way advantageous to him, nor in the least relating to the Govt. It is a thing spontaneously raised among themselves, & like to the Inns of Court, which are voluntary societies (PEMBERTON, C.J.).—R. *v.* COLLEGE OF PHYSICIANS (1681), 2 Show. 178; 89 E. R. 874.

10. —— —— Who entitled.]—R. *v.* COLLEGE OF PHYSICIANS (1771), 5 Burr. 2740; 98 E. R. 437.

11. —— —— ——.]—R. *v.* COLLEGE OF PHYSICIANS (1797), No. 2, *ante*.

12. —— Restoration to—Mandamus.]—GODDARD'S CASE (1660), 1 Lev. 19; 1 Sid. 29; 83 E. R. 276.

Annotations:—**Refd.** Stamp's Case (1661), 1 Sid. 40; Middleton's Case (1663), 1 Sid. 169.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 276 *et seq.*

13. Treasurer of College—Right to sue—Proof of appointment.]—In an action on 14 Geo. 3, c. 49, by the Treasurer of the College of Physicians, to prove his right to sue in that capacity, it is enough to put in the annals of the *comitia majora* recording his appointment, & to show that he afterwards acted as treasurer, without calling anyone who was present at the election.—BUDD *v.* FOULKS (1813), 3 Camp. 404; 170 E. R. 1426, N. P.

SECT. 2.—SURGEONS.

SUB-SECT. 1.—IN GENERAL.

See, now, Medical Act, 1886 (c. 48).

14. Meaning of "surgeon."]—(1) A person having a certificate from the College of Surgeons cannot charge for attending a patient in a fever, unless he have also a certificate from the Apothecaries' co.

(2) An apothecary is not merely to make up medicines, he is to have a certain portion of competent skill for the administering of them (PARK, J.).

(3) A chemist may prepare & vend but not prescribe or administer medicine (BEST, C.J.).

(4) The business of a surgeon is, properly speaking, with external ailments & injuries of the limbs (BEST, C.J.).—ALLISON *v.* HAYDON (1828), 4 Bing. 619; 3 C. & P. 246; 1 Moo. & P. 588; 6 L. J. O. S. C. P. 144; 130 E. R. 907.

15. Person acting as surgeon—In position of salaried assistant to surgeon—Whether carrying on profession of surgeon.]—M. became assistant to H. & P., surgeons at N., & entered into a bond which recited that he was taken into their employment on the terms "that he should not at any time set up or carry on the business or profession of a surgeon" in N., or within ten miles thereof. The condition of the bond was that M. "shall not at any time here-after directly or indirectly, & either alone or in partnership with or as assistant to any other person or persons carry on the profession or business of a surgeon" in N. or within ten miles thereof. The partnership having been dissolved, both partners continued to practise in N., & H. engaged M. as his assistant at a salary. P. brought his action to restrain M. from acting as such:—*Held:* there had been a breach, for that

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PART I. SECT. 2, SUB-SECT. 1.

c. *Faculty of Physicians & Surgeons of Glasgow—Disciplinary powers.*]—GLASGOW UNIVERSITY *v.* FACULTY OF SURGEONS (1840), 7 Cl. & Fin. 958.—**SCOT.**

d. *College of Physicians & Surgeons of Alberta—Status.*]—The College of Physicians & Surgeons of Alberta is at least a quasi-public institution, not brought into existence exclusively for the protection of its members to their professional capacity, but also indirectly as a safeguard to the health & welfare of the people of the province generally.—PALMER SCHOOL & INFIRMARY OF CHIROPRACTIC *v.* EDMONTON CITY, [1921] 2 W. W. R. 6.—**CAN.**

a person acting as a surgeon was carrying on the profession of a surgeon, although he only acted as salaried assistant to a surgeon who carried it on for his own benefit.—PALMER *v.* MALLET (1887), 36 Ch. D. 411; 57 L. J. Ch. 226; 58 L. T. 64; 36 W. R. 460; 3 T. L. R. 760, C. A.

Annotation:—**Apld.** Robertson *v.* Willmott (1909), 25 T. L. R. 681.

Whether a "trader" within Bankruptcy Acts.]—*See* BANKRUPTCY, Vol. IV., pp. 22, 23, Nos. 158–161.

Right to sue for fees.]—*See* Part III., Sect. 4, *post*.

SUB-SECT. 2.—THE ROYAL COLLEGE OF SURGEONS.

16. Objects of the College.]—The College has two main objects, each of great importance, in fact, it would be difficult to say which of the two main functions imposed on & discharged by the College is the more important. Neither can be considered as merely subsidiary to the other. The one may be shortly described as the promotion of the science of surgery. The other is the promotion & encouragement of the practice of surgery, including the promotion of the interests of those practising, or about to practise, surgery as a profession, & also including the examination of students & others to qualify for practice or honours in surgery or kindred subjects (ROMER, L.J.).—*Re* ROYAL COLLEGE OF SURGEONS OF ENGLAND, [1899] 1 Q. B. 871; 68 L. J. Q. B. 613; 80 L. T. 611; 47 W. R. 452; 15 T. L. R. 317; 43 Sol. Jo. 416; *sub nom.* ROYAL COLLEGE OF SURGEONS OF ENGLAND *v.* INLAND REVENUE COMRS., 4 Tax Cas. 344, C. A.

17. Diploma of College—Whether a public document.]—*Semble:* a diploma of the College of Surgeons is not a public document.—R. *v.* HODGSON (1856), Dears. & B. 3; 25 L. J. M. C. 78; 27 L. T. O. S. 144; 20 J. P. 309; 2 Jur. N. S. 453; 4 W. R. 509; 7 Cox, C. C. 122; 169 E. R. 891, C. C. R.

Annotation:—**Mentd.** R. *v.* Moah (1858), Dears. & B. 550.

18. Licentiate of College—Right to practise as surgeon.]—APOTHECARIES CO. *v.* RYAN (1834), cited in 4 Tyr. at p. 327.

Annotation:—**Refd.** Simpson *v.* Ralfe (1834), 4 Tyr. 325.

See, now, Medical Act, 1886 (c. 48), s. 2.

Part II.—The General Medical Council and Similar Bodies in the Dominions.

SECT. 1.—**THE GENERAL MEDICAL COUNCIL.**

SUB-SECT. 1.—CONSTITUTION.

Membership.]—*See* Medical Acts, 1858 (c. 90), ss. 3, 8, 47, 1886 (c. 48), ss. 7, 8, 10; Medical Council Act, 1862 (c. 91), s. 1.

Meetings & committees.]—*See* Medical Act, 1886 (c. 48), ss. 9, 12.

Officers.]—*See* Medical Act, 1886 (c. 48), ss. 9, 10.

Expenses.]—*See* Medical Act, 1858 (c. 90), s. 13.

Branch councils.]—*See* Medical Acts, 1858 (c. 90), ss. 6, 10, 11, 27; 1886 (c. 48), s. 8 (2).

SUB-SECT. 2.—FUNCTIONS AND POWERS.

A. The Medical Register.

See, generally, Medical Act, 1858 (c. 90), ss. 10, 11, 14, 15, 16, 25, 26, 27, 30, 45, sched. D.

19. Copy of register—Admissibility in evidence—Medical Act, 1858 (c. 90), s. 27.]—*Semble:* a book purporting to be a copy of the "Medical Register" pursuant to above act, & professing to be "published & sold at the office of the General Council of Medical Education & Registration," is admissible under above sect.—PEDGRIFT *v.* CHEVALLIER (1860), 8 C. B. N. S. 246; 29 L. J. M. C. 225; 2 L. T. 360; 25 J. P. 181; 6 Jur. N. S. 1341; 141 E. R. 1160.

20. Entry on register—Right of qualified person to be entered.]—R. *v.* GENERAL COUNCIL OF MEDICAL EDUCATION, No. 23, *post*.

21. Erasure of entries fraudulently or incorrectly made—Medical Act, 1858 (c. 90), s. 26.]—R. *v.* GENERAL COUNCIL OF MEDICAL EDUCATION, No. 23, *post*.

Erasure of names—Powers of Council.]—*See* Nos. 22–24, *post;* Medical Act, 1858 (c. 90), s. 29.

B. Disciplinary Powers.

(a) Erasure of Name from Register for Misconduct.

i. *Nature of Misconduct.*

See, generally, Medical Act, 1858 (c. 90), s. 29.

22. Misconduct occurring before registration.]—O., a medical practitioner, having previously practised in the service of charitable institutions, applied after the passing of Medical Act, 1858 (c. 90), to have his name entered in the register, sending as voucher a foreign diploma, & his name was duly entered. Afterwards on information sent to the general council, as to previous misconduct on O.'s part in reference to the diploma, notice was sent him, that his name would be struck out of the register on a given day, which was next day, & O. had no opportunity of showing cause. On application for a *mandamus* to restore his name: *Held:* he was entitled to reasonable notice so as to show cause against his name being erased, & rule absolute accordingly.—*Ex p.* ORGAN (1860), 24 J. P. 309; *subsequent proceedings, sub nom.* R. *v.* GENERAL COUNCIL OF MEDICAL EDUCATION (1861), 3 E. & E. 525.

23. ----.]—(1) Medical Act, 1858 (c. 90), s. 26, applies to cases in which the registration has taken place under the dispensing power conferred on the council by sect. 46, as well as to the registration by the registrar under sect. 15.

(2) Medical Act, 1858 (c. 90), s. 29, extends to conduct of which the practitioner has been guilty before registration.

(3) Under Medical Act, 1858 (c. 90), s. 15, it appears that any duly qualified person is entitled to be registered without regard to his character if he pays the proper fee & produces to the registrar sufficient evidence of his qualification (CROMPTON, J.).—R. *v.* GENERAL COUNCIL OF MEDICAL EDUCATION (1861), 3 E. & E. 525; 30 L. J. Q. B. 201; 3 L. T. 692; 25 J. P. 693; 7 Jur. N. S. 798; 9 W. R. 413; 121 E. R. 539.

Sect. 1.—*The general medical council: Sub-sect.* 2, *B. (a) i., ii. & iii., (b), (c) & (d), & C. Sect.* 2.]

24. What amounts to "infamous" conduct.]—(1) If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute & competency, then it is open to the General Medical Council to say that he has been "guilty of infamous conduct in a professional respect," within Medical Act, 1858 (c. 90), s. 29.

(2) A complaint against a medical practitioner was made by the Medical Defence Union. P. was a member of this union, & was afterwards, on May 3, elected a member of the General Medical Council, under Medical Act, 1858 (c. 90). On the same day he sent a notice of his resignation as member of the Medical Defence Union, but by the articles of that union, the resignation did not take effect until two months afterwards. The inquiry into the complaint against the medical practitioner was held on May 28, at which P. took part as a member of the General Medical Council:—*Held:* P. was not disqualified from taking part in the inquiry.—ALLINSON *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION, [1894] 1 Q. B. 750; 63 L. J. Q. B. 534; 70 L. T. 471; 58 J. P. 542; 42 W. R. 289; 10 T. L. R. 304; 9 R. 217, C. A.

Annotations:—As to (1) **Consd.** Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244. **Refd** Hill *v.* Clifford, Clifford *v.* Timms, Clifford *v.* Phillips, [1907] 2 Ch. 236; *Re* A Solicitor, *Ex p.* Law Soc., [1912] 1 K. B. 302. *As to* (2) **Refd.** R. *v.* Burton, *Ex p.* Young, [1897] 2 Q. B. 468; R. *v.* London County JJ., *Ex p.* South Metropolitan Gas Co. (1907), 98 L. T. 519; Law *v.* Chartered Institute of Patent Agents, [1919] 2 Ch. 276. *Generally*, **Mentd.** R. *v.* Howard, [1902] 2 K. B. 363; R. *v.* Bath Compensation Authority, [1925] 1 K. B. 685.

ii. *Discretion of Council.*

See, generally, Medical Act, 1858 (c. 90), s. 29.

25. Sole discretion of Council.]—By Medical Act, 1858 (c. 90), s. 29, if a medical practitioner shall, after due inquiry, be judged by the General Council of Medical Education & Registration of the United Kingdom to have been "guilty of infamous conduct in any professional respect," they may, if they see fit, erase his name from the register. Where a medical officer has been so adjudged guilty by the General Council, & his name erased from the register, a *mandamus* will not lie to restore it.—*Ex p.* LA MERT (1863), 4 B. & S. 582; 3 New Rep. 120; 33 L. J. Q. B. 69; 9 L. T. 410; 12 W. R. 201; 122 E. R. 578.

Annotation:—**Apprvd.** Allbutt *v.* General Council of Medical Education & Registration (1889), 23 Q. B. D. 400.

26. ——.]—ALLBUTT *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION, No. 28, *post*.

27. Proper exercise of discretion — Whether mandamus to restore will lie.]—*Ex p.* LA MERT, No. 25, *ante*.

28. —— ——.]—(1) If the Council, acting *bonâ fide* & after due inquiry, have adjudged a medical practitioner to have been guilty of infamous conduct in a professional respect, the ct. has no jurisdiction to review their decision by granting a *mandamus* to restore the erasure.

(2) The publication of the minutes of the Council, containing a report of their proceedings, comprising a statement that the name of a specified medical practitioner has been removed from the register on the ground that, in the opinion of the Council, he has been guilty of infamous conduct in a professional respect, is, if the report be accurate, & published *bonâ fide* & without malice, privileged.—ALLBUTT *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION (1889), 23 Q. B. D. 400; 58 L. J. Q. B. 606; 61 L. T. 585; 54 J. P. 36; 37 W. R. 771; 5 T. L. R. 651, C. A.

Annotations:—As to (1) **Refd.** Partridge *v.* General Council of Medical Education & Registration (1892), 57 J. P. 4; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244. *Generally*, **Mentd.** Macdougall *v.* Knight (1890), 25 Q. B. D. 1; Mangena *v.* Wright, [1909] 2 K. B. 958.

29. —— ——.]—*Ex p.* BYNOE (1900), *Times*, June 21, D. C.

30. —— **Injunction to restrain erasure.**]—(1) The General Council of Medical Education & Registration, acting under the powers of Medical Act, 1858 (c. 90), held an inquiry in which they adjudged a medical practitioner to be guilty of infamous conduct in a professional respect, & removed his name from the register of medical practitioners. The proceedings were instituted by the managing body of a co. called the Medical Defence Union, whose object was to protect the characters of medical practitioners & to suppress & prosecute unauthorised practitioners. Two out of twenty-nine persons who held the inquiry were members of the Medical Defence Union, but not of the managing body of the Union. In an action to restrain the erasure & publication of the resolutions relating to pltf.'s conduct:—*Held:* the two members had not such an interest in the matter in question as to disqualify them from taking part in the inquiry; & the ct. refused to interfere with the decision of the Council.

(2) The General Medical Council cannot, strictly speaking, take evidence. They cannot take evidence on oath. They cannot take evidence which we as lawyers have to consider as evidence. They have statements made before them in support of any complaint which is made, & also they have statements made on the other side by the medical man against whom the complaint is made; & if it is once established that the complaint made before them does involve a matter in respect of which they can exercise the jurisdiction given to them by Medical Act, 1858 (c. 90), s. 29, then I think we ought not to look at the evidence, or in any way consider whether they have arrived at a right conclusion (COTTON, L.J.).

(3) The only thing which the cts. can investigate when proceedings of the General Medical Council of this character are brought before them is whether the domestic forum has acted honestly within its jurisdiction (BOWEN, L.J.).

(4) I trust that in future the General Medical Council will think it reasonable advice that those who sit on these inquiries should cease to occupy a position of subscribers to a society which brings them before the council (BOWEN, L.J.).—LEESON *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION (1889), 43 Ch. D. 366; 59 L. J. Ch. 233; 61 L. T. 849; 38 W. R. 303, C. A.

Annotations:—As to (1) **Apld.** Partridge *v.* General Council of Medical Education & Registration (1892), 57 J. P. 4; Allinson *v.* General Council of Medical Education & Registration, [1894] 1 Q. B. 750. **Refd.** R. *v.* Gaisford, [1892] 1 Q. B. 381; R. *v.* L. C. C., *Ex p.* Akkersdyk, *Ex p.* Fermenia, [1892] 1 Q. B. 190; R. *v.* L. C. C., *Re* Empire Theatre (1894), 71 L. T. 638; R. *v.* Burton, etc. Tunbridge Wells JJ. & Incorporated Law Soc., *Ex p.* Young (1897), 61 J. P. 727; R. *v.* London JJ., *Ex p.* South Metropolitan Gas Co. (1908), 98 L. T. 519; Law *v.* Chartered Institute of Patent Agents, [1919] 2 Ch. 276; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244; Thompson *v.* British Medical Assocn., New South Wales Branch, [1924] A. C. 764; Frome United Breweries Co. *v.* Bath JJ., [1926] A. C. 586. *As to* (2) & (3) **Consd.** Everett *v.* Griffiths, [1921] 1 A. C. 631. *Generally*, **Mentd.** *Ex p.* Hopkins (1891), 61 L. J. Q. B. 240; R. *v.* McKenzie, [1892] 2 Q. B. 519; R. *v.* Fraser (1893), 9 T. L. R. 613; R. *v.* Huggins (1895), 43 W. R. 329; R. *v.* Howard, [1902] 2 K. B. 363.

31. Erroneous exercise of discretion—Liability to action—Mala fides.]—Pltf.'s name had been entered on the dentists' register in respect of a diploma in dental surgery conferred upon him by

the Royal College of Surgeons in Ireland. Such diploma was afterwards withdrawn on the ground that pltf. had advertised in connection with his profession in breach of an undertaking not to do so given by him when his diploma was granted. Defts., the General Council, on being informed of such withdrawal, & its cause, without calling on pltf. for explanation, directed the registrar to remove pltf.'s name from the dentists' register. On an application for a *mandamus* to restore his name, it was held that the defts. had acted erroneously, & that his name must be restored. Pltf. then brought his action for wrongfully removing his name from the register:—*Held:* the functions exercised by the General Council under Dentists Act, 1878 (c. 33), ss. 11, 13, respectively being discretionary, not merely ministerial, whether they acted under sect. 13 or under sect. 11, sub-sect. 5, only, they were not liable to an action for the erroneous exercise of their discretion in the absence of *mala fides*—PARTRIDGE *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION OF UNITED KINGDOM (1890), 25 Q. B. D. 90; 59 L. J. Q. B. 475; 62 L. T. 787; 55 J. P. 4; 38 W. R. 729; 6 T. L. R. 313, C. A.; *subsequent proceedings* (1892), 57 J.P. 4, C. A.

Annotation:—**Refd.** Everett *v.* Griffiths, [1921] 1 A. C. 631.

iii. *Notice of Intention to Erase.*

See, generally, Medical Act, 1858 (c. 90), s. 29.

32. Right of practitioner to notice.]—*Ex p.* ORGAN, No. 22, *ante*.

33. Erasure without notice — Whether mandamus to restore will lie.]—*Ex p.* ORGAN, No. 22, *ante*.

(*b*) *Who May Take Part in Disciplinary Proceedings.*

34. Subscriber to society conducting prosecution.]—LEESON *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION, No. 30, *ante*.

35. Member of society conducting prosecution.]—LEESON *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION, No. 30, *ante*.

36. ——.]—ALLINSON *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION, No. 24, *ante*.

(*c*) *Procedure on and after Disciplinary Inquiry.*

See, generally, Standing Orders of the General Medical Council, 1908, ch. xiv.

37. Publication of grounds for erasure of name from register—Privilege.]—ALLBUTT *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION, No. 28, *ante*.

—— Whether restrained.]—*See* No. 30, *ante*.

38. Power of Council to take evidence—On oath.]—LEESON *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION, No. 30, *ante*.

39. Rehearing—Discretion of Council.]—*Ex p.* BYNOE (1900), *Times*, June 21, D. C.

Notice of intention to erase name—Right of practitioner to.]—*See* No. 22, *ante*.

(*d*) *Restoration of Name to Register.*

Mandamus to restore.]—*See* Nos. 22, 25, 29, *ante*.

C. The British Pharmacopœia.

Publication.]—*See* Medical Act, 1858 (c. 90), s. 54; Medical Act, 1862 (c. 91), ss. 2, 3.

As to compounding medicines otherwise than in accordance with Pharmacopœia, *see* FOOD & DRUGS, Vol. XXV., p. 90, Nos. 158-161.

SECT. 2.—**SIMILAR BODIES IN THE DOMINIONS.**

See Cases *infra*.

PART II. SECT. 2.

e. *Erasure of name from register—Notice of intention to erase—Erasure without notice—Whether mandamus to restore will lie.*]—R. *v.* MEDICAL BOARD OF VICTORIA (1867), 4 W. W. & A'B. 139.—**AUS.**

f. —— —— —— ——.]—R. *v.* COLLEGE OF PHYSICIANS & SURGEONS OF ONTARIO, *Re* MCCONNELL (1879), 44 U. C. R. 146.—**CAN.**

g. —— *Nature of misconduct — Fraud.*]—*Ex p.* BOURCHIER (1892), 13 N. S. W. L. R. 105; 8 N. S. W. W. N. 137.—**AUS.**

h. —— —— *What amounts to disgraceful conduct.*]—*Re* WASHINGTON (1893), 23 O. R. 299.—**CAN.**

k. —— —— ——.]—*Re* CRICHTON (1906), 8 O. W. R. 841; 13 O. L. R. 271.—**CAN.**

l. —— —— ——.]—*Re* CHERNIAK & COLLEGE OF PHYSICIANS & SURGEONS OF ONTARIO (1920), 46 O. L. R. 435; 51 D. L. R. 522; 33 Can. Crim. Cas. 43; 17 O. W. N. 239.—**CAN.**

m. —— —— ——.]—HUNT *v.* COLLEGE OF PHYSICIANS & SURGEONS OF SASKATCHEWAN, [1925] 4 D. L. R. 834; [1925] 3 W. W. R. 758.—**CAN.**

n. —— —— ——.]—The fact that a physician made use of the Abrams machine in the diagnosis & treatment of disease held not to render him guilty of unbecoming or improper conduct within Medical Profession Act, R. S. S., 1920, s. 40.—*Re* MEDICAL PROFESSION ACT, *Re* CAREFOOT, [1926] 1 D. L. R. 236; [1926] 1 W. W. R. 49; 45 Can. Crim. Cas. 52; 20 Sask. L. R. 202.—**CAN.**

o. —— ——.]—*Re* TELFORD (1905), 11 B. C. R. 355; 2 W. L. R. 405.—**CAN.**

p. ——.]—*Re* DYAS (1908), 5 E. L. R. 545.—**CAN.**

q. *Entry on register — Right of qualified person to be entered.*]—PETERSON *v.* HARDING (1860), 9 N. B. R. (4 All.) 583.—**CAN.**

r. —— ——.]—*Re* SINCLAIR (1904), 7 Terr. L. R. 178.—**CAN.**

t. —— —— *Discretion of Registrar-General.*]—*Re* MCKINNON, [1918] N. Z. L. R. 566.—**N.Z.**

a. *Disciplinary powers — Whether mandamus will lie to compel exercise.*]—Under Medical Act, 1898, s. 36, the council may hold an inquiry into a charge of unprofessional conduct made against a registered medical practitioner:—*Held: mandamus* did not lie to compel the council to hold an inquiry.—*Re* MEDICAL ACT, *Ex p.* INVERARITY (1903), 10 B. C. R. 268.—**CAN.**

b. —— *Appeal — Duty of appellate court.*]—Where a tribunal such as is constituted by the Medical Act, after full inquiry, absolves the accused, an appellate tribunal should not reverse that decision unless the findings of fact are clearly wrong, or unless, the facts being clear, the tribunal of first instance has applied a standard of conduct which, as between the profession & the public, should not be recognised by the cts.—*Re* HANINGTON (1907), 6 W. L. R. 37.—**CAN.**

c. —— *Proceedings on inquiry.*]—*Re* STINSON & COLLEGE OF PHYSICIANS & SURGEONS OF ONTARIO (1912), 27 O. L. R. 565; 4 O. W. N. 627; 10 D. L. R. 699.—**CAN.**

d. —— ——.]—In deciding whether a member is guilty of unbecoming or improper conduct, the Medical Council must act as a ct. should act in the exercise of a judicial discretion, that is, not according to private opinion, but on the evidence & according to the principles of reason & justice.—HUNT *v.* COLLEGE OF PHYSICIANS & SURGEONS OF SASKATCHEWAN, [1925] 4 D. L. R. 834; [1925] 3 W. W. R. 758.—**CAN.**

aa. —— ——.]—*Re* MEDICAL PROFESSION ACT, *Re* CAREFOOT, [1926] 1 D. L. R. 236; [1926] 1 W. W. R. 49; 45 Can. Crim. Cas. 52; 20 Sask. L. R. 202.—**CAN.**

bb. *Erasure of qualification from register—Proper exercise of discretion—Whether mandamus to restore will lie.*]—When the registrar of the Branch Medical Council inserts in, & afterwards, by order of such Branch Council, & without notice to the party registered, strikes out of the register the description of a qualification, which the evidence produced to the registrar by the claimant did not show that he had obtained; the ct. will not, by *mandamus*, compel the registrar to reinsert such description.—R. *v.* STEELE (1861), 13 I. C. L. R. 398.—**IR.**

Part III.—Medical Practitioners.

SECT. 1.—QUALIFICATIONS.

SUB-SECT. 1.—EXAMINATION FOR QUALIFICATIONS.

See Medical Act, 1858 (c. 90), ss. 19, 20, 21, 22; Medical Act, 1886 (c. 48), ss. 2, 3, 4, 5, 19.

40. Who entitled to act as examining body—Royal College of Physicians.]—ROYAL COLLEGE OF PHYSICIANS *v.* GENERAL MEDICAL COUNCIL, No. 7, *ante*.

——.]—*See, also*, Medical Act, 1886, c. 48, s. 3 (1).

SUB-SECT. 2.—PROOF OF QUALIFICATIONS.

41. Proof of University diploma—Sufficiency.]—The mere production in ct. of a diploma of Doctor of Physic under the seal of one of the Universities is not in itself evidence to show that the party named in the diploma is entitled to that degree.—MOISES *v.* THORNTON (1799), 8 Term Rep. 303; 3 Esp. 4; 101 E. R. 1402.

Annotations:—**Distd.** Smith *v.* Taylor (1805), 1 Bos. & P. N. R. 196; Walmsley *v.* Abbott (1824), 5 Dow. & Ry. K. B. 62. **Refd.** Henry *v.* Adey (1803), 3 East, 221; R. *v.* Bathwick (1831), 9 L. J. O. S. M. C. 103; Cannell *v.* Curtis (1835), 2 Bing. N. C. 228.

42. —— ——.]—A document was produced in evidence, purporting to be a diploma from the University of St. Andrews, & a witness was called, who stated that he went to a place which he was told was St. Andrews, taking with him the diploma, where he had seen three persons, whom, he was informed, were three of the professors, one of whom was the librarian, who acknowledged their signatures to that diploma. He was also shown, by the librarian, the Book of Acts, in which was an entry, of which he produced an examined copy, conferring the degree of M.D. on pltf., as also the seal of the University, corresponding with that on the diploma:—*Held*: that was sufficient evidence of the conferring of the degree by the University of St. Andrews.—COLLINS *v.* CARNEGIE (1834), 1 Ad. & El. 695; 3 Nev. & M. K. B. 703; 3 L. J. K. B. 196; 110 E. R. 1373.

Annotation:—**Expld.** M'Gahey *v.* Alston (1836), Tyr. & Gr. 981.

SUB-SECT. 3.—COLONIAL AND FOREIGN PRACTITIONERS.

See Medical Act, 1886 (c. 48), ss. 11, 13, 14, 15, 16, 17; Standing Orders of the General Medical Council, 1908, ch. xiii. (4).

43. Holder of foreign diploma—Practising under title "M.D."—Criminal liability.]—A., a druggist, had attended a patient in the capacity of a medical man, & sent in to him a bill for such attendances, headed, "Mr. P. to Thomas Andrews, M.D.," setting out a variety of charges for attendance & medicine, etc. He subsequently wrote a letter signed, "Thomas Andrews, M.D.," threatening legal proceedings unless the bill were paid, & he gave a receipt for the bill when paid, signing it in the same way. There was a coloured lamp over his shop door, on three sides of which the words & letters "Thomas Andrews, M.D." were painted. It appeared that he had obtained by the payment of a sum of money a diploma of doctor of medicine from the University of Philadelphia in the United States of America, but that he had never been in America, or studied, or passed any examination, for such degree, & he was not registered under Medical Act, 1858 (c. 90). On appeal, from a conviction by justices under Medical Act, 1858 (c. 90), s. 40, for having unlawfully, wilfully, & falsely taken & used the name, title, description & addition of "M.D.," & "thereby implying that he was then registered under Medical Act, 1858 (c. 90), whereas he was not so registered," etc.:—*Held*: the conviction was right, & must be affirmed.—ANDREWS *v.* STYRAP (1872), 26 L. T. 704.

Annotation:—**Consd.** Hunter *v.* Clare, [1899] 1 Q. B. 635.

44. —— **Whether a "practitioner"—Within Vaccination Act, 1867 (c. 84), s. 16.**]—CROMACK *v.* BRENNAND (1873), 37 J. P. Jo. 276.

SUB-SECT. 4.—ADMISSION OF WOMEN.

See Medical Act, 1858 (c. 90), s. 15; Medical Act, 1876 (c. 41), s. 1.

PART III. SECT. 1, SUB-SECT. 1.

g. *Whether mandamus will lie to compel examination.*]—The censors, etc., of the College of Surgeons having refused to examine a candidate, upon the ground that the person to whom he served his apprenticeship was not a regularly educated surgeon, as he had only received a diploma from the college of Glasgow, & had kept an apothecary's shop, the ct. refused to grant a *mandamus* to compel the examination of the candidate, the censors, etc., not having acted capriciously, partially, or on false principles in his rejection.—R. *v.* ROYAL COLLEGE OF SURGEONS IN IRELAND (1828), 1 Hud. & B. 475; 1 Ir. L. Rec. 1st ser. 211.—**IR.**

PART III. SECT. 1, SUB-SECT. 2.

h. *Evidence of acting as doctor—Sufficiency.*]—Where in an action for libel, pltf. set out with an inducement of character as "a physician & surgeon, licensed to practise according to the laws of the Province":—*Held*: proof that he acted as such was insufficient without showing a license.—HAMILTON *v.* BURWELL (1832), 2 O. S. 339.—**CAN.**

k. *Certificate of college registrar.*]—*Held*: pltf. had sufficiently proved his status as a registered medical practitioner by the production of a certificate under the hand of the registrar of the College of Physicians & Surgeons of Saskatchewan, which expressly stated that he was registered, & by the production by the registrar of the *de facto* register of the college, upon which pltf.'s name appeared.—SANDWITH *v.* COWPER & GARRIOCH (1911), 17 W. L. R. 1; 4 Sask. L. R. 12.—**CAN.**

l. *Entry in medical register.*]—In an action for libel brought by a medical practitioner against defts. for publishing a statement that he had no claim to the title of "Dr.," not having a doctor's degree:—*Held*: the entry of pltf.'s name & degree in the register kept under Medical Practitioners Registration Act, 1860, was sufficient evidence that pltf. held the degree.—MIRBACH *v.* MCHARDY (1890), 8 N. Z. L. R. 248.—**N.Z.**

m. *Parol evidence.*]—A medical practitioner, suing for his fees, gave evidence that he was a duly licensed medical practitioner:—*Held*: oral evidence did not amount to the proof that he was duly licensed. He must either produce the licence itself or the certificate referred to in Act 34 of 1891, s. 56.—NQUMBELA *v.* CULLIGAN (1903), 20 S. C. 269; 13 C. T. R. 489.—**S. AF.**

PART III. SECT. 1, SUB-SECT. 3.

n. *Right to practise outside Province in which licenced.*]—*Held*: pltf., who had a diploma from Lower Canada, was entitled to practise in the Upper Province, subject to any local laws respecting the profession there.—SHAVER *v.* LINTON (1862), 22 U. C. R. 177.—**CAN.**

o. *Registration in Great Britain—Necessity for registration in colony—Whether mandamus to register will issue.*]—A medical practitioner, registered in England under the Imperial Medical Act, is entitled, without examination, to practise in Ontario, on payment of the proper fees; & a *mandamus* will therefore be granted to the proper authorities to admit him to registration on payment of such fees.—R. *v.* COLLEGE OF PHYSICIANS & SURGEONS OF ONTARIO, *Re* MALLORY (1879), 44 U. C. R. 564.—**CAN.**

p. —— ——.]—A medical practitioner registered in Great Britain, to entitle him to practise in this Province, must be registered under R. S. O. 1877, s. 21.—SKIRVING *v.* ROSS (1880), 31 C. P. 423.—**CAN.**

SECT. 2.—WHO MAY PRACTISE.

See Part I., Sect. 1, sub-sect. 1, Sect. 2, sub-sect. 2; Part III., Sect. 1, *ante*.

SECT. 3.—RESPONSIBILITY.

SUB-SECT. 1.—CIVIL RESPONSIBILITY.

A. Implied Undertaking as to Possession of Knowledge and Skill.

45. Qualified practitioner.]—An action on the case lies against a surgeon for gross ignorance & want of skill in his profession as well as for negligence & carelessness to the detriment of a patient; though if the evidence be of negligence only; which was properly left to the jury & negatived by them; the ct. will not grant a new trial because the jury were directed that want of skill alone would not sustain the action.

A surgeon would be liable for *crassa ignorantia*, & would be justly responsible in damages for having rashly adventured upon the exercise of a profession without the ordinary qualification of skill, to the injury of a patient: yet the question did not arise upon the evidence in this case; for no want of skill was imputed to deft.; & therefore the opinion of the learned judge upon that point does not affect the merits of the verdict upon the evidence in the cause (LORD ELLENBOROUGH, C.J.).—SEARE *v.* PRENTICE (1807), 8 East, 347; 103 E. R. 376.

Annotation:—**Refd.** Everett *v.* Griffiths, [1920] 3 K. B. 163.

46. ——.]—LANPHIER *v.* PHIPOS, No. 57, *post*.

47. ——.]—A medical practitioner who undertakes the treatment of a patient owes a duty to the patient to use a fair & reasonable standard of care & competence in administering the treatment.—R. *v.* BATEMAN (1925), 94 L. J. K. B. 791; 133 L. T. 730; 89 J. P. 162; 41 T. L. R. 557; 69 Sol. Jo. 622; 28 Cox, C. C. 33; 19 Cr. App. Rep. 8, C. C. A.

48. —— **Attending for reward.**]—If a man applies to a surgeon to attend him in a disorder for reward, & the person treats him improperly, there is gross negligence & the surgeon is liable to an action; & the surgeon would also be liable for such negligence, if he undertook gratis to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man, of a different employment or occupation, for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable. It would be attended with injurious consequences, if a gratuitous undertaking of this sort should subject the person who made it, & who acted to the best of his knowledge, to an action (HEATH, J.).—SHIELLS *v.* BLACKBURNE (1789), 1 Hy. Bl. 158; 126 E. R. 94.

Annotations:—**Refd.** Fish *v.* Kelly (1864), 17 C. B. N. S. 194; Everett *v.* Griffiths, [1920] 3 K. B. 163. **Mentd.** Bourne *v.* Diggles (1814), 2 Chit. 311; Doorman *v.* Jenkins (1834), 2 Ad. & El. 256; Giblin *v.* McMullen (1869), 21 L. T. 214; Banbury *v.* Bank of Montreal, [1918] A. C. 626.

49. —— —— ——.]—HARMER *v.* CORNELIUS, No. 58, *post*.

50. —— **Attending gratis.**]—SHIELLS *v.* BLACKBURNE, No. 48, *ante*.

51. —— **Implied undertaking to cure.**]—LANPHIER *v.* PHIPOS, No. 57, *post*.

52. Unqualified person—Attending gratis.]—SHIELLS *v.* BLACKBURNE, No. 48, *ante*.

53. —— **Acting as medical practitioner.**]—A person not qualified, as not being a regular medical practitioner, but assuming to be, or to practise as such, & undertaking to treat another for a disease, is liable for injury caused by ignorant & improper treatment, *e.g.* giving an improper medicine, mercury, by which the patient is rendered worse instead of better, & is injured by the use of improper medicine.—RUDDOCK *v.* LOWE (1865), 4 F. & F. 519.

Annotation:—**Refd.** Jones *v.* Fay (1865), 4 F. & F. 525.

54. —— **Druggist.**]—If a person acts as medical practitioner he is liable as such although he is only a chemist.

In an action against a chemist & druggist upon an alleged retainer as a surgeon & apothecary to treat pltf. for a certain disorder, for which mercurial treatment was improper, the breach being negligent & ignorant treatment, by mercury:—*Held*: if deft. assumed to act as "a surgeon or apothecary," he was liable as such; but those words were immaterial, & might be rejected, the substance of the declaration being, that he undertook to treat pltf. for his disorder, & did so negligently or ignorantly; & mercurial treatment, in a case for which it was wholly unfit, was such negligence or ignorance as would sustain the action.—JONES *v.* FAY (1865), 4 F. & F. 525.

55. Want of proper skill in assistant—Liability of surgeon—Unqualified apprentice.]—(1) A surgeon is responsible for an injury done to a patient through the want of proper skill in his apprentice; but, in an action against him, pltf. must show that the injury was produced by such want of skill, & it is not to be inferred.

(2) If, from some accident or some variation in the frame of a particular individual, an injury happens, it is not a fault in the medical man (TINDAL, C.J.).—HANCKE *v.* HOOPER (1835), 7 C. & P. 81.

56. —— —— **Nurse.**]—In an action by a person, who had been a patient at a hospital, for maltreatment there by defts., two of the surgeons, it appearing that the alleged maltreatment was in the administration of a hot bath, which they had ordered, but which it was no part of their ordinary duty personally to direct & superintend, & at the actual administration of which they were not present:—*Held*: pltf. was not entitled to expect more than the usual & ordinary degree of care & attention at the hands of the surgeons, & if they were not personally cognisant of the alleged ill-usage, they were not liable.

It was indispensable that such matters [placing pltf. in bath ordered by defts.] should be left to nurses. . . . Defts. would not be liable for the negligence of the nurses unless near enough to be aware of it & to prevent it. . . . A verdict was not to be given against defts. unless they were personally responsible for [the way the nurses placed pltf. in the bath]. The statement of pltf. on that point was not supported. . . . No doubt, persons who went as patients into hospitals were not to be treated with negligence; but on the other hand, medical gentlemen who gave their services gratuitously were not to be made liable for negligence for which they were not personally

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PART III. SECT. 3, SUB-SECT. 1.—A.

45 i. *Qualified practitioner.*]—Deft., a chiropractor, was held liable in damages for failure correctly to diagnose the ailment from which a child taken to him was suffering, & for applying his method of treatment which on the evidence was held not to be the proper treatment in the case in question. It was held that, under the law as it stood at the times in question, a person who held himself out as a chiropractor held himself out as having a reasonable degree of knowledge & skill to diagnose disease.—GIBBONS *v.* HARRIS (Alta.), [1924] 1 D. L. R. 923; [1924] 1 W. W. R. 674.—**CAN.**

Sect. 3.—*Responsibility : Sub-sect.* 1, *A., B., C., D., E., F. & G.*]

responsible (COCKBURN, C.J.).—PERIONOWSKY *v.* FREEMAN (1866), 4 F. & F. 977.

B. Degree of Skill or Knowledge Required.

57. Reasonable skill.]—Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care & skill; he does not, if he is an attorney, undertake at all events to gain the cause; nor does a surgeon undertake that he will perform a cure; nor does the latter undertake to use the highest possible degree of skill, as there may be persons of higher education & greater advantages than himself; but he undertakes to bring a fair, reasonable, & competent degree of skill; & in an action against him by a patient, the question for the jury is, whether the injury complained of must be referred to the want of a proper degree of skill & care in deft., or not.—LANPHIER *v.* PHIPOS (1838), 8 C. & P. 475.

Annotation :—**Refd.** Steljes *v.* Ingram (1903), 19 T. L. R. 534.

58. ——.]—The public profession of an art is a representation & undertaking to all the world that the professor possesses the requisite skill & ability. When a skilled labourer, artizan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes.

Thus if an apothecary, a watchmaker or an attorney be employed for reward, they each impliedly undertake to possess & exercise reasonable skill in their several arts (WILLES, J.).—HARMER *v.* CORNELIUS (1858), 5 C. B. N. S. 236; 28 L. J. C. P. 85; 32 L. T. O. S. 62; 22 J. P. 724; 4 Jur. N. S. 1110; 6 W. R. 749; 141 E. R. 94.

Annotations :—**Refd.** Cuckson *v.* Stones (1858), 28 L. J. Q. B. 25; Andrews *v.* Garstin (1861), 10 C. B. N. S. 444.

59. ——.]—To render a medical man liable, even civilly, for negligence, or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of care than even he himself might have bestowed; nor is it enough that he himself acknowledges some degree of want of care; there must have been a want of competent & ordinary care & skill, & to such a degree as to have led to a bad result.

A medical man is bound to have that degree of skill which cannot be defined, but which, in the opinion of the jury, is a competent degree of skill & knowledge (ERLE, C.J.).—RICH *v.* PIERPONT (1862), 3 F. & F. 35.

60. ——.]—R. *v.* BATEMAN, No. 47, *ante*.

61. —— **Want of—Question for jury.**]—LANPHIER *v.* PHIPOS, No. 57, *ante*.

62. —— —— ——.]—RICH *v.* PIERPONT, No. 59, *ante*.

63. Not highest possible degree of skill.]—LANPHIER *v.* PHIPOS, No. 57, *ante*.

64. Less degree than might have been shown by others.]—RICH *v.* PIERPONT, No. 59, *ante*.

65. Less than defendant might have exercised.]—RICH *v.* PIERPONT, No. 59, *ante*.

66. Competent & ordinary skill.]—RICH *v.* PIERPONT, No. 59, *ante*.

C. Liability for Negligence.

67. Whether action lies.]—SEARE *v.* PRENTICE, No. 45, *ante*.

68. ——.]—RUDDOCK *v.* LOWE, No. 53, *ante*.

69. ——.]—JONES *v.* FAY, No. 54, *ante*.

70. Evidence of negligence—Question for jury.]—SEARE *v.* PRENTICE, No. 45, *ante*.

71. Duty must be owed to patient.]—Deft., a surgeon, having been employed by a railway co. to examine pltf., one of their passengers, who had sustained an injury in a collision on their line, & deft. having, so far as he could see or judge, on pltf.'s statement of his injuries, told pltf. that they were so slight, that pltf. accepted a small sum in compensation :—*Held :* even assuming that pltf.'s injuries were greater than deft. had advised, there was no ground of action by pltf. for negligence.—PIMM *v.* ROPER (1862), 2 F. & F. 783.

Annotation :—**Refd.** Everett *v.* Griffiths, [1920] 3 K. B. 163.

72. ——.]—A man could not be sued for negligence unless there was a duty imposed upon him to take care. . . . In the present case, the wife, & daughter, & son of pltf. were frightened about pltf.'s conduct. The wife went to the relieving officer. The relieving officer desired to have the opinion of the medical man. The wife went to deft. & obtained what was called a certificate. It was in reality merely the written opinion of deft. The wife did not go to deft. to get advice & treatment for pltf. She only went to get his opinion for the relieving officer. . . . Therefore there was no duty imposed upon deft. towards pltf. as a patient, to exercise ordinary care & skill, there was no other duty imposed upon him beyond that imposed upon any other person. There was therefore . . . no negligence (LORD ESHER, M.R.).—THOMPSON *v.* SCHMIDT (1891), 56 J. P. 212; 8 T. L. R. 120, C. A.

Annotations :—**Refd.** Everett *v.* Griffiths, [1921] 1 A. C. 631; Harnett *v.* Fisher (1926), 135 L. T. 724.

PART III. SECT. 3, SUB-SECT. 1.—B.

57 i. *Reasonable skill.*]—ZIRKLER *v.* ROBERTSON (1897), 30 N. S. R. 61.—**CAN.**

57 ii. ——.]—A physician or surgeon is bound to bring to the exercise of his profession a reasonable degree of care & skill.—DANGERFIELD *v.* DAVID (Sask.) (1911), 17 W. L. R. 249.—**CAN.**

57 iii. ——.]—A medical man, while he does not in law undertake to perform a cure or to treat his patient with the utmost skill & competency, is liable for negligence or unskilfulness in his treatment; for, holding himself out as a professional man, he undertakes to perform the service required of him with reasonable skill & ability.—COPPEN *v.* IMPEY, [1916] C. P. D. 309.—**S. AF.**

63 i. *Not highest possible degree of skill.*]—A medical practitioner is not expected to bring to bear on a case entrusted to him the highest possible degree of professional skill but is bound to employ reasonable skill & care & is liable for the consequences if he does not.—MITCHELL *v.* DIXON, [1914] App. D.—**S. AF.**

PART III. SECT. 3, SUB-SECT. 1.—C.

67 i. *Whether action lies.*]—STAMPER *v.* RHINDRESS (1906), 2 E. L. R. 186; 41 N. S. R. 45.—**CAN.**

67 ii. ——.]—TURRIFF *v.* KING (1913), 23 W. L. R. 149; 3 W. W. R. 802; 6 Sask. L. R. 37; 9 D. L. R. 676.—**CAN.**

67 iii. ——.]—SMITH *v.* RAE (1920), 46 O. L. R. 518; 51 D. L. R. 323; 17 O. W. N. 253.—**CAN.**

67 iv. ——.]—URQUHART *v.* GRIGOR (1864), 3 Macph. (Ct. of Sess.) 283.—**SCOT.**

67 v. ——.]—FARQUHAR *v.* MURRAY (1901), 38 Sc. L. R. 642.—**SCOT.**

70 i. *Evidence of negligence—Question for jury.*]—FAWCETT *v.* MOTHERSELL (1864), 14 C. P. 104.—**CAN.**

70 ii. —— ——.]—Where the evidence in an action against a surgeon for malpractice is as consistent with the absence as with the existence of negligence, the case should not be left to the jury.—JACKSON *v.* HYDE (1869), 28 U. C. R. 294.—**CAN.**

70 iii. —— ——.]—VAN MERE *v.* FAREWELL (1886), 12 O. R. 285.—**CAN.**

70 iv. —— ——.]—JAMES *v.* CROCKETT (1898), 34 N. B. R. 540.—**CAN.**

70 v. —— ——.]—In action against a surgeon for malpractice, pltf. has the right to a decision by a jury of a fact in controversy.—MCNULTY *v.* MORRIS (1901), 21 C. L. T. 591; 2 O. L. R. 656.—**CAN.**

70 vi. —— ——.]—RICHARDSON *v.* NUGENT (1918), 45 N. B. R. 331; 40 D. L. R. 700.—**CAN.**

73. Degree of care required—Competent & ordinary care.]—RICH *v.* PIERPONT, No. 59, *ante*.

See, also, Sub-sect. 1, A., B., *ante*.

Negligence of nurse—Gratuitous medical services.]—*See* No. 56, *ante*.

D. Who May Sue.

74. Person employing practitioner.]—EVERARD *v.* HOPKINS (1615), 2 Bulst. 332; 1 Roll. Rep. 124; 80 E. R. 1164.

Annotations:—**Mentd.** Longmeid *v.* Holliday (1851), 6 Exch. 761; Hadley *v.* Baxendale (1854), 9 Exch. 341; Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213; Horne *v.* Mid. Ry. (1872), L. R. 7 C. P. 583.

75. ——.]—(1) The only person who can properly sustain an action for damages for an injury done to the person of the patient is the patient himself, for damages could not be given on that account to any other person though the surgeon may have been retained & employed by him to undertake the case. The party employing the surgeon can have nothing to do with the action (RICHARDS, C.B.).

(2) Deft., being a surgeon, undertakes to the public, to cure wounds & other ailments of the human system, & professes himself ready to be employed by any one for that purpose. The declaration states that he was as a surgeon employed for a reasonable reward, to attend & cure his patient, that he entered on the treatment, etc. It is, therefore, I think, sufficiently stated that deft. undertook the cure (RICHARDS, C.B.).—PIPPIN *v.* SHEPPARD (1822), 11 Price, 400; 147 E. R. 512.

Annotations:—*As to* (2) **Folld.** Gladwell *v.* Steggall (1839), 8 Scott, 60. **Consd.** Everett *v.* Griffiths, [1920] 3 K. B. 163. *Generally*, **Mentd.** Longmeid *v.* Holliday (1851), 6 Exch. 761; Marshall *v.* York, Newcastle & Berwick Ry. (1851), 11 C. B. 655; Dalyell *v.* Tyrer (1858), E. B. & E. 899.

76. Patient.] — EVERARD *v.* HOPKINS (1615), 2 Bulst. 332; 1 Roll. Rep. 124; 80 E. R. 1164.

Annotations:—**Mentd.** Longmeid *v.* Holliday (1851), 6 Exch. 761; Hadley *v.* Baxendale (1854), 9 Exch. 341; Alton *v.* Mid. Ry. (1865), 19 C. B. N. S. 213; Horne *v.* Mid. Ry. (1872), L. R. 7 C. P. 583.

77. ——.]—PIPPIN *v.* SHEPPARD, No. 75, *ante*.

78. ——.]—GLADWELL *v.* STEGGALL, No. 80, *post*.

E. Essentials of Liability.

79. Proof of employment.]—PIPPIN *v.* SHEPPARD, No. 75, *ante*.

80. ——.]—A declaration in case stated that pltf., an infant, had employed deft., a surgeon to cure her, & then claimed damages for a misfeasance:—*Plea*, that pltf. did not employ deft.:—*Held:* (1) it was immaterial by whom deft. was employed; or if material, pltf.'s submitting to deft.'s treatment was sufficient proof of the allegation of employment by her.

(2) The question really at issue is, as to the breach of duty, not as to the party by whom deft. was employed, & pltf. is the only person who can maintain the action.—GLADWELL *v.* STEGGALL (1839), 5 Bing. N. C. 733; 8 Scott, 60; 8 L. J. C. P. 361; 3 Jur. 535; 132 E. R. 1283.

Annotations:—*Generally*, **Mentd.** Longmeid *v.* Holliday (1851), 6 Exch. 761; Dalyell *v.* Tyrer (1858), E. B. & E. 899; Playford *v.* United Kingdom Electric Telegraph Co. (1867), 17 L. T. 243.

81. Injury directly caused by lack of skill.]—HANCKE *v.* HOOPER, No. 55, *ante*.

82. ——.]—LANPHIER *v.* PHIPOS, No. 57, *ante*.

F. Responsibility in Cases of Lunatics.

See LUNATICS, Vol. XXXIII., pp. 265–267, 271, 272, Nos. 1850–1856, 1893–1896.

G. Responsibility in Case of Operations.

83. Experiment with new instrument.]—(1) It appears from the evidence of the surgeons that it was improper to disunite the callous without consent, this is the usage & law of surgeons; then it was ignorance & unskilfulness in that very particular, to do contrary to the rule of the profession, what no surgeon ought to have done; & indeed it is reasonable that a patient should be told what is about to be done to him, that he may take courage & put himself in such a situation as to enable him to undergo the operation (*per* CUR.).

(2) For any thing that appears to the ct. this was the first experiment made with this new instrument, & if it was, it was a rash action, & he who acts rashly acts ignorantly; & although defts. in general may be as skilful in their respective professions as any two gentlemen in England, yet the ct. cannot help saying that in this particular case they have acted ignorantly & unskilfully, contrary to the known rule & usage of surgeons (*per* CUR.).—SLATER *v.* BAKER (1767), 2 Wils. 359; 95 E. R. 860.

Annotation:—**Mentd.** Scott *v.* Shepherd (1773), 3 Wils. 403.

84. Necessity for consent of patient.]—SLATER *v.* BAKER, No. 83, *ante*.

85. —— Whether consent communicated — Question for jury.]—BEATTY *v.* CULLINGWORTH (1896), as reported in Halsbury's Laws of England, Vol. XX., p. 333.

Annotation:—**Mentd.** R. *v.* Camelleri, [1922] 2 K. B. 122.

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73 i. *Degree of care required—Competent & ordinary care.*]—FIELDS *v.* RUTHERFORD (1878), 29 C. P. 113.—**CAN.**

q. *Limitation of action.*] — An action for malpractice was brought within one year from the time when the alleged ill-effects of the treatment developed, but more than a year from the date when the professional services terminated:—*Held:* the action was barred under Ontario Medical Act, R. S. O. 1887, s. 40.—MILLER *v.* RYERSON (1892), 22 O. R. 369.—**CAN.**

r. ——.]—TOWN *v.* ARCHER (1902), 22 C. L. T. 258; 4 O. L. R. 383; 1 O. W. R. 391.—**CAN.**

PART III. SECT. 3, SUB-SECT. 1.—D.

76 i. *Patient.*] — The ground of action in a claim of damages against a medical man for unskilful treatment is breach of his duty to his patient & not breach of his contract with his employer; &, accordingly:—*Held:* a married woman had a title to sue such an action, although the medical man had been employed to attend to her by her husband & not by herself.—EDGAR *v.* LAMONT, [1914] S. C. 277.—**SCOT.**

t. *Negligent treatment of wife—Action by husband.*]—SMITH *v.* CARDER (1853), 11 U. C. R. 77.—**CAN.**

a. —— ——.]—HUNTER *v.* OGDEN (1871), 31 U. C. R. 132.—**CAN.**

PART III. SECT. 3, SUB-SECT. 1.—E.

81 i. *Injury directly caused by lack of skill.*]—In an action against a medical practitioner for malpractice pltf. must prove not only that there was negligence or want of skill on the part of deft., but also that pltf. was injured thereby.—MCQUAY *v.* EASTWOOD (1886), 12 O. R. 402.—**CAN.**

81 ii. ——.]—HODGINS *v.* BANTING (1906), 12 O. L. R. 117; 7 O. W. R. 707.—**CAN.**

81 iii. ——.]—BENNETT *v.* C—— (1908), 7 W. L. R. 740.—**CAN.**

81 iv. ——.]—In an action against a medical practitioner for negligent & unskilful treatment, pltf. must show that there was negligence or want of skill or carefulness on the part of deft.; & that pltf. has been injured, & that the injury is the result of the negligence & want of skill of deft.—HAMPTON *v.* MACADAM (1912), 22 W. L. R. 31; 7 D. L. R. 880.—**CAN.**

b. *Intention immaterial.*]—The declaration in an action against a surgeon for negligence stated that deft., wrongfully intending to injure pltf., did not use proper care, etc.:—*Held:* negligence being the gist of the action, deft.'s intent was immaterial.—KELLY *v.* DOW (1860), 9 N. B. R. (4 All.) 435.—**CAN.**

c. ——.] — SHERIDAN *v.* PIGEON (1886), 10 O. R. 632.—**CAN.**

PART III. SECT. 3, SUB-SECT. 1.—G.

83 i. *Experiment with new instrument.*]—BAILLS *v.* BOULANGER (Alta.), [1924] 4 D. L. R. 1083.—**CAN.**

84 i. *Necessity for consent of patient.*] —STOFFBERG *v.* ELLIOT, [1923] C. P. D. 148.—**S. AF.**

Sect. 3.—*Responsibility: Sub-sect.* 1, *H.; sub-sect.* 2. *Sect.* 4: *Sub-sects.* 1 & 2, *A.*]

H. Liability of Hospitals and Public Institutions.

86. Negligence of professional staff — Care exercised in selection of staff.]—Defts., a local authority, acting under the provisions of Public Health Act, 1875 (c. 55), provided for the use of the inhabitants of their district a hospital for the reception of persons suffering from infectious diseases. A visiting physician, who was a competent medical practitioner, was appointed to the hospital, & acted under the general directions of the hospitals committee of defts., the rules providing (*inter alia*) that he should be responsible for "the treatment of the patients from the beginning to the end of their stay, & also for their freedom from infection when discharged." A son of pltf. was treated in the hospital while suffering from a mild attack of scarlet fever, & was ultimately discharged by the visiting physician while still in an infectious condition, & under circumstances which a jury found to amount to a want of reasonable skill & care on his part in & about the discharge; after the boy had returned home, he communicated the disease to three other children of pltf. Pltf. then sued defts. to recover the expense to which he had been put in regard to the illness of his other children owing to the premature discharge of his son from the hospital by the visiting physician:—*Held:* pltf. was not entitled to recover, for the legal obligation of defts. extended only to the provision of reasonably skilled & competent medical attendance for the patients, which they had discharged, & there was no absolute undertaking or obligation on their part that no patient should be discharged by the visiting physician while still in a condition which might cause infection.—EVANS *v.* LIVERPOOL CORPN., [1906] 1 K. B. 160; 74 L. J. K. B. 742; 69 J. P. 263; 21 T. L. R. 558; 3 L. G. R. 868.

Annotations:—**Apprvd.** Hillyer *v.* St. Bartholomew's Hospital, [1909] 2 K. B. 820. **Mentd.** Smith *v.* Martin & Kingston-upon-Hull Corpn., [1911] 2 K. B. 775; University of London Press *v.* University Tutorial Press, [1916] 2 Ch. 601.

87. —— ——.]—The only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care & skill in selecting their medical staff. The relationship of master & servant does not exist between the governors & the physicians & surgeons who give their services at the hospital, & the nurses & other attendants assisting at an operation cease for the time being to be the servants of the governors, inasmuch as they take their orders during that period from the operating surgeon alone & not from the hospital authorities.

Pltf. brought an action against the governors of a hospital for damages for injuries alleged to have been caused to him during an operation by the negligence of some member of the hospital staff:—*Held:* the action was not maintainable.

I see no ground for holding it to be a right legal inference from the circumstances of the relation of hospital & patient that the hospital authority makes itself liable in damages, if members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use or use negligently in his treatment the apparatus or appliances which are at their disposal (KENNEDY, L.J.).—HILLYER *v.* ST. BARTHOLOMEW'S HOSPITAL (GOVERNORS), [1909] 2 K. B. 820; 78 L. J. K. B. 958; 25 T. L. R. 762; 53 Sol. Jo. 714; *sub nom.* HILLYER *v.* LONDON CORPN. ETC. (GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL), 101 L. T. 368; 73 J. P. 501, C. A.

Annotations:—**Reid.** Scottish Insce. Comrs. *v.* Royal Infirmary of Edinburgh (1913), 6 B. W. C. C. N. 120. **Mentd.** Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305; Smith *v.* Martin & Kingston-upon-Hull Corpn., [1911] 2 K. B. 775.

SUB-SECT. 2.—CRIMINAL RESPONSIBILITY.

Who may be liable—Qualified persons.]—*See* CRIMINAL LAW, Vol. XV., pp. 800–802, Nos. 8665–8672, 8674–8677, 8680, 8683–8685, 8688.

—— **Unqualified persons.**]—*See* CRIMINAL LAW, Vol. XV., pp. 801, 802, Nos. 8673–8683, 8685.

Extent of liability—Death occasioned by negligence.]—*See* CRIMINAL LAW, Vol. XV., pp. 800, 801, Nos. 8665–8683.

—— **Error of judgment.**]—*See* CRIMINAL LAW, Vol. XV., p. 801, Nos. 8684–8688.

—— **Assault.**]—*See* CRIMINAL LAW, Vol. XV., p. 826, Nos. 9028, 9029.

—— **False statements in certificate of death.**]—*See* CRIMINAL LAW, Vol. XV., p. 695, No. 7485.

SECT. 4.—RECOVERY OF CHARGES.

SUB-SECT. 1.—REGISTRATION AS CONDITION PRECEDENT TO RIGHT TO SUE.

88. At what time practitioner must be registered.]—It is sufficient for a person suing for medical attendance to show that he is on the Medical Registry at the time of the trial, without proving that he was registered when he did the work for which he claims payment.—TURNER *v.* REYNALL (1863), 14 C. B. N. S. 328; 2 New Rep. 78; 32 L. J. C. P. 164; 8 L. T. 281; 9 Jur. N. S. 1077; 11 W. R. 700; 143 E. R. 472.

Annotations:—**Dbtd.** Howarth *v.* Brearley (1887), 19 Q. B. D. 303. **Reid.** Leman *v.* Fletcher (1873), 28 L. T. 499; Leman *v.* Housley (1874), 31 L. T. 833.

89. ——.]—Under Medical Act, 1858 (c. 90), ss. 31, 32, & Apothecaries Act, 1815 (c. 194), s. 21, in order to recover for medicines & attendance as an apothecary, it is necessary that the practitioner should have been qualified & registered at the time of the services rendered, & it is not

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PART III. SECT. 3, SUB-SECT. 1.—H.

86 i. *Negligence of professional staff —Care exercised in selection of staff.*]—In an action for damages brought by pltf. against the Hobart Public Hospitals Board:—*Held:* under the Hospitals Act, 1918, the Board's sole duty with regard to medicine & surgery was to use as much care as was necessary to see that its medical officers were so qualified by their skill & trustworthy by their character as to fit them for their respective offices.—CUMMINS *v.* HOBART PUBLIC HOSPITALS BOARD (1923), 19 Tas. L. R. 18.—**AUS.**

86 ii. —— ——.]—THOMPSON *v.* COLUMBIA COAST MISSION (1914), 20 B. C. R. 115.—**CAN.**

86 iii. —— ——.]—Apart from special contract the managers of a public hospital are not responsible to the patients whom they receive, whether paying or non-paying, for unskilful or negligent medical treatment, provided they have exercised due care in the selection of a competent staff.—FOOTE *v.* SHAW STEWART, [1912] S. C. 69.—**SCOT.**

PART III. SECT. 4, SUB-SECT. 1.

88 i. *At what time practitioner must be registered.*]—The proof of registration required by Medical Act, s. 32, by which medical men are precluded from recovering for professional services, without proof of registry, is proof that pltf. is registered at the time he tenders such proof in evidence.—HAFFIELD *v.* MACKENZIE (1860), 10 I. C. L. R. 289.—**IR.**

88 ii. ——.]—A medical practitioner cannot recover fees for medical attendance unless he was registered under Medical Practitioners' Registration Act, 1869, at the time the services were rendered.—RUSSELL *v.* SIMS (1900), 18 N. Z. L. R. 773.—**N.Z.**

d. *Registration abroad — Services rendered abroad.*]—WILMOT *v.* SHAW (1881), 14 N. S. R. (2 R. & G.) 343; 2 C. L. T. 96.—**CAN.**

e. *Registration of locum tenens.*]—Where plaintiff, admittedly a registered

sufficient that he produce at the trial a certificate of registration obtained after action brought.

It is obvious that the qualification & registration ought to exist at the time the services are rendered, & not merely at the time of trial (BLACKBURN, J.). —LEMAN *v.* HOUSELEY (1874), L. R. 10 Q. B. 66; 44 L. J. Q. B. 22; 31 L. T. 833; 39 J. P. 182; 23 W. R. 235.

Annotation :— **Refd.** Howarth *v.* Brearley (1887), 19 Q. B. D. 303.

90. ——.] — (1) Under Medical Act, 1858 (c. 90), s. 32, a duly qualified & registered medical practitioner is not entitled to recover charges for medicines supplied or medical services rendered by an unqualified & unregistered assistant, where such services have been wholly rendered by the unqualified assistant, & where no part of such services has been rendered by the qualified practitioner himself.

(2) *Semble* : to entitle a medical practitioner to recover charges for such services, it is necessary that he should have been qualified & registered at the time of rendering such services, as well as at the trial.—HOWARTH *v.* BREARLEY (1887), 19 Q. B. D. 303; 56 L. J. Q. B. 543; 56 L. T. 743; 51 J. P. 440; 36 W. R. 302; 3 T. L. R. 680, D. C.

SUB-SECT. 2.—REGISTERED PRACTITIONERS.

A. In General.

See, now, Medical Act, 1886 (c. 48).

NOTE.—*Cases prior to Medical Act*, 1886 (c. 48), *which deal solely with the right of a physician to recover fees or of a surgeon to recover fees for work done as physician, have been omitted as obsolete.*

91. Amount recoverable—Where no agreement—Quantum meruit—Question for jury.]—I was of opinion, that fees to physicians or lawyers, were by the civil law merely honorary, & were not to be demanded, or recovered; but supposing they were recoverable at common law, it must be upon a *quantum meruit*, to be settled by a jury, which must depend upon the eminence of the physician (SIR GEORGE LEE).—VON SOLENDAHL *v.* HAMPE (1752), 1 Lee, 102; 161 E. R. 38.

92. —— —— **Reasonable charge—Question for jury.**]—A surgeon & apothecary may, besides his charges for medicine, recover such charges for attendances, as the jury shall consider to be fair & reasonable.—HANDEY *v.* HENSON (1830), 4 C. & P. 110, N.P.

93. —— **Attendance—Amount left blank in bill.**]—If a surgeon furnishes a bill to his patient & he leaves a blank for his charge for attendances; if the patient pays a certain sum on that account, as the surgeon made no specific charge, he is bound by the sum so paid, & can recover no more. —TUSON *v.* BATTING (1800), 3 Esp. 192; 170 E. R. 584, N. P.

94. Attendance under expectation of legacy—No legacy given—Whether practitioners entitled.]—A surgeon forbore to send in his bill for medicines & attendance to a deceased patient in her lifetime, under the expectation of a legacy. On her death, finding she had left him nothing, he made a claim on her exors. :—*Held* : he was entitled to recover, no proof having been given of any understanding between the parties that he was to be paid only by a legacy.—BAXTER *v.* GRAY (1842), 3 Man. & G. 771; 4 Scott, N. R. 374; 11 L. J. C. P. 63; 133 E. R. 1349.

Annotations :—**Consd.** Hulse *v.* Hulse (1856), 17 C. B. 711. **Refd.** The Joseph Dexter (1869), 20 L. T. 820.

95. —— —— **Disallowance of payment by executor.**]—A physician attended B. during several of the last years of his life without any payment being made to him, but upon some understanding that remuneration was to be made by a legacy, which was not done. The exor. paid to the physician £100, as a remuneration for the services performed, which the Master disallowed. Upon exceptions to the report :—*Held* : there was nothing to raise an implied contract; the exor. had placed himself in the situation of the physician, & was not entitled to have the payment allowed.—SHALLCROSS *v.* WRIGHT (1850), 12 Beav. 558; 19 L. J. Ch. 443; 16 L. T. O. S. 257; 14 Jur. 1037; 50 E. R. 1174.

Annotation :—**Mentd.** *Re* Rownson, Field *v.* White (1885), 29 Ch. D. 358.

96. Negligence as defence to action — By apothecary—Acting under direction of qualified practitioner.]—It is a good defence in an action by an apothecary that he treated the patient ignorantly or improperly. *Aliter* if the medicines were administered under the direction of a physician.

In a case where the demand is compounded of skill & things administered, if the skill, which is a principal part is wanting the action fails. . . . If the medicines applied had been given under the direction of a physician, however improper they might be, the action should be supported, because the skill would not in that case be the ground of

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medical practitioner, sued for fees for professional services rendered partly by himself & partly by his *locum tenens* & produced the certificate of registration of his *locum tenens* :— *Held* : such production was sufficient evidence of registration.—KATZ *v.* DREW (1914), W. R. 751.—**S. AF.**

PART III. SECT. 4, SUB-SECT. 2.—A.

t. Amount recoverable — Where no agreement—Quantum meruit.]—ROSS *v.* LONDON (1911), 18 O. W. R. 82; 2 O. W. N. 583; 23 O. L. R. 74.—**CAN.**

g. —— —— *Reasonable charge.*]—Action for medical services rendered deft.'s wife. As to the proper scale of fees the reasonable rule is to pay the charges current in the locality where the services were rendered.—BISSET *v.* STEWART (N. S.) (1910), 8 E. L. R. 82.—**CAN.**

h. —— —— ——.]—MARIEN *v.* LUSSIER, 22 C. L. T. 418.—**CAN.**

k. —— —— ——.]—Where a doctor's account appears, according to medical usage & the custom of the place, to be excessive, the ct., without necessarily taxing each separate item, will reduce it to what, on a general view of the case, seems fair & reasonable under the circumstances.—VEI MAAK *v.* ROUSSEAU, [1907] E. D. C. 123.—**S. AF.**

l. —— *Special remuneration.*]—The performing of a major operation is one of those special duties of a medical man which is entitled to special remuneration, not only for the actual time & labour employed, but also for the special degree of professional training & skill necessary to perform such an operation.—RANDALL *v.* ORR (1908), 18 C. T. R. 462.—**S. AF.**

m. —— ——.]—PHILLIPS *v.* STEYN, [1918] C. P. D. 247.—**S. AF.**

n. Who may be liable—Patient in hospital.]—*Held* : although the hospital was primarily an eleemosynary institution, yet as there was no bye-law prohibiting the house surgeon from charging for services rendered to patients able to pay, & who resorted to the institution for the sake of better attendance, plff. could recover on an implied *assumpsit*.—FARRELL *v.* MCLAREN (1878), 12 N. S. R. (3 R. & C.) 75.—**CAN.**

o. —— ——.]—GALT HOSPITAL *v.* LYNN (Alta.) (1922), 69 D. L. R. 715. —**CAN.**

p. —— ——.]—HOYES *v.* M'HUGH (1900), 34 I. L. T. 181.—**IR.**

q. —— *Municipality.*]—A municipality is liable for the expenses of a medical practitioner engaged by a duly constituted board of health to attend cases of smallpox, but not for his wrongful dismissal.—MCKAY *v.* CAPE BRETON MUNICIPALITY (1889), 21 N. S. R. 492; 18 S. C. R. 639.—**CAN.**

r. —— *Crown.*]—MOLONY *v.* COLONIAL GOVERNMENT (1894), 4 C. T. R. 166.—**S. AF.**

t. Who may recover—Qualified assistant—Patient must agree to employment.]—LINDSAY *v.* FREDA, [1923] 2 D. L. R. 1180; 56 N. S. R. 210.—**CAN.**

a. —— —— ——.]—ORR *v.*

Sect. 4.—Recovery of charges: Sub-sect. 2, A., B. & C.; sub-sects. 3 & 4. Sects. 5, 6 & 7: Sub-sects. 1 & 2, A.]

the action (LORD KENYON).—KANNEN *v.* M'MULLEN (1791), Peake, 83; 170 E. R. 87, N. P.

97. Who may be liable—Attendance on pauper—Stranger.]—A deputy overseer, or even a mere stranger, directing a surgeon to attend a poor man, is liable to pay the surgeon.—WATLING *v.* WALTERS (1823), 1 C. & P. 132, N. P.

98. —— —— Overseer.]—WATLING *v.* WALTERS, No. 97, *ante*.

—— **Attendance on lunatic.**]—*See* LUNATICS, Vol. XXXIII., p. 167, No. 535.

—— **Attendance on servant.**]—*See* MASTER & SERVANT, p. 115, Nos. 862–867, *ante*.

B. Gratuitous Services.

99. Practitioner not practising for profit.] — Attendance by a medical man on the deceased, held, under the circumstances, to have been gratuitous, & his demand, as a debt against the assets, was rejected.

Pltf. was on sick furlough. He was entitled to practice for profit but he did not do so; he prescribed & attended patients for his father & brother, but never took fees or sent in a bill. He did so also for other persons, but only as an amateur & friend, & took no fees (ROMILLY, M.R.). —PACKMAN *v.* VIVIAN (1857), 24 Beav. 290; 53 E. R. 369.

100. Attendance on family of deceased medical man—Custom.]—Although there is not a binding custom, there is a very general practice among medical men not to charge the widow & children of a deceased medical man for attendance. If, therefore, a doctor intends to charge in such a case he must say so, & thus give the patient the opportunity of declining his services & of going to another doctor who will not charge.—CORBIN *v.* STEWART (1911), 28 T. L. R. 99.

C. Services by Unqualified Assistant.

101. Whether fees recoverable.]—HOWARTH *v.* BREARLEY, No. 90, *ante*.

SUB-SECT. 3.—UNREGISTERED PRACTITIONERS.

102. Right to sue for fees — Action against patient.]—If a medical practitioner passes himself off as a physician, although he has no diploma & no right to assume that character, he cannot maintain an action for his fees.—LIPSCOMBE *v.* HOLMES (1810), 2 Camp. 441; 170 E. R. 1211, N. P.

Annotations:—**Refd.** Shearwood *v.* Hay, Wills *v.* Langridge (1836), 5 Ad. & El. 383; Veitch *v.* Russell (1842), Car. & M. 362.

103. —— —— Employment induced by fraud.] —One who professes to cure disorders within a specific time by means of sovereign medicines, & induces another to employ him by false & fraudulent professions of his skill, cannot recover for medicines or attendance.—HUPE *v.* PHELPS (1819), 2 Stark. 480, N. P.

104. —— Action against qualified practitioner—Employer of plaintiff.]—(1) Medical Act, 1858 (c. 90), s. 32, which prohibits an unregistered practitioner from recovering for advice, attendance, or medicines supplied, is not confined to cases in which the patient is sued. (2) Though an unregistered assistant may sue a registered practitioner for salary, an unregistered practitioner cannot sue a registered practitioner for medicines supplied to or attendance upon the patients of the latter at his request.

A medical officer of a Peruvian vessel of war lying in the Thames engaged pltf., an unregistered practitioner, to attend the crew & troops, partly on board the vessel & partly on shore, during his temporary absence. In an action against the Peruvian officer for the services thus rendered: —*Held:* Medical Act, 1858 (c. 90), s. 32, precluded pltf. from recovering.—DE LA ROSA *v.* PRIETO (1864), 16 C. B. N. S. 578; 4 New Rep. 463; 33 L. J. C. P. 262; 10 L. T. 757; 10 Jur. N. S. 851; 12 W. R. 1029; 2 Mar. L. C. 67; 143 E. R. 1253.

Annotation:—*As to* (2) **Consd.** Howarth *v.* Brearley (1887), 19 Q. B. D. 303.

105. —— Osteopath—Holding foreign diploma—Treatment not within Medical Act, 1858 (c. 90), s. 32.] —HALL *v.* TROTTER (1921), 38 T. L. R. 30, D. C.

106. —— —— —— ——.]—MACNAGHTEN *v.* DOUGLAS, [1927] W. N. 156.

Registration as condition precedent to right to sue.]—*See* Sub-sect. 1, *ante*.

SUB-SECT. 4.—APOTHECARIES.

See Part IV., Sect. 3, *post*.

SECT. 5.—PRIVILEGES AND EXEMPTIONS.

Whether exempted from performance of public duties.]—*See, generally,* Medical Act, 1858 (c. 90), s. 35.

—— **Jury service.**]—*See* Juries Act, 1870 (c. 77), s. 9, sched.

—— **Service in militia.**]—*See* Territorial Army & Militia Act, 1921 (c. 37), s. 4 (1), sched. II.

107. Medical witness—Whether bound to disclose confidential communications.]—There is no privilege . . . in the case of a medical man (BEST, C.J.).—BROAD *v.* PITT (1828), 3 C. & P. 518; Mood. & M. 233, N. P.

Annotations:—**Refd.** Greenough *v.* Gaskell (1833), 1 My. & K. 98. **Mentd.** Herring *v.* Clobery (1842), 1 Ph. 91; Dwyer *v.* Collins (1852), 21 L. J. Ex. 225.

108. —— ——.]—The foundation of this rule is not difficult to discover. It is not, as has sometimes been said, on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, & especially to medical advisers (LORD BROUGHAM, C.).—GREENHOUGH *v.* GASKELL (1833), 1 My. & K. 98; Coop. *temp.* Brough. 96; 47 E. R. 35, L. C.

Annotations:—**Mentd.** Moore *v.* Terrell (1833), 4 B. & Ad. 870; Bland *v.* Wainwright (1835), 4 L. J. Ex. Eq. 19; Meath (Bp.) *v.* Winchester (1836), 10 Bli. N. S. 330; Storey *v.* Lennox (1836), 1 Keen, 341; Turquand *v.* Knight (1836), 2 M. & W. 98; Desborough *v.* Rawlins

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STEVENSON (1908), 25 S. C. 199; 18 C. T. R. 219.—**S. AF.**

b. —— *Consultant.*]—In the absence of a special agreement, any person calling in a second physician as a consultant of his ordinary physician, must be taken to agree to pay the ordinary fees chargeable for consultations.—(GREATHEAD & CHEW *v.* STANTON (1895), 9 E. D. C. 189.—**S. AF.**

PART III. SECT. 5.

107 i. *Medical witness — Whether bound to disclose confidential communications.*] — *Held:* a witness is absolutely privileged in respect of statements made in giving his evidence if pertinent to the matter at issue; but this privilege does not extend to statements made in precognition.—A. B. *v.* C. D., [1904] 7 F. (Ct. of Sess.) 72.—**SCOT.**

(1838), 3 My. & Cr. 515; Mackenzie *v.* Yeo (1841), 2 Curt. 866; Horring *v.* Clobery (1842), 1 Ph. 91; Llewellyn *v.* Baddeley (1842), 11 L. J. Ch. 310; Walsingham *v.* Goodricke (1843), 3 Hare, 122; Weeks *v.* Argent (1847), 16 M. & W. 817; Chant *v.* Brown (1849), 7 Hare, 79; Glyn *v.* Caulfield (1851), 3 Mac. & G. 463; Russell *v.* Jackson (1851), 9 Hare, 387; Warde *v.* Warde (1851), 3 Mac. & G. 365; *Re* Columbine, *Ex p.* Allen (1853), 1 Bankr. & Ins. R. 43; Brown *v.* Foster (1857), 1 H. & N. 736; Ford *v.* Tennant (No. 2) (1863), 32 Beav. 162; Ramsbotham *v.* Senior (1869), L. R. 8 Eq. 575; Ross *v.* Gibbs, Gibbs *v.* Ross (1869), L. R. 8 Eq. 522; Wilson *v.* Northampton & Banbury Junction Ry. (1872), L. R. 14 Eq. 477; Smith *v.* Daniell (1874), L. R. 18 Eq. 649; Anderson *v.* Bank of British Columbia (1876), 2 Ch. D. 644; R. *v.* Cox & Railton (1884), 14 Q. B. D. 153; *Re* Strachan, [1895] 1 Ch. 439; Ainsworth *v.* Wilding, [1900] 2 Ch. 315; O'Rourke *v.* Darbishire, [1920] A. C. 581.

—— ——.] —*See, further*, EVIDENCE, Vol. XXII., pp. 419, 420, Nos. 4299–4306.

—— **Right to compensation for loss of time.**]—*See* EVIDENCE, Vol. XXII., p. 410, Nos. 4570–4572.

—— **Right to fees at coroner's inquest.**]—*See* CORONERS, Vol. XIII., p. 246, Nos. 184, 185.

Medical reports of accidents—When privileged.]—*See* DISCOVERY, Vol. XVIII., pp. 139–142, Nos. 892–906.

Diplomatic privilege—Ambassador's retainer.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 510, No. 434.

SECT. 6.—THE PRACTICE OF ANATOMY.

See, generally, Anatomy Act, 1832 (c. 75).

Exhumation & disposal of bodies an indictable offence.]—*See* BURIAL, Vol. VII., pp. 521, 559, Nos. 3, 4, 352.

Burial of remains.]—*See* Anatomy Act, 1832 (c. 75), s. 13; Anatomy Act, 1871 (c. 16), s. 2; Anatomy (England & Wales) Order, 1916.

SECT. 7.—UNQUALIFIED PERSONS.

SUB-SECT. 1.—IN GENERAL.

109. Agreement with qualified practitioner—Service as assistant—Legality—Effect of personal abstention from practice.]—Apothecaries Act, 1815 (c. 194), prohibiting medical practice by unqualified persons is not repealed by implication by Medical Act, 1858 (c. 90).

Deft., a duly qualified medical practitioner, agreed with pltf., a medical practitioner not duly qualified, but who was described in the agreement as "medical practitioner," to serve pltf. as assistant in his profession as a medical practitioner, & not to practise at R. within five years after the close of the engagement. Pltf. applied for an injunction to prevent deft. from practising at R. in breach of this agreement.

The judge held that the Medical Act of 1858 did not prohibit unqualified persons from practising medicine, its object being only to enable the public to distinguish between qualified & unqualified practitioners, that the use by an unqualified person in a private agreement with another medical man, of any of the titles for the wilful use of which by an unqualified person, for the purpose of deceiving the public, penalties were imposed by sect. 40 of the Act, was not an offence within that sect., that the agreement therefore was not illegal, & that pltf. could enforce its terms, & was entitled to an injunction.

Deft. appealed, & on appeal showed that pltf. had given various certificates of cause of death, which showed that pltf. had attended deceased persons during their last illness, & from which it was to be inferred that he attended patients in the way in which a medical practitioner ordinarily attends, & in fact personally acted as an apothecary:—*Held:* his doing so was made illegal by Apothecaries Act, 1815 (c. 194), s. 14, the agreement therefore was to assist pltf. in carrying on a business which he could not lawfully carry on, & the agreement was illegal & could not be enforced. *Semble:* if pltf. had carried on his business by means of duly qualified assistants, without personally acting as a physician, surgeon, or apothecary, the agreement might have been legal.—DAVIES *v.* MAKUNA (1885), 29 Ch. D. 596; 54 L. J. Ch. 1148; 53 L. T. 314; 50 J. P. 5; 33 W. R. 668; 1 T. L. R. 420, C. A.

Annotation:—**Refd.** Bellerby *v.* Heyworth, [1909] 2 Ch 23.

SUB-SECT. 2.—PROCEEDINGS AGAINST UNQUALIFIED PERSONS.

A. In General.

See Apothecaries Act, 1815 (c. 194), s. 14; Medical Act, 1858 (c. 90), Preamble, ss. 40–43; Venereal Diseases Act, 1917 (c. 21), s. 1.

PART III. SECT. 7, SUB-SECT. 2.—A.

c. *Effect of Medical Act, 1858* (c. 90)—*Who may institute proceedings.*]—Any member of the public may institute proceedings under sect. 40 of above Act.—CLARKE *v.* M'GUIRE, [1909] 2 I. R. 681.—**IR.**

d. *Representation as to qualification—What amounts to.*]—STEPHENS *v.* JAYASINGA (1913), 15 W. A. L. R. 55.—**AUS.**

e. —— ——.]—R. *v.* TEFFT (1880), 45 U. C. R. 144.—**CAN.**

f. —— *Conviction — Appeal.*]—Applt. having been convicted before justices of having pretended to be a physician, appealed to the quarter sessions & was found guilty:—*Held:* the sessions had no power to reserve a case for the opinion of the ct.—POMEROY *v.* WILSON (1866), 26 U. C. R. 45.—**CAN.**

g. —— *Onus of proof.*]—R. *v.* KINGSTON (1904), 24 N. Z. L. R. 431.—**N.Z.**

h. —— *Question for jury.*]—R. *v.* SEARBY (1906), 26 N. Z. L. R. 690.—**N.Z.**

k. *Unregistered practitioner—Practising—What amounts to.*]—STEPHENS *v.* TAUFIK RAAD (No. 2) (1914), 16 W. A. L. R. 136.—**AUS.**

l. —— —— ——.]—R. *v.* HALL (1885), 8 O. R. 407.—**CAN.**

m. —— —— ——.]—PROVINCIAL MEDICAL BOARD *v.* WASHINGTON (1886), 19 N. S. R. (7 R. & C.) 470; 8 C. L. T. 16.—**CAN.**

n. —— —— ——.]—Deft. attended a couple of sick persons for which he received payment, but he neither prescribed nor administered any medicine, nor gave any advice, his treatment consisting of merely sitting still & fixing his eyes on the patient:—*Held:* this was not a practising of medicine.—R. *v.* STEWART (1889), 17 O. R. 4.—**CAN.**

o. —— —— ——.]—PROVINCIAL MEDICAL BOARD *v.* BOND (1890), 22 N. S. R. 153.—**CAN.**

p. —— —— ——.]—R. *v.* HOWARTH (1894), 24 O. R. 561.—**CAN.**

q. —— —— ——.]—Deft., with the object of making sales of medicines professed by him to be specifics for certain diseases, held public meetings, invited proposed purchasers to declare their symptoms, & publicly examined them & applied the remedy:—*Held:* this was practising medicine for gain or hope of reward.—R. *v.* BARNFIELD (*alias* SEQUAH) (1895), 4 B. C. R. 305.—**CAN.**

r. —— —— ——.]—R. *v.* COULSON (1896), 27 O. R. 59.—**CAN.**

t. —— —— ——.]—Diagnosing only, or professing to diagnose, without prescribing a remedy or medicine, is not a practising of medicine.—R. *v.* VALLEAU, 20 C. L. T. 310.—**CAN.**

a. —— —— ——.]—R. *v.* RONDEAU (1903), 5 Terr. L. R. 478.—**CAN.**

b. —— —— ——.]—It is unlawful under Medical Act, R. S. M. 1902, s. 62, for a person not registered under the Act to practise as an electro-therapeutist for hire, gain, or hope of reward.—BEROMAN *v.* BOND (1904), 24 C. L. T. 152; 14 Man. L. R. 503.—**CAN.**

aa. —— —— ——.]—*Re* ONTARIO MEDICAL ACT (1906), 8 O. W. R. 766; 13 O. L. R. 501.—**CAN.**

bb. —— —— ——.]—R. *v.* RAFFENBERG (No. 1) (1909), 12 W. L. R. 419.—**CAN.**

Sect. 7.—Unqualified persons: Sub-sect. 2, A. & B. (a), (b), (c) & (d); sub-sect. 3. Sect. 8.]

110. No indictment lies at common law.]—ANON. (1654), Sty. 433; 82 E. R. 839.

111. Effect of Medical Act, 1858 (c. 90)—Apothecaries Act, 1815 (c. 194), s. 14, not repealed.]—DAVIES *v.* MARUNA, No. 109, *ante*.

B. Wilfully and Falsely Pretending, etc.

(a) Question of Law or Fact.

112. Question of fact.]—LADD *v.* GOULD, No. 130, *post*.

113. ——.]—K., who was legally qualified as a surgeon & apothecary, & registered as such under Medical Act, 1858 (c. 90), was, before the time of passing of that Act, possessed of a German medical diploma, & called himself Doctor K. He continued to use that description after the passing of the Act, though not registered as doctor of medicine:—*Held:* no evidence that he had wilfully & falsely pretended to be, or taken or used the name & title of a doctor of medicine so as to render him liable to a penalty under Medical Act, 1858 (c. 90), s. 40.

It is a matter of fact for magistrates only to decide, not one of law to be reserved for the opinion of this ct. as decided in *Ladd* v. *Gould*, No. 130, *post* (WILDE, B.).—ELLIS *v.* KELLY (1860), 6 H. & N. 222; 30 L. J. M. C. 35; 3 L. T. 331; 25 J. P. 279; 6 Jur. N. S. 1119; 9 W. R. 56; 158 E. R. 92.

Annotations:—**Consd.** R. *v.* Bak r, etc. JJ. & Clarke (1891), 66 L. T. 416; Steel *v.* Ormsby (1894), 10 T. L. R. 483; Hunter *v.* Clare, [1899] 1 Q. B. 635. **Refd.** Carpenter *v.* Hamilton (1877), 41 J. P. 615; R. *v.* Lewis (1896), 40 Sol. Jo. 515; Brindley *v.* Shelton Iron, Steel & Coal Co. (1923), 128 L. T. 783. **Mentd.** Leman *v.* Fletcher (1873), L. R. 8 Q. B. 319.

114. ——.]—Resp. kept a shop, where he dispensed medicine & gave advice; he had a diploma in the window, in which he was described as "John Hamilton, Doctor of Medicine of the Metropolitan Medical College of New York," & he so held himself out to the world; & the magistrate reported that it was not satisfactorily proved that resp. was not entitled so to describe himself. He was not registered, & held no qualifications which would entitle him to be registered under the Medical Act, 1858 (c. 90). The magistrate having dismissed a complaint brought against resp. under Medical Act, 1858 (c. 90), s. 40:—*Held:* the decision of the magistrate was right, as the only evidence of any false pretence was, that resp. pretended to be what he really was; & also it was a question of fact for the magistrate's decision rather than one of law for the ct.—CARPENTER *v.* HAMILTON (1877), 37 L. T. 157; 41 J. P. 615, D. C.

Annotation:—**Refd.** R. *v.* Lewis (1896), 40 Sol. Jo. 515.

115. ——.]—Resps., Frickhart & Bridgwater, were charged with wilfully & falsely pretending to be respectively doctors of medicine, contrary to Medical Act, 1858 (c. 90), s. 40. In Frickhart's case, the only proof of the charge offered was a copy of the Medical Register for the year, in which her name did not appear, & the evidence of the informant, a retired doctor of medicine, to whom she gave a medical certificate signed with the letters M.D. after her name. She had a degree of M.D., University Zurich, 1877, in respect of which she had at one time been registered. In Bridgwater's case, the only proof was a copy of the Medical Register for the year, in which Bridgwater's name did not appear, & the evidence of the same informant, who had twice consulted Bridgwater & received from him, for payment, medical advice & medicine, & an unsigned certificate. In Bridgwater's handbills, & on the window blinds of his place of business, he was described as "Dr. Bridgwater, M.D., U.S.A.," & in his consulting room was hung up what purported to be a diploma of some American university. The magistrate dismissed the summons in either case, on the ground that there was no proof of any wilful & false pretence:—*Held:* the magistrate could not be called upon to state a case, as his determination had proceeded solely on a question of fact. Whether a person having a non-registrable title & knowing it to be such, by using the title M.D., commits an offence against the statute, & how far the question is a question of fact or a question of law, is doubtful.—R. *v.* LEWIS (STIPENDIARY MAGISTRATE) & FRICKHART, R. *v.* LEWIS (STIPENDIARY MAGISTRATE) & BRIDGWATER (1896), 60 J. P. 392; 12 T. L. R. 415, 433; 40 Sol. Jo. 515, D. C.

(b) Wilful and False Pretence.

116. Necessity for proof.]—ELLIS *v.* KELLY, No. 113, *ante*.

117. ——.]—PEDGRIFT *v.* CHEVALLIER, No. 129, *post*.

118. ——.]—STEEL *v.* ORMSBY (1894), 10 T. L. R. 483, D. C.

Annotation:—**Refd.** R. *v.* Lewis & Frickhart, R. *v.* Lewis & Bridgwater (1896), 60 J. P. 392.

119. ——.]—A licentiate of the Society of the Apothecaries of London under a diploma granted by that body since 1886, although duly registered as a medical practitioner under Medical Acts & entitled to practise medicine, surgery & midwifery, is not entitled to describe himself as a physician; but such a description, though incorrect, does not subject him to the penalty imposed by Medical Act, 1858 (c. 90), s. 40, unless it be also made wilfully & falsely.—HUNTER *v.* CLARE, [1899] 1 Q. B. 635; 68 L. J. Q. B. 278; 80 L. T. 197; 63 J. P. 308; 47 W. R. 394; 15 T. L. R. 161; 43 Sol. Jo. 367, D. C.

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e. —— —— ——.]—R. (BURROWS) *v.* EVANS (1916), 23 B. C. R. 128.—**CAN.**

f. —— —— ——.]—R. *v.* MCSLOY, [1917] 1 W. W. R. 112.—**CAN.**

g. —— —— ——.]—To enable a proprietor of a bath to come within the exception in the proviso to sect. 63 of the Medical Act, the primary object of the establishment must be the bath, & any treatment given must be incidental thereto.—R. *v.* TELFORD, [1921] 2 W. W. R. 255; 58 D. L. R. 593.—**CAN.**

h. —— —— ——.]—R. *v.* O'MALLEY (Alta.), [1924] 3 D. L. R. 430; [1924] 2 W. W. R. 652.—**CAN.**

k. —— —— ——.]—R. *v.* HANNAH, [1913] App. D. 48.—**S. AF.**

l. —— —— ——.]—R. *v.* BEZINDEAHOUT, [1922] App. D. 206.—**S. AF.**

m. —— —— *Form of conviction.*]—R. *v.* HESSEL (1878), 44 U. C. R. 51.—**CAN.**

n. —— —— ——.]—A conviction under Ontario Medical Act, 1877, for practising without being registered, was quashed, because, in default of payment of the fine imposed, distress was also awarded.—R. *v.* SPARHAM (1885), 8 O. R. 570.—**CAN.**

o. —— —— ——.]—A conviction under Ontario Medical Act, 1887, for practising medicine for hire:—*Held:* bad for uncertainty in not specifying the particular act or acts which constituted the practising.—R. *v.* COULSON (1893), 24 O. R. 246.—**CAN.**

p. —— —— ——.]—*Re* WAGNER (1916), 33 W. L. R. 415; 9 W. W. R. 1000.—**CAN.**

q. —— —— *Who may be liable.*]—Deft., an unenfranchised treaty Indian, residing on a reserve, was convicted for having practised medicine for hire, in Ontario, but not upon the reserve, without being registered under Ontario Medical Act, 1897:—*Held:* deft. was subject to the provisions of the Medical Act, & was properly convicted.—R. *v.* HILL (1907), 15 O. L. R. 406; 11 O. W. R. 20.—**CAN.**

(c) *Assumption of Title of Doctor.*

120. By person qualified as surgeon.]—ELLIS *v.* KELLY, No. 113, *ante.*

121. By person with foreign qualification.]—ANDREWS *v.* STYRAP, No. 43, *ante.*

122. ——.]—A medical practitioner registered as Licentiate of the Society of Apothecaries London 1885, but not qualified to be registered as M.D. physician, or surgeon, under Medical Act, 1858 (c. 90), placed "M.D." after his name on vaccination certificates, & in other ways described himself to the public as M.D., as "physician & surgeon," in some cases with the further addition of "legally registered practitioner":—*Held:* he could be convicted of wilfully & falsely pretending to be a doctor of medicine, physician, & surgeon, contrary to Medical Act, 1858 (c. 90), s. 40.

Deft. says he is in possession of a degree of "M.D.," not of any of the universities mentioned in the Act, but of some institute at Indianapolis, in America. If he were not claiming to practise & to take privileges under the Act, he would have a perfect right to put "M.D." after his name, & it would not be necessary for him to add anything to show that it was not a degree conferred by Edinburgh, London, Dublin, or any other place but Indianapolis. . . . A person who may be an excellent doctor of medicine may be an absolutely incompetent surgeon & if he put surgeon after his name when he was M.D. only he would be misleading people (LORD COLERIDGE, C.J.).—R. *v.* BAKER, ETC., JJ. & CLARKE (1891), 60 L. T. 416; 56 J. P. 406; 17 Cox, C. C. 575; *sub nom.* R. *v.* ASTON, BIRMINGHAM, JJ., 8 T. L. R. 123, D. C.

Annotation:—**Distd.** Hunter *v.* Clare, [1899] 1 Q. B. 635.

123. —— **When foreign qualification disclosed.**]—CARPENTER *v.* HAMILTON, No. 114, *ante.*

124. —— ——.]—R. *v.* LEWIS (STIPENDIARY MAGISTRATE) & FRICKHART, R. *v.* LEWIS (STIPENDIARY MAGISTRATE) & BRIDGWATER, No. 115, *ante.*

125. —— ——.]—R. *v.* FERDINAND (1896), 12 T. L. R. 135.

126. By member of botanic college.]—STEEL *v.* ORMSBY (1894), 10 T. L. R. 483, D. C.

Annotation:—**Reid.** R. *v.* Lewis & Frickhart, R. *v.* Lewis & Bridgwater (1896), 60 J. P. 392.

127. By licentiate of Society of Apothecaries.]—R. *v.* BAKER, ETC., JJ. & CLARKE, No. 122, *ante.*

128. ——.]—HUNTER *v.* CLARE, No. 119, *ante.*

(d) *Assumption of Title of Surgeon.*

129. By person not on medical register.]—The mere fact that a person, whose name did not appear in the medical register, represented himself to be a surgeon, is not sufficient to warrant a conviction under Medical Act, 1858 (c. 90), s. 40.

To warrant a conviction under Medical Act, 1858 (c. 90), s. 42, for acting as or pretending to be a surgeon, there must be unequivocal evidence that the party has so acted or pretended; it is not enough that he is so called by persons whom he has attended professionally, in the absence of evidence to show that he has done so on his own account & for his own profit.—PEDGRIFT *v.* CHEVALLIER (1860), 8 C. B. N. S. 240; 29 L. J. M. C. 225; 2 L. T. 360; 25 J. P. 181; 6 Jur. N. S. 1341; 8 W. R. 500; 141 E. R. 1157.

130. By dentist.]—G. kept a chemist's shop, & on the door were the words "surgeon & mechanical dentist." He treated a woman for a bruised arm, & gave her a liniment. G. was summoned before the justices for falsely pretending to be a surgeon, but the justices declined to convict:—*Held:* the justices were right, & it was a question of fact for them to say whether G. used the word "surgeon" in connection with 'dentist" merely to show what branch of the latter business he carried on.—LADD *v.* GOULD (1860), 1 L. T. 325; 24 J. P. 357.

Annotations:—**Reid.** Ellis *v.* Kelly (1860), 6 H. & N. 222; Carpenter *v.* Hamilton (1877), 41 J. P. 615; Royal College of Veterinary Surgeons *v.* Robinson, [1892] 1 Q. B. 557; Brown *v.* Whitlock (1903), 67 J. P. 451.

131. By doctor of medicine.]—A person who signed a medical certificate of death described himself botanic surgeon, & on his door was the word "surgeon," with the word "anti-registered" in very small letters above it:—*Held:* there was no evidence in the above facts to sustain a conviction of his falsely pretending to be a registered surgeon.—STEELE *v.* HAMILTON (1860), 3 L. T. 322; 25 J. P. 643.

132. By botanic surgeon.]—R. *v.* BAKER, ETC., JJ. & CLARKE, No. 122, *ante.*

SUB-SECT. 3.—RECOVERY OF CHARGES BY UNQUALIFIED PERSONS.

See Sect. 1, sub-sect. 3, *ante.*

SECT. 8.—**NATIONAL HEALTH INSURANCE ACTS.**

See WORK & LABOUR.

PART III. SECT. 7, SUB-SECT. 2.—B. (c).

r. *By unqualified person.*]—*Ex p.* WATSON (1920), 20 S. R. N. S. W. 361; 37 N. S. W. W. N. 105.—**AUS.**

t. ——.]—EASTBURN *v.* ROBERTSON (1893), 1 F. (Ct. of Sess.) 14; 30 Sc. L. R. 67; 6 S. L. T. 193 (J.).—**SCOT.**

Part IV.—Apothecaries.

SECT. 1.—IN GENERAL.

See Apothecaries Act, 1815 (c. 194); Apothecaries Act, 1907 (c. xxii).

133. Scope & development of functions.]—Where deft. was sued for a penalty under Apothecaries Act, 1815 (c. 194), s. 20, & contended that he was within the exception, as having, prior to Aug. 1, 1815, actually practised as an apothecary:—*Held:* it was proper, in summing up to the jury, for the judge to refer to Apothecaries Act, 1815 (c. 194), s. 5, as describing the duty of an apothecary to be to make up the prescriptions of physicians; & it appearing that deft. never had, or could have done so, prior to Aug. 1, 1815, such total incapacity was cogent evidence to be left to the jury, & they did right to find that he had never practised as an apothecary, although, in fact, he had on many occasions administered medicines to various patients prior to that period.

Formerly, I believe, the only duty of an apothecary was to make up the prescriptions of physicians. In more modern times, however, they have been in the habit of attending patients, & administering medicines upon their own judgment. But still it has always continued to be a most important branch of their duty to make up the prescriptions of others (BEST, J.).—APOTHECARIES' CO. *v.* WARBURTON (1819), 3 B. & Ald. 40; 106 E. R. 578.

Annotations:—**Refd.** Apothecaries' Co. *v.* Allen (1833), 4 B. & Ad. 625; Batty *v.* Monks (1865), 12 L. T. 832.

134. ——.]—If in an action for an apothecary's bill, it appear that pltf., on & prior to Aug. 1, 1815, was a curer of certain local complaints, but did not keep any shop or make up the prescriptions of physicians, he will not be entitled to recover the amount of his bill.

The duty of an apothecary is to prepare the medicine directed by the prescriptions of physicians; & in 55 Geo. 3, c. 194, s. 5, it is recited that "it is the duty of every person using or exercising the art & mystery of an apothecary, to prepare with exactness, & to dispense such medicines as may be directed for the sick by any physician lawfully licenced" (LORD TENTERDEN, C.J.).—THOMPSON *v.* LEWIS (1828), 3 C. & P. 483; Mood. & M. 255, N. P.

135. ——.]—ALLISON *v.* HAYDON, No. 14, *ante*.

136. ——.]—WOODWARD *v.* BALL, No. 178, *post*.

137. ——.]—A surgeon may administer medicines in the cure of a surgical case without being subject to the penalties of Apothecaries Act, 1815 (c. 194), but he has no right to do so in the case of internal diseases not requiring surgical treatment, such as fever, or consumption.

I apprehend that an apothecary is a person who professes to judge of internal disease by its symptoms, & applies himself to cure that disease by medicines. . . . The mere fact of deft.'s having supplied medicines, does not necessarily show that he practised as an apothecary; for a surgeon may lawfully do that, if the medicines are administered in the cure of a surgical case. . . . A chemist is one who sells medicines which are asked for (CRESSWELL, J.).—APOTHECARIES' CO. *v.* LOTINGA (1843), 2 Mood. & R. 495, N. P.

Annotation:—**Refd.** Apothecaries' Soc. *v.* Gregory (1908), 25 T. L. R. 37.

138. ——.]—DAVIES *v.* MAKUNA, No. 109, *ante*.

139. Who may practise—Infant.]—Apothecaries Act, 1815 (c. 194), which was passed on July 12, does not extend to persons practising as apothecaries previously to Aug. 1 in that year. A person who practised as an apothecary, previous to, but not on, Aug. 1, without a certificate was however held to be within the penalties of the Act. *Qu.:* whether an infant under the age of twenty-one can lawfully practise as an apothecary, without reference to the Act.—APOTHECARIES' CO. *v.* ROBY (1822), 5 B. & Ald. 949; 1 Dow. & Ry. K. B. 564; 106 E. R. 1439.

Annotations:—**Refd.** Millbank *v.* Aldridge (1840), H. & W. 64; Milbank *v.* Bryant (1842), 6 Jur. 931.

140. —— **Necessity for certificate of Apothecaries' company—Medical degree insufficient.**]—A diploma of M.D. from the University of St. Andrew's, in Scotland, is no defence to an action for penalties under Apothecaries Act, 1815 (c. 194), s. 20, for practising as an apothecary, without having obtained a certificate from the Apothecaries' co. *Semble:* a similar diploma from an English University would not be so.—APOTHECARIES' CO. *v.* COLLINS (1833), 4 B. & Ad. 604; 5 C. & P. 519; 1 Nev. & M. K. B. 401; 2 L. J. K. B. 149; 110 E. R. 583.

Annotation:—**Refd.** A.-G. *v.* Royal College of Physicians (1861), 1 John. & H. 561.

141. —— —— **Effect of Medical Act, 1858 (c. 90).**]—DAVIES *v.* MAKUNA, No. 109, *ante*.

142. Whether entitled to title of physician.]—R. *v.* BAKER, ETC., JJ. & CLARKE, No. 122, *ante*.

143. ——.]—HUNTER *v.* CLARE, No. 119, *ante*.

144. Whether entitled to title of surgeon.]—R. *v.* BAKER, ETC., JJ. & CLARKE, No. 122, *ante*.

See, now, Apothecaries Act, 1907 (c. xxii).

Whether subject to bankruptcy laws as trader.]—*See* BANKRUPTCY, Vol. IV., pp. 22, 23, Nos. 158–161.

SECT. 2.—CERTIFICATE OF QUALIFICATION.

See Apothecaries Act, 1815 (c. 194); Apothecaries Act Amendment Act, 1874 (c. 34); Apothecaries Act, 1907 (c. xxii).

145. Grant of—Duty of court of examiners—Bound to act reasonably.]—YOUNG *v.* GEIGER, No. 159, *post*.

146. —— **Service of apprenticeship—Must be actual.**]—Service with an apothecary for three years at least must be actual in order to comply with the provisions of the Act of Parliament (WOOD, V.C.).—SIMPSON *v.* BROWN (1865), 11 L. T. 593; 13 W. R. 312.

147. Proof of—Signature of court of examiners.]—Where an apothecary, in an action to recover the amount of his bill, produced in evidence a certificate, purporting to be granted by the ct. of examiners of the Apothecaries' co., & bearing twelve signatures, purporting to be the signatures of the persons constituting that ct., of which signatures he proved one, & gave other evidence to show that the document was genuine, & that he obtained it from the ct. of examiners:—*Held:* this was sufficient & he was not bound to prove the handwriting of each member of the ct. of examiners who had subscribed the certificate.—WALMSLEY *v.* ABBOTT (1824), 3 B. & C. 218; 1 C. & P. 495; 5 Dow. & Ry. K. B. 62; 2 L. J. O. S. K. B. 223; 107 E. R. 715.

See, further, EVIDENCE, Vol. XXII., p. 320, Nos. 3148, 3149.

Certificate evidence of right to practise.]—*See* EVIDENCE, Vol. XXII., p. 320, No. 3150.

Certificate evidence of right to recover charges.]—*See* Sect. 4, sub-sect. 3, *post.*

Proof of identity.]—*See* EVIDENCE, Vol. XXII., p. 63, No. 360.

SECT. 3.—RECOVERY OF CHARGES.

See Apothecaries Act, 1815 (c. 194), s. 21.

148. Matter of contract.] — The right of an apothecary to charge for attendances is not matter of law but of contract, either express or to be implied from the usage of the place.—SMITH *v.* CHAMBERS (1847), 2 Ph. 221; 41 E. R. 926; *sub nom.* CHAMBERS *v.* SMITH, 16 L. J. Ch. 291; 9 L. T. O. S. 33; 11 Jur. 359, L. C.

149. Condition precedent to recovery—Proof of certificate.]—An apothecary who furnishes medicines, & brings an action for the price of them, not being in a capacity to recover under Apothecaries Act, 1815 (c. 194), cannot recover even for the phials in which the medicines were contained.—STEED *v.* HENLEY (1824), 1 C. & P. 574, N. P.

150. —— ——.]—WALMSLEY *v.* ABBOTT, No. 147, *ante.*

151. —— ——.]—In an action by payee of a promissory note, expressed to be "in consideration of the payee's care & medical attendance bestowed on the maker":—*Held:* evidence was admissible to show the consideration to have been medicines furnished & services performed as an apothecary; & if that was proved, the plaintiff could not recover without bringing himself within Apothecaries Act, 1815 (c. 194), s. 21.—BLOGG *v.* PINKERS (1824), Ry. & M. 125, N. P.

152. —— ——.]—ALLISON *v.* HAYDON, No. 14, *ante.*

153. —— ——.] — In an action brought since the rules of 1833, for medicines furnished, & work done, by pltf., as an apothecary, pltf. is liable to be nonsuited under Apothecaries Act, 1815 (c. 194), s. 21, if he fail to prove his certificate, or that he was in practice before Aug. 5, 1815, although deft. has pleaded only *non assumpsit.*—SHEARWOOD *v.* HAY, WILLS *v.* LANGRIDGE (1836), 5 Ad. & El. 383; 2 Har. & W. 249, 250; 6 Nev. & M. K. B. 831; 5 L. J. K. B. 246; 111 E. R. 1210.

Annotations:—**Folld.** Wagstaffe *v.* Sharpe (1838), 3 M. & W. 521. **Apld.** Wright *v.* Greenroyed (1861), 5 L. T. 347. **Reid.** Richmond *v.* Coles (1842), 11 L. J. Q. B. 155. **Mentd.** Martin *v.* Smith (1838), 6 Scott, 268; Jones *v.* Flint (1839), 2 Per. & Dav. 594; Varney *v.* Hickman (1847), 10 L. T. O. S. 248.

154. —— ——.]—Since the rules of 1833, in an action brought by an apothecary, for work & labour as an apothecary, & for medicines, pltf. must either prove his certificate, or that he was in practice as an apothecary before Aug. 5, 1815, pursuant to Apothecaries Act, 1815 (c. 194), s. 21.—WAGSTAFFE *v.* SHARPE (1838), 3 M. & W. 521; 7 L. J. Ex. 167; 150 E. R. 1252; *sub nom.* SHARPE *v.* WAGSTAFF, 6 Dowl. 566; 1 Horn & H. 164.

Annotations:—**Reid.** Gibbon *v.* Budd (1863), 2 New Rep. 171. **Mentd.** Martin *v.* Scott (1838), 6 Scott, 268.

155. —— ——.]—Debt for work done as an apothecary: plea, that pltf. was not an apothecary prior to Aug. 1, 1815, nor had at any time obtained a certificate to practise as an apothecary from the master, wardens, & society of the art & mystery of Apothecaries: replication, that before the work was done, & before Aug. 1, 1826, pltf. held a warrant as assistant-surgeon in the Navy, bearing date, etc., & that the work was done after the passing of 6 Geo. 4, c. 133:—*Held:* the replication was good.—STEAVENSON *v.* OLIVER (1841), 8 M. & W. 234; 10 L. J. Ex. 338; 5 Jur. 1064; 151 E. R. 1024.

Annotations:—**Reid.** Chappell *v.* Davidson (1856), 18 C. B. 194. **Mentd.** Spencer *v.* Hooton, Spencer *v.* Newton & Pycroft, Briggs *v.* G. N. Ry., Parkinson *v.* Wigan Coal & Iron Co., Harrison *v.* Wigan Coal & Iron Co. (1920), 37 T. L. R. 280; R. *v.* Ellis, *Ex p.* Amalgamated Engineering Union (1921), 125 L. T. 397.

156. —— ——.]—Where an apothecary files a bill to obtain payment of sums due to him from testator's estate for professional charges, he must prove that he has been duly licenced in manner required by Apothecaries Act, 1815 (c. 194).—HOOD *v.* HALL (1842), 6 Jur. 1121.

157. —— ——.] — Debt for goods sold & delivered, work done, & materials provided, & on an account stated. The particulars of demand consisted of items for "medicines & attendances." At the trial, pltfs. assistant proved that they were surgeons, & that he had visited & dispensed medicines to deft., & that on one occasion he had bled deft.:—*Held: primâ facie* the charges were charges in a medical case; & pltfs. were therefore bound to prove that they were certificated as apothecaries, or that they had been in practice previous to Aug. 1, 1815.—PROUD *v.* MAYALL (1846), 3 Dow. & L. 531.

158. —— —— **Services rendered in London—Sufficiency of general certificate.**]—A general certificate of qualification to practise, without limitation as to time or place, is sufficient under Apothecaries Act, 1815 (c. 194), to enable an apothecary to sue on a bill for medicines, etc., furnished to patients in London, though on the back of such certificate is indorsed a receipt for four guineas proved to have been paid after the commencement of the action; which sum Apothecaries Act, 1815 (c. 194), s. 19, directs to be paid, & the receipt indorsed, where persons originally qualified by their certificate, to practise in the country, obtain the privilege of practising in London.—CHADWICK *v.* BUNNING (1825), 2 C. & P. 106; Ry. & M. 306, N. P.

159. —— —— —— ——.] — An apothecary who has obtained a certificate of qualification to practise, under Apothecaries Act, 1815 (c. 194), s. 14, may recover the amount of his charges, although such certificate shows that he has only paid to the Apothecaries' co. the lesser fee of £6 6s., for a country certificate, & the medicines & attendances were furnished in London—the insufficiency of the certificate not being specially pleaded.

When a person who has served a proper apprenticeship, presents himself for examination, & shows that he possesses sufficient medical skill & knowledge, & produces testimonials of good moral conduct, he is a competent apothecary, & the ct. of examiners are bound to grant him a certificate (MAULE, J.).—YOUNG *v.* GEIGER (1848), 6 C. B. 541; 6 Dow. & L. 337; 18 L. J. C. P. 40; 12 L. T. O. S. 174; 12 Jur. 983; 136 E. R. 1360.

160. —— —— —— ——.] — *Semble:* an extra-urban licence to an apothecary, that he is qualified to practise except in the city of London & ten miles round it, is sufficient to support an action by such apothecary for services rendered within such ten miles.—WADSWORTH *v.* COLLINS (1852), 3 Car. & Kir. 53; 19 L. T. O. S. 351, N. P.

161. —— —— **Effect of Medical Act, 1858 (c. 90).**]—LEMAN *v.* HOUSELEY, No. 89, *ante.*

See, now, Medical Act, 1858 (c. 90); Medical Act, 1886 (c. 48).

162. What charges recoverable — Whether for medicines & attendance.]—An apothecary may

Sect. 3.—*Recovery of charges. Sect.* 4: *Sub-sects.* 1 & 2. *Part V. Sects.* 1 & 2.]

either charge for his attendances or for the medicines he sends, but he cannot be allowed to charge for both.—TOWNE *v.* GRESLEY (1829), 3 C. & P. 581, N. P.

163. —— —— Reasonable remuneration—Question for jury.]—HANDEY *v.* HENSON, No. 92, *ante.*

164. —— —— —— ——.]—There is no rule of law which prevents an apothecary from making distinct charges for attendances & for medicines. Whether the patient be liable to a separate demand for attendances, is a question to be decided by the jury in each case, on the facts proving or disproving a contract to that effect; as the prior dealing between the same parties; or the reasonableness or unreasonableness, under the circumstances in the particular case, of making a charge for attendances, as well as for medicines.—MORGAN *v.* HALLEN (1838), 8 Ad. & El. 489; 3 Nev. & P. K. B. 498; 1 Will. Woll. & H. 370; 7 L. J. Q. B. 212; 2 Jur. 591; 112 E. R. 924.

165. Proof of charges—Proof of separate items not necessary—General verdict for amount claimed.]—In an action for an apothecary's bill, consisting of a great number of items, where the jury have a verdict for the whole sum due, the ct. will not grant a new trial because every item was not proved, if evidence was given as to some of them.—WHEELER *v.* SIMS (1841), 5 Jur. 151.

166. Defence to action—Negligent treatment—Unless under direction of physician.]—KANNEN *v.* M'MULLEN, No. 96, *ante.*

Action on express promise—Medical attendance on pauper.]—*See* CONTRACT, Vol. XII., p. 217, Nos. 1767–1769.

SECT. 4.—PROCEEDINGS AGAINST UNQUALIFIED PERSONS.

SUB-SECT. 1.—IN GENERAL.

See Apothecaries Act, 1815 (c. 194), ss. 20, 25, 26.

167. Onus of proof of certificate—On defendant.]—(1) In an action of debt, on Apothecaries Act, 1815 (c. 194), s. 20, for a penalty for practising as an apothecary, without having obtained a certificate from the Apothecaries' co. under hat Act, it is not necessary, on the part of pltfs. to prove that the party has not obtained his certificate, the *onus* lying on him to show that he has. It must, however, be averred in the declaration that he has not. (2) *Qu.:* whether a party incurs only one penalty by a continued practising as an apothecary, though he attends several patients, or whether he incurs a fresh penalty for each patient that he attends.—APOTHECARIES' CO. *v.* BENTLEY (1824), 1 C. & P. 538; Ry. & M. 159, N. P.

Annotations:—*As to* (1) **Reld.** Doe d. Bridger *v.* Whitehead (1838), 8 Ad. & El. 571; Toleman *v.* Portbury (1870), 39 L. J. Q. B. 136. *As to* (2) **Reld.** Apothecaries Co. *v.* Jones, [1893] 1 Q. B. 89.

168. Whether more than one penalty recoverable.]—APOTHECARIES' CO. *v.* BENTLEY, No. 167, *ante.*

169. ——.]—A plaint was brought in the county ct. of C. to recover £20, for practising as an apothecary without a certificate. The particulars of demand stated the cause of action to be that deft. did, on Nov. 17, 1849, & on divers other days & times, act & practise as an apothecary within the jurisdiction of the ct., that is to say, at U., in the county of C.; U., in the county of N.; O., in the county of C.; & O., in the county of N., by then & there attending, & furnishing medicines for divers persons, S., P., A., & R., whereby deft. has forfeited £20. Apothecaries Act, 1815 (c. 194), s. 20, enacts, that any person who shall practise as an apothecary without having obtained a certificate, shall "forfeit for every such offence" £20:—*Held:* whether the facts stated in the particulars amounted to four offences or one, pltf. could only recover £20 in this proceeding, & therefore, there was no ground for a prohibition.—APOTHECARIES CO. *v.* BURT (1850), 5 Exch. 363; 1 L. M. & P. 405; Cox, M. & H. 281; Rob. L. & W. 406; 19 L. J. Ex. 334; 15 L. T. O. S. 257; 15 J. P. 149; 14 Jur. 487; 155 E. R. 159.

Annotation:—**Reld.** Apothecaries Co. *v.* Jones, [1893] 1 Q. B. 89.

170. ——.]—By Apothecaries Act, 1815 (c. 194), s. 20, any person who shall "act or practise as an apothecary" without a certificate is liable to a penalty "for every such offence." Deft. practised as an apothecary without a certificate, & gave medical advice & supplied medicine to three different persons at different times on the same day. He was sued for three penalties:—*Held:* the words "act or practise as an apothecary" were directed against an habitual or continuous course of conduct, & deft. was not guilty of a separate offence in attending each of the three persons, & was only liable to one penalty.—APOTHECARIES CO. *v.* JONES, [1893] 1 Q. B. 89; 67 L. T. 677; 57 J. P. 56; 41 W. R. 267; 9 T. L. R. 68; 17 Cox, C. C. 588; 5 R. 101, D. C.

Discovery in action for penalties.]—*See* DISCOVERY, Vol. XVIII., p. 181, No. 1332.

SUB-SECT. 2.—WHAT CONSTITUTES PRACTISING AS APOTHECARY.

171. Question of fact.]—Deft., a fish salesman, was consulted by a fellow salesman in reference to an injury to the latter's thumb, into which a fish bone had penetrated, with the result that a blister formed on the spot. Deft. bathed the thumb & applied to it a plaster composed of various ingredients compounded according to a recipe handed down in his family. For this deft. charged two guineas. In an action against him by pltf. to recover the penalty of £20 under Apothecaries Act, 1815 (c. 194), s. 20, for having acted or practised as an apothecary without having a certificate, the county ct. judge decided in favour of deft., on the ground that what he had done amounted to acting, not as an apothecary, but as a surgeon in a minor surgical case:—*Held:* the question was one of fact for the county ct. judge, & as he had arrived at the conclusion that deft. had not acted or practised as an apothecary, the appeal from his decision must be dismissed.—APOTHECARIES SOCIETY *v.* GREGORY (1908), 25 T. L. R. 37, D. C.

172. Administering medicines.]—APOTHECARIES' CO. *v.* WARBURTON, No. 133, *ante.*

173. —— .]—THOMPSON *v.* LEWIS, No. 134, *ante.*

PART IV. SECT. 4, SUB-SECT. 1.

a. *Penalties—What must be averred in action for—Defendant practising art of apothecary.*]—APOTHECARIES' HALL *v.* CALVERT (1843), 6 I. L. R. 186.—**IR.**

PART IV. SECT. 4, SUB-SECT. 2.

172 i. *Administering medicines.*]—A person advising patients, compounding medicines for them, & selling those medicines to them is an apothecary.—GERLACH *v.* HERMAN, GERLACH *v.* DE LEON (1894), 20 V. L. R. 284.—**AUS.**

172 ii. ——.]—TERRY *v.* STARKWEATHER (1828), Tay. 57.—**CAN.**

174. —— By surgeon.]—APOTHECARIES' CO. *v.* LOTINGA, No. 137, *ante*.

175. —— As apothecary's assistant.] — Administering medicines while in the service of another person, as an apothecary's assistant, is not a practising as an apothecary, within Apothecaries Act, 1815 (c. 194), s. 22, though the person so administering the medicines is himself paid for them.—BROWN *v.* ROBINSON (1824), 1 C. & P. 264, N. P.

176. —— —— Apprentice acting in different locality.]—A. bound himself apprentice to an apothecary, who resided eight miles from H. The apothecary then took a house at H., in which A. resided, & attended several patients there, the apothecary coming over occasionally, & being consulted by deft. about the patients:—*Held*: this was a practising by A. as an apothecary within Apothecaries Act, 1815 (c. 194), s. 20.—APOTHECARIES' CO. *v.* GREENWOOD (1831), 2 B. & Ad. 708; 9 L. J. O. S. K. B. 331; 109 E. R. 1307.

177. Dispensing medicine—From own prescriptions.]—A person who advises patients, & compounds & sells the medicines recommended by himself, but does not & cannot make up physicians' prescriptions, is liable to the penalties of Apothecaries Act, 1815 (c. 194), s. 20, for practising as an apothecary without a certificate.—APOTHECARIES' CO. *v.* ALLEN (1833), 4 B. & Ad. 625; 1 Nev. & M. K. B. 413; 110 E. R. 591.

Annotations:—**Distd.** Simpson *v.* Ralfe (1834), 4 Tyr. 325. **Refd.** Batty *v.* Monks (1865), 12 L. T. 832.

178. —— ——.]—(1) Practising as an apothecary is the mixing up & preparing medicines, prescribed either by a physician, or by any other person, or by the apothecary himself. (2) The acting as a surgeon or accoucheur is not practising as an apothecary; (3) nor would the party supplying medicine to a friend be so. But if the party sought his living by practising as an apothecary, that is sufficient, as it is not essential that he should have gained his whole livelihood by his practice. — WOODWARD *v.* BALL (1834), 6 C. & P. 577.

Annotations:—*As to* (1) **Refd.** Batty *v.* Monks (1865), 12 L. T. 832. *As to* (2) **Refd.** Apothecaries Soc. *v.* Gregory (1908), 25 T. L. R. 37.

179. —— ——.]—Customers went to the shop of deft., a chemist, & asked him what was good for their ailments, & defts., who was not a certificated apothecary, was accustomed to suggest medicine, make it up, & sell it to them:—*Held*: in so doing, deft. was acting & practising as an apothecary, & was liable to a penalty under Apothecaries Act, 1815 (c. 194), s. 20.—APOTHECARIES' CO. *v.* NOTTINGHAM (1876), 34 L. T. 76, N. P.

180. Not acting as surgeon.] — WOODWARD *v.* BALL, No. 178, *ante*.

181. ——.]—APOTHECARIES SOCIETY *v.* GREGORY, No. 171, *ante*.

182. Not supplying medicine to a friend.] — WOODWARD *v.* BALL, No. 178, *ante*.

183. Chemist giving advice.]—In an action to recover penalties under Apothecaries Act, 1815 (c. 194), s. 20, for practising as an apothecary, by attending, advising, & furnishing medicines, without certificate, the defence was that deft. was a chemist & druggist, & therefore protected by sect. 28, which enacts that nothing in the statute shall affect the business of a chemist & druggist in "the buying, preparing, compounding, dispensing & vending drugs, medicines," etc.; but all persons using, or who shall use, that business may use, exercise, & carry on the same as fully & amply as the same was used, etc., by chemists & druggists before the passing of the Act:—*Held*: (1) deft., to bring himself within this clause, if available, was bound to show by evidence that chemists & druggists did in fact attend, advise, & furnish medicines before the statute passed; (2) the words of Apothecaries Act, 1815 (c. 194), s. 28, do not exempt chemists & druggists from the regulations imposed by the Act on persons intending to practise as apothecaries.—APOTHECARIES' CO. *v.* GREENOUGH (1841), 1 Q. B. 799; 1 Gal. & Dav. 378; 11 L. J. Q. B. 156; 113 E. R. 1337.

Annotations:—*As to* (1) **Refd.** Richmond *v.* Coles (1842), 11 L. J. Q. B. 155. *Generally*, **Mentd.** Nicholson *v.* Cooper (1858), 31 L. T. O. S. 184; Apothecaries Soc. *v.* Gregory (1908), 25 T. L. R. 37.

184. ——.] APOTHECARIES' CO. *v.* NOTTINGHAM, No. 179, *ante*.

185. Not carrying on business by qualified assistants.]—DAVIES *v.* MAKUNA, No. 109, *ante*.

Part V.—Chemists and Druggists.

SECT. 1.—IN GENERAL.

See Pharmacy Act, 1852 (c. 56); Pharmacy Act, 1868 (c. 121); Poisons & Pharmacy Act, 1908 (c. 55).

186. Functions of chemist—Distinguished from apothecary.]—ALLISON *v.* HAYDON, No. 14, *ante*.

187. —— ——.]—APOTHECARIES' CO. *v.* LOTINGA, No. 137, *ante*.

188. Who may be registered as pharmaceutical chemist — Corporation.] — PHARMACEUTICAL SOCIETY *v.* LONDON & PROVINCIAL SUPPLY ASSOCN., No. 257, *post*.

See, now, Poisons & Pharmacy Act, 1908 (c. 55), s. 3 (4).

SECT. 2.—THE PHARMACEUTICAL SOCIETY.

See Pharmacy Act, 1852 (c. 56), s. 1; Pharmacy Act, 1868 (c. 121); Pharmacy Acts Amendment Act, 1898 (c. 25); Poisons & Pharmacy Act, 1908 (c. 55).

189. Powers of—Effect of Pharmacy Act, 1852 (c. 56).]—Deft. society was incorporated by Royal Charter in 1843 for the purpose of advancing chemistry & pharmacy & promoting a uniform system of education of those who should practise the same, & also for the protection of those who carried on the business of chemists & druggists. The charter was subsequently confirmed by above Act:—*Held*: the regulation of the hours of busi-

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PART V. SECT. 1.

188 i. *Who may be registered as pharmaceutical chemist—Corporation.*]—CAPE PROVINCE PHARMACEUTICAL SOCIETY *v.* RECEIVER OF REVENUE, [1921] C. P. D. 157.—S. AF.

b. —— *Whether partner of chemist—Practising within Province.*]—One who resided in the Province until the coming into force of Pharmacy Act, 1891, & was a partner of a druggist practising within the Province, is not entitled to be registered under sect. 12 of the Act, as having practised as a druggist.—*Re* PHARMACY ACT, *Ex p.* HENDERSON (1891), 2 B. C. R. 103.—CAN.

PART V. SECT. 2.

c. *Power of—To make reasonable regulations—Within Pharmacy Act.*]—TAIT *v.* PHARMACY BOARD (1902), 2

Sect. 2.—*The Pharmaceutical Society. Sects.* 3, 4 & 5. *Part VI. Sects.* 1 & 2.]

ness of members, the wages & conditions of employment between master & employee members of the society, the prices at which members might sell their goods, & the expenditure of the funds of the society in the formation of an industrial council committee for, amongst others, the above-named objects, all of which would in effect convert the society into a trade union, a result which could not have been contemplated in 1843 when the charter was granted, & the insurance of members generally against insurable risks, were not within the powers or purposes of the society, & pltf., a registered member of the society, was entitled to an injunction to restrain the society from committing such acts.

Above Act, sect. 1 confirmed the charter, & sect. 2, which authorised the council to make bye-laws for the purposes contemplated by the charter or the Act, recognised that the only purposes of the society were those which were contemplated either by the charter or by the Act; & I am of opinion that this amounts to a statutory limitation of the objects of the society (PETERSON, J.). —JENKIN *v.* PHARMACEUTICAL SOCIETY OF GREAT BRITAIN, [1921] 1 Ch. 392; 90 L. J. Ch. 47; 124 L. T. 309; 37 T. L. R. 54; 65 Sol. Jo. 116.

190. —— To declare poisons—Under Pharmacy Act, 1868 (c. 121).]—Applt., a registered chemist, was convicted of selling veratrine, a poison, without having complied with the provisions of above Act, sect. 17, applicable to the sale of poisons within Sched. A., Part 1, to the Act. Veratrine is a poisonous vegetable alkaloid, & therefore a poison within Sched. A., Part 1. The veratrine in question formed one of the ingredients of an ointment sold by applt. for the destruction of vermin. In 1869 the Pharmaceutical Society in pursuance of above Act, sect. 2, declared by resolution that every compound containing any poison within the Act, when sold for the destruction of vermin, should be deemed a poison within the Act, but did not place these compounds in Sched. A., Part 1:—*Held:* the Pharmaceutical Society had power to declare that a compound containing as one of its ingredients a poison mentioned in Sched. A., Part 1, ought to be deemed a poison within Sched. A., Part 2; the article sold by applt. was a poison within Sched. A., Part 2, & the conviction was, therefore, wrong.—BROWN *v.* LEGGETT, [1906] 1 K. B. 330; 75 L. J. K. B. 193; 94 L. T. 200; 70 J. P. 109; 54 W. R. 362; 22 T. L. R. 180; 50 Sol. Jo. 141; 21 Cox, C. C. 114.

191. —— Not to regulate hours of business of members.]—JENKIN *v.* PHARMACEUTICAL SOCIETY OF GREAT BRITAIN, No. 189, *ante*.

192. —— Not to regulate conditions of employment by members.]—JENKIN *v.* PHARMACEUTICAL SOCIETY OF GREAT BRITAIN, No. 189, *ante*.

193. —— Not to regulate prices of goods sold.]—JENKIN *v.* PHARMACEUTICAL SOCIETY OF GREAT BRITAIN, No. 189, *ante*.

194. —— Not to expend funds on formation of industrial council.]—JENKIN *v.* PHARMACEUTICAL SOCIETY OF GREAT BRITAIN, No. 189, *ante*.

195. —— Not insurance of members.]—JENKIN *v.* PHARMACEUTICAL SOCIETY OF GREAT BRITAIN, No. 189, *ante*.

SECT. 3.—CIVIL RIGHTS AND LIABILITIES.

196. Right to recover charges—Not in respect of services as apothecary.]—A chemist & druggist cannot recover for medicines, if they have been supplied under circumstances which would amount to a practising as an apothecary, within Apothecaries Act, 1815 (c. 194). The question for the jury is, not whether pltf. has charged as an apothecary, but whether he has acted as such.—RICHMOND *v.* COLES (1842), 1 Dowl. N. S. 560; 11 L. J. Q. B. 155; 6 Jur. 238.

197. —— —— Sale of own patent medicine—Advice given on bottle.]—COLLINS *v.* VIDLER (1846), 7 L. T. O. S. 527.

198. Liability for negligence—When acting as medical practitioner.]—JONES *v.* FAY, No. 54, *ante*.

SECT. 4.—OFFENCES.

Liability for manslaughter—Error in dispensing.] —*See* CRIMINAL LAW, Vol. XV., p. 802, No. 8688.

Breach of Sale of Food & Drugs Act, 1875 (c. 63).] —*See* FOOD & DRUGS, Vol. XXV., p. 90, Nos. 158–161.

Prescribing remedy contrary to Venereal Diseases Act, 1917 (c. 21).]—*See* CRIMINAL LAW, Vol. XV., p. 750, No. 8094.

SECT. 5.—PROCEEDINGS AGAINST UNREGISTERED PERSONS.

See Pharmacy Act, 1852 (c. 56), ss. 12, 13; Pharmacy Act, 1868 (c. 121), s. 15; Poisons & Pharmacy Act, 1908 (c. 55), s. 3.

199. Use of name, sign, or title—What amounts to—Pharmacy Act, 1852 (c. 56), s. 12.]—Above sect. provides that if a person, not being registered under the Act as a pharmaceutical chemist, shall assume, use, or exhibit any name, title, or sign implying that he is a person registered under the Act or that he is a member of the Pharmaceutical Society shall be liable to a penalty.

Deft. carried on the business of a vendor of medicine at a shop over the door of which was his name followed by the words "The Pharmacy." Deft. was not registered as a pharmaceutical

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S. R. N. S. W. 168; 19 N. S. W. W. N. 111.—**AUS.**

PART V. SECT. 3.

d. *Liability for negligence.*]—STRETTON *v.* HOLMES (1890), 19 O. R. 286. —**CAN.**

PART V. SECT. 5.

e. *Use of name sign or title—What amounts to—Pharmacy Act.*]—Resp. was not registered as a pharmaceutical chemist. He had in his window a bottle of medicine labelled as follows: "From J. McL. . . . Grawler. . . . The mixture. Prescriptions made up":—*Held:* this might be construed that deft. held himself out under Pharmacy Act, 1891, as a dispensing druggist.—YOUNG *v.* MCLEAN, [1914] S. A. L. R. 10.—**AUS.**

f. —— —— ——.]—A person who, not being a registered pharmacist, in his shop, which appeared to be that of a chemist, dispensed medicines as ordinarily a dispensing chemist does:—*Held:* he was properly convicted of pretending to be a dispensing chemist under Pharmacy Act, 1897.—FARRAN *v.* GEE (1917), 22 C. L. R. 550.—**AUS.**

g. —— —— ——.]—BUTCHERS *v.* BARNES, [1921] V. L. R. 148.—**AUS.**

h. —— —— ——.]—R. *v.* SIMPSON (1896), 27 O. R. 603.—**CAN.**

k. —— —— ——.]—R. *v.* HERRELL (1899), 12 Man. L. R. 522.—**CAN.**

l. —— —— ——.]—NOVA SCOTIA PHARMACEUTICAL SOCIETY *v.* RIORDAN (1917), 51 N. S. R. 142; 36 D. L. R. 652.—**CAN.**

m. —— —— ——.]—SHAW *v.* PHARMACY BOARD OF NEW ZEALAND (1893), 11 N. Z. L. R. 715.—**N.Z.**

n. —— —— ——.]—GRAY *v.*

chemist under above Act:—*Held:* deft. had not assumed, used, or exhibited a name, title, or sign implying that he was registered under the Act or that he was a member of the Pharmaceutical Society.—PHARMACEUTICAL SOCIETY OF GREAT BRITAIN *v.* MERCER, [1910] 1 K. B. 74; 79 L. J. K. B. 50; 101 L. T. 635; 74 J. P. 26; 26 T. L. R. 35; 54 Sol. Jo. 33.

200. Sale by unqualified person—Pharmacy Act, 1868 (c. 121), s. 15—Effect of licence under Poisons & Pharmacy Act, 1908 (c. 55), s. 2.]—(1) Where a person, licenced by the local authority under Poisons & Pharmacy Act, 1908 (c. 55), s. 2, to sell poisonous substances to be used exclusively in agriculture or horticulture, sells such a substance in breach of the regulations made under that sect., as, for instance, by selling it in a vessel not duly labelled with the name & address of the seller, he may be sued in the county ct. for the statutory sum or penalty of £5 imposed by Pharmacy Act, 1868 (c. 121), s. 15, on the sale of poisons by persons who are not duly registered pharmaceutical chemists or chemists & druggists, & such seller is not protected by Poisons & Pharmacy Act, 1908 (c. 55), s. 2.

(2) Where the breach of the regulations is that of selling the poison in a vessel not duly labelled, the fact that deft. has made himself criminally liable under Pharmacy Act, 1868 (c. 121), s. 17, does not bar the claim for the penalty in the county ct.—PHARMACEUTICAL SOCIETY *v.* JACKS, [1911] 2 K. B. 115; 80 L. J. K. B. 767; 104 L. T. 640; 75 J. P. 351; 27 T. L. R. 373.

201. —— —— Penalty recoverable in county court.]—PHARMACEUTICAL SOCIETY *v.* JACKS, No. 200, *ante*.

—— **Liability of corporation.**]—*See* No. 257, *post*.

Part VI.—Dentists.

SECT. 1.—IN GENERAL.

See, generally, Dentists Act, 1921 (c. 21).

Establishment of Dental Board.]—*See* Dentists Act, 1921 (c. 21), s. 2, sched. II.

SECT. 2.—THE DENTISTS' REGISTER.

See, generally, Dentists Act, 1878 (c. 33); Dentists Act, 1921 (c. 21); Dentists Act, 1923 (c. 36).

202. Right to registration — Pupil at time of passing of the Act—Whether absolute right.]—A person who has been articled as a pupil, & has paid a premium to a dental practitioner entitled to be registered under Dentists Act, 1878 (c. 33), in consideration of receiving from such practitioner a complete dental education, has not, although his articles expired before Jan. 1, 1880, an absolute right to registration under the Act, unless he has made the declaration required under sect. 7, in the case of persons engaged in the practice of dentistry at the date of the passing of the Act, at least in a case where there was time for registering him after the expiration of his articles, & before Jan. 1, 1880.—R. *v.* MEDICAL COUNCIL, [1897] 2 Q. B. 203; 66 L. J. Q. B. 588; 76 L. T. 706; 46 W. R. 2; 13 T. L. R. 446, C. A.

203. Erasure of name from—A judicial power of General Medical Council—Only exercisable when case within Dentists Act, 1878 (c. 33), ss. 12, 13.]—Where a person has been registered under above Act as a licentiate of a medical authority, the fact that his diploma has since been revoked by such medical authority does not render him liable to be erased from the dentists' register under above Act.

The power of erasure by the council is in the nature of a judicial power, & must be confined to the matters into which they are authorised to inquire for the purpose of exercising such power. . . . . The mere fact that a medical authority has struck a person's name off their register of licentiate does not authorise the erasure of his name by the general council from the register under above Act in the absence of any exercise by the council of the judicial powers given to them by above Act, sect. 13 (LORD ESHER, M.R.).

I think that the true construction of above Act is, that, when a person's name is once placed on the register, it cannot be removed, unless the case is brought within above sects., or that it cannot be removed merely because the person has lost the qualification in respect of which he was originally entitled to be registered (LOPES, L.J.).—*Ex p.* PARTRIDGE (1887), 19 Q. B. D. 467; 52 J. P. 40; 36 W. R. 442; *sub nom.* R. *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION OF UNITED KINGDOM, 56 L. J. Q. B. 609; 3 T. L. R. 817, C. A.; *subsequent proceedings, sub nom.* PARTRIDGE *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION OF UNITED KINGDOM (1890), 25 Q. B. D. 90, C. A.; (1892), 57 J. P. 4, C. A.

204. —— Sufficiency of grounds for—Qualification subsequently taken away.]—*Ex p.* PARTRIDGE, No. 203, *ante*.

205. —— —— Infamous or disgraceful conduct.]—Pltf. was a duly registered dentist. He had advertised his name in connection with a

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BREMRIDGE (1887), 14 R. (Ct. of Sess.) 60; 24 Sc. L. R. 747 (J.).—SCOT.

o. —— —— ——.]—BREMRIDGE *v.* TOMLINSON (1894), 21 R. (Ct. of Sess.) 46; 31 Sc. L. R. 683; 2 S. L. T. 62 (J.).—SCOT.

p. —— —— ——.]—The use of the title "scientific instrument maker & technical chemist" by a person who had not the statutory qualification was a contravention of Pharmacy Act, 1868.—BREMRIDGE *v.* HUME (1895), 23 R. (Ct. of Sess.) 9 (J.).—SCOT.

q. —— —— ——.]—BREMRIDGE *v.* TURNBULL (1895), 23 R. (Ct. of Sess.) 12 (J.).—SCOT.

r. —— —— ——.]—R. *v.* HANNAH, [1915] App. D. 344.—S. AF.

PART VI. SECT. 1.

t. *Regulations of dental college—Whether unreasonable.*]—HODGSON *v.* COWAN (1913), 26 W. L. R. 407; 5 W. W. R. 907; 15 D. L. R. 236; 6 Sask. L. R. 377.—CAN.

a. *Liability for negligence — Registered & unregistered dentist—Standard of care.*]—DICKSON *v.* HYGIENIC INSTITUTE, [1910] S. C. 352.—SCOT.

PART VI. SECT. 2.

202 i. *Right to registration—Pupil at time of passing of the Act—Whether absolute right.*]—HOWARD *v.* DENTAL SURGERY & DENTISTRY BOARD EXAMINERS (1914), 10 Tas. L. R. 44.—AUS.

205 i. *Erasure of name from—Sufficiency of grounds for—Infamous or disgraceful conduct.*]—*Re* KENNELY (1912), 12 S. R. N. S. W. 319; 29 N. S. W. W. N. 64.—AUS.

205 ii. —— —— ——.]—THOMAS *v.* DENTAL BOARD (1916), 16 S. R. N. S. W. 369; 33 N. S. W. W. N. 112.—AUS.

205 iii. —— —— ——.]—SPILLER *v.* DENTAL BOARD (1918), 18 S. R. N

Sect. 2.—The dentists' register. Sect. 3.]

dental institution. The General Council considered such conduct amounted to "disgraceful conduct in a professional respect" within Dentists Act, 1878 (c. 33), & erased his name from the register. On an action for a *mandamus* to have the name reinstated:—*Held:* there were facts before the General Council on which they might come to the determination to erase pltf.'s name from the register, &, therefore, this ct. would not interfere.—PARTRIDGE *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION (1892), 57 J. P. 4; 8 T. L. R. 453, C. A.

206. —— Publication of erasure—Whether restrained by injunction.]—ALLINSON *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION (1892), 8 T. L. R. 784, C. A.; *subsequent proceedings*, [1894] 1 Q. B. 750, C. A.

207. Professional misconduct — What amounts to — Advertising.] — PARTRIDGE *v.* GENERAL COUNCIL OF MEDICAL EDUCATION & REGISTRATION, No. 205, *ante*.

208. —— —— ——.]—One of the parties to a partnership deed between dentists was, as a director of the American Dental Institute, Ltd., a party to self-puffing advertisements of the co. in which it was alleged (*inter alia*) that among other advantages the instruments of the co. were always sterilised before use, & that a trained lady nurse was always present at operations so as to prevent any possibility of scandal between an operator & a lady patient:—*Held:* the partner had been guilty of professional misconduct within the meaning of the partnership deed which entitled the other partner to determine the partnership.—CLIFFORD *v.* TIMMS, [1908] A. C. 12; 77 L. J. Ch. 91; 98 L. T. 64; 24 T. L. R. 112; 52 Sol. Jo. 92, H. L.; *affg.* S. C. *sub nom.* HILL *v.* CLIFFORD, CLIFFORD *v.* TIMMS, CLIFFORD *v.* PHILLIPS, [1907] 2 Ch. 236, C. A.

209. *S. P.* CLIFFORD *v.* PHILLIPS, [1908] A. C. 15; 77 L. J. Ch. 93; 98 L. T. 65; 52 Sol. Jo. 92, H. L.; *affg.* S. C. *sub nom.* HILL *v.* CLIFFORD, CLIFFORD *v.* TIMMS, CLIFFORD *v.* PHILLIPS, [1907] 2 Ch. 236, C. A.

210. Dentists Act, 1923 (c. 36), s. 1—Service in His Majesty's forces during the war—Meaning of.] —By above sect. one of the conditions for the registration of an unregistered dentist is that appct. shall satisfy the board that he "served during the late war in His Majesty's forces":—*Held:* the condition had been fulfilled by appct. who, having attested voluntarily in 1917, & having been ordered to go home till called for, was afterwards called up for medical examination, & received one day's pay, &, having again returned home, subsequently received a discharge on the ground of permanent & total disablement.—BINNS *v.* DENTAL BOARD (1924), 40 T. L. R. 699, D. C.

SECT. 3.—STATUTORY OFFENCES.

See Dentists Act, 1878 (c. 33), s. 3.

211. Taking or using an addition or description implying registration of special qualification—What amounts to — A question of fact.] — Whitlock, resp., who was neither on the dentists' register, nor a legally qualified medical practitioner, carried on a practice as a dentist at certain premises, where, on the front railings, there was a white marble slab with the words "Mr. W. Lawson Whitlock, 10—5" upon it. At the side of the front door & at the side door were the words "Mr. C. R. Stent, R.D.S. Eng., Surgeon-Dentist." In the forecourt was a gas lamp on which was written "Mr. C. R. Stent, Surgeon-Dentist." There was a further notice outside the premises "Messrs. Stent, Surgeon-Dentists, established 1840, hours of attendance," etc. Respondent stated that he purchased the practice from the personal representative of the late Stent, together with the right to keep Stent's name & qualifications upon the premises. On an information laid by applt. for the British Dental Association, a police magistrate decided that resp. did not, contrary to Dentists Act, 1878 (c. 33), s. 3, take & use an addition or description "R. D. S. Eng., Surgeon-Dentist," implying that he was then registered under the Act, or that he was specially qualified to practise dentistry:—*Held:* the magistrate's decision was a finding of fact with which the ct. could not interfere.—BROWN *v.* WHITLOCK (1903), 67 J. P. 451; 19 T. L. R. 524; 47 Sol. Jo. 548, D. C.

212. —— —— **Additional title — "German Dental Institute, West Central Dental Institute."**] —Applt., not being a registered person under Dentists Act, 1878 (c. 33), or a legally qualified medical practitioner, was summoned for using an additional title, "German Dental Institute, West Central Dental Institute, Limited," implying that he had registered under the Act or was specially qualified to practise dentistry:—*Held:* he was rightly convicted.—PANHAUS *v.*

S. W. 192; 35 N. S. W. W. N. 55.—**AUS.**

205 iv. —— —— ——.]—Dentistry Act, s. 39, empowering the council of the College of Dental Surgeons to erase the name of a practitioner guilty of infamous or unprofessional conduct, applies to acts committed by a member before registration under the Act.—G—— *v.* COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA (1908), 14 B. C. R. 129; 9 W. L. R. 650.—**CAN.**

205 v. —— —— ——.]—COLLEGE OF DENTAL SURGEONS *v.* MOODY (1909), 10 W. L. R. 525.—**CAN.**

205 vi. —— —— ——.]—GORDON *v.* ROYAL COLLEGE OF DENTAL SURGEONS (1911), 18 O. W. R. 149; 2 O. W. N. 733.—**CAN.**

207 i. *Professional misconduct—What amounts to—Advertising.*]—OSBORNE *v.* DENTAL BOARD (1916), 16 S. R. N. S. W. 125; 33 N. S. W. W. N. 36.—**AUS.**

207 ii. —— —— ——.]—*Re* DAVIDSON & ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO, [1925] 3 D. L. R. 543; 57 O. L. R. 222.—**CAN.**

207 iii. —— —— ——.]—MEYER *v.* COLONIAL MEDICAL COUNCIL (1904), 21 S. C. 472.—**S. AF.**

b. —— ——.] — LOCKETT *v.* DENTAL BOARD (1914), 14 S. R. N. S. W. 50; 31 N. S. W. W. N. 24.—**AUS.**

c. —— ——.]—Where a professional class, such as dentists, is governed by a statute applying specifically to that profession, & such statute prescribes the manner in which the members of the profession shall carry on their business, it is unprofessional conduct to carry it on otherwise.—*Re* MOODY & COLLEGE OF DENTAL SURGEONS (1909), 14 B. C. R. 206.—**CAN.**

d. *No application for registration—Within stipulated period.*]—*Re* DENTAL BOARD, *Ex p.* PERRY (1922), 22 S. R. N. S. W. 230; 39 N. S. W. W. N. 69.—**AUS.**

PART VI. SECT. 3.

211 i. *Taking or using an addition or description implying registration of special qualification—What amounts to—Question of fact.*] — The words "specially qualified" in Dentists Act, 1878, refer to a qualification in the nature of a degree, diploma, etc., & do not include the case of a description implying mere personal skill & accomplishment.—BYRNE *v.* ROGERS, [1910] 2 I. R. 220.—**IR.**

e. —— —— *Notice on door.*]—EMSLIE *v.* PATERSON (1897), 24 R. (Ct. of Sess.) 77; 34 Sc. L. R. 674; 5 S. L. T. 77 (J.).—**SCOT.**

BROWN (1904), 68 J. P. 435; 48 Sol. Jo. 508, D. C.

Annotations:—**Apld.** Barnes *v.* Brown, [1909] 1 K. B. 38. **Distd.** Bellerby *v.* Heyworth, [1909] 2 Ch. 23. **Dbtd.** R. *v.* Registrar of Cos., *Ex p.* Bowen, [1914] 3 K. B. 1161. I find it difficult to suppose that the case of *Panhaus* v. *Brown* is still good law, having regard to the decision of the House of Lords in *Minter* v. *Snow* [No. 218, *post*] (AVORY, J.).

213. —— —— —— United Dental Service, Ltd.] —Application was made for the registration, under Cos. Act, 1908 (c. 69), of a co. with the name of "The United Dental Service, Limited." One of the objects of the co. was "to carry on the practice, profession, or business of practitioners in dentistry in all its branches," which it was intended to carry on by practitioners not registered under Dentists Act, 1878 (c. 33):—*Held:* the use of the proposed name by the co. when carrying on business by unregistered practitioners would not constitute an offence under Dentists Act, 1878 (c. 33), s. 3, & therefore the object of the co. was not unlawful; & the registrar of cos. had no power to refuse registration upon the ground that the name of the co. would be calculated to deceive people into the belief that the business was carried on by registered practitioners.—R. *v.* REGISTRAR OF COMPANIES, *Ex p.* BOWEN, [1914] 3 K. B. 1161; 84 L. J. K. B. 229; 112 L. T. 38; 30 T. L. R. 707, D. C.

214. —— —— Notice on door—Room fitted as operating room.]—Applt., who was not registered under Dentists Act, 1878 (c. 33), & was not a legally qualified medical practitioner, carried on a dentist's practice at premises on the inner door & windows of which he exhibited his name & a notice as follows: "H. J. Barnes. Finest artificial teeth at moderate prices. Extractions. Advice free. Hours 10—7. English & American teeth. Advice free. Painless extractions." His room was fitted as a dentist's operating room. Applt. having been convicted by a ct. of summary jurisdiction of having taken & used a description implying that he was specially qualified to practise dentistry:—*Held:* there was evidence upon which applt. could be convicted of an offence under Dentists Act, 1878 (c. 33), s. 3.—BARNES *v.* BROWN, [1909] 1 K. B. 38; 78 L. J. K. B. 39; 99 L. T. 801; 72 J. P. 485; 25 T. L. R. 3; 53 Sol. Jo. 14, D. C.

Annotations:—**Overd.** Bellerby *v.* Heyworth, [1910] A. C. 377. **Consd.** Royal College of Veterinary Surgeons *v.* Kennard, [1914] 1 K. B. 92. **Refd.** Pharmaceutical Soc. of Great Britain *v.* Mercer, [1910] 1 K. B. 74.

215. —— —— Statement — To patient.]—Applt., who was in the employment of a county council, was medically examined by the council's medical officer, & received from him a document in which it was stated that, as his teeth were found to be defective, he should see a registered dentist, & that it would be necessary for him to obtain & forward to the medical officer a certificate that his teeth were in a satisfactory condition. At the foot of the document were the words "Please show this form to the dentist, as only the certificate of a registered dentist can be accepted." Applt. went to resp., who practised dentistry, but who was neither a registered dentist nor a legally qualified medical practitioner, in the belief that he was a registered dentist, & had his teeth examined. Applt. handed him the above document, telling him that he required a certificate by a registered dentist. Respondent read the document & said that he had given hundreds of such certificates to the Post Office, & that he would give applt. the certificate required, when he returned on a subsequent day to have his teeth finished. Applt. did not return & no such certificate was given. Resp. did not at any time in writing or orally use the words "dentist" or "registered dentist" or state that he was a person specially qualified to practise dentistry:—*Held:* resp. had taken or used a description implying that he was registered under Dentists Act, 1878 (c. 33), contrary to sect. 3 of that Act, & had therefore rendered himself liable to a penalty.—ROBERTSON *v.* HAWKINS, [1913] 1 K. B. 57; 82 L. J. K. B. 97; 107 L. T. 795; 77 J. P. 63; 29 T. L. R. 32; 23 Cox, C. C. 239, D. C.

Annotation:—**Consd.** Blain *v.* King, [1918] 2 K. B. 30.

216. —— —— —— Given in evidence in court.] —Applt. was an artificial teeth specialist, & was not a registered dentist. When giving evidence in a county ct. he stated, in answer to a question put to him by the judge, that the was a dentist. In respect of this statement he was charged for that he did unlawfully "take or use the name or title of 'dentist,'" contrary to Dentists Act, 1878 (c. 33), s. 3. The justices, being satisfied on the evidence that applt. had held himself out in public to be a dentist, convicted him of the offence charged:—*Held:* there was evidence on which the justices could find that applt. had committed the offence with which he was charged.—BLAIN *v.* KING, [1918] 2 K. B. 30; 87 L. J. K. B. 993; 119 L. T. 54; 82 J. P. 179; 62 Sol. Jo. 520; 17 L. G. R. 269; 26 Cox, C. C. 285, D. C.

217. —— Qualification by diploma, certificate or other hall mark—Not by competence or skill.]—The words "specially qualified to practise dentistry" in Dentists Act, 1878 (c. 33), s. 3, refer to a qualification by diploma, certificate, or other hall mark, & not to competence or skill.—BELLERBY *v.* HEYWORTH, [1910] A. C. 377; 79 L. J. Ch. 402; 102 L. T. 545; 74 J. P. 257; 26 T. L. R. 403; 54 Sol. Jo. 441, H. L.

Annotations:—**Apld.** Pharmaceutical Soc. of Great Britain *v.* Mercer, [1910] 1 K. B. 74. **Folld.** Minter *v.* Snow (1910), 74 J. P. 258; R. *v.* Registrar of Cos., *Ex p.* Bowen, [1914] 3 K. B. 1161. **Apld.** Royal College of Veterinary Surgeons *v.* Kennard, [1914] 1 K. B. 92. **Refd.** Graham *v.* Tanner, [1913] 1 K. B. 17; Hans *v.* Graham, [1914] 3 K. B. 400; Blain *v.* King, [1918] 2 K. B. 30.

218. *S. P.* MINTER *v.* SNOW (1910), 74 J. P. 258; 54 Sol. Jo. 441, H. L.

Annotation:—**Folld.** R. *v.* Registrar of Cos., *Ex p.* Bowen, [1914] 3 K. B. 1161.

219. Limited company—Whether person within Act.]—A co. was formed in 1906 to carry on the business of G. whose name, formerly on the dentists' register, as struck off on May 22, 1906. An action was brought at the instance of the British Dental Association against the co. & G.

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215 i. —— —— *Statement — To patient.*]—JOSKE *v.* LUBRANO (1906), 4 C. L. R. 71.—**AUS.**

f. —— —— *No representation made.*]—BEAMES *v.* FIFE, BEAMES *v.* DEAN (1912), 12 S. R. N. S. W. 517; 29 N. S. W. W. N. 104.—**AUS.**

g. —— —— ——.]—*Re* R. *v.* LINDUP, *Ex p.* A.-G. (1926), 47 N. L. R. 108.—**S. AF.**

h. —— —— *Who may sue.*]—R. (DENTAL ASSOCN. OF ALBERTA) *v.* AUSTIN (1909), 10 W. L. R. 387.—**CAN.**

k. —— —— *What charge must specify.*]—COWAN *v.* SCHILLING (1915), 30 W. L. R. 463; 7 W. W. R. 1112.—**CAN.**

l. —— *Qualification by diploma, certificate, or other hall mark.*]—JOSKE *v.* DENTAL CASH ORDER CO. PROPRIETARY, LTD. (1916), 21 C. L. R. 172.—**AUS.**

m. ——.]—DUNGEY *v.* WALKER, [1918] S. A. L. R. 57.—**AUS.**

219 i. *Limited company—Whether person within Act.*]—The word "person" in Dentists Act, 1878, relates only to an individual, & does not embrace a corpn. or co.—O'DUFFY *v.* JAFFE, [1904] 2 I. R. 27; 37 I. L. T. 236.—**IR.**

219 ii. ——.]—A.-G. (O'DUFFY) *v.* APPLETON, [1907] 1 I. R. 252.—**IR.**

219 iii. —— ——.]—Although the word "person" in Dentists Act, 1878, s. 3, has been held not to include artificial persons, & not to apply to limited cos., a limited co. is not at liberty to use the word "dentist"

Sect. 3.—Statutory offences. Sect. 4. Part VII.]

the sole director to restrain the co. from representing that it was carrying on the business of a dentist or surgeon dentist as successors to G. or that it was a person specially qualified to practise dentistry:—*Held:* the co. was a "person" within the meaning of Dentists Act, 1878 (c. 33), s. 3, & an injunction must be granted as asked.—A.-G. *v.* SMITH (GEORGE C.), LTD., [1909] 2 Ch. 524; 78 L. J. Ch. 781; 100 L. T. 225; 25 T. L. R. 257.

220. —— Practising as successor to man struck off the register—Injunction.]—A.-G. *v.* SMITH (GEORGE C.), LTD., No. 219, *ante*.

221. —— Right to carry on business.]—R. *v.* REGISTRAR OF COMPANIES, *Ex p.* BOWEN, No. 213, *ante*.

SECT. 4.—RECOVERY OF CHARGES.

See Dentists Act, 1878 (c. 33), ss. 3, 5.

222. Unregistered dentist—Recovery of price of materials—Not fees for fitting.]—A person who was carrying on the practice of a dentist, but who was not registered under Dentists Act, 1878 (c. 33), made for deft. & fitted to the deft.'s mouth a set of false teeth which were taken by deft. & kept & used by him. Deft. having refused to pay for the same:—*Held:* Dentists Act, 1878 (c. 33), s. 5, which prevented an unregistered person from recovering any fee or charge for "the performance of any dental operation, or for any dental attendance or advice," did not prevent the unregistered person from recovering the price of the set of teeth so supplied, as distinguished from the fitting of the same.—HENNAN & CO., LTD. *v.* DUCKWORTH (1904), 90 L. T. 546; 20 T. L. R. 436; 48 Sol. Jo. 436.

Annotation:—**Refd.** Seymour *v.* Pickett (1905), 74 L. J. K. B. 413.

223. —— —— ——.]—A person who is not registered under Dentists Act, 1878 (c. 33), though he is prohibited by sect. 5, of the Act from recovering any fee for the performance of any dental operation, can maintain an action for the price of material, such as gold & false teeth, supplied by him to a patient.

A person who was not registered under Dentists Act, 1878 (c. 33), operated as a dentist on a patient, & supplied him with false teeth & gold. He made a charge of £45, & the patient gave him two cheques for £20 and £25 respectively, the latter cheque being post-dated. The £20 cheque was duly paid, but the £25 cheque was dishonoured on presentation, the drawer having stopped the payment of it by his bankers.

The dentist brought an action in the county ct. against the patient on the £25 cheque. The judge found that £21 represented the price of the gold & other material supplied by pltf. Pltf. when being examined as a witness claimed to appropriate the £20 cheque to the payment of his professional fees. No appropriation had been made by the patient:—*Held:* pltf. was entitled to make the appropriation & to recover the £21 in the action.—SEYMOUR *v.* PICKETT, [1905] 1 K. B. 715; 74 L. J. K. B. 413; 92 L. T. 519; 21 T. L. R. 302, C. A.

Annotation:—**Refd.** Robinson *v.* Marsh, [1921] 2 K. B. 640.

224. From executor of patient—Death before artificial teeth fitted.]—A contract to make a set of artificial teeth is a contract for the sale of goods, wares or merchandise within the Stat. Frauds, s. 17.

A. ordered of B. a set of artificial teeth, which were by the terms of the contract to be fitted to her mouth; before they were so fitted A. died:—*Held:* B. could not sue A.'s exor. in an action for work & labour done, & materials provided for his testatrix.—LEE *v.* GRIFFIN (1861), 1 B. & S. 272; 30 L. J. Q. B. 252; 4 L. T. 546; 7 Jur. N. S. 1302; 9 W. R. 702; 121 E. R. 716.

Annotations:—**Refd.** Copland *v.* Miller (1903), *Times*, Nov. 28; R. *v.* Wood Green Profiteering Committee, *Ex p.* Boots Cash Chemists (Southern) (1919), 89 L. J. K. B. 55.

225. Contract for sale of artificial teeth—Stat. Frauds, s. 17.]—LEE *v.* GRIFFIN, No. 224, *ante*.

Part VII.—Midwives.

See, generally, Midwives Act, 1902 (c. 17); Midwives Act, 1918 (c. 43).

226. Right of appeal from Board.]—Applt. a midwife whose name was upon the roll, was charged before the Board with having been guilty of misconduct within Midwives Act, 1902 (c. 17), s. 3, in that she had been & still was cohabiting with a man not her husband. An inquiry took place before the Board, & at the first meeting she gave evidence. At an adjourned meeting of which she had notice but at which she did not appear, the Board had before them a report by a relieving officer not verified by statutory declaration & of which no copy had been supplied to applt. as required by Rules of Procedure, 1911, r. 2. The Board decided that applt. had not told the truth & removed her name from the roll. Certain statements in the report were inaccurate & might well have influenced the Board in arriving at their decision:—*Held:* (1) the misconduct dealt with by Midwives Act, 1902 (c. 17), s. 3, was not limited to misconduct in the discharge of the duties of

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or its synonyms in such a way as to amount to a false representation, calculated to induce the public to believe that the individuals whom it comprises or employs are qualified "dentists."—A.-G. (O'DUFFY) *v.* MYDDLETONS, LTD., [1907] 1 I. R. 471.—IR.

n. *Practising dentistry — What amounts to.*]—Accused who took an impression of the gums & later fitted a plate in the mouth of B., & who treated two teeth for F., was practising dentistry.—R. *v.* AUSTIN (1916), 33 W. L. R. 758.—CAN.

o. —— ——.]—A person who, besides having taken impressions of three persons' mouths & supplied them with false teeth, also filled & stopped the teeth of one of the three persons, & took fees for these operations:—*Held:* to have practised as a dentist.—R. *v.* GINSBERG (1904), 18 E. D. C. 272.—S. AF.

p. —— ——.]—Persons who take impressions of the mouths of others & from the impressions so taken make, & subsequently fit in, false teeth, practise as dentists & do not merely exercise the calling of dental mechanics.—R. *v.* VLOTMAN, R. *v.* KOONIN, [1911] C. P. D. 879.—S. AF.

q. —— ——.]—VLOTMAN *v.* R. (1925), 46 N. L. R. 317.—S. AF.

PART VI. SECT. 4.

222 i. *Unregistered dentist—Recovery of price of materials—Not fees for fitting.*]—ANDERSON *v.* JONES, [1920] E. D. L. 124.—S. AF.

r. —— *Employed by registered dentist—Whether latter can sue for fees—For services rendered to patient by former.*]—BURGESS *v.* ZIMMERLI (1914), 27 W. L. R. 875; 6 W. W. R. 908; 17 D. L. R. 708; 19 B. C. R. 428.—CAN.

PART VII.

t. *Construction of statute—Meaning of words—"Attend women in childbirth."*]—DUVANEL *v.* WARD, [1921] V. L. R. 69.—AUS.

a midwife, but included misconduct which in the opinion of the Board tended to unfit applt. for the discharge of the duties of a midwife; if the facts had justified the Board in coming to the conclusion at which they had arrived, they would have been entitled, if they thought fit, to remove applt.'s name from the roll; but (2) as the report of the relieving officer had been irregularly admitted, & as it was impossible to say that the Board was not influenced by the inaccurate statements in it, the order removing applt.'s name from the roll must be quashed. (3) *Semble:* a full right of appeal is given by Midwives Act, 1902 (c. 17).—STOCK *v.* CENTRAL MIDWIVES BOARD, [1915] 3 K. B. 756; 84 L. J. K. B. 1835; 113 L. T. 428; 79 J. P. 397; 31 T. L. R. 436; 13 L. G. R. 1227.

Annotation:—As to (2) **Refd.** Davies *v.* Central Midwives Board (1919), 88 L. J. K. B. 962.

See, further, Midwives Act, 1902 (c. 17), s. 4.

227. Duty of Board at hearing—To act in judicial manner—Whether bound by legal rules of evidence.]—Owing to investigations made by an inspector acting for the local supervising authority over midwives, charges of misconduct were brought against applt., a certified midwife, that she had employed an uncertified person to act as her substitute contrary to the provision in Midwives Act, 1902 (c. 17), s. 1 (4), that no woman certified under the Act should employ an uncertified person as her substitute. At an inquiry held by the Central Midwives Board evidence was given by the inspector of admissions made to him by applt. that her husband, who was uncertified, had acted for her as her substitute in a certain case while she was engaged in another case, & of statements made to him by other patients of applts. who were not called before the Board. Applt. herself gave evidence denying the truth of the charges, but the Board, after deliberation, decided that misconduct was proved, & that applt.'s name should be removed from the roll. On appeal to the Div. Ct. objection was taken on behalf of applt. that the evidence before the Board was all hearsay evidence, & was therefore inadmissible against applt.:—*Held:* (1) to constitute an "employment" of a substitute within sect. 1, sub-sect. 4 of the Act, it was not necessary that the substitute should be paid, & that the offence under that sub-sect. would be committed by employing an uncertified substitute, whether such substitute were paid or not; (2) the Board were acting as a judicial body & were entitled to act upon the best evidence they could get, & having before them evidence of misconduct upon which they could properly act, & having upon that evidence come to the conclusion that misconduct was proved, the ct. would not interfere, but the ct. declined to lay down any general rules as to the conduct of such inquiries by the Board. *Qu.:* whether on such an inquiry the Board are bound by the legal rules of evidence.—*Re* FELDMANN (1907), 97 L. T. 548; 71 J. P. 269; 23 T. L. R. 432; 5 L. G. R. 653.

Annotation:—Generally, **Refd.** Stock *v.* Central Midwives Board, [1915] 3 K. B. 756.

228. —— —— Entitled to act on best evidence obtainable.]—*Re* FELDMANN, No. 227, *ante.*

229. —— —— Admission of improper evidence.]—STOCK *v.* CENTRAL MIDWIVES BOARD, No. 226, *ante.*

230. —— —— Evidence by statutory declaration.]—A midwife was charged before the Central Midwives Board with having contravened certain of their rules. The charges were considered to be proved, but sentence was postponed. In the meantime the local supervising authority, appointed under Midwives Act, 1902 (c. 17), s. 8, were instructed to furnish reports at specified times on the future conduct of the accused. One of these reports was unsatisfactory, & the name of the accused was thereupon removed from the roll, but the report was not communicated to her. Part of the evidence before the Board consisted of a statutory declaration made by a former patient, who refused to appear as a witness. On appeal by the midwife further oral & other evidence was admitted:—*Held:* (1) the charges were abundantly proved & the decision of the Board must be affirmed; (2) the Board were entitled to arrive at their decision when the case was heard & to act upon it at a later date, as they had done after receiving the report; (3) the Central Midwives Board Rules, 1916, Sched. D, r. 5, providing for the verification by statutory declaration of statements relied on as part of the case against the accused person, applied to final hearings before the Board as well as to preliminary inquiries, & at the final hearing the Board might receive in evidence the statutory declaration of a person who refused to appear as a witness, provided that a copy had been supplied to the accused person.—DAVIES *v.* CENTRAL MIDWIVES' BOARD (1918), 88 L. J. K. B. 962; 120 L. T. 349; 83 J. P. 74; 17 L. G. R. 129.

231. —— —— Postponement of sentence.]—DAVIES *v.* CENTRAL MIDWIVES' BOARD, No. 230, *ante.*

232. What amounts to employment of substitute—Substitute not paid.]—*Re* FELDMANN, No. 227, *ante.*

233. What amounts to misconduct—Not limited to misconduct in discharge of duties—Conduct tending to unfit applicant for discharge of duties.]—STOCK *v.* CENTRAL MIDWIVES BOARD, No. 226, *ante.*

234. Attending patient "under direction of" qualified medical practitioner—Midwives Act, 1902 (c. 17), s. 1 (2).]—A woman who had formerly been, but had ceased to be, certified under above Act, was engaged to attend at five cases of confinement, & in each case as soon as she was engaged a qualified medical practitioner was also retained. In each case the woman attended & delivered the patient. In none of the cases was the doctor present or sent for at or before the birth of the child, but in each case he paid a professional visit thereafter. In none of the cases did the doctor make any professional inquiry or give any instructions. There was no emergency, but, if there had been, there was opportunity for summoning the doctors. In the opinion of the doctors the woman was capable & trustworthy, & no instructions to her were necessary in any of the cases:—*Held:* in these cases the woman had not attended the patients "under the direction" of a qualified medical practitioner within above sub-sect. of above Act, & she was liable to be convicted under that sub-sect.—DAVIS *v.* MORRIS, [1923] 2 K. B. 508; 92 L. J. K. B. 678; 129 L. T. 88; 87 J. P. 83; 39 T. L. R. 454; 21 L. G. R. 462; 27 Cox, C. C. 424.

Part VIII.—Veterinary Surgeons.

See, generally, Veterinary Surgeons Act, 1881 (c. 62).

235. Use of description by unqualified person—What amounts to—"Veterinary forge."]—Deft. was a shoeing smith & was not possessed of the qualifications specified by Veterinary Surgeons Act, 1881 (c. 62), s. 17 (1). He had for the last twenty-five years described his place of business as a "veterinary forge":—*Held:* these words constituted a description stating that he was specially qualified to practise a branch of veterinary surgery within the meaning of the sect., & he was therefore liable under the sect.—ROYAL COLLEGE OF VETERINARY SURGEONS *v.* ROBINSON, [1892] 1 Q. B. 557; 61 L. J. M. C. 146; 66 L. T. 263; 56 J. P. 313; 40 W. R. 412; 8 T. L. R. 393; 36 Sol. Jo. 273; 17 Cox, C. C. 477.

Annotations:—**Dbtd.** Royal College of Veterinary Surgeons *v.* Collinson, [1908] 2 K. B. 248. **Apld.** Barnes *v.* Brown, [1909] 1 K. B. 38. **Consd.** Bellerby *v.* Heyworth, [1909] 2 Ch. 23; Royal College of Veterinary Surgeons *v.* Kennard, [1914] 1 K. B. 92. **Refd.** Veterinary College *v.* Groves (1893), 57 J. P. 505.

236. —— —— "Pharmaceutical & veterinary chemist."]—G., a chemist, published a book dealing with diseases of horses, recommending medicines which he kept, & advising, in some cases, people to consult a veterinary surgeon. He described himself in the book as "pharmaceutical & veterinary chemist":—*Held:* the justices were right in holding that this was not unlawfully using a description implying that he was a veterinary surgeon contrary to Veterinary Surgeons Act, 1881 (c. 62), s. 17.—VETERINARY COLLEGE *v.* GROVES (1893), 57 J. P. 505; *sub nom.* ROYAL COLLEGE OF VETERINARY SURGEONS *v.* GROVES, 9 T. L. R. 483.

Annotations:—**Refd.** Royal College of Veterinary Surgeons *v.* Collinson, [1908] 2 K. B. 248; Royal College of Veterinary Surgeons *v.* Kennard (1913), 78 J. P. 1.

237. —— —— "Canine specialist."] Resp., who was not possessed of the qualifications specified by Veterinary Surgeons Act, 1881 (c. 62), s. 17 (1), exhibited outside his residence a board with his name & the words "Canine specialist. Dogs & cats treated for all diseases":—*Held:* these words constituted a description stating that he was specially qualified to practise a branch of veterinary surgery, & he was therefore liable under the sect.—ROYAL COLLEGE OF VETERINARY SURGEONS *v.* COLLINSON, [1908] 2 K. B. 248; 77 L. J. K. B. 689; 99 L. T. 122; 72 J. P. 267; 24 T. L. R. 530; 52 Sol. Jo. 457.

Annotations:—**Consd.** Barnes *v.* Brown, [1909] 1 K. B. 38. **Distd.** Bellerby *v.* Heyworth, [1909] 2 Ch. 23; Royal College of Veterinary Surgeons *v.* Kennard, [1914] 1 K. B. 92.

238. —— —— "Canine surgery."]—By the Veterinary Surgeons Act, 1881, s. 17, sub-s. 1, any person not possessing the prescribed qualification who after Dec. 31, 1883, "takes or uses . . . any name, title addition, or description, stating that he is a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same," shall be liable to a fine.

Resp., who was not possessed of the qualifications specified by Veterinary Surgeons Act, 1881 (c. 62), s. 17 (1), exhibited over the entrance door to his residence a lamp on which was inscribed "A. E. Kennard, Canine Surgery," & on the wall of the premises a brass plate bearing the inscription "Canine Surgery. A. E. Kennard":—*Held:* these words did not constitute a description stating that resp. was specially qualified to practise a branch of veterinary surgery, & he was not liable to a fine under the sect.

The expression "canine surgery" is a description of the place & not of the person. . . . In the present case resp. has not said that he is a canine specialist (RIDLEY, J.).—ROYAL COLLEGE OF VETERINARY SURGEONS *v.* KENNARD, [1914] 1 K. B. 92; 83 L. J. K. B. 267; 109 L. T. 866; 78 J. P. 1; 30 T. L. R. 3; 23 Cox, C. C. 645.

Annotation:—**Apld.** Hans *v.* Graham, [1914] 3 K. B. 400.

239. —— Remedy for offence by limited company—Injunction at suit of Attorney-General.]—Although a limited co. is not a "person" within Veterinary Surgeons Act, 1881 (c. 62), s. 17, & cannot be prosecuted for an offence under that sect., an action will lie at the suit of the A.-G. to restrain the co. & its officials from falsely holding out or representing to the public that the individuals who comprise it or are employed by it are veterinary surgeons or persons specially qualified to practise veterinary surgery or any branch thereof.—A.-G. *v.* CHURCHILL'S VETERINARY SANATORIUM, LTD., [1910] 2 Ch. 401; 79 L. J. Ch. 741; 103 L. T. 368; 74 J. P. 397; 26 T. L. R. 630.

Annotation:—**Refd.** Royal College of Veterinary Surgeons *v.* Kennard (1913), 78 J. P. 1.

240. Limited company not a person within Veterinary Surgeons Act, 1881 (c. 62), s. 17.]—A.-G. *v.* CHURCHILL'S VETERINARY SANATORIUM, LTD., No. 239, *ante*.

241. Usage—Charge for attendance—Not much medicine required.]—The certificate of the veterinary college, that pltf. had attended lectures there, is not admissible in evidence, as not coming from a body known to the law. If there is a general usage applicable to a particular trade or profession; persons employing one in such trade or profession will be taken to have dealt with him, according to that usage; but a usage for a veterinary surgeon to charge for his attendance, when there was not much medicine required, is too uncertain.—SEWELL *v.* CORP (1824), 1 C. & P. 392, N. P.

——.]—*See, generally*, CUSTOM & USAGES, Vol. XVII., pp. 25 *et seq.*

PART VIII.

a. Use of description by unqualified person—What amounts to—No particular act alleged in charge.]—*Re* BIBBY (1890), 6 Man. L. R. 472.—**CAN.**

b. Liability for wrongful advice.]—CARROLL *v.* BELL (B. C.) (1910), 15 W. L. R. 327.—**CAN.**

c. Who may give expert advice—Whether surgeon registered in different province.]—It is not necessary for one who was licensed as a veterinary surgeon in another province to be registered in Saskatchewan in order to give an expert opinion as a witness regarding the disease of a horse.—ANDERSON *v.* KENNEDY, [1920] 1 W. W. R. 25; 50 D. L. R. 105; 13 Sask. L. R. 38.—**CAN.**

Part IX.—Drugs.

SECT. 1.—IN GENERAL.

What are drugs.]—*See* FOOD & DRUGS, Vol. XXV., p. 70, Nos. 1–3.

Adulteration & impoverishment.]—*See* FOOD & DRUGS, Vol. XXV., pp. 70–108.

Importation.]—*See* FOOD & DRUGS, Vol. XXV., pp. 115, 116, Nos. 385–388.

Dangerous drugs.]—*See, now,* Dangerous Drugs Acts, 1920–1925.

242. —— "Administration" of drug — Dangerous Drugs Regulations, 1921.]—The word "administration" in the proviso to reg. 4 of above Regulations as to administration by a medical man is not confined to administration in an emergency as contrasted with a general supply, & the words "personal supervision" are not limited to cases where the medical man is personally present when the dose is taken.—KINGSBURY *v.* PUBLIC PROSECUTIONS DIRECTOR (1926), 96 L. J. K. B. 209; 136 L. T. 312; 91 J. P. 24; 43 T. L. R. 79; 70 Sol. Jo. 1182.

SECT. 2.—SALE OF PROPRIETARY MEDICINES.

See Medicines Stamp Act, 1812 (c. 150); 3 & 4 Will. 4, c. 97, s. 20.

243. What is a proprietary medicine—Question of fact.]—FINCHER *v.* DUCLERCQ (1896), 12 T. L. R. 349; 60 J. P. Jo. 276, D. C.

Annotation:—**Consd.** Harding *v.* Miggo (1909), 101 L. T. 459.

244. —— Solid emitting gas in water.]—A composition sold in a solid state contained three ingredients, one of which was a medicine, the other two, bicarbonate of soda & tartaric acid, being added to evolve carbonic acid gas when it was dissolved in water; it was advertised by the vendor as a medicine:—*Held:* the article was a "water," & was taxable as such by Medicines Stamp Act, 1812 (c. 150), sched., & by the repeal of the Schedule so far as it related to "waters" the article did not become taxable under the general clause.—A.-G. *v.* LAMPLOUGH (1878), 3 Ex. D. 214; 47 L. J. Q. B. 555; 38 L. T. 87; 42 J. P. 356; 26 W. R. 323, C. A.

Annotations:—**Mentd.** Halesowen Ry. *v.* G. W. Ry. & Mid. Ry. (1883), 4 Ry. & Can Tr. Cas. 224; Panagotis *v.* S.S. Pontiac, [1912] 1 K. B. 74.

245. —— Pine tar soap.] — FINCHER *v.* DUCLERCQ (1896), 12 T. L. R. 349; 60 J. P. Jo. 276, D. C.

Annotation:—**Consd.** Harding *v.* Miggo (1909), 101 L. T. 459.

246. "Held out or recommended to public"—Necessity for notice or advertisement to be affixed.]—By the Medicines Stamp Act, 1812 (c. 150), s. 2, a penalty is imposed on any person who shall utter, vend, or expose to sale, any packet, etc., containing any of the drugs, etc., mentioned in the schedule, without a paper cover, duly stamped, denoting the duty charged.

The schedule includes all powders, tinctures, etc., to be used or applied as medicines for the prevention, cure, or relief of any disorder or complaint, incident to or affecting the human body, which are, by any public notice or advertisement, or by any written papers or handbills, or by any label or words written or printed, affixed to or delivered with any packet, etc., containing the same, held out or recommended to the public by the makers, vendors, or proprietors, as nostrums or proprietary medicines, or as specifics, or as beneficial to the prevention, cure, or relief of any distemper, malady, ailment, disorder, or complaint, incident to or affecting the human body.

The special exemptions in the schedule include all medicinal drugs which shall be uttered or vended entire, without any mixture or composition with any other drug or ingredient, by any surgeon, apothecary, chemist, or druggist who has served a regular apprenticeship, or by any other person licenced.

Informations were preferred against resps., a limited co., for selling a powder & a tincture without stamps. Resps. issued a price list, which was distributed gratis, & described the medicines as beneficial for certain specified ailments, & the bottle of tincture was wrapped in a handbill describing it in terms similar to those in the price list:—*Held:* (1) by distributing the price list, resps. had held out or recommended the medicines to the public, by a public notice or advertisement, as beneficial for the cure of disorders, within the schedule; (2) it was not necessary that the notice or advertisement should be affixed to or delivered with the medicine; (3) the case did not come within the special exemptions, the stamp duty was payable, & the informations ought not to be dismissed.—SMITH *v.* MASON & Co., [1894] 2 Q. B. 363; 63 L. J. M. C. 201; 70 L. T. 909; 58 J. P. 432; 10 T. L. R. 504; 10 R. 459, D. C.

247. —— Distribution of price list.]—SMITH *v.* MASON & Co., No. 246, *ante.*

248. —— —— By wholesale to retail dealer—Offer to supply advertising matter.]—Applts., wholesale chemists, issued a price list of drugs to retail chemists but not to the public generally. They sold to a person who produced an order purporting to come from a retail chemist, a bottle of tablets of a drug described & priced in their list which was not stamped for the duty chargeable under Medicines Act, 1812 (c. 150). The list contained a recommendation of their preparations & stated that medical literature & advertising matter would be supplied on application, & it described the use of the drug. The drug was mixed with starch & milk sugar, but the milk sugar did not affect the medicinal quality of the drug, & the starch had no medicinal effect:—*Held:* there was evidence that applts. had by advertisement or printed papers held out or recommended the drug to the public as beneficial for human ailments, & it was not "entire without any mixture or composition with any other drug or ingredient" within Medicines Stamp Act, 1812 (c. 150), sched.—KNOLL *v.* RENSHAW, [1916] 1 K. B. 700; 85 L. J. K. B. 882; 114 L. T. 948; 80 J. P. 237; 32 T. L. R. 274, D. C.

249. —— Description on wrapper.]—SMITH *v.* MASON & Co., No. 246, *ante.*

250. —— What amounts to recommendation—"Delightfully soothing to singers & public speakers."]—Resp., a chemist, was summoned under Medicines Stamp Act, 1812 (c. 150), s. 2, for uttering, vending or exposing to sale certain gum pastilles in a box which had a label containing the words "Pure Gum Pastilles: Influenza: Delightfully soothing to singers & public speakers," without a paper cover, wrapper, & label provided by the Comrs. of Inland Revenue &

Sect. 2.—Sale of proprietary medicines. Part X. Sects. 1 & 2.]

without being duly stamped. The justices dismissed the summons on the ground that in their opinion the said words did not in fact hold out or recommend to the public any nostrum, proprietary medicine or specific, or that the pastilles were beneficial for the prevention, cure, or relief of any distemper within the said Act:—*Held:* the said words were capable of only one meaning, namely, as amounting to a distinct statement that these pastilles were beneficial to a complaint affecting the human body, & the justices ought to have convicted.—RANSOM *v.* SANGUINETTI (1903), 67 J. P. 219, D. C.

251. —— —— "Brain & nerve food."]—Resp. sold a preparation known as "Antineurasthin," & described as a "brain & nerve food;" & in pamphlets published by him it was recommended as a nerve food for persons suffering from mental strain, & as a cure for nervous diseases, headaches, neuralgic pains, & other ailments. It was sold in boxes, each containing twenty-four tablets, & the usual dose was said to be three or four tablets a day, to be taken between meals. It was described by resp. as a natural food, & most of its ingredients were articles of food. Resp. was summoned for selling a box containing the preparation to be used as a medicine without a paper cover or wrapper provided & stamped by the Comrs. of Inland Revenue, as required by Medicines Stan p Act, 1812 (c. 150), s. 2, & the magistrate, being of opinion, on the facts proved, that the article was not a medicine within the Act, dismissed the summons:—*Held:* the article was sold as a medicine "for the prevention, cure, or relief of disorders & complaints incident to or affecting the human body," within the Act, & resp. was liable to a penalty for selling the same without having the box duly stamped.—HARDING *v.* MIGGE (1909), 101 L. T. 459; 73 J. P. 493, D. C.

252. "Owner . . . first vendor"—Recommendation affixed by retailer.]—A retail chemist who purchases a preparation of medicinal drugs from the manufacturers or from other persons, & himself attaches to the bottles in which he retails it a label recommending it as a remedy for certain specified human ailments, is not the "owner, proprietor . . . original or first vendor thereof," within Medicines Stamp Act, 1812 (c. 150), sched.; & if the preparation at the time that he so purchased it was exempt from stamp duty, the fact of his attaching the said label will not deprive it of the exemption.—FARMER *v.* GLYN-JONES, [1903] 2 K. B. 6; 72 L. J. K. B. 523; 89 L. T. 64; 67 J. P. 240; 51 W. R. 524; 19 T. L. R. 423, D. C.

253. Surgeon, etc. "who has served apprenticeship"—Apprenticeship must be in writing.]—Medicines Stamp Act, 1812 (c. 150), s. 2, imposes a penalty upon any person vending or exposing to sale any packet, box, bottle, pot, phial, or other inclosure containing any of the drugs, preparations, or compositions set forth in the Schedule to the Act without a proper paper cover, wrapper, or label duly stamped with the duty charged thereon. The Schedule to the Act contains, so far as material, an exemption in the case of mixtures, compositions, or preparations which shall be vended by any surgeon, apothecary, chemist, or druggist "who hath served a regular apprenticeship":—*Held:* in order to constitute a "regular apprenticeship" within the above exemption there must be an apprenticeship under a contract in writing, & therefore the exemption does not apply where there has been service in fact as an apprentice under an oral contract.—KIRKBY *v.* TAYLOR, [1910] 1 K. B. 529; 79 L. J. K. B. 267; 102 L. T. 184; 74 J. P. 143; 26 T. L. R. 246, D. C.

Part X.—Poisons.

SECT. 1.—IN GENERAL.

See Pharmacy Act, 1868 (c. 121); Poisons & Pharmacy Act, 1908 (c. 55).

254. Two separate convictions—Under different sections of Pharmacy Act, 1868 (c. 121)—For one & same act.]—BERRY *v.* HENDERSON, No. 267, *post.*

255. Liability to be sued for penalty—Although criminal offence also committed.]—PHARMACEUTICAL SOCIETY *v.* JACKS, No. 200, *ante.*

SECT. 2.—RESTRICTIONS ON SALE.

See Pharmacy Act, 1868 (c. 121).

256. "Open shop"—No exterior notice of sale.]—PHARMACEUTICAL SOCIETY *v.* HORNSEY (1894), 10 T. L. R. 492, D. C.

257. "Person"—Corporation—Effect of employment of qualified assistant.]—Whether the word "person" in a statute can be treated as including a corpn. must depend on a consideration of the object of the statute, & of the enactments passed with a view to carry that object into effect.

A small body of persons had obtained a registration under Cos. Acts, 1862–1867. One only of these persons was a qualified, certified, & registered chemist. His share in the co. was very small; he was the person who appeared in the shop & conducted the sales, & he received a salary for his labour in dispensing the drugs, which were sold for the profit of the co.:—*Held:* under these circumstances, the word "person" in Pharmacy Act, 1868 (c. 121), ss. 1, 15, did not apply so as to make this incorporated co. liable to a penalty; but the actual seller must be a qualified person.

PART X. SECT. 1.

d. *Opium — Possession of — Prescribed by doctor whether a defence.*]—MORONEY *v.* QUOK YEN, [1908] S. R. Q. 205.—**AUS.**

e. —— ——.]—R. *v.* AH LIN (1909), 8 C. L. R. 325.—**AUS.**

f. —— ——.]—R. *v.* JAMES (1919), 52 N. S. R. 244.—**CAN.**

g. —— ——.]—R. (WAUGH) *v.* WONG MAH, [1922] 1 W. W. R. 67; 66 D. L. R. 517; 36 Can. Crim. Cas. 319; 17 Alta. L. R. 363.—**CAN.**

h. —— ——.]—SALT *v.* SING LEE (Sask.) (1922), 69 D. L. R. 69; 37 Can. Crim. Cas. 214; [1922] 3 W. W. R. 159.—**CAN.**

k. *Entry in register — Non-compliance with statutory requirements.*]—SHILLINGLAW *v.* ROBERTS (1891), 17 V. L. R. 359.—**AUS.**

l. —— *No record of sales kept—Contrary to statute.*]—R. (LAVENDER) *v.* SHAW, R. (LAVENDER) *v.* BROWN, R. (LAVENDER) *v.* WHITE OWL DRUG STORES, LTD. (Man.), [1921] 1 W. W. R. 1147; 58 D. L. R. 448.—**CAN.**

m. —— —— ——.]—SHAW *v.* PARDY (1900), 18 N. Z. L. R. 782.—**N.Z.**

A corpn. certainly cannot, under the provisions of Pharmacy Act, 1868 (c. 121), be a pharmaceutical chemist. Nor can it be a chemist & druggist within the meaning of this Act & be registered under this Act. . . . The act of selling, the act of compounding, & every other definite & particular act mentioned in sect. 1, & in the sects. by which penalties are imposed are struck at, whether the person who does them is a principal to whom the business belongs, or anyone whom he employs to carry on the business (LORD SELBORNE, C.).

I feel strongly inclined to think that if a corpn. . . . caused an unqualified person to conduct sales . . . they would be liable to the penalty under sect. 15 (LORD BLACKBURN).—PHARMACEUTICAL SOCIETY *v.* LONDON & PROVINCIAL SUPPLY ASSOCN. (1880), 5 App. Cas. 857; 49 L. J. Q. B. 736; 43 L. T. 389; 45 J. P. 20; 28 W. R. 937, H. L.

Annotations :—**Consd.** Pharmaceutical Soc. *v.* White, [1901] 1 K. B. 601; Edwards *v.* Pharmaceutical Soc. of Great Britain, [1910] 2 K. B. 766. **Refd.** *Re* Jeffcock's Trusts (1882), 51 L. J. Ch. 507; Pharmaceutical Soc. *v.* Wheeldon (1890), 24 Q. B. D. 683; Pearks, Gunston & Tee *v.* Ward, Hennen *v.* Southern Counties Dairies Co., [1902] 2 K. B. 1; Pharmaceutical Soc. *v.* Nash (1910), 80 L. J. K. B. 416; Willmott *v.* London Road Car Co., [1910] 2 Ch. 525. **Mentd.** Chapleo *v.* Brunswick Permanent Bldg. Soc. (1881), 6 Q. B. D. 696; G. W. Ry. *v.* Swindon & Cheltenham Extension Ry. (1882), 52 L. J. Ch. 306; Enniskillen Union Grdns. *v.* Hilliard (1884), 15 Cox, C. C. 643; R. *v.* Tyler & International Commercial Co., [1891] 2 Q. B. 588; Hirst *v.* West Riding Union Banking Co., [1901] 2 K. B. 560; Wills *v.* Tozer (1904), 53 W. R. 74; *Re* Royal Naval School, Seymour *v.* Royal Naval School, [1910] 1 Ch. 806.

258. —— Unqualified assistant of qualified man.]—Pharmacy Act, 1868 (c. 121), s. 15, enacts that "any person who shall sell or keep an open shop for the retailing, dispensing, or compounding poisons, . . . not being a duly-registered pharmaceutical chemist, or chemist & druggist," shall be liable to a penalty:—*Held:* the unqualified assistant of a qualified chemist is liable under this sect. for selling a poison to which the Act applies without the actual personal supervision of his employer.—PHARMACEUTICAL SOCIETY *v.* WHEELDON (1890), 24 Q. B. D. 683; 59 L. J. Q. B. 400; 62 L. T. 727; 54 J. P. 407; 6 T. L. R. 303, D. C.

Annotations :—**Refd.** Pharmaceutical Soc. *v.* White, [1900] 1 Q. B. 454; Pharmaceutical Soc. *v.* Nash, [1911] 1 K. B. 520.

259. —— —— .]—PHARMACEUTICAL SOCIETY *v.* NASH, No. 271, *post*.

260. "Seller"—Order' taken by canvasser.] Deft., a seedsman & florist at Worcester, acted as agent to receive orders for a limited co. at Liverpool who were the manufacturers of a preparation called "Weed Killer" which contained arsenic. Deft. took at his shop for transmission to the co., an order for "Weed Killer" & received on account of the co. the price of the quantity ordered, for which he gave a receipt on a bill headed with the name of the co. He subsequently transmitted the order to the co., who sent the "Weed Killer" ordered to the giver of the order direct. Deft. was in the habit of taking, & dealing with, orders for "Weed Killer" in the manner above described, & he received a commission from the co. in respect of orders so transmitted by him & executed by the co. In an action in the county ct. against deft., for a penalty for selling poison in contravention of Pharmacy Act, 1868 (c. 121), s. 15, the county ct. judge gave judgment for deft. on the ground that deft. was not the seller of the "Weed Killer" within the meaning of the sect. & he found as a fact that deft. was in the position merely of a canvasser for the co. with authority to receive money on their account:—*Held:* there being evidence to support the county ct. judge's finding of fact, the ct. was bound thereby, &, upon that finding deft. did not sell the "Weed Killer" within Pharmacy Act, 1868 (c. 121), s. 15—PHARMACEUTICAL SOCIETY *v.* WHITE, [1901] 1 K. B. 601; 70 L. J. K. B. 386; 84 L. T. 188; 65 J. P. 340; 49 W. R. 407; 17 T. L. R. 262; 45 Sol. Jo. 293, C. A.

Annotation :—**Distd.** Pharmaceutical Soc. *v.* Nash (1910), 103 L. T. 802.

261. Name & address of seller—Unqualified tradesman—Selling on commission for qualified man.]—Resp. sold at his shop in Friar Street, Oxford, a packet of poison labelled only, "W. Paterson, chemist & druggist, 3, Cowley Road, Oxford"—the name & address of a registered chemist who had supplied the poison to resp., & paid him a commission on the sale:—*Held:* resp. was the "seller," with whose name & address the packet should have been labelled, & he was liable to a penalty under Pharmacy Act, 1868 (c. 121), s. 17, which applies to the person keeping the shop or conducting the business in which the sale is made.—TEMPLEMAN *v.* TRAFFORD (1881), 8 Q. B. D. 397; 51 L. J. M. C. 4; 45 L. T. 684; 46 J. P. 325; 30 W. R. 78, D. C.

Annotations :—**Refd.** Pharmaceutical Soc. *v.* White, [1900] 1 Q. B. 454; Edwards *v.* Pharmaceutical Soc. of Great Britain (1910), 79 L. J. K. B. 859.

262. —— Name may be trade name.]—A duly qualified chemist sold poison which was contained in a bottle labelled with his trade name but not with his personal name:—*Held:* the "name" of the seller mentioned in the section includes his trade name; that there had therefore been a sufficient compliance with Pharmacy Act, 1868 (c. 121), s. 17; & the chemist was not liable to the penalty imposed by it upon a person who sells poison contained in a bottle not labelled with the name of the seller.—EDWARDS *v.* PHARMACEUTICAL SOCIETY OF GREAT BRITAIN, [1910] 2 K. B. 766; 79 L. J. K. B. 859; 102 L. T. 592; 74 J. P. 283; 26 T. L. R. 420, D. C.

263. "Poison"—Medicine containing infinitesimal quantity.] A person not being a chemist within Pharmacy Act, 1868 (c. 121), does not commit an offence against sect. 15 of that Act by selling a medicine containing an infinitesimal quantity of poison as defined by the Act.—PHARMACEUTICAL SOCIETY *v.* DELVE, [1894] 1 Q. B. 71; 63 L. J. Q. B. 360; 70 L. T. 139; 58 J. P. 152; 42 W. R. 192; 10 T. L. R. 23; 38 Sol. Jo. 11; 10 R. 25, D. C.

Annotation :—**Refd.** Pharmaceutical Soc. *v.* Armson, [1894] 2 Q. B. 720.

264. —— What quantity sufficient to make compound a poison—Question of fact.]—Deft., who was a grocer & not registered as a chemist, sold in bottles a compound called balsam of aniseed. Each bottle contained one-tenth of a grain of morphine. It was found as a fact that the contents of a bottle if taken at once would be

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PART X. SECT. 2.

258 i. "*Person*" — *Unqualified assistant of qualified man.*]—A chemist is not liable criminally if his assistant, acting contrary to his orders, & without his knowledge sells drugs in contravention of Opium & Narcotic Act.—R. *v.* LEDUC (1921), 69 D. L. R. 568; 38 Can. Crim. Cas. 177; 28 R. L. N. S. 319.—**CAN.**

258 ii. —— ——.]—BREMRIDGE *v.* TOMLINSON (1894), 21 R. (Ct. of Sess.) 46; 31 Sc. L. R. 683; 2 S. L. T. 62 (J.). —**SCOT.**

a. —— *Unqualified assistant of unqualified man.*]—The sale of poison by an apprentice or assistant on behalf of a person not qualified under Poisons Act, 1890, s. 4, is a sale by such person within the sect.—SHILLINGLAW *v.* REDMOND, [1908] V. L. R. 427.—**AUS.**

o. *Opium — Sold for other than medicinal purposes.*]—Where a drug

Sect. 2.—Restrictions on sale. Sects. 3 & 4.]

injurious, & might be fatal, in the case of a child, & in the case of an infant would probably be fatal. Preparations of morphine are scheduled as poisons under Pharmacy Act, 1868 (c. 121):—*Held:* balsam of aniseed was a poison within the meaning of the Act, and deft. was liable to a penalty under sect. 15 for having sold a poison contrary to the provisions of the Act. The exemption in Pharmacy Act, 1868 (c. 121), s. 16, as to patent medicines is limited to medicines which are the subject of a patent, & does not include proprietary medicines generally.—PHARMACEUTICAL SOCIETY *v.* ARMSON, [1894] 2 Q. B. 720; 64 L. J. Q. B. 32; 71 L. T. 315; 59 J. P. 52; 42 W. R. 662; 10 T. L. R. 582; 9 R. 587, C. A

Annotation:—**Refd.** Brown *v.* Leggett, [1906] 1 K. B. 330.

265. —— Chlorodyne.]—Applt., a grocer, was sued for penalties under Pharmacy Act, 1868 (c. 121), s. 15, for selling "poison" without being a duly registered pharmaceutical chemist. The alleged "poison" consisted of a bottle of a compound called chlorodyne, which amongst other ingredients contained opium, or a preparation of opium & chloroform, both of which are poisons in the schedule to the Act, & it was proved that one bottle contained sufficient opium to kill an adult:—*Held:* (1) chlorodyne was a "poison" within Pharmacy Act, 1868 (c. 121), s. 20; (2) chlorodyne, though a proprietary medicine, was not a "patent medicine" within Pharmacy Act, 1868 (c. 121), s. 16.—PHARMACEUTICAL SOCIETY *v.* PIPER & Co., [1893] 1 Q. B. 686; 62 L. J. Q. B. 305; 68 L. T. 490; 57 J. P. 502; 41 W. R. 447; 9 T. L. R. 278; 37 Sol. Jo. 287; 5 R. 296, D. C.

Annotations:—*As to* (1) **Apprvd.** Pharmaceutical Soc. *v.* Armson, [1894] 2 Q. B. 720. **Refd.** Brown *v.* Leggett, [1906] 1 K. B. 330.

266. —— Balsam of aniseed.]—PHARMACEUTICAL SOCIETY *v.* ARMSON, No. 264, *ante*.

SECT. 3.—EXEMPTIONS FROM RESTRICTIONS.

See Pharmacy Act, 1868 (c. 121), ss. 16, 17.

267. Poison in medicine dispensed—By registered chemist—Bonâ fide belief in authenticity of prescription.]—Applt., a duly registered chemist, was convicted under Pharmacy Act, 1868 (c. 121), s. 17, for selling poison to a person unknown to him. It was proved that J., who was unknown to applt. came into his shop & produced a prescription written in the abbreviated form usual among chemists. At the foot of it were the initials "R. M. L.," & the words "Mrs. Newton, Aug. 11, 1869." There was a legally qualified medical practitioner having the initials "R. M. L." Applt.'s assistant dispensed the prescription by putting a small quantity of prussic acid into a bottle & filling up the bottle with rose water, according to the meaning of the prescription. Applt. made an entry in his prescription book, "Newton, Mrs., copying the prescription, Aug. 11, R. M. L." He also indexed the entry by inserting the name "Newton" & the page in the index contained in the book. The bottle was labelled with the name & address of applt., but not with the word "poison." The prescription was one which might be ordered for a lotion. No evidence was given as to whether there was such a person as Mrs. Newton or not. Applt. was also convicted in respect of the same sale for selling poison in a bottle not labelled with the word "poison":—*Held:* (1) assuming that applt. *bonâ fide* believed that he was dispensing a prescription given by a medical man to Mrs. Newton, he could not be convicted for selling poison to a person unknown to him, but must be taken to have dispensed a medicine according to the requirements of the proviso to Pharmacy Act, 1868 (c. 121), s. 17; (2) he could not be twice convicted under the same sect. in respect of the same sale.—BERRY *v.* HENDERSON (1870), L. R. 5 Q. B. 296; 39 L. J. M. C. 77; 22 L. T. 331; 34 J. P. 805, D. C.

Annotations:—*As to* (1) **Consd.** Pharmaceutical Soc. *v.* Piper, [1893] 1 Q. B. 686. **Apprvd.** Pharmaceutical Soc. *v.* Armson, [1894] 2 Q. B. 720. **Refd.** R. *v.* Wood Green Profiteering Committee, *Ex p.* Boots Cash Chemists (Southern) (1919), 89 L. J. K. B. 55.

See, also, No. 258, *ante*.

268. Patent medicine—Proprietary medicine—Not subject of letters patent.]—PHARMACEUTICAL SOCIETY *v.* PIPER & Co., No. 265, *ante*.

269. —— —— ——.]—PHARMACEUTICAL SOCIETY *v.* ARMSON, No. 264, *ante*.

270. —— Patent lapsed.]—A medicine for which the patent has lapsed is not within the exemptions of Pharmacy Act, 1868 (c. 121), s. 16.—PHARMACEUTICAL SOCIETY *v.* FOX (1896), 12 T. L. R. 471, D. C.

271. Poison to be used exclusively in agriculture or horticulture—Poisons & Pharmacy Act, 1908 (c. 55), s. 2—Sale by unlicenced assistant.]—By Poisons & Pharmacy Act, 1908 (c. 55), s. 2, "So much of Pharmacy Act, 1868 (c. 121), as makes it an offence for any person to sell . . . poisons unless he is a duly registered pharmaceutical chemist . . . shall not apply in the case of" certain specified "poisonous substances to be used exclusively in agriculture or horticulture . . . if the person so selling . . . is duly licensed for the purpose" under that sect.:—*Held:* the words "the person so selling" include the person actually conducting the sale; & an unlicensed shop assistant who sells on behalf of his master one of the specified poisonous substances is not protected from the liability to the penalty imposed by the Pharmacy Act, 1868 (c. 55), by the fact that his master is duly licensed.—PHARMACEUTICAL SOCIETY *v.* NASH, [1911] 1 K. B. 520; 80 L. J. K. B. 416; 103 L. T. 802; 75 J. P. 151; 27 T. L. R. 147; 55 Sol. Jo. 156, D. C.

272. —— —— Sale in bottle improperly labelled—Liable to penalty sued for under Pharmacy Act, 1868 (c. 121), s. 15.]—PHARMACEUTICAL SOCIETY *v.* JACKS, No. 200, *ante*.

SECT. 4.—POWERS OF PHARMACEUTICAL SOCIETY.

See Pharmacy Act, 1868 (c. 121), ss. 2, 17, sched. A.

273. Declaration—Compound of which one ingredient is a poison.]—BROWN *v.* LEGGETT, No. 190, *ante*.

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clerk, contrary to instructions, sold crude opium for other than medicinal purposes:—*Held:* the master could not be convicted of the offence.—R. *v.* A. & N. (1909), 15 C. W. R. 339; 16 Can. Crim. Cas. 381.—**CAN.**

p. —— *Morphia—Whether in definition of.*]—Although "morphia" is not a preparation or admixture of opium, it is an intoxicating drug prepared from the poppy & therefore it fulfils the requirements of the definition of "opium" contained in Opium Act, 1, of 1878, s. 3.—R. *v.* ROBINSON (1922), I. L. R. 3 Lah. 230.—**IND.**

MEETINGS.

See BUILDING SOCIETIES ; CLUBS ; COMPANIES ; CORPORATIONS ; CRIMINAL LAW AND PROCEDURE ; ELECTIONS ; FRIENDLY SOCIETIES ; INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES ; LOCAL GOVERNMENT ; MEDICINE AND PHARMACY ; PARLIAMENT ; PRESS AND PRINTING ; TRESPASS.

MEMBER OF PARLIAMENT.

See ELECTIONS ; PARLIAMENT.

MEMBERS' CLUBS.

See CLUBS.

MEMORANDUM OR NOTE.

See AUCTION AND AUCTIONEERS ; CONTRACT ; GUARANTEE AND INDEMNITY ; INSURANCE ; LANDLORD AND TENANT ; SALE OF GOODS ; SALE OF LAND ; SETTLEMENT.

MERCANTILE AGENCY.

See AGENCY.

MERCANTILE GUARANTEE.

See GUARANTEE AND INDEMNITY.

MERCANTILE TRANSFER.

See BILLS OF SALE ; CHOSES IN ACTION ; COMPANIES ; STOCK EXCHANGE.

MERCHANDISE MARKS.

See TRADE MARKS, TRADE NAMES, AND DESIGNS.

MERCHANT SHIPPING.

See SHIPPING AND NAVIGATION.

MERGER.

See BANKRUPTCY AND INSOLVENCY; BONDS; CONFLICT OF LAWS; CONTRACT; COPYHOLDS; DESCENT AND DISTRIBUTION; EQUITY; ESTOPPEL; EXECUTION; GUARANTEE AND INDEMNITY; INSURANCE; JUDGMENTS AND ORDERS; LANDLORD AND TENANT; MORTGAGE; REAL PROPERTY AND CHATTELS REAL; RENTCHARGES AND ANNUITIES.

MESNE PROFITS.

See LANDLORD AND TENANT; MORTGAGE; REAL PROPERTY AND CHATTELS REAL; TRESPASS.

METROPOLIS.

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Part I.—Definitions.

Statutory definition.]—*See* Metropolis Management Act, 1855 (c. 120), s. 250.

—— **Fire brigade purposes.**]—*See* Metropolitan Fire Brigade Act, 1865 (c. 90), s. 2.

1. Meaning of "London"—Used in contract.]—Pltf. alleged that deft., having agreed to convey her safely by his coach from London to Blackheath, neglected his duty, by throwing her down, etc. Deft.'s coach ran from Charing Cross to Blackheath, & pltf. got up at the Elephant & Castle; but deft. had inscribed on his coach "London to Blackheath": —*Held:* no variance.

The agreement here must be taken according to the intention of the parties, & by London, they meant, not the city, strictly speaking, but what is usually called London (BEST, C.J.).—DITCHAM *v.* CHIVIS (1828), 4 Bing. 706; 1 Moo. & P. 735; 6 L. J. O. S. C. P. 176; 130 E. R. 941.

Annotations:—**Apld.** Wallace *v.* A.-G. (1864), 33 Beav. 384. **Mentd.** Wood *v.* Adam (1830), 6 Bing. 481; Ireland *v.* Johnson (1834), 1 Bing. N. C. 162.

2. ——— ——.] In stating the termini of the journey in declaring against a carrier the word London will be taken as *nomen collectivum* including all that is commonly so-called & not the City merely.—BECKFORD *v.* CRUTWELL (1832), 5 C. & P. 242; 1 Mood. & R. 187, N. P.

Annotations:—**Apld.** Wallace *v.* A.-G. (1864), 33 Beav. 384. **Mentd.** Simpson *v.* Margitson (1847), 11 Q. B. 23; Bruner *v.* Moore, [1904] 1 Ch. 305.

3. ——— ———.]—By arts. of agreement between A., described as "of Great Russell-street, Bloomsbury-square, in the county of Middlesex," of the one part, & B., of etc., of the second part, the former agreed to instruct the latter in the business of a surgeon-dentist for a term of four years, & it was stipulated that B. should not, without the consent of A., carry on the business of surgeon-dentist "in London, or any of the towns or places in England or Scotland" where A., may have been practising before the expiration of the said term:—*Held:* in its strict & proper meaning, the word "London" meant the City of London, in which sense it ought to be understood, as there was nothing in the context to prevent its being construed in its proper sense; & a statement in the case, that "London" had a popular or colloquial sense, in which Great Russell street would be understood to be within its limits, was not sufficient for the purpose of causing a different construction to be put upon that word in the instrument.—MALLAN *v.* MAY (1841), 13 M. & W. 511; 14 L. J. Ex. 48; 4 L. T. O. S. 174; 9 Jur. 19; 153 E. R. 213.

Annotations:—**Refd.** Wallace *v.* A.-G. (1864), 33 Beav. 384. **Mentd.** Simpson *v.* Margitson (1847), 11 Q. B. 23; Horwood *v.* Griffith (1853), 2 W. R. 71; Bruner *v.* Moore, [1904] 1 Ch. 305; Cave *v.* Horsell, [1912] 3 K. B. 533.

4. —— **Used in will.**]—"London" in its popular sense is a word of fluctuating extent.

Testator domiciled in Paris bequeathed his residue "to the hospitals of Paris & London." The ct., considering testator had used the word London in the ordinary & popular sense in which persons are said to reside in London rejected all the local boundaries suggested, & held that an accurate definition of the extent of the limits of the metropolis of London was not capable of being made, & it determined on deciding the rights of each claimant separately. The ct also considered that houses which stood in a street with houses continuous to the Cities of London & Westminster & the borough of Southwark, were within the limit & also that the Consumption Hospital at Brompton came within the terms of the bequest.—WALLACE *v.* A.-G. (1864), 33 Beav. 384; 3 New Rep. 555; 33 L. J. Ch. 314; 10 L. T. 51; 28 J. P. 341; 10 Jur. N. S. 249; 12 W. R. 506; 55 E. R. 416.

Annotations:—**Mentd.** Coventry *v.* L. B. & S. C. Ry. (1867), L. R. 5 Eq. 104; Carington *v.* Wycombe Ry. (1868), 3 Ch. App. 377.

5. ——— **Used in statute—Applies strictly to City of London only.**]—D. was rector of the united benefices of St. Vedast & St. Michaelmle Querne. The right of presentation to these benefices was first vested alternately in the Archbishop of Canterbury & the Dean & Chapter of St. Paul's, but afterwards, during D.'s incumbency, the alternate turn or right of patronage then belonging to the Dean & Chapter of St. Paul's was vested in the Bishop of London & his successors. A representation against D., under Public Worship Act, 1874 (c. 85), s. 7, was sent to the Bishop of London, & was by the bishop duly transmitted to the Archbishop of Canterbury. The archbishop thereupon, by instrument of requisition, required the judge to hear matters of the representation "at any place in London or Westminster, or within the diocese of London, as you may deem fit." The judge heard the case in the public library at Lambeth Palace, which, though in the province of Canterbury, is neither in London, Westminster, nor the diocese of London, & gave judgment against D., who had notice of the proceedings, but did not appear. A monition, & subsequently an inhibition, were issued against D., & his benefice was sequestered. D. did not know that the patronage of the living had been transferred to the bishop until after the sentence had been given against him & the monition issued. After the sequestration & nine months after the sentence, he applied for a prohibition to the Arches Ct.:—*Held:* the prohibition must be granted, for the bishop was patron of the benefices within Public Worship Act, 1874 (c. 85), s. 16, & was disqualified from acting in the matters of the representation, & D. had not acquiesced in the proceedings, & his application for a prohibition was not too late.

Qu.: whether the place of trial being neither in the diocese, nor in London nor in Westminster, the proceedings were on that account void.—SERJEANT *v.* DALE (1877), 2 Q. B. D. 558; 46 L. J. Q. B. 781; 37 L. T. 153; 41 J. P. 694, D. C.

Annotations:—**Refd.** Hudson *v.* Tooth (1877), 3 Q. B. D. 46. **Mentd.** Toomer *v.* L. C. & D. Ry. (1877), 2 Ex. D. 450; Dale's Case, Enraght's Case (1881), 6 Q. B. D. 376; Combe *v.* De La Bere (1882), 22 Ch. D. 316; Tolputt *v.* Mole, [1911] 1 K. B. 87.

6. ——— ——— ———.]—A representation under Public Worship Act, 1874 (c. 85), was forwarded to the Bishop of Rochester charging that T., the incumbent of a parish within the diocese, had been guilty of illegal practices in the conduct of divine service. The bishop transmitted the representation to the Archbishop of Canterbury, & the Archbishop thereupon by instrument of requisition required the judge to hear & determine the matter of the representation "at any place in London or Westminster, or within the diocese of Rochester, as you may deem fit." Notice was given to T. that the case would be heard in Lambeth Palace, which, although within the province of Canterbury, is neither in London, Westminster, nor the diocese of Rochester.

In July, 1876, the case was heard at Lambeth Palace in his absence, & he was adjudged to have been guilty of illegal practices, & a monition was made for him to abstain from them. On his non-compliance with the monition, he was pronounced guilty of contempt & imprisoned. From first to last he took no notice of the proceedings, & in no way acquiesced in them:—*Held:* the whole proceeding was void, & a prohibition must be granted, for the word "London" in the requisition could only be construed in its strict sense as the City proper of London, & the judge had no power, under the Act or otherwise, to sit in any place beyond the limits fixed by the Archbishop.—HUDSON *v.* TOOTH (1877), 3 Q. B. D. 46; 47 L. J. Q. B. 18; 37 L. T. 462; 42 J. P. 133; 26 W. R. 95, D. C.

Annotations:—**Refd.** R. *v.* Penzance (1880), 45 J. P. 125; Dale's Case, Enraght's Case (1881), 6 Q. B. D. 376. **Mentd.** *Re* Serjeant *v.* Dale, *Ex p.* Dale, *Re* Perkins *v.* Enraght, *Ex p.* Enraght (1881), 43 L. T. 769.

Part II.—Metropolitan Areas and Authorities.

Administration—Control of common lodging houses.]—*See* PUBLIC HEALTH.

—— **Powers in regard to offensive trades.**]—*See* PUBLIC HEALTH.

—— **Registration of employment agencies.**]—*See* WORK & LABOUR.

—— **Control of slaughter houses.**]—*See* PUBLIC HEALTH.

—— **Licencing of theatres & other places of entertainment.**]—*See* THEATRES.

Quarter sessions.]—*See* MAGISTRATES, Vol. XXXIII., pp. 374 *et seq.*

Metropolitan boroughs—Duties & liabilities—As highway authority.]—*See* HIGHWAYS, Vol. XXVI., pp. 487 *et seq.*

—— —— **As sanitary authority.**]—*See* PUBLIC HEALTH; SEWERS & DRAINS.

Port of London.]—*See* WATERS & WATERCOURSES.

Conservators of river Thames.]—*See* WATER & WATERCOURSES.

Poor law areas.]—*See* POOR LAW.

Fire brigade.]—*See* PUBLIC HEALTH.

Metropolitan police district.]—*See* POLICE.

Metropolitan Water Board.]—*See* WATER SUPPLY.

Areas—Judicial notice of.]—*See* EVIDENCE, Vol. XXII., p. 151, Nos. 1287–1291.

Part III.—The London County Council.

7. Whether exercising judicial functions—Hearing applications for licences.]—The London County Council delegates to a committee of their body the hearing of applications or music & dancing licences, which committee, after hearing evidence, recommends to the council the granting or refusal of such applications. Two applications for renewal & music & dancing licences were made to the committee, who, by a majority, recommended that the applications should not be granted. Appcts. thereupon applied to the council for the licences. Four of the committee who had voted in the majority against the renewal instructed counsel to appear on their behalf at the hearing before the council, & to oppose the applications. Three of the said four members of the committee were also present at the hearing, & when the proceedings began were sitting among those adjudicating, but they subsequently retired & did not vote but remained in the room. The council by a majority refused the applications for the licences:—*Held:* (1 the applications had not been heard, & determined according to law; the presence at the hearing of those members who had instructed counsel to oppose the applications vitiated the proceedings; (2) The London County Council in adjudicating on these applications for licences were acting judicially & were bound by the ordinary principles of justice, & their discretion to grant or refuse licences must be exercised according to the rules of reason & justice.—R. *v.* LONDON COUNTY COUNCIL, *Ex p.* AKKERSDYK, *Ex p.* FERMENIA, [1892] 1 Q. B. 190; 61 L. J. M. C. 75; 66 L. T. 168; 56 J. P. 8; 40 W. R. 285; 8 T. L. R. 175; 36 Sol. Jo. 309, D. C.

Annotations:—*As to* (1) **Expld.** Royal Aquarium & Summer & Winter Garden Soc. *v.* Parkinson, [1892] 1 Q. B. 431. **Apld.** R. *v.* L. C. C., *Re* Empire Theatre (1894), 71 L. T. 638. **Folld.** Frome United Breweries Co. *v.* Bath County Borough JJ., [1926] A. C. 586. **Refd.** R. *v.* Budden, etc., Kent JJ. (1896), 60 J. P. 166; R. *v.* London JJ., *Ex p.* Kerfoot (1896), 45 W. R. 58; R. *v.* Farnham Licensing JJ. (1902), 50 W. R. 573; R. *v.* Howard, etc., Farnham Licensing JJ. (1902), 71 L. J. K. B. 754. *As to* (2) **Refd.** Murray *v.* Epsom L. B., [1897] 1 Ch. 35.

8. ——— ———.]—A meeting of the London County Council for granting music & dancing licenses under Disorderly Houses Act, 1751 (c. 36), s. 2, is not a ct. within the meaning of the rule by which defamatory statements made in the course of proceedings before a ct. are absolutely privileged. Therefore, a county councillor making a defamatory statement at such a meeting with regard to a person applying for a licence is not entitled to absolute immunity from an action in respect of such statement. He is only entitled to the ordinary privilege which applies to a communication made without express malice on a privileged occasion.—ROYAL AQUARIUM & SUMMER & WINTER GARDEN SOCIETY, LTD. *v.* PARKINSON, [1892] 1 Q. B. 431; 61 L. J. Q. B. 409; 66 L. T. 513; 56 J. P. 404; 40 W. R. 450; 8 T. L. R. 352, C. A.

Annotations:—**Apld.** Attwood *v.* Chapman, [1914] 3 K. B. 275. **Refd.** R. *v.* L. C. C., *Re* Empire Theatre (1894), 71 L. T. 638; R. *v.* L. C. C., *Ex p.* London & Provincial Electric Theatres, [1915] 2 K. B. 466. **Mentd.** Hodson *v.* Pare [1899] 1 Q. B. 455; Barratt *v.* Kearns, [1905] 1 K. B. 504; R. *v.* Russell, *Ex p.* Morris (1905), 93 L. T. 407; Tenby Corpn. *v.* Mason, [1908] 1 Ch. 457; Burr *v.* Smith (1909), 78 L. J. K. B. 889; R. *v.* L. G. Board, *Ex p.* Arlidge (1913), 78 J. P. 25; Copartnership Farms *v.* Harvey-Smith, [1918] 2 K. B. 405; Roff *v.* British & French Chemical Manufacturing Co. & Gibson, [1918] 2 K. B. 677; Slack *v.* Barr (1918), 82 J. P. 91; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244; Weld-Blundell *v.* Stephens, [1919] 1 K. B. 520; Everett *v.* Griffiths, [1920] 3 K. B. 163.

9. ——— ———.]—The London County Council is not a ct. & their proceedings are not judicial (WRIGHT, J.).—R. *v.* LONDON COUNTY COUNCIL, *Re* EMPIRE THEATRE (1895), 71 L. T. 638; 11 T. L. R. 24; 39 Sol. Jo. 63; *sub nom.* R. *v.*

LONDON COUNTY COUNCIL, *Ex p.* EDWARDES, 15 R. 66, D. C.

Annotation:—**Mentd.** R. *v.* Higgins, *Ex p.* Clancy (1895), 15 R. 203.

10. —— Exercise of discretion as to bye-laws.]—The London County Council in exercise of statutory powers, made by a bye-law relating to parks, gardens, & open spaces whereby the selling of any article without the consent in writing of the Council was constituted an offence. After granting permission to sell literature at meetings in certain parks, they passed a resolution that the existing permission should be determined & that no new permission should be granted thenceforth. Acting on this resolution they refused an application made by a certain society for permission to sell pamphlets at its meeting in one of the parks:—*Held:* there was vested in the London County Council by virtue of the bye-laws a discretion similar to that of justices at licensing sessions, & they did not properly exercise that discretion by passing a general resolution to grant no permission & acting on that resolution.—R. *v.* LONDON COUNTY COUNCIL, *Ex p.* CORRIE, [1918] 1 K. B. 68; 87 L. J. K. B. 303; 118 L. T. 107; 82 J. P. 20; 34 T. L. R. 21; 62 Sol. Jo. 70; 15 L. G. R. 889, D. C.

Annotations:—**Apld.** R. *v.* Port of London Authority, *Ex p.* Kynoch, [1919] 1 K. B. 176. **Mentd.** Short *v.* Poole Corpn., [1926] Ch. 66.

Part IV.—The City Corporation.

SECT. 1.—THE LORD MAYOR.

11. Proceedings against—By impeachment—Hindering petition to Parliament.]—GURNEY'S CASE (1642), 4 State Tr. 159.

12. —— Action for refusing poll.]—Action on the case lies against the Mayor of London for refusing a poll at the election of a bridge master.—TURNER *v.* STERLING (1672), Freem. K. B. 15; 3 Keb. 26; 2 Vent. 25; 89 E. R. 13; *sub nom.* STERLING *v.* TURNER, 1 Vent. 206; *sub nom.* STARLING *v.* TURNER, 2 Lev. 50.

Annotations:—**Refd.** Ferguson *v.* Kinnoull (1842), 9 Cl. & Fin. 251. **Mentd.** Ashby *v.* White (1703), 2 Ld. Raym. 938; Kendall *v.* John (1708), Fortes. Rep. 104; Phillips *v.* Smith (1717), 1 Com. 279; Lewis *v.* Lewis (1729), Fitz-G., 173; Tewkesbury Bailiffs *v.* Diston (1805), 2 Smith, K. B. 508; Hampden *v.* Macmullen (1813), 3 Notes of Cases Supp. 1.

13. Proceedings by—In official capacity—Right to costs of prosecution.]—Where the Lord Mayor of London committed deft. to take his trial for an assault, & directed the City solr. to conduct the prosecution, & the expenses were paid out of the funds of the corpn.:—*Held:* the Lord Mayor was not entitled to the costs of the prosecution, under 5 & 6 Will. & Mar. c. 11, s. 3, the object of that sect. being to indemnify prosecutors for the costs which they were liable to pay.—R. *v.* WILSON (1853), Dears. C. C. 79; 1 E. & B. 597; 22 L. J. M. C. 53; 20 L. T. O. S. 235; 17 Jur. 460; 1 W. R. 150; 6 Cox, C. C. 176; 17 J. P. Jo. 101; 169 E. R. 645.

Annotation:—**Mentd.** R. *v.* Hills (1853), 2 E. & B. 176.

14. Election of—Precedence of other business.] On the charter day for the election of Lord Mayor of the City of London, the business of the election ought to have precedence of all other matters; & therefore it is not lawful, after the Lord Mayor & aldermen have retired from the hustings, to propose any other business inconsistent with the election, the discussion of which may have the effect of putting it off altogether.—R. *v.* PARKYNS (1820), 3 B. & Ald. 668; 106 E. R. 805.

Annotations:—**Mentd.** R. *v.* Morgan (1836), 7 C. & P. 642; Ford *v.* Nassau (1842), 9 M. & W. 793; Benns *v.* Mosley (1857), 2 C. B. N. S. 116; Weldon *v.* Neal (1885), 15 Q. B. D. 471.

As judge of court of hustings.]—*See* COURTS, Vol. XVI., p. 200, No. 1066.

SECT. 2.—THE ALDERMEN.

15. Amotion of—For imprisonment.]—An alderman of London in custody in execution, & under an escape-warrant, without probability of discharge, may be amoved.

Imprisonment is stronger than voluntary absence, on account of the incapacity (BUTLER, J.).—R. *v.* LONDON CORPN. (1785), 4 Doug. K. B. 360; 99 E. R. 922.

Annotation:—**Mentd.** R. *v.* Gaskin (1799), 8 Term Rep. 209.

16. "Directly or indirectly interested or concerned in" contract—Alderman shareholder in contracting company.] Contracts for lighting the City of London, made between electric cos. & the Comrs. of Sewers, are, like all contracts by cos. with the Comrs. upon the true construction of City of London Sewers Act, 1848 (c. clxii), s. 42, null & void if at the date of the contracts any of the Comrs., members of the Court of Aldermen or the Common Council, were shareholders in the lighting cos. But a valid contract is not made invalid by the mere fact that after the contract was made it was with the consent of the Comrs. transferred to another co., in which Comrs. or members of the Court of Aldermen or of the Common Council were shareholders.—CITY OF LONDON ELECTRIC LIGHTING CO. *v.* LONDON CORPN., [1903] A. C. 434; 72 L. J. Ch. 737; 89 L. T. 310; 67 J. P. 437; 52 W. R. 158; 19 T. L. R. 694; 2 L. G. R. 93, H. L.

Annotation:—**Refd.** Norton *v.* Taylor, [1906] A. C. 378.

17. Powers of—To send policeman to view deserted premises & deliver up possession.]—An alderman of London sitting at the Mansion House & Guildhall has not by Summary Jurisdiction Act, 1848 (c. 43), s. 34, & Metropolitan Police Courts Act, 1840 (c. 84), s. 6, the same power as a police magistrate has by Metropolitan Police Courts Act, 1840 (c. 84), s. 13 to send a constable to view the deserted premises & to deliver up possession under Distress for Rent Act, 1737 (c. 19), s. 16.—EDWARDS *v.* HODGES (1855), 15 C. B. 477; 3 C. L. R. 472; 24 L. J. M. C. 81; 24 L. T. O. S. 237; 19 J. P. 102; 1 Jur. N. S. 91; 3 W. R. 167; 139 E. R. 510.

18. —— To state case.]—Applt. having received notice from resp. of his intention to build fifty-two arches, inspected & measured them on several occasions. The arches were built on a vacant space of ground under what was & is a public highway, & were built on the four sides of a parallelogram. Applt. claimed £26, being 10*s.* per arch, while resp. refused to pay more than 10*s.* altogether. Upon appeal to the alderman he was of opinion that 10*s.* was all that applt. was entitled to, but stated a case for the opinion

Sect. 2.—The aldermen. Sect. 3. Part V. Sects. 1 & 2: Sub-sects. 1 & 2. Sect. 3. Parts VI. & VII.]

of the Ct. of Common Pleas. It was objected on the part of resp. that the alderman had no power to state a case, which was taken away by Metropolitan Building Act, 1854 (c. 122), s. 106 :—*Held :* the power of the alderman to state a case under Summary Jurisdiction Act, 1857 (c. 43), was not taken away by Metropolitan Building Act, 1854 (c. 122), s. 106.—POWER *v.* WIGMORE (1872), L. R. 7 C. P. 386 ; 27 L. T. 148 ; 36 J. P. 694.

Annotation :—**Mentd.** Peagram *v.* Peagram, [1926] 2 K. B. 165.

Custom as to election of alderman.]—*See* Part XIV., Sect. 3, *post.*

SECT. 3.—LIVERY COMPANIES.

See CORPORATIONS, Vol. XIII., pp. 437, 438, Nos. 1605–1624.

In connection with charities.]—*See* CHARITIES, Vol. VIII., pp. 263, 264, Nos. 253–257.

Proof of admission as freeman.]—*See* EVIDENCE, Vol. XXII., p. 258, No. 2435.

Part V.—Metropolitan Borough Councils.

SECT. 1.—IN GENERAL.

19. Vestry room remains property of vicar & churchwardens.]—In the year 1719 the parish church of St. Martin-in-the-Fields was rebuilt under a local Act, which also provided for the building of a parish vestry room. This vestry room was built on ground which was purchased for & added to the churchyard, & the site of the vestry room & certain burial vaults constructed underneath it were consecrated & used as a place for burials. In 1826 this vestry room was pulled down & replaced by a building erected under 7 Geo. 4, c. 77, which provided that the new vestry room & the ground on which it was erected should be vested in the persons or bodies corporate in whom the room in lieu of which it was erected would have been vested if the Act had not been passed. In the basement of the new vestry room vaults were constructed & used for burials, the site having been previously consecrated. This vestry room was used, as its predecessor had been, for meetings of the vestry, & for other ecclesiastical and civil purposes connected with the affairs of the parish. In 1891 the vestry, which had then become a corpn. under Metropolis Management Act, 1855 (c. 120), having built a new town hall at some distance from the church, gave up possession of the old vestry room to the vicar & churchwardens. By London Government Act, 1899 (c. 14), the property & powers of the old vestry were transferred to pltfs., who, in 1903, brought an action against the vicar & churchwardens to recover possession of the old vestry room :—*Held :* by Burial Act, 1816 (c. 141), s. 4, the then vestry room, being erected on a site which was consecrated as burial ground, was vested in the vicar of the parish, the vestry room of 1826 was by the Act under which it was erected similarly vested, & consequently that it did not pass under the Act of 1899 as "property of the vestry" to pltfs.—WESTMINSTER CORPN. *v.* ST. MARTIN-IN-THE-FIELDS (VICAR & CHURCHWARDENS) (1906), 96 L. T. 491 ; 71 J. P. 82 ; 23 T. L. R. 112 ; 5 L. G. R. 500.

20. Adjustment of areas & expenses between councils—Case stated under London Government Act, 1899 (c. 14), s. 29—No costs awarded.]—On a case stated under above sect., the ct. will not make any order as to costs.—PADDINGTON BOROUGH COUNCIL *v.* KENSINGTON ROYAL BOROUGH COUNCIL (1911), 105 L. T. 35 ; 75 J. P. 514 ; 9 L. G. R. 868, D. C.

SECT. 2.—THE CONSTITUTION.

SUB-SECT. 1.—THE MAYOR AND ALDERMEN.

21. Alderman—Disqualification—Absence for six months consecutively—From when computed.]—By Local Government Act, 1894 (c. 73), s. 46 (6), which is incorporated in London Government Act, 1899 (c. 14), by sect. 2 (5) of the latter Act, so far as relates to the offices of mayor & alderman, if a member of a council of a parish or district, including now an alderman, is absent from meetings of the council for more than six months consecutively, except in certain cases, his office shall, on the expiration of those months, become vacant. Pltf., who was an alderman of a metropolitan borough, was absent from a meeting of the council on June 6, 1905, & from each subsequent meeting until Nov. 21, when he was again present :—*Held :* the absence must begin to be reckoned from the first meeting at which pltf. was absent, viz. June 6, & as the six months from that date had not expired on Nov. 21, his office had not become vacant.—KERSHAW *v.* SHOREDITCH CORPN. (1906), 95 L. T. 55 ; 70 J. P. 190 ; 22 T. L. R. 302 ; 4 L. G. R. 302.

SUB-SECT. 2.—BOROUGH COUNCILLORS.

See LOCAL GOVERNMENT, Vol. XXXIII., pp. 62 *et seq.*

22. Disqualification of liability to penalties—"Being concerned or interested in any contract."]—By Metropolis Management Act, 1855 (c. 120), s. 54, if a member of a vestry is concerned or interested in any contract made with the vestry, he ceases to be a member, & is liable to penalties. Deft. lent money to a person who had made a contract with a vestry, & the benefit of the contractor was assigned to deft. as security for the loan. Afterwards deft. was elected a member of the vestry :—*Held :* Metropolis Management Act, 1855 (c. 120), s. 54, applied to a contract made before deft. became a member of the vestry, deft. was interested in the contract within the meaning of the sect. ; & there was evidence of his having acted as a member of the vestry.—HUNNINGS *v.* WILLIAMSON (1883), 11 Q. B. D. 533 ; 52 L. J. Q. B. 416 ; 49 L. T. 361 ; 48 J. P. 132 ; 32 W. R. 267, C. A.

Annotations :—**Refd.** Everett *v.* Griffiths, [1924] 1 K. B. 941 ; Lapish *v.* Braithwaite, [1925] 1 K. B. 474.

SECT. 3.—**PROCEEDINGS.**

23. Method of voting—By show of hands—Division claimed after show of hands.]—By a bye-law made pursuant to Metropolis Management Act, 1855 (c. 120), s. 202, it was provided that "all questions shall be determined by a show of hands, or by a division, if demanded, with the names recorded":—*Held:* the division or poll might take place after a show of hands.—TEAR *v.* FREEBODY (1858), as reported in 4 C. B. N. S. 228; 140 E. R. 1071.

Annotations:—**Mentd.** Simpson *v.* Smith (1871), L. R. 6 C. P. 87; Manners *v.* Johnson (1875), 1 Ch. D. 673; St. Mary, Islington, Vestry *v.* Goodman (1889), 23 Q. B. D. 154.

24. Meeting for special purpose—Necessity for notice.]—Where on a transfer of powers & officers from a vestry to a borough council under the London Government Act, 1899 (c. 14), an officer, whose office is abolished, makes a claim for compensation, the council is the proper tribunal to decide, with a view to assessing his compensation, what has been the amount of his salary & emoluments, & their finding of fact cannot be reviewed by the ct.

Where a borough council after investigation of the circumstances have passed a resolution under Local Government Act, 1888 (c. 41), s. 120, assessing the compensation payable to an officer for the abolition of his office, this resolution is binding on the council, & cannot be rescinded by a subsequent resolution on the ground that the amount claimed & assessed is excessive.

In 1874 the pltf. was appointed surveyor to the vestry of St. George, Hanover Square, at a salary of £350 a year, which was increased from time to time. By the London Government Act, 1899 (c. 14), the borough of Westminster was constituted, which included the parish of St. George. In May, 1901, the Westminster City Council abolished pltf.'s office, & he sent in his claim for compensation based on the average of his salary & emoluments for the five years previous to the abolition of his office. On Aug. 1, 1901, the council passed a resolution granting him the amount claimed, namely, £518 12*s.* 4*d.* a year. There was no appeal to the Treasury from this resolution. In Nov. 1902, the auditor disallowed part of the compensation on the ground that it did not properly represent emoluments, & he surcharged the members of the council with the amount. On Nov. 20, 1902, the council passed a resolution rescinding their resolution of Aug. 1, 1901, & reducing pltf.'s allowance to £432 7*s.* 10*d.* He appealed to the Treasury, but this appeal was disallowed, & in July, 1903, commenced this action against the corpn. for the arrears of his allowance:—*Held:* (1) the period of five years of which pltf. had given particulars was the right period, but it was immaterial, as the council had a general power to assess; the question what was the amount of pltf.'s salary & emoluments was a question of fact which must be decided by the council, & it was not competent for the ct. to review their decision; even if the council exceeded the right amount their decision was not *ultra vires:* the vote was good up to the proper limit; the resolution of Aug. 1, 1901, was valid; the council had no power to relieve themselves from the obligation thus rendered binding upon them, & the resolution to rescind it was invalid.

(2) The sect. [Metropolitan Management Amendment Act, 1856 (c. 112), s. 9] means that public notice must be given of the place & time of holding the meeting & of the special purposes thereof (BUCKLEY, J.).—LIVINGSTONE *v.* WESTMINSTER CORPN., [1904] 2 K. B. 109; 73 L. J. K. B. 434; 68 J. P. 276; 52 W. R. 395; 20 T. L. R. 361; 48 Sol. Jo. 331; 2 L. G. R. 581.

Annotation:—*As to* (1) **Reld.** R. *v.* Roberts, *Ex p.* Scurr, [1924] 2 K. B. 695.

25. Effect of resolution.]—LIVINGSTONE *v.* WESTMINSTER CORPN., No. 24, *ante*.

Part VI.—Metropolitan Local Finance.

Rating powers.]—*See* RATES & RATING.

Borrowing powers.]—*See* LOCAL GOVERNMENT, Vol. XXXIII., pp. 18, 19, 87-89.

Revenue & expenditure.]—*See* INCOME TAX, Vol. XXVIII., pp. 55, 73, Nos. 281, 302, 393.

Accounts & audit.]—*See* LOCAL GOVERNMENT, Vol. XXXIII., pp. 19-21, 89, 90.

Part VII.—Officers of Metropolitan Authorities.

Officers.]—*See, generally,* LOCAL GOVERNMENT, Vol. XXXIII., pp. 73-79.

Compensation for loss of office.]—*See, generally,* PUBLIC AUTHORITIES.

26. Superannuation allowance—Discretion to grant or refuse—Discretion as to amount—Superannuation (Metropolis) Act, 1866 (c. 3), s. 1.]—A metropolitan vestry has a discretion under above sect. to grant or to refuse a superannuation allowance to a retiring officer; but, if an allowance be granted, the vestry has no discretion as to the amount, which must be in accordance with the scale prescribed in sect. 4.—R. *v.* ST. GEORGE'S, SOUTHWARK, VESTRY (1887), 19 Q. B. D. 533; 56 L. J. Q. B. 652; 52 J. P. 6; 35 W. R. 841, D. C.

Annotations:—**Overd.** R. *v.* St. Pancras Vestry (1890), 24 Q. B. D. 371. **Reld.** R. *v.* Board of Education, [1910] 2 K. B. 165.

27. —— —— —— ——.]—A metropolitan vestry has a discretion under above sect., not merely as to granting or refusing a superannuation allowance to a retiring officer, but also, if an allowance be granted, as to the amount, subject to the scale of maximum allowances prescribed in sect. 4.

R. v. *St. George's, Southwark, Vestry,* No. 26, *ante*, overd.

A vestry in declining to grant a superannuation allowance to a retiring officer were influenced by

the idea that they had no discretion as to the amount:—*Held:* the vestry had not properly exercised their discretion, & a *mandamus* should go to them to consider & determine the application.—R. *v.* ST. PANCRAS VESTRY (1890), 24 Q. B. D. 371; 59 L. J. Q. B. 244; 62 L. T. 440; 54 J. P. 389; 38 W. R. 311; 6 T. L. R. 175, C. A.

Annotations:—**Consd.** R. *v.* Board of Education, [1910] 2 K. B. 165. **Apld.** Webster *v.* Metropolitan Water Board (1912), 76 J. P. 474; Sadler *v.* Sheffield Corpn., Dyson *v.* Sheffield Corpn., [1924] 1 Ch. 483. **Refd.** Smith *v.* Chorley District Council (1897), 76 L. T. 637; Newton *v.* St. Marylebone B. C. (1915), 113 L. T. 531; Roberts *v.* Hopwood, [1925] A. C. 578; Short *v.* Poole Corpn., [1926] Ch. 66.

28. —— ——.]—A metropolitan vestry appointed a committee to consider an application from a rate collector for a superannuation allowance. The committee, after fully considering the whole matter, reported that no pension should be granted on the ground of the high salary received by the collector for many years, & because he had been allowed to perform the office by deputy for several years. The vestry adopted the conclusions of this report & refused the application. More than a year previously, sixty out of one hundred & eight members of the vestry had been elected on a programme including the total abolition of pensions to salaried officers:—*Held:* there was not sufficient evidence that the vestry had not exercised their discretion lawfully.—R. *v.* BROMLEY ST. LEONARD VESTRY (1896), 60 J. P. 725; 13 T. L. R. 1; 41 Sol. Jo. 13, D. C.

29. —— "Every person designated an officer."]—A local Act provided a scheme under which every officer of the council who shall have completed a certain length of service or attained a certain age shall be entitled to a superannuation allowance. By sect. 2: "Officer" is defined to mean "every officer in the service of the Council designated an officer in an established capacity by a resolution of the Council passed or to be passed." In 1876, pltf. was, by a resolution of the vestry of the parish of St. Marylebone, defts.', predecessors, appointed the broker to execute warrants of distress for the recovery of the parochial rates, & acted in that capacity for many years. In 1899 the powers of the vestry were transferred to defts. by the London Government Act, 1899 (c. 14), & pltf. passed into their service as an officer to collect rates. From time to time resolutions were passed by the council, & entered in their minutes, in which pltf. was referred to as their warrant officer. Pltf., on leaving defts.' employment, claimed to be entitled to a pension under the local Act, as being an officer within the meaning of sect. 2:—*Held:* the word "designated" in sect. 2 did not mean "incidentally referred to," but meant "pointed out with particularity," & in the absence of any resolution designating pltf. an officer in an established capacity, he was not entitled to participate in the superannuation scheme.—NEWTON *v.* MARYLEBONE BOROUGH COUNCIL (1915), 84 L. J. K. B. 1721; 113 L. T. 531; 79 J. P. 410; 59 Sol. Jo. 493; 13 L. G. R. 711, C. A.

Part VIII.—Powers in regard to Land.

SECT. 1.—ACQUISITION OF LAND.

Under Local Government Acts—By London County Council.]—*See* Local Government Act, 1888 (c. 41), ss. 3 (iv), 40 (6), 65 (1), (2); Public Health Act, 1875 (c. 55), ss. 176–178; COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 291 *et seq.*; LOCAL GOVERNMENT, Vol. XXXIII., pp. 13, 14.

—— **By borough council.**]—*See* London Government Act, 1899 (c. 14), s. 55 (2), sched. II., Part II.

Under Metropolis Management Acts.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 295, Nos. 2243–2251.

Under Metropolitan Paving Act, 1817 (c. xxix).]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 295–297, Nos. 2252–2287.

Under other Acts.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 297, 298, Nos. 2288–2298.

SECT. 2.—ALIENATION OF LAND.

By London County Council.]—*See* Local Government Act, 1881 (c. 41), ss. 40 (6), 64 (3).

By borough council.]—*See* London Government Act, 1899 (c. 14), ss. 6 (5), 32.

Application of purchase-money.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 246, Nos. 1455–1457.

SECT. 3.—METROPOLITAN COMMONS.

See COMMONS, Vol. XI., pp. 88–90, Nos. 1077–1090.

Part IX.—Metropolitan Bye-Laws.

See, generally, PUBLIC HEALTH.

Part X.—Execution of the Metropolitan Management Acts and Public Health (London) Act.

SECT. 1.—**METROPOLIS MANAGEMENT ACTS.**

Streets in metropolis.]—*See, generally,* HIGHWAYS, Vol. XXVI., pp. 487–518.

—— **Definition.**]—*See* HIGHWAYS, Vol. XXVI., pp. 272–274, Nos. 114–125.

—— **New street.**]—*See* HIGHWAYS, Vol. XXVI., pp. 275–279, Nos. 134–163.

—— **Nuisances in streets.**]—*See* HIGHWAYS, Vol. XXVI., pp. 423, 424, Nos. 1427–1439.

—— **Injury to street lamps.**]—*See* HIGHWAYS, Vol. XXVI., p. 394, No. 1209.

—— **Liability for expenses as between landlord & tenant.**]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 305–307, Nos. 4496, 4509.

Charities — Nomination of beneficiaries.] — *See* CHARITIES, Vol. VIII., p. 319, No. 1015.

—— **Appointment of new trustees.**] — *See* CHARITIES, Vol. VIII., p. 371, No. 1779.

Powers in regard to land.]—*See* Part VIII., *ante.*

Sewers & drains.]—*See* SEWERS & DRAINS.

SECT. 2.—**PUBLIC HEALTH (LONDON) ACT.**

See, generally, PUBLIC HEALTH.

Creation & abatement of nuisances.] — *See* NUISANCE.

Sanitary arrangements.]—*See* PUBLIC HEALTH, SEWERS & DRAINS.

Water supply.]— *See* WATER SUPPLY.

Offences as to sale of unwholesome food.]—*See* FOOD & DRUGS, Vol. XXV., pp. 113–115, Nos. 370–384.

Electric light & power undertakings.] — *See* ELECTRIC LIGHTING, Vol. XX., p. 218, No. 111.

Liability for payment of expenses as between landlord & tenant.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 307, 308, Nos. 4510–4527.

Part XI.—Metropolitan Building Legislation.

NOTE.—*In this part of the Title London Building Act,* 1894 (c. ccxiii), *London Building Act,* 1894 (*Amendment*) *Act,* 1898 (c. cxxxviii), *London Building Acts* (*Amendment*) *Act,* 1905 (c. ccix), *London County Council* (*General Powers*) *Act,* 1908 (c. cvii), *Part III., & London County Council* (*General Powers*) *Act,* 1909 (c. cxxx), *Part IV., are referred to particularly as* 1894 *Act,* 1898 *Act,* 1905 *Act,* 1908 *Act,* 1909 *Act respectively, & collectively as the London Building Acts.*

SECT. 1.—**AUTHORITIES AND OFFICERS.**

SUB-SECT. 1.—THE TRIBUNAL OF APPEAL.

See 1894 Act, ss. 157, 175–186 ; 1909 Act, s. 25.

30. Jurisdiction of tribunal—Conditional approval of plans—Failure to object to condition within time.]—The plans of a new building within 1905 Act, s. 7, were approved by the county council subject to a condition, & the owner of the building did not appeal within two months after the conditional approval. The owner erected the building without complying with the condition, & the council refused to issue a certificate under s. 7 (2). The owner within two months therefrom appealed to the tribunal of appeal against the refusal of the certificate, & contended that he was entitled to raise the question whether the condition was one which could be reasonably required :— *Held :* an appeal against the condition ought to have been brought within two months after the conditional approval of the plans by the council, & upon the appeal against the refusal of the certificate the tribunal of appeal had jurisdiction only to determine the question whether the building had in fact been erected in accordance with the plans as approved.—LONDON COUNTY COUNCIL *v.* CLARK, [1912] 1 K. B. 511 ; 81 L. J. K. B. 225 ; 105 L. T. 713 ; 76 J. P. 60 ; 10 L. G. R. 59 ; *sub nom.* CLARKE *v.* LONDON COUNTY COUNCIL, 56 Sol. Jo. 125, D. C.

31. Discretion of tribunal—Statement of case.]—The ct. will not interfere with the discretion of the tribunal of appeal under 1894 Act, by ordering them to state only one case, instead of several cases, where several parties are dissatisfied with a decision of the tribunal & desire to have cases stated for the opinion of the ct.—R. *v.* TRIBUNAL OF APPEAL, *Ex p.* LONDON COUNTY COUNCIL (1912), 76 J. P. 345 ; 10 L. G. R. 637, D. C.

32. Form of order — Necessity for seal.] — A decision of the tribunal of appeal under 1894 Act, which is expressed in the judgment of the tribunal, but is not embodied in an order under its seal, is of no binding effect.—LONDON COUNTY COUNCIL *v.* METROPOLITAN RY. CO., [1919] 1 K. B. 283 ; 88 L. J. K. B. 448 ; 120 L. T. 182 ; 83 J. P. 105 ; 17 L. G. R. 210, C. A.

33. Appeal to tribunal—Whether deposit of plans for building notice condition precedent.]—LONDON COUNTY COUNCIL *v.* SPINK & SON, LTD., No. 108, *post.*

—— .] —*See* HIGHWAYS, Vol. XXVI., pp. 506, 507, Nos. 2120–2126.

SUB-SECT. 2.—THE SUPERINTENDING ARCHITECT.

See 1894 Act, ss. 136, 137.

Conclusiveness of decision.]—*See* HIGHWAYS, Vol. XXVI., pp. 504–506, Nos. 2110–2119.

Time when decision may be given.]—*See* HIGHWAYS, Vol. XXVI., p. 507, Nos. 2127–2130.

SUB-SECT. 3.—THE DISTRICT SURVEYOR.

A. In General.

See 1894 Act, ss. 138–144, 217.

34. Right of county council to dismiss.]—The London County Council have, under 1894 Act, s. 139, power to dismiss a district surveyor from his office at their pleasure. His tenure of office

Sect. 1.—*Authorities and officers: Sub-sect.* 3, *A., B. & C.*]

is neither a freehold nor *quamdiu se bene gesserit.*—NOTLEY *v.* LONDON COUNTY COUNCIL, [1915] 3 K. B. 580; 85 L. J. K. B. 113; 113 L. T. 1110; 80 J. P. 23; 13 L. G. R. 1346.

B. Powers and Duties.

See 1894 Act, ss. 148, 150–153, 159–163; 1905 Act, s. 23 (2).

35. Enforcement of duties—By mandamus.]—R. *v.* REDMAN (1889), 6 T. L. R. 9, D. C.

Mandamus generally.]—*See* CROWN PRACTICE, Vol. XVI., pp. 276 *et seq.*

36. Notice of objection—Service of—Buildings not in course of erection.]—In 1876 T. applied to the Metropolitan Board of Works for leave to erect an iron building called a skating rink at the back of his premises pursuant to Metropolitan Building Act, 1855 (c. 122), s. 56, & the board granted leave on T. giving the board an undertaking to remove the building within two years. The time elapsed, & the board called on T. to remove the building, but he failed to do so:—*Held:* sects. 45 & 46 applied only to a building in course of erection & not to this case, & there was no power given to a magistrate to enforce its removal.—PARSONS *v.* TIMEWELL (1879), 44 J. P. 296, D. C.

Annotations:—**Folld.** Smith *v.* Legg, [1893] 1 Q. B. 398. **Reld.** Wallen *v.* Lister, [1894] 1 Q. B. 312.

37. —— —— ——.]—By Metropolitan Building Act, 1855 (c. 122), s. 45, if in erecting any building anything is done contrary to the rules of the Act, power is given to the district surveyor to give "the builder engaged in erecting such building" notice to cause anything done contrary to the rules of the Act to be amended; &, by s. 46, if the builder to whom such notice is given makes default in complying with such notice, a magistrate may, on the application of the surveyor, make an order requiring him to comply with it. By s. 105: "In cases where any building has been erected . . . without due notice to the district surveyor . . . the time during which the district surveyor may take any proceeding or do anything authorised or required by this Act to be done by him in respect of such building . . . shall begin to run from the date of his discovering that such building has been erected."

After the completion of a building, which had been erected without due notice to & without the knowledge of the district surveyor, he discovered that it infringed the rules of the Act. He thereupon served the builder who had erected the building with notice under s. 45, calling upon him to render the building conformable to the rules of the Act, &, upon his failing to comply with this notice, he obtained from a magistrate, under s. 46, an order requiring him to do so:—*Held:* ss. 45 & 46 only applied while the building was in course of erection, & s. 105 did not enable the surveyor to take any proceeding under these sections when the building had been completed.—SMITH *v.* LEGG, [1893] 1 Q. B. 398; 68 L. T. 347; 57 J. P. 295; 41 W. R. 464; 9 T. L. R. 231; 37 Sol. Jo. 252; 5 R. 233, D. C.

Annotation:—**Apld.** Wallen *v.* Lister, [1894] 1 Q. B. 312.

38. —— —— ——.]—A justice has no jurisdiction to make an order under Metropolitan Building Act, 1855 (c. 127), s. 46, upon a builder who at the date of the order has completed the building & given up possession of it, even though he was engaged in erecting it at the time of the service upon him of the notice under s. 45.—WALLEN *v.* LISTER, [1894] 1 Q. B. 312; 63 L. J. M. C. 51; 70 L. T. 348; 58 J. P. 283; 42 W. R. 318; 10 T. L. R. 209; 10 R. 127, D. C.

See, now, 1894 Act, s. 152.

39. —— —— **Time for taking proceedings.**]—G., the builder of a new house in the metropolis, on Apr. 1, sent notice to B., the district surveyor, with plans. On Aug. 4, B. served forty-eight hours' notice on G. to amend the work & leave sufficient area space, pursuant to 44 & 45 Vict. c. 14, s. 14. The house was then covered in, & nothing was done under the notice. On Feb. 1 following information of an offence was laid by B.:—*Held:* the offence was the refusal to do the work ordered on Aug. 4, & the information was within the six months' limitation.—BOVILL *v.* GIBBS (1887), 51 J. P. 485, D. C.

40. —— **Effect of failure to give.**]—Failure by a district surveyor to give a notice of objection under 1894 Act, s. 150, is no bar to proceedings for default in complying with a notice of irregularity under 1894 Act, s 153, even although the district surveyor is aware of what is being done.—COGGIN *v.* DUFF (1907), 96 L. T. 670; 71 J. P. 302; 5 L. G. R. 615, D. C.

41. Supervision of wooden structures.]—WESTMINSTER CORPN. *v.* WATSON, No. 42, *post.*

C. Remuneration.

See 1894 Act, ss. 154–158.

42. Right to fees—Effect of 1894 Act.]—(1) The transfer by the London Government Act, 1899 (c. 14), of the powers & duties of the London County Council as to licencing the erection of wooden structures under 1894 Act, s. 84, to the borough councils established by the Act of 1899 does not operate as a transfer of the powers & duties of the district surveyors with respect to the supervision or inspection of those structures. Under the licence granted by a borough council a district surveyor has no powers, duties, or liabilities imposed upon him, unless he is named in the licence as the person to exercise supervision or inspection.

(2) Wooden structures falling within 1894 Act, s. 84, are works of which a district surveyor is entitled to notice under s. 145 of that Act, & as to which he may have duties of supervision & inspection independently of the terms of the licence of the borough council.

(3) The right to receive the fees for supervision & inspection specified in 1894 Act has not been transferred to the borough councils, nor has it wholly lapsed; a right to receive proper fees for duties necessarily performed remains in the district surveyor.—WESTMINSTER CORPN. *v.* WATSON, [1902] 2 K. B. 717; 71 L. J. K. B. 603; 87 L. T. 326; 51 W. R. 300; 18 T. L. R. 621; 46 Sol. Jo. 514, D. C.

Annotations: *As to* (2) **Reld.** Daubney *v.* Angel (1912), 77 J. P. Jo. 5. *As to* (3) **Reld.** Akers *v.* Daubney (1915), 85 L. J. K. B. 315.

43. Who is an "owner"—Land let on building lease at peppercorn rent.]—Under Metropolitan Building Act, 1855 (c. 122), s. 51, an owner of land in fee simple who lets it on a building lease at a peppercorn rent is not liable, as owner, to the surveyor for fees in respect of buildings afterwards erected on such land, a peppercorn rent not being within the meaning of the words "of the whole or of any part of the rents or profits of any land or tenement" in the interpretation clause, sect. 3.—EVELYN *v.* WHICHCORD (1858), E. B. & E. 126; 27 L. J. M. C. 211; 31 L. T. O. S. 96; 22 J. P. 658; 4 Jur. N. S. 808; 6 W. R. 468; 120 E. R. 455.

Annotation:—**Reld.** Hunt *v.* Harris (1865), 19 C. B. N. S. 13.

44. —— ——.]—Applt. being seised in fee of certain building land situate within the limits of Metropolitan Building Act, 1855 (c. 122), entered into an agreement with L. to grant leases of ninety-nine years of certain plots of the land, so soon as L. should have erected houses thereon, at a peppercorn until June 24, 1870, & afterwards at £28 a year. L. built houses which were roofed in about Sept. 1870, & applt. became entitled to receive the first quarter's ground rent on Sept. 29; the houses were surveyed by resp., the district surveyor, & he, on Oct. 26, 1870, delivered a bill for his fees to L., who afterwards became insolvent. Resp. afterwards claimed payment of his fees from applt.:—*Held:* applt. was not liable to pay resp.'s fees, as he was not the "owner" of the houses within the meaning of sects. 3, 51; for L., the lessee for ninety-nine years, whether he had a legal or only an equitable title, had the power to let the houses & receive the profits, & was therefore "owner."—CAUDWELL *v.* HANSON (1871), L. R. 7 Q. B. 55; 25 L. T. 595; 36 J. P. 470; 20 W. R. 202; *sub nom.* CANWELL *v.* HANSON, 41 L. J. M. C. 8.

45. —— **Owner at time fees become due.**]—In 1866, notice was given by a builder to the district surveyor of his intention to erect three houses under Metropolitan Building Act, 1855 (c. 122), s. 38. The surveyor inspected the houses, & the roofs were covered in on July 9, 1866, & on Aug. 9, 1866, the surveyor became entitled to certain fees from the "builder, owner, or occupier," under sect. 51. T. first became owner in 1869; & the surveyor, after due demand, took out a summons against T for the fees:—*Held:* "owner" meant owner for the time being when the fees became due; & T. was, therefore, not liable.—TUBB *v.* GOOD (1870), L. R. 5 Q. B. 443; 39 L. J. M. C. 135; 22 L. T. 885; 35 J. P. 118.

46. For what buildings fee may be charged — Separate sets of chambers in one building.]—Fourteen sets of chambers were erected, intended to be tenanted by different persons, & contained in a building exceeding 3,600 square feet in area. Each set was separate from the others, & had its own separate entrance door giving access from the street entrance & staircase which were common to all. Adjoining sets were divided in accordance with Metropolitan Building Act, 1855 (c. 122), s. 27, r. 2, horizontally by party arches or fireproof floors, & vertically by party walls. Resp., as district surveyor, claimed a fee in respect of each set of chambers as a separate building. On a case stated:—*Held:* the separate sets of chambers were not buildings within Metropolitan Building Act, 1855 (c. 122), sched. II., Part I., & the district surveyor was entitled to one fee only in respect of the entire structure.—MOIR *v.* WILLIAMS, [1892] 1 Q. B. 264; 61 L. J. M. C. 33; 66 L. T. 215; 56 J. P. 197; 40 W. R. 69; 8 T. L. R. 44; 36 Sol. Jo. 40, C. A.

Annotation:—**Mentd.** Waite's Executors *v.* I. R. Comrs., [1914] 3 K. B. 196.

47. —— **Buildings erected for school board.**]—By 1894 Act, s. 21, any building to be erected upon any lands belonging at the time of the coming into operation of the Act, to the London School Board, may be erected in accordance with the provision of any Act in force immediately before the passing of the Act:—*Held:* the fees payable to the district surveyor were also regulated by such earlier Act.—MARSLAND *v.* WALLIS & SONS (1900), 83 L. T. 761; 65 J. P. 166, D. C.

48. —— ——.]—Applts. erected for the London County Council, as education authority for the county of London, school premises intended to be used as a special public elementary school, as contemplated by Elementary Education (Defective & Epileptic Children) Act, 1899 (c. 32). During the progress of the work resp., who was the district surveyor for the district, inspected it in that capacity. The premises were built in accordance with plans prepared by the architect to the London County Council Education Department & approved by the Board of Education, & such plans were in no way deviated from by reason of any requirements of resp. A building notice was served on the resp. under 1894 Act, s. 145, after the completion of the buildings, but not previously:—*Held:* although the building was exempted by 1894 Act, s. 201 (5), from the operation of Parts VI. & VII. of the Act, yet, as it had been decided in *London County Council* v. *District Surveyors' Association & Willis*, No. 71, *post*, that the district surveyor was entitled to notice in respect of such a building under s. 145, & as he had duties to perform in respect of it under Parts of the Act other than Parts VI. & VII., he was entitled to the fees mentioned in s. 154 as being payable to the district surveyor.—GALBRAITH BROTHERS *v.* DICKSEE (1910), 102 L. T. 890; 74 J. P. 348; 8 L. G. R. 800, D. C.

Annotations:—**Consd.** Akers *v.* Daubney (1915), 85 L. J. K. B. 315. **Reld.** Holliday & Greenwood *v.* District Surveyors' Assocn. & Dicksee (1914), 110 L. T. 983.

49. —— **Reservoir.**]—A water co. was empowered by a special Act to make & maintain in the lines & situation & according to the levels shown on the deposited plans & sections the reservoirs, lines of pipes, & other works thereinafter described, with all proper wells, filtering beds, & other appliances for collecting, filtering, storing, & distributing water. The co. constructed, under the powers of the Act, two covered storage reservoirs in the metropolitan district of the cubical extent of 2,900,000 cubic feet & 2,769,000 cubic feet respectively. The reservoirs had a flooring of concrete, with walls of brickwork backed by concrete & earth, & were covered in by a series of brick arches supported by brick piers 20 feet high. The brick arches were covered with a layer of concrete with earth on top. The reservoirs in some portion projected above the surface of the ground:—*Held:* the reservoirs were "buildings or structures" within 1894 Act, sects. 138, 145, 154; the application of those sects. was not inconsistent with the provisions of the special Act; & therefore it was the duty of the district surveyor to supervise the construction of the reservoirs, & he was entitled to his fees for such supervision.—MORAN & SON, LTD. *v.* MARSLAND, [1909] 1 K. B. 744; 78 L. J. K. B. 346; 100 L. T. 374; 73 J. P. 114; 25 T. L. R. 235; 7 L. G. R. 493, D. C.

Annotations:—**Reld.** Galbraith *v.* Dicksee (1910), 74 J. P. 348; Daubney *v.* Angel (1912), 77 J. P. Jo. 5. **Mentd.** Kershaw *v.* L. M. & S. Ry. (1924), 23 L. G. R. 592.

50. —— **Additions & alterations to building.**]—(1) The question whether a building is a new building within Education (Administrative Provisions) Act, 1911 (c. 32), s. 3, is one of fact.

(2) Where a district surveyor has been served with a building notice under 1894 Act, s. 145, in respect of works consisting in the making of additions & alterations in a building, & has consequential duties to perform, & performs those duties, he is entitled to the fees payable under sect. 154 (1), & Schedule III. of the Act.—AKERS & CO., LTD. *v.* DAUBNEY (1915), 85 L. J. K. B. 315; 114 L. T. 160; 79 J. P. 516; 13 L. G. R. 1201, D. C.

51. —— **In respect of party wall—Whether from both owners.**]—A party wall separating the premises of two adjoining owners became

Sect. 1.—*Authorities and officers: Sub-sect.* 3, *C. Sect.* 2: *Sub-sects.* 1 & 2.]

dangerous, & the steps prescribed by the "dangerous structures" provisions of 1894 Act were duly taken with regard to it, & an inspection of the party wall was made by the district surveyor. The county council paid to the district surveyor two sets of fees in respect of his inspection of the party wall, which was the dangerous structure in question, & claimed to recover the two sets of fees from the owners. They had already recovered one set of fees from one of the owners:—*Held:* the party wall was only one dangerous structure within the meaning of the Act, & the county council were entitled to recover only one set of fees in respect of the surveyor's inspection of the same.—LONDON COUNTY COUNCIL *v.* SHEINMAN (1905), 93 L. T. 505; 69 J. P. 395; 3 L. G. R. 977, D. C.

52. Recovery of fees—When "default" occurs—1894 Act, s. 157 (2).]—Where default is made by a builder in payment of the fees due from him to the district surveyor under 1894 Act, s. 154, they may, under above sub-sect., be recovered from the owner within six calendar months from the delivery to him of a proper bill specifying the amount of the fees, inasmuch as until that time the "matter of complaint" within Summary Jurisdiction Act, 1848 (c. 42), s. 11, does not arise.—CORBETT *v.* BADGER, [1901] 2 K. B. 278; 70 L. J. K. B. 640; 84 L. T. 602; 65 J. P. 552; 49 W. R. 539; 17 T. L. R. 474; 45 Sol. Jo. 485, D. C.

SECT. 2.—GENERAL PROVISIONS OF LONDON BUILDING ACTS.

SUB-SECT. 1.—DEFINITIONS.

53. "Building"—Wooden structure without foundations.]—A structure of wood, of considerable size, 16 feet by 13, & intended to be permanently used as a shop, is a "building" within Metropolitan Building Act, 1855 (c. 122), although not let into the ground, but merely laid upon timbers upon the surface.—STEVENS *v.* GOURLEY (1859), 7 C. B. N. S. 99; 29 L. J. C. P. 1; 1 L. T. 33; 6 Jur. N. S. 147; 8 W. R. 85; 141 E. R. 752.

Annotations:—**Apld.** Richardson *v.* Brown (1885), 49 J. P. 661. **Distd.** Hall *v.* Smallpiece (1890), 59 L. J. M. C. 97. **Consd.** L. C. C. *v.* Pearce, [1892] 2 Q. B. 109; Southend-on-Sea Corpn. *v.* Archer, Same *v.* Romanis (1901), 70 L. J. K. B. 328. **Refd.** Harris *v.* De Pinna (1886), 33 Ch. D. 238; L. C. C. *v.* Humphreys (1894), 10 T. L. R. 594; Badley *v.* Cuckfield Union R. D. C. (1895), 15 R. 461; Newell *v.* Ormskirk U. D. C. (1907), 71 J. P. 119. **Mentd.** *Re* Coltman, Coltman *v.* Coltman (1881), 19 Ch. D. 64; Brightman *v.* Tate, [1919] 1 K. B. 463.

54. —— Roof inclosure.]—C. was occupier of a house in the Metropolis, & there was part of his yard between the front of the house & the footpath of the street, the yard being inclosed by a brick wall. C. raised the wall 5 feet, & then covered in the yard between the wall & his house with a roof, the said building being beyond the line of street, as certified by the superintending architect:—*Held:* the roof inclosure constituted a building within Metropolis Management Amendment Act, 1862 (c. 102), s. 75. *Semble:* the magistrate had power to order the roof to be removed, but not to order the wall to be reduced to its original height.—CLARK *v.* ST. PANCRAS VESTRY (1869), 34 J. P. 181.

Annotation:—**Consd.** Wendon *v.* L. C. C., [1894] 1 Q. B. 812.

55. "Public building"—Ambulance station.]—An ambulance station structurally disconnected, with any buildings, & from which the public is rigorously excluded, is not of itself a public building within Metropolitan Building Act, 1855 (c. 122), s. 3, so as to require the builder to deposit plans & sections of the building with the notice of its erection to the district surveyor under bye-law 5, made under sect. 16 of Metropolitan Management & Building Acts (Amendment) Act, 1878 (c. 32).—JOSOLYNE *v.* MEESON (1885), 53 L. T. 319; 49 J. P. 805; *sub nom.* JOSELYN *v.* MEESON, 1 T. L. R. 565, D. C.

Annotation:—**Folld.** Moses *v.* Marsland, [1901] 1 K. B. 668.

56. —— Home for defective children.]—A house provided by the managers of the Metropolitan Asylums District as a permanent home, but not as a school, for children who by reason of defect of intellect or physical infirmity cannot be properly trained in association with children in ordinary schools is not a "public building" within 1894 Act.—MOSES *v.* MARSLAND, [1901] 1 K. B. 668; 70 L. J. Q. B. 261; 83 L. T. 740; 65 J. P. 183; 49 W. R. 217; 17 T. L. R. 190; 45 Sol. Jo. 220, D. C.

Annotation:—**Refd.** Mary Clark Home, Trustees *v.* Anderson (1904), 91 L. T. 457.

57. —— Public elementary school.]—LONDON COUNTY COUNCIL *v.* DISTRICT SURVEYORS' ASSOCN. & WILLIS, No. 71, *post.*

58. "Topmost storey"—Need not be contained in four vertical walls.]—By Metropolitan Building Act, 1855 (c. 122), sched. I., the thickness of the external & party-walls of dwelling-houses & warehouses throughout the different storeys is regulated in accordance with rules there laid down, the necessary thickness varying with the height & width of the wall; by rule 5, provision is made for the mode of measuring the height of every topmost storey, & by rule 6, "the height of every wall is to be measured from the base of the wall to the level of the top of the topmost storey":—*Held:* a "topmost storey" need not necessarily be contained within four vertical walls, & floors or rooms inclosed on three sides by vertical walls & in front by the sloping roof of the house were storeys within the sched. & rules.—FOOT *v.* HODGSON (1890), 25 Q. B. D. 160; 59 L. J. Q. B. 343; 55 J. P. 116, D. C.

59. "Building structure or work"—Movable seating for public hall.]—The owners of a certain large building situate in London called the Agricultural Hall, which was used for the purpose of public exhibitions or shows, were possessed of certain movable seating consisting of tiers of wooden platforms & capable of accommodating upwards of 3,000 persons, which seating they from time to time erected for the accommodation of the spectators at such of the exhibitions as required it:—*Held:* such seating was not a "building structure or work" within 1894 Act, s. 145; & the owners of the hall were not thereby required to serve a building notice on the district surveyor upon each occasion on which they re-erected the seating.—VENNER *v.* M'DONELL, [1897] 1 Q. B. 421; 66 L. J. Q. B. 273; 76 L. T. 152; 61 J. P. 181; 45 W. R. 267; 13 T. L. R. 254; 41 Sol. Jo. 210, D. C.

Annotations:—**Folld.** Handover *v.* Meeson (1903), 67 J. P. 313. **Apld.** Daubney *v.* Angel (1912), 77 J. P. Jo. 5. **Refd.** Moran *v.* Marsland, [1909] 1 K. B. 744; Goddard *v.* Greig, [1917] 2 K. B. 397.

60. —— Temporary flooring.]—Applts. were employed as contractors by a borough council to fit together & place in public baths which were vested in the council by London Government Act, 1899 (c. 14), temporary wooden floorings in order that the baths might be used as halls during the winter months. Applts. began the construction

of the floorings before serving a building notice under 1894 Act, s. 145, on resp., the district surveyor of the council. Resp. laid an information under the Act against applts. for neglecting to serve such a notice. The magistrate convicted applts., but found that the floorings did not affect & were not likely to affect the baths :—*Held :* the case of *Venner* v. *M'Donell*, No. 59, *ante*, was an authority governing this case. The floorings did not form a "structure, or building or work," before the commencement of which a building notice must be served upon a district surveyor under 1894 Act, s. 145, as according to the finding of the magistrate they did not affect & were not likely to affect the building in which they were placed, & so did not come within s. 78 of the Act. —HANDOVER *v.* MEESON (1903), 67 J. P. 313, D. C.

61. —— Illuminated sign.] — CHILVERS *v.* SCHENZIK, *Ex p.* LONDON COUNTY COUNCIL (1904), 48 Sol. Jo. 605, D. C.

62. —— Reservoir.]—MORAN & SON, LTD. *v.* MARSLAND, No. 49, *ante*.

63. —— Work incidental to sewer construction.] —DAUBNEY *v.* ANGEL (1912), 77 J. P. Jo. 5.

—— Street boxes for supply of electricity.]— *See* ELECTRIC LIGHTING, Vol. XX., p. 202, Nos. 21–23.

Party-walls.] — *See* BOUNDARIES, Vol. VII., pp. 304, 305, Nos. 261–268.

SUB-SECT. 2.—EXEMPTIONS AND SAVING CLAUSES.

64. Crown property—Militia depot.]—Buildings erected by the Comrs. of Lieutenancy of the City of London, under Militia (City of London) Act, 1820 (c. 100), s. 39, & Militia Law Amendment Act, 1854 (c. 105), s. 2, for the custody of the arms & stores of the militia, are within the exemption in Metropolitan Building Act, 1855 (c. 122), s. 6, as "employed for Her Majesty's use or service"; & it is not necessary to give notice to the district surveyor before commencing the building, under sect. 38. —R. *v.* JAY (1857), 8 E. & B. 469; 120 E. R. 175; *sub nom.* JAY *v.* HAMMON, 27 L. J. M. C. 25; 30 L. T. O. S. 133; 22 J. P. 527; 4 Jur. N. S. 407; 6 W. R. 41.

Annotation :—**Distd.** Westminster Vestry *v.* Hoskins, [1899] 2 Q. B. 474.

65. —— Volunteers' drill hall.]—A drill hall built for the exclusive use of a volunteer corps & vested in the commanding officer for military purposes is not exempt from Metropolis Management Act, 1855 (c. 120), s. 75, on the ground that it is Crown property.—WESTMINSTER VESTRY *v.* HOSKINS, [1899] 2 Q. B. 474; *sub nom.* ST. MARGARET'S & ST. JOHN'S VESTRY *v.* HOSKINS, 68 L. J. Q. B. 840; 81 L. T. 390; 63 J. P. 725; 47 W. R. 649; 15 T. L. R. 414; 43 Sol. Jo. 571, D. C.

Annotation :—**Dbtd.** Hornsey U. C. *v.* Hennell, [1902] 2 K. B. 73.

66. —— Buildings subject to Crown's option to lease.]—Buildings of which her Majesty's Comrs. of Works have entered into an agreement to take a lease at their option when the buildings are completed, the said buildings being built under the supervision of an architect subject to the approval of the surveyor of the Comrs. of her Majesty's Board of Works, do not come under the exemption in 1894 Act, s. 202.—DRURY *v.* RICKARD (1899), 63 J. P. 374; 15 T. L. R. 188, D. C.

67. —— Building vested in & in occupation of Crown.]—On Apr. 5, 1911, a summons was taken out under 1894 Act, s. 153, by resp., a district surveyor for the purposes of London Building Acts, against a firm of builders for non-compliance with a notice of irregularity which had been served upon them by resp. on Mar. 31, 1911, under 1894 Act, s. 151, in respect of a building in course of erection by them. The building was admittedly not in accordance with the London Building Acts. On July 20, 1911, a metropolitan magistrate made an order for compliance with the notice, the building having at that date become vested in & in the occupation of the Crown :—*Held :* the magistrate had no power to make the order. The order related to the building itself & was not merely an order that the builder should pay a fine for some previous offence, & inasmuch as the building was at the date of the order vested in & in the occupation of the Crown, it was within the exemption contained in 1894 Act, s. 202.—DELLAR BROTHERS, LTD. & TERRITORIAL FORCE ASSOCN. OF COUNTY OF LONDON *v.* DRURY, [1912] 2 K. B. 209; 81 L. J. K. B. 766; 106 L. T. 806; 76 J. P. 239; 28 T. L. R. 345; 10 L. G. R. 395, D. C.

—— .] — *See* 1894 Act, s. 202; 1905 Act, ss. 41, 42; 1908 Act, ss. 22, 77, 78; 1909 Act, s. 69.

68. Exemption by virtue of special Act—Canal company.]—By Metropolitan Building Act, 1855 (c. 122), s. 38, two days before any building is commenced, a notice in writing containing specified particulars must be given by the builder to the district surveyor appointed under the Act; & s. 6 exempts from the operation of this part of the Act any building belonging to a canal co., "& used for the purposes of" the canal under the provisions of any Act of Parliament.

A canal co. under their statutory powers put up a building upon one of their wharves, the wharf & the building being let by the co. to an institution for distributing firewood. The building was used by the tenants as a place in which to chop up firewood. The co. were not a carrying co., but took tolls for the passage of barges along their canal, & it was agreed between themselves & their tenants that all the wood required by the latter should be brought to the wharf & building in their barges along the co.'s canal :—*Held :* the building was not "used for the purposes of the canal" within Metropolitan Building Act, 1855 (c. 122), s. 6, & therefore the notice required by s. 38 ought to have been given.—COOLE *v.* LOVEGROVE, [1893] 2 Q. B. 44; 62 L. J. M. C. 153; 69 L. T. 19; 57 J. P. 647; 41 W. R. 570; 9 T. L. R. 455; 37 Sol. Jo. 477; 5 R. 418, D. C.

Annotation :—**Mentd.** Elliott *v.* L. C. C., [1899] 2 Q. B. 277.

69. Crystal Palace Act, 1881.]—CRYSTAL PALACE CO. *v.* LONDON COUNTY COUNCIL (1900), 16 T. L. R. 184, D. C.

70. Dock company.]—By Metropolis Management Act, 1855 (c. 120), s. 76, it is required that before beginning to lay or dig out the foundations of any new building seven days' notice in writing should be given to the local authority by the person intending to build. In 1894 a dock co. obtained statutory authority to make certain alterations in their dock premises, & it became necessary as ancillary to those alterations to demolish a certain workshop & erect another in its place. No notice of the intention of the dock co. to erect the new workshop was given to the local authority :—*Held :* the interference & control involved in Metropolis Management Act, 1855 (c. 120), s. 76, was inconsistent with the powers conferred upon the dock co. under their statutory authority, & there was therefore no need for them to give notice to the local authority of their intention to erect the new workshop.—SURREY

Sect. 2.—General provisions of London Building Acts: Sub-sects. 2, 3, 4, 5, 6 & 7.]

COMMERCIAL DOCK CO. *v.* BERMONDSEY CORPN., [1904] 1 K. B. 474; 73 L. J. K. B. 293; 90 L. T. 123; 68 J. P. 155; 52 W. R. 446; 20 T. L. R. 208; 2 L. G. R. 356, D. C.

Annotations:—**Apld.** Moran *v.* Marsland, [1909] 1 K. B. 744; Kershaw *v.* L. M. & S. Ry. (1924), 23 L. G. R. 592.

71. —— Buildings for education authority.]—Applts. as the local education authority for London commenced to erect a building to be used as a public elementary school. By the code of building regulations for public elementary schools issued by the Board of Education in pursuance of the Education Acts, 1870 to 1902, such buildings are required to comply with the provisions therein stated as to the height & dimensions of the rooms, corridors, & staircases, the construction of the walls, floors, roofs, & staircases, the lighting, ventilating & warming of the buildings & the sanitary arrangements in connection with them.

By 1894 Act, s. 201 (5), "public buildings occupied for public purposes by the County Council of London" are exempt from the operation of the portion of that Act relating to the construction of buildings. Applts. did not before commencing to build serve a building notice upon the district surveyor in accordance with 1894 Act, s. 145:—*Held:* applts. were not exempt from the obligation to serve a building notice either by the fact that the building was a public elementary school & as such subject to the jurisdiction of the Board of Education, or that it was a "public building occupied" by applts. "for public purposes," or that the district surveyor was an officer appointed & dismissible by applts.—LONDON COUNTY COUNCIL *v.* DISTRICT SURVEYORS' ASSOCN. & WILLIS, [1909] 2 K. B. 138; 78 L. J. K. B. 729; 100 L. T. 890; 73 J. P. 291; 25 T. L. R. 463; 7 L. G. R. 569, D. C.

Annotations:— **Consd.** Holliday & Greenwood *v.* District Surveyors' Assocn. & Dicksee, [1914] 2 K. B. 803. **Refd.** Daubney *v.* Angel (1912), 77 J. P. Jo. 5 **Mentd.** Galbraith *v.* Dicksee (1910), 102 L. T. 890; Akers *v.* Daubney (1915), 85 L. J. K. B. 315.

72. —— ——.]— A firm of builders had entered into a contract with the London County Council as the education authority for the county of London for the erection of certain buildings to be erected as a public elementary school according to plans approved by the Board of Education. No building notice was given to the district surveyor. The builders were convicted of an offence under 1894 Act:—*Held:* 1894 Act, s. 145 was a provision in a local Act "dealing with the construction of new buildings" within Education (Administrative Provisions) Act, 1911 (c. 32), s. 3, & therefore did not apply to the buildings in question; & consequently the conviction was wrong.—HOLLIDAY & GREENWOOD, LTD. *v.* DISTRICT SURVEYORS' ASSOCN. & DICKSEE, [1914] 2 K. B. 803; 83 L. J. K. B. 1482; 110 L. T. 983; 78 J. P. 262; 30 T. L. R. 370; 12 L. G. R. 633, D. C.

Annotation:—**Mentd.** Akers *v.* Daubney (1915), 13 L. G. R. 1201.

73. —— Railway company.]—A railway co. in 1866 were empowered by a special Act to "enter upon, take & use" for the purposes of their railway a certain site adjoining a street in the Metropolis. The special Act incorporated the Railways Clauses Act, 1845 (c. 20), by s. 16 of which the co. "may erect & construct such . . . buildings . . . & other works & conveniences as they think proper" & "may do all . . . acts necessary for making maintaining . . . & using the railway." In 1908 the co. erected upon the site an accumulator shed which was used for railway purposes in connection with the electrical signalling upon their railway. The shed was in front of the general line of buildings in the street:—*Held:* both the general power to "use" the site for the purposes of the railway given by the special Act & the general powers given by Railways Clauses Act conferred a statutory power to erect the accumulator shed upon that site within 1894 Act, s. 31, & a special power authorising that particular work was not necessary to entitle the co. to build in front of the general building line without the consent of the county council.—METROPOLITAN RY. CO. *v.* LONDON COUNTY COUNCIL, [1913] 2 K. B. 249; 82 L. J. K. B. 542; 108 L. T. 420; 77 J. P. 190; 29 T. L. R. 361; 11 L. G. R. 494, D. C.

74. —— ——.]—By a special Act, resp. railway co. were authorised to make & maintain railways & (*inter alia*) all "proper" stations, works, & conveniences connected therewith. The Act incorporated the Railway Clauses (Consolidation) Act, 1845 (c. 20), s. 16, of which empowered railway cos. (*inter alia*) to execute works & construct such buildings & other works & conveniences "as they think proper."

Under these powers the railway co. executed certain sanitary works & constructed certain sanitary conveniences at one of their stations. Applt., a sanitary inspector, preferred informations against them for breaches in respect of these conveniences of byelaws made by the London County Council in pursuance of Metropolitan Management Act, 1855 (c. 120), s. 202. The magistrate found as a fact that the sanitary conveniences were proper conveniences within s. 5 of the special Act. He further found that the exercise by applt. of some of the rights conferred by the bye-laws would or might cause inconvenience & for danger to the working by the railway co. of the traffic on their lines; but the exercise by applt. of the said rights, with reference to the said water-closets would not have caused any such inconvenience or danger:—*Held:* the interference & control involved in Metropolis Management Act, 1855 (c. 120), s. 202), were inconsistent with the powers conferred on resp. railway co. by the special Act, & therefore the bye-laws made under Metropolitan Management Act, 1855 (c. 120), s. 202, did not apply to the premises & works of resp. co.—KERSHAW *v.* LONDON, MIDLAND & SCOTTISH RY. CO. (1924), 23 L. G. R. 592.

——.]—*See* HIGHWAYS, Vol. XXVI., pp. 507, 508, 510, Nos. 2131-2135, 2153.

SUB-SECT. 3.—APPLICATION OF ACTS WHEN BUILDINGS REBUILT, ALTERED OR CONVERTED.

See 1894 Act, ss. 5 (6), 207-212, 1905 Act, s. 6 (1).

75. Building more than half taken down—Power of district surveyor to direct rebuilding of party-wall.]—Subsequently to the commencement of 1894 Act, a building within the administrative county of London, which had been partially burnt, was taken down for more than half its cubical extent, but the party-wall between it & the adjoining building was taken down to the extent of less than one-half thereof, & re-erected in conformity with the previous building acts. The district surveyor ordered the party-wall to be rebuilt from the ground upwards in accordance with 1894 Act:—*Held:* under 1894 Act, s. 208, the surveyor had no jurisdiction to order the remaining part at least of the party-wall to be

pulled down & rebuilt in accordance with the requirements of that act.—CROW *v.* REDHOUSE (1895), 59 J. P. 663 ; 11 T. L. R. 563, C. A.

76. Exemption from 1894 Act—Houses erected under building scheme made before passing of Act.]—The exemption from the operation of 1894 Act, contained in s 212 of that Act in favour of buildings to be carried out under a contract entered into before the passing of the Act applies not merely to buildings to be erected under a contract with a builder according to definite plans & specifications, but also to buildings to be erected under a building agreement for the development of a building estate, the complete performance of which may extend over a period of years.—TANNER *v.* OLDMAN, [1896] 1 Q. B. 60 ; 65 L. J. M. C. 10 ; 73 L. T. 404 ; 44 W. R. 63 ; 40 Sol. Jo. 12 ; 15 R. 603 ; 59 J. P. Jo. 693, D. C.

Annotation :—**Mentd.** Withington U. D. C. *v.* Moore (1896), 60 J. P. 408.

77. What amounts to repair—Replacement of roof.]—A certain house in London had a flat wooden roof covered with zinc. The zinc having become defective, the owner employed a builder to repair it. The builder stripped off the zinc, & substituted for it felt covered with a layer of asphalte. On appeal by the builder against a conviction for failing to serve a building notice in accordance with 1894 Act, s. 209 : —*Held :* there was evidence on which the magistrates might find that the stripping of the roof & the substitution of another material for the external covering was an alteration which was something more than a repair, & consequently did not come within the exception.—GODDARD *v.* GREIG, [1917] 2 K. B. 397 ; 86 L. J. K. B. 1485 ; 117 L. T. 277 ; 81 J. P. 214 ; 15 L. G. R. 552, D. C.

SUB-SECT. 4.—BUILDING NOTICES.

See 1894 Act, ss. 145, 147, 149.

What are buildings, structures or works.]—*See* Sub-sect. 1, *ante*.

78. Necessity for notice—Repairs not affecting external construction.]—The occupier of a house within the limits of the metropolitan building Act ordered his builder to do, & the builder did, without giving notice to the district surveyor, repairs which consisted in replacing the frame of the entrance door which had become decayed, & in repairing with old bricks part of the brickwork on each side of the doorway which had become defective. The opening of the doorway was not enlarged, but rather contracted ; & the structure of the external wall was not in any other respect altered :—*Held :* no notice had been necessary, as the work was within sect. 9 of the Act, that is, " work done for necessary repair not affecting any external or party-wall in, to, or upon any old building."—BADGER *v.* DENN (1858), 22 J. P. 129.

Annotation :—**Refd.** Goddard *v.* Greig, [1917] 2 K. B. 397.

79. —— Where district surveyor has duty of inspection.]—WESTMINSTER CORPN. *v.* WATSON, No. 42, *ante*.

SUB-SECT. 5.—DUTIES AND POWERS OF DISTRICT SURVEYOR.

See Sect. 1, sub-sect. 3, B., *ante*.

SUB-SECT. 6.—SANCTIONS, NOTICES AND PLANS.

See 1894 Act, ss. 174, 187, 188, 190, 194, 195 ; 1898 Act, s. 5.

80. Notice as to dangerous structure—Necessity for proof of service on owner.]—By 1894 Act, s. 188, any notice order or other document required to be served under that Act, the service of which is not provided for by the Summary Jurisdiction Acts may be served, if no person be found on the premises to which it relates by fixing a copy on some conspicuous part of the building to which it relates. By Summary Jurisdiction Act, 1848 (c. 43), s. 1, a summons issued upon any information or complaint shall be served by delivering it to the person to whom it is directed or by leaving it with some person for him at his last or most usual place of abode. A summons issued upon a complaint made under 1894 Act & addressed " To the owner " of a building alleged to be in a dangerous condition, was served by fixing a copy of the summons on a conspicuous part of the building. The premises were said to be unoccupied. The owner did not appear on the summons :—*Held :* in the absence of evidence that reasonable inquiry had been made to find out who was the owner so that he could be served under Summary Jurisdiction Act, 1848 (c. 43), s. 1, the provisions of 1894 Act, s. 188, were not applicable & therefore the service was bad.—R. *v.* MEAD, [1898] 1 Q. B. 110 ; 66 L. J. Q. B. 874 ; 61 J. P. 759 ; *sub nom.* R. *v.* MEAD, *Ex p.* LONDON COUNTY COUNCIL, 77 L. T. 462 ; 46 W. R. 61 ; 14 T. L. R. 14 ; 42 Sol. Jo. 14 ; 18 Cox, C. C. 670, D. C.

See, now, 1898 Act, s. 5.

SUB-SECT. 7.—LEGAL PROCEEDINGS, EXPENSES AND PENALTIES.

See 1894 Act, ss. 164 (1), 200 ; 1898 Act, ss. 6, 7 ; 1905 Act, s. 24 ; 1908 Act, ss. 18 (5), 21.

81. Limitation of time for proceedings—Removal of dangerous structure.]—Metropolitan Building Act, 1855 (c. 122), s. 73, authorises the Comrs. under that Act, in certain cases, to take down, repair, or otherwise secure, dangerous structures ; & enacts that the expenses incurred by them shall be paid by the owner of the structure. No time for making complaint in respect of the expense is limited by this Act.—LABALMONDIERE *v.* ADDISON (1858), 1 E. & E. 41 ; 28 L. J. M. C. 25 ; 23 J. P. 261 ; 5 Jur. N. S. 431 ; 120 E. R. 823.

Annotations :—**Refd.** Corbett *v.* Badger, [1901] 2 K. B. 278. **Mentd.** Eddleston *v.* Francis (1860), 7 C. B. N. S. 568 ; Greee *v.* Hunt (1), Greee *v.* Hunt (2), Greee *v.* Comber, Greee *v.* Crowhurst (1877), 2 Q. B. D. 389 ; White *v.* Colson (1881), 46 J. P. 565 ; Pool & Fordon Highway Board *v.* Gunning (1882), 51 L. J. M. C. 49 ; Elliott *v.* Russell, [1902] 2 K. B. 748.

82. —— Infringement of building line.]—By Metropolis Management Amendment Act, 1862 (c. 102), s. 75, the erection, without the consent of the Metropolitan Board of Works, of any building, etc., in any street, etc., beyond the general line of buildings is prohibited, & it is enacted that for any infringement of that provision the vestry or board may summon the offender before a justice, who may order the demolition of the building & make an order for costs ; & that, on default by the owner, the vestry or board may enter & demolish it ; & sect. 107 enacts that " no person shall be liable for the payment of any penalty or forfeiture under the recited Acts or that Act, for any offence made cognisable before a justice, unless the complaint respecting such offence have been made before such justice within six months next after the commission or discovery of such offence " : —*Held :* this limitation clause applies only to the case of pecuniary penalties or forfeitures, & not to

Sect. 2.—General provisions of London Building Acts: Sub-sect. 7. Sects. 3, 4, 5, 6 & 7.]

offences under sect. 75.—BERMONDSEY VESTRY *v.* JOHNSON (1873), L. R. 8 C. P. 441; 42 L. J. M. C. 67; 28 L. T. 665; 37 J. P. 392; 21 W. R. 626.

Annotation:—**Mentd.** Morant *v.* Taylor (1876), 34 L. T. 139.

———.]—*See* HIGHWAYS, Vol. XXVI., p. 509, Nos. 2138–2141.

83. ——— Erection of structure without licence.]—Resps. erected a temporary wooden structure within the Metropolitan area without a licence from the Metropolitan Board of Works as required by Metropolitan Building Act, 1882 (c. 14), s. 13. Within six months of the discovery, but more than six months after the completion of the erection, the board made a complaint, & took out a summons against resps. for the recovery of penalties imposed by the Act:—*Held:* the offence was a continuing one, & the period within which the complaint must be made did not commence to run from the day on which the erection was completed.—METROPOLITAN BOARD OF WORKS *v.* ANTHONY & CO. (1884), 54 L. J. M. C. 39; 49 J. P. 229; 33 W. R. 166, D. C.

Annotations:—**Reld.** L. C. C. *v.* Worley, [1894] 2 Q. B. 826. **Mentd.** Reay *v.* Gateshead Corpn. (1886), 55 L. T. 92.

84. ——— ———.]—A liability to penalties for erecting a wooden structure without licence under Metropolitan Building Act, 1882 (c. 14), s. 13, which existed on Jan. 1, 1895, when 1894 Act, came into operation, is saved by sect. 215 of the latter Act; but proceedings which have been delayed for more than six months after Jan. 1, 1895, cannot be taken for the recovery of such penalties owing to the operation of Summary Jurisdiction Act, 1848 (c. 43), s. 11.—R. *v.* CLUER, *Ex p.* LONDON COUNTY COUNCIL (1897), 67 L. J. Q. B. 36; 77 L. T. 439, D. C.

85. ——— ———.]—(1) Land may be so situate as "to admit of being drained by gravitation into an existing sewer," within 1894 Act, s. 122, notwithstanding that, owing to the construction or management of the sewer, drainage from the land cannot in time of flood find its way into the sewer.

(2) Proceedings may be brought under 1894 Act, s. 200, to recover a penalty imposed by sub-sect. 9 thereof at any time within six months of the date of the completion of a house erected, without a licence, otherwise than in accordance with the provisions of Part XI. of the Act.—ELLIS *v.* LONDON COUNTY COUNCIL, [1904] 1 K. B. 283; 73 L. J. K. B. 151; 90 L. T. 206; 68 J. P. 99; 52 W. R. 381; 2 L. G. R. 147, D. C.

86. ——— Failure to obey surveyor's directions.]—BOVILL *v.* GIBBS, No. 39, *ante*.

87. By whom payable—"Owner."]—A chapel was let by M. to N. for twenty-one years, & becoming a dangerous structure, was shored up after notice by the comr., under Metropolitan Building Act, 1855 (c. 122):—*Held:* the order for reimbursement ought to be made not on M. but on N., who was the owner, within Metropolitan Building Act, 1855 (c. 122), ss. 3, 73, as being in possession of the profits, & occupying the premises other than as tenant from year to year.—MOURILYAN *v.* LABALMONDIERE (1861), 1 E. & E. 533; 30 L. J. M. C. 95; 25 J. P. 340; 7 Jur N. S. 627; 9 W. R. 341; 120 E. R. 1009; *sub nom.* R. *v.* MOURILYAN, 3 L. T. 668.

Annotations:—**Consd.** Hunt *v.* Harris (1865), 19 C. B. N. S. 13. **Folld.** Wigg *v.* Lefevre (1892), 8 T. L. R. 493.

Apportionment between landlord & tenant.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 305 *et seq.*

Liability of adjoining owners for party walls.]—*See* BOUNDARIES, Vol. VII., pp. 305 *et seq.*

SECT. 3.—FORMATION AND WIDENING OF STREETS.

See 1894 Act, Part II.; 1898 Act, ss. 3, 4, HIGHWAYS, Vol. XXVI., pp. 510–513, Nos. 2154–2170.

SECT. 4.—BUILDING LINE.

See 1894 Act, Part III.; HIGHWAYS, Vol. XXVI., pp. 501–510, Nos. 2086–2153.

SECT. 5.—NAMING AND NUMBERING OF STREETS.

See 1894 Act, Part IV.; HIGHWAYS, Vol. XXVI., p. 517, Nos. 2199, 2200.

SECT. 6.—OPEN SPACES ABOUT BUILDINGS AND HEIGHT OF BUILDINGS.

See 1894 Act, Part V.; HIGHWAYS, Vol. XXVI., pp. 509, 510, Nos. 2145–2153.

88. What are working class dwellings.]—On an appeal under 1894 Act, s. 150, in which the matter at issue was whether certain dwelling-houses were dwelling-houses "to be inhabited by persons of the working class" within the proviso 1894 Act, s. 13 (5), a magistrate found that "the dwelling-houses when completed would not be specially adapted for inhabitation by persons of the working class only. They would be suitable for occupation by any person living in a small way whether belonging to the working class or not," & that "resp. had no intention that the houses should be occupied by persons of the working class only, but that he intended them for occupation by anyone who would take them":—*Held:* it was doubtful whether the magistrate had applied the proper test under the sect. to the two questions of fact, & he may have misdirected himself by limiting the scope of the "adaptation" by the words "specially" & "only," & by limiting the scope of the "intention" by the addition of the word "only."

Semble: if a dwelling-house is adapted in its construction for occupation by a number of families in separate tenements, it is "adapted to be inhabited by persons of the working class" within the proviso, although it may be occupied by a clerk or any person of small means.—CROW *v.* DAVIS (1903), 89 L. T. 407; 67 J. P. 319; 19 T. L. R. 505, D. C.

89. ——.]—Where a person proposes to erect houses in a locality almost entirely inhabited by persons of the working class, which are constructed in such a way that it is practically certain that when constructed they would be inhabited by persons of the working class, such buildings are deemed to be "dwelling-houses inhabited or adapted to be inhabited by persons of the working class" within 1898 Act, s. 4.—CROW *v.* DAVIS (No. 2) (1904), 91 L. T. 88; 68 J. P. 447; 2 L. G. R. 1034, D. C.

SECT. 7.—CONSTRUCTION OF BUILDINGS.

See 1894 Act, Part VI.; 1908 Act; 1909 Act.

Party-walls.]—*See* BOUNDARIES, Vol. VII., pp. 304–310, Nos. 261–315.

90. Uniting buildings—What constitutes.]—Before Metropolitan Building Act, 1855 (c. 122),

came into operation, an opening was made in the wall which separated two adjoining houses, numbered 66 & 67 A. street. A third house numbered 6 L. lane, afterwards came into the same occupation, & an opening was then & after the Act came into operation, made in the wall which divided the house in L. lane, from No. 66, A. Street. The three houses taken together exceeded in area 216,000 cubic feet, but the cubic area of No. 6, L. lane, & 66 A. street, was less than that quantity. Metropolitan Building Act, 1855 (c. 121), s. 28, provides, that "where an opening is made in a party wall dividing buildings, which if taken together would contain more than 216,000 cubic feet" certain conditions must be complied with:—*Held:* Nos. 66 & 67 A. street had been united so as to become one building, & in making the opening in the wall between No. 66 & the house in L. lane, the conditions required by sect. 28 must be complied with.—ASHBY *v.* WOODTHORPE (1863), 3 New Rep. 249; 33 L. J. M. C. 68; 9 L. T. 409; 27 J. P. 792; 12 W. R. 209.

91. —— —— Addition of new building.]—By Metropolitan Building Act, 1855 (c. 121), s. 9, an addition to an old building is subject to the regulations of the Act; by sect. 27, r. 4, certain buildings containing more than 216,000 cubic feet are to be divided by party-walls; & by sect. 28, r. 2, no buildings shall be united, if when so united they will be in contravention of the Act. A new building was added to an old building the united building containing more than 216,000 cubic feet:—*Held:* the united building was not within the words of the Act, & need not be divided by a party-wall.—SCOTT *v.* LEGG (1877), 10 Q. B. D. 236; 46 L. J. M. C. 267; 36 L. T. 456; 41 J. P. 773; 25 W. R. 594, C. A.

92. —— —— Connection by covered way.]—1894 Act, s. 77 (1), prohibits the "uniting" of buildings, except where they are wholly in one occupation, or are constructed or adapted to be so.

A builder proposed to build six blocks of flats to be used as private residences. Two of these blocks fronted on a street, one of these being completed & the other only partially so. The proposal showed four other blocks in the rear of these, & each of the four blocks as proposed to be erected contained its own staircase, its own entrance, & a connection between each pair of adjacent blocks by a door leading from the bathrooms of one block to the bathrooms of the adjacent block. There was also a passage or corridor leading from end to end through the four blocks. The walls between these four blocks were party-walls going up to, but not through, the roof, & each block was capable of being let separately. What the builder intended to erect was a single separate building, & not a union under one roof of separate buildings:—*Held:* the connecting of the blocks by means of a corridor was not a "uniting" of them within 1894 Act, s. 77 (1), & there had been no "uniting" of buildings, either of the partly completed block in front with the four blocks in the rear, or of these four blocks with each other.

The mere connecting of two buildings by a covered passage or way does not come within the sect. as a uniting of the buildings.

Semble: sect. 77 means the union of two existing & separate buildings which were built as separate buildings, & which have been united within the meaning of that sect., & the sect. does not apply to additions built on to, & connected with, a previously existing structure.—GOODCHILD *v.* MATTHEWS (1903), 8 L. T. 369; 67 J. P. 296; 19 T. L. R. 492; 1 L. G. R. 523, D. C.

93. —— Buildings united by openings—Construction of further openings.]—(1) Where buildings not wholly in one occupation are in fact united by an opening, although the said opening may have been made without the necessary consents under Metropolitan Building Act, 1855 (c. 121), or under 1894 Act, it is no offence against s. 77 (1) of the latter Act to make another opening between the same buildings.

(2) The words "or are constructed or adapted to be so" in the same sub-sect. have reference to the state of things at the time of the uniting & not at the time of the original construction.—WOODTHORP *v.* SPENCER & HUSBANDS (1899), 63 J. P. 246, D. C.

Annotation:—*As to* (2) **Refd.** Goodchild *v.* Matthews (1903), 67 J. P. 296.

94. Roof covering—Material partly combustible & partly incombustible.]—The roof of a building was covered externally with materials consisting of woven wire material coated with an oleaginous compound. The coating would ignite & burn away, leaving the wirework uninjured:—*Held:* the roof was not covered with "incombustible materials" within Metropolitan Building Act, 1855 (c. 122), s. 19 (1).—PAYNE *v.* WRIGHT, [1892] 1 Q. B. 104; 61 L. J. M. C. 7; 65 L. T. 612; 56 J. P. 120; 40 W. R. 191; 8 T. L. R. 54; 36 Sol. Jo. 61, D. C.

95. Separation of buildings—Buildings used partly for trade—Separation by concrete floor.]—Applts. erected a building consisting of eight floors. The basement was intended to be used for the packing of goods, the ground floor as a retail shop, & the floors above for dining-rooms & kitchens. The two upper storeys were supported by a concrete floor 9½ inches thick, with four openings in it for the purposes of lifts. The cubical contents of the whole building were 289,456 feet, including a staircase which was 16,636 cubic feet, & the cubical contents above the concrete floor were 62,087 feet:—*Held:* the building was a building used partly for the purposes of trade & the provisions of Metropolitan Building Act, 1855 (c. 122), s. 27, r. 4, had not been complied with.—HOLLAND *v.* WALLEN (1894), 70 L. T. 376; 10 T. L. R. 300; 38 Sol. Jo. 326; 10 R. 583; 58 J. P. Jo. 132, D. C.

96. —— Building used partly as dwelling-house—Public-house.]—A fully licensed public-house is not a building "used in part for purposes of trade or manufacture & in part as a dwelling-house" within 1894 Act, s. 74; so that the means of approach to the part used as a dwelling-house need not be constructed of fire-resisting materials as required by that sect.—CARRITT *v.* GODSON & SONS, [1899] 2 Q. B. 193; 68 L. J. Q. B. 799; 80 L. T. 771; 63 J. P. 644; 15 T. L. R. 400; 19 Cox, C. C. 355, D. C.

Annotations:—**Distd.** Dicksee *v.* Hoskins, [1901] 2 K. B. 660. **Refd.** R. *v.* Shiel (1900), 82 L. T. 587; L. C. C. *v.* Cannon Brewery Co. (1910), 103 L. T. 574.

97. —— —— ——.]—In a special case stated by a metropolitan police magistrate upon an objection raised by a district surveyor that 1894 Act, s. 74 (2), applied to a building about to be erected as a beerhouse, the magistrate found as a fact that the basement & ground floor of the building were intended to be used for the purpose of the trade of a beerhouse & that the part above the ground-floor was intended to be used as a dwelling-house for the licensed occupier; but he held that the case was governed by the decision in *Carritt* v. *Godson & Sons*, No. 96, *ante*, & overruled the objection of the district surveyor:—*Held:* the question whether the building was within 1894 Act, s. 74 (2), was concluded by the finding of fact in the case at bar, which was binding

Sect. 7.—Construction of buildings. Sects. 8, 9, 10, 11 & 12.]

on the ct.—DICKSEE *v.* HOSKINS, [1901] 2 K. B. 660; 70 L. J. K. B. 851; 85 L. T. 205; 65 J. P. 612; 49 W. R. 693; 17 T. L. R. 660, C. A.

98. Chimney flue—Adequacy of brickwork.]—AERATED BREAD CO. *v.* SHEPHERD (1897), 13 T. L. R. 311; 41 Sol. Jo. 385.

SECT. 8.—TEMPORARY BUILDINGS AND WOODEN STRUCTURES.

See 1894 Act, Part VII.

99. Power to licence in borough council—London Government Act, 1899 (c. 14), s. 5, sched. II., Part I.]—A structure made wholly of wood, except so far as nails are used in its construction, & erected for the temporary purpose of enabling persons to view a public procession or spectacle, is a wooden structure within 1894 Act, s. 84, & the power to licence the setting up of such a structure, & to take proceedings for default in obtaining or observing the conditions of a licence, is transferred by above Act from the London County Council to each of the borough councils established by that Act as respects their borough.—WESTMINSTER CORPN. *v.* LONDON COUNTY COUNCIL, [1902] 1 K. B. 326; 71 L. J. K. B. 244; 86 L. T. 53; 66 J. P. 199; 50 W. R. 429; 18 T. L. R. 187, D. C.

Annotation:—**Refd.** Westminster Corpn. *v.* Watson, [1902] 2 K. B. 717.

100. ——.]—The licence of the borough council under Metropolis Management Act, 1855 (c. 120), s. 122, for the erection of a hoarding in a street is required in the case of all hoardings erected under sect. 121 of that Act. Sects. 121, 122, 123 are not provisions "dealing with the construction of new buildings" within Education (Administrative Provisions) Act, 1911 (c. 32), s. 3, & school buildings though built in accordance with plans approved by the Board of Education are not exempted from their operation.—HIGGS & HILL, LTD. *v.* STEPNEY BOROUGH COUNCIL, [1914] 1 K. B. 505; 83 L. J. K. B. 294; 110 L. T. 377; 78 J. P. 134; 30 T. L. R. 198; 12 L. G. R. 395.

101. What are wooden structures of movable or temporary character—Steam roundabout, shooting gallery, & caravans.]—A steam roundabout, shooting gallery, & caravans are not "wooden structures or erections of a movable or temporary character" within Metropolis Management & Building Acts Amendment Act, 1882 (c. 14), s. 13, & may, therefore, be set up without obtaining from the London County Council the licence in writing prescribed by that sect.—HALL *v.* SMALLPIECE (1890), 59 L. J. M. C. 97; 54 J. P. 710, D. C.

Annotations:—**Apld.** L. C. C. *v.* Pearce, [1892] 2 Q. B. 109; L. C. C. *v.* Humphreys, [1894] 2 Q. B. 755. **Refd.** Keeling *v.* Wirral R. D. C. (1925), 23 L. G. R. 201.

102. —— **Structure for carrying on business during repair.**]—The proviso attached to Metropolis Management & Building Acts Amendment Act, 1882 (c. 14), s. 13, allowing a temporary wooden structure to be "erected by a builder for use during the alteration or repair of any building" without a licence, is limited in its application to structures erected by a builder for his use, & does not apply to a structure erected for the purpose of carrying on during the progress of the works the business usually carried on in the premises undergoing alteration or repair.—LONDON COUNTY COUNCIL *v.* CANDLER & SONS (1891), 60 L. J. M. C. 114; 55 J. P. 679, D. C.

Annotation:—**Refd.** L. C. C. *v.* Humphreys (1894), 10 T. L. R. 594.

103. —— **Builder's office on wheels.**]—A builder's office, constructed of wood & roofed with zinc, & placed upon iron wheels for the purpose of enabling it to be wheeled about to any place where building operations were being carried on, was, when not required at any such place, kept in the builder's own yard & used as a pay office for his men:—*Held:* it was not a "wooden structure or erection of a movable or temporary character" within Metropolis Management & Building Acts Amendment Act, 1882 (c. 14), s. 13, & did not require a licence in writing from the London County Council for its erection.—LONDON COUNTY COUNCIL *v.* PEARCE, [1892] 2 Q. B. 109; 66 L. T. 685; 56 J. P. 790; 40 W. R. 543; 8 T. L. R. 531, D. C.

Annotations:—**Apld.** L. C. C. *v.* Humphreys, [1894] 2 Q. B. 755. **Refd.** Leicester Corpn. *v.* Brown (1892), 62 L. J. M. C. 22; Southend-on-Sea Corpn. *v.* Archer, Same *v.* Romanis (1901), 70 L. J. K. B. 328; Newell *v.* Ormskirk U. D. C. (1907), 71 J. P. 119.

104. —— **Bungalow erected for exhibition & sale.**]—A bungalow constructed of wood & corrugated iron was erected on a piece of land for the purpose of exhibition & sale; but it was not used or occupied, or intended to be used or occupied, on the spot on which it was erected:—*Held:* it was not a "wooden structure or erection of a movable or temporary character" within Metropolis Management & Building Acts Amendment Act, 1882 (c. 14), s. 13, & did not require a licence in writing from the London County Council for its erection.—LONDON COUNTY COUNCIL *v.* HUMPHREYS, [1894] 2 Q. B. 755; 63 L. J. M. C. 215; 71 L. T. 201; 58 J. P. 734; 43 W. R. 13; 10 T. L. R. 594; 38 Sol. Jo. 632; 10 R. 533, D. C.

105. Structure "used in connection with traffic of railway company"—Coal merchants' office.]—Applts., coal merchants, were in the habit of having coal consigned to them by railway to London, where it was delivered to them at a wharf in the coal yard of the railway co. By the permission of the railway co. applts. erected in the coal yard a small wooden structure which they used as a coal office. The use of this coal office by applts. was a matter of convenience to the railway co. in that it contributed to the speedy clearing of the coal trucks from the co.'s sidings:—*Held:* the structure in question was "used in connection with the traffic of the railway co.," within 1894 Act, s. 86, & its erection did not require the licence of resps. under sect. 84.—ELLIOTT *v.* LONDON COUNTY COUNCIL, [1899] 2 Q. B. 277; 68 L. J. Q. B. 837; 81 L. T. 155; 63 J. P. 645; 15 T. L. R. 412, D. C.

106. Erection without licence—Continuing offence.]—METROPOLITAN BOARD OF WORKS *v.* ANTHONY & CO., No. 83, *ante*.

107. —— **Effect of 1894 Act.**]—R. *v.* CLUER, *Ex p.* LONDON COUNTY COUNCIL, No. 84, *ante*.

SECT. 9.—PROTECTION AGAINST AND MEANS OF ESCAPE FROM FIRE.

See 1905 Act.

108. Deposit of plans—Time for.]—The provision in 1905 Act, s. 7, which deals with means of escape in case of fire in certain new buildings, requiring the deposit of plans "before or at the same time" as the building notice, is directory only, & not a condition precedent either to the jurisdiction of the county council to approve or reject the plans or to the right of the building owner to appeal under 1905 Act, s. 22, to the tribunal of appeal from the rejection of the plans.

So where a building owner, having given a building notice in the case of a high building, subsequently deposited plans showing the means of escape in case of fire, which were rejected by the county council:—*Held:* he was not precluded from appealing to the tribunal of appeal from the rejection by reason of his failure to deposit the plans before or at the same time as the building notice.—LONDON COUNTY COUNCIL *v.* SPINK & SON, LTD., [1908] 2 K. B. 447; 77 L. J. K. B. 855; 99 L. T. 197; 72 J. P. 341; 6 L. G. R. 745, D. C.

Annotation:—**Reld.** L. C. C. *v.* Clark, [1912] 1 K. B. 511.

109. Dwelling-house occupied by not more than two families—Public-house occupied by tenant & staff.]—A fully licensed public-house contained four storeys above the basement. The ground floor was used almost entirely as a bar. There were two sitting-rooms on the first floor & six bedrooms on the two upper floors. The house was inhabited by thirteen persons, namely, the tenant, his wife & three children, their servant, & the members of the public-house staff, all of whom slept there. Upon an information for non-compliance with the provisions of 1905 Act, s. 12, the magistrate was of opinion that the house was a dwelling-house & that it was occupied as such by one family only, & that therefore sect. 12 did not apply:—*Held:* upon the facts the magistrate was justified in finding that the house was a dwelling-house occupied as such by one family, & was therefore within the exemption in sect. 12, it being impossible to draw a distinction between the tenant's servant & the members of the public-house staff, & to say that the latter were not equally members of the same family as the former.—LONDON COUNTY COUNCIL *v.* CANNON BREWERY CO., LTD., [1911] 1 K. B. 235; 80 L. J. K. B. 258; 103 L. T. 574; 74 J. P. 461; 8 L. G. R. 1094.

Theatres, music-halls & other places of entertainment.]—*See* THEATRES.

SECT. 10.—RIGHTS OF BUILDING OWNERS AND ADJOINING OWNERS.

See BOUNDARIES, Vol. VII., pp. 304–310, Nos. 261–315.

SECT. 11.—DWELLING-HOUSES ON LOW LYING LAND.

See 1894 Act, Part XI.

110. What amounts to drainage by gravitation to sewer.]—ELLIS *v.* LONDON COUNTY COUNCIL, No. 85, *ante*.

SECT. 12.—DANGEROUS AND NEGLECTED STRUCTURES.

See 1894 Act, Part IX.; 1898 Act, s. 5; HIGHWAYS, Vol. XXVI., p. 514, Nos. 2179, 2180.

111. Duties of London County Council—Ministerial—Capable of delegation.]—Where a public duty vested in a public body is not discretionary but merely ministerial the public body may delegate it to one of its officers.

The duties of the London County Council as to dangerous structures under 1894 Act, Part IX., are merely ministerial, & may, therefore, be delegated to the council's superintending architect.—LONDON COUNTY COUNCIL *v.* HOBBIS (1896), 75 L. T. 687; 61 J. P. 85; 45 W. R. 270; 41 Sol. Jo. 143, D. C.

112. What amounts to a dangerous structure—Structure not adjacent to highway.]—A justice of the peace has jurisdiction under Metropolitan Buildings Act, 1855 (c. 122), s. 73, to order the owner of a dangerous structure to take down or secure the same, even though such structure is not adjacent to a highway & therefore not dangerous to the public.—LONDON COUNTY COUNCIL *v.* HERRING, [1894] 2 Q. B. 522; 58 J. P. 721; 10 R. 455; *sub nom.* R. *v.* HERRING, 63 L. J. M. C. 230, D. C.

113. —— Apprehension of injury to adjoining owners.]—The fact that the London County Council has in pursuance of the power given to it by 1894 Act, s. 106, temporarily shored up a structure certified by the district surveyor to be in a dangerous state does not prevent the structure from still being in a dangerous state within 1894 Act, ss. 103, 107 (1); & the owner still remains liable, in proceedings taken against him under those sects. in a petty sessional ct., to an order to take down, repair, or otherwise secure to the satisfaction of the district surveyor the structure or such part thereof as appears to the ct. to be in a dangerous state.

In order that a house may be dangerous within 1894 Act, ss. 103, 106 & 107 (1), it is not necessary that it should be dangerous to inmates or to the public passing along the adjacent highway. It is sufficient if there is an apprehension of danger or injury to adjoining houses or to their inhabitants, or even to trespassers.—LONDON COUNTY COUNCIL *v.* JONES, [1912] 2 K. B. 504; 81 L. J. K. B. 948; 106 L. T. 872; 76 J. P. 293; 10 L. G. R. 471, D. C.

114. — Effect of temporary shoring up by council.]—LONDON COUNTY COUNCIL *v.* JONES, No. 113, *ante*.

115. Recovery of expenses—From owner—Lessor.]—A house occupied by a tenant under a lease for twenty-one years was during the term accidentally burnt, &, being ruinous, was pulled down under the provisions of Metropolitan Building Act, 1855 (c. 122). By the lease the tenant was exempted from paying rent for the time that the house was untenantable by reason of an accidental fire:—*Held:* the expenses incurred could not be recovered from the landlord, a tenant for life of the reversion, under Metropolitan Building Act, 1855 (c. 122), s. 42, which throws the burden upon "the owner of every such building, being the person entitled to the immediate possession thereof."—*Ex p.* SAFFRON HILL OVERSEERS (1854), 24 L. J. M. C. 56; 24 L. T. O. S. 118; 18 J. P. 825; 18 Jur. 1104; 3 W. R. 64.

116. —— ——.]—MOURILYAN *v.* LABALMONDIERE, No. 87, *ante*.

117. —— —— Incumbent of church.]—The incumbent of a district church in the Metropolis, although the freehold of such church is vested in him under the Church Building Acts, is not the "owner" of the church within the Metropolitan Building Act, 1855 (c. 122), Part II., so as to be personally liable for the expenses incurred by the Metropolitan Board of Works in respect of such church as a dangerous structure.—R. *v.* LEE (1878), 4 Q. B. D. 75; 48 L. J. M. C. 22; 39 L. T. 605; 43 J. P. 302; *sub nom.* R. *v.* PARTRIDGE & LEE, 27 W. R. 151.

Annotation:—**Distd.** Regents Canal & Dock Co. *v.* L. C. C. (1908), 73 J. P. 276.

118. —— What expenses recoverable.]—A structure within the Metropolis having been surveyed & reported dangerous, notice was served on the owner, under Metropolitan Building Act, 1855 (c. 122), ss. 69–73; & not having repaired it, he

Sect. 12.—*Dangerous and neglected structures. Sects.* 13 & 14. *Parts XII., XIII. & XIV. Sects.* 1, 2 & 3.]

was summoned by the Metropolitan Board of Works before a magistrate; the summons was adjourned from time to time, & ultimately withdrawn, the owner having in the meantime duly repaired the structure. The board sought to charge against the owner, under sect. 73, as "expenses incurred in respect of a dangerous structure," in addition to the surveyor's fees allowed by sects. 77–79, the following items, which by resolution of the board, had been resolved should be charged against owners in respect of dangerous structures, viz., 3*s.* 6*d.* for preparation of notices & forms, 2*s.* 6*d.* for clerk's time in service of notices; & 2*s.* 6*d.* for general office expenses:—*Held:* the board were not entitled to charge the last item, but were entitled to charge the other two.—METROPOLITAN BOARD OF WORKS *v.* FLIGHT (1873), L. R. 9 Q. B. 58; 43 L. J. M. C. 46; 29 L. T. 608; 38 J. P. 503, D. C.

119. —— Apportionment between tenant for life & remainderman.]—There is no distinction in the position of an equitable tenant for life of leaseholds where the property is sub-let at a rack-rent, & where it is sub-let at an improved ground-rent; as between tenant for life & remainderman the cost of complying with a sanitary notice under the Public Health (London) Act, 1891 (c. 76), & a dangerous structures notice under 1894 Act is chargeable against income.—*Re* COPLAND'S SETTLEMENT, JOHNS *v.* CARDEN, [1900] 1 Ch. 326; 69 L. J. Ch. 240; 82 L. T. 194.

Annotation:—**Reld.** *Re* Farnham's Settlmt., Law Union *v.* Crown Insce. *v.* Hartopp, [1904] 2 Ch. 561.

120. Reference to arbitration—Effect of 1894 Act, s. 107.]—The true construction of above sect. is as follows: If the surveyors meet & report within the seven days, or if they disagree, & the arbitrator report within fourteen days the matter is at an end. But if the owner, having given notice of arbn., fail to appoint a surveyor, or if the surveyor whom he has appointed fail to concur in the appointment of an arbitrator, or in any way fail to report within the seven days, then the owner's counter-requisition for arbn. drops if no arbitrator has been appointed; but if an arbitrator has been duly appointed then upon the surveyors disagreeing, or failing to report within the seven days, the whole matters in dispute go to the arbitrator to be dealt with by him, & if the arbitrator is unable, from any cause, to report within the fourteen days, the ct. has power, under the Arbitration Act, 1889 (c. 49), to extend the time, or otherwise cure any defects.—LONDON COUNTY COUNCIL *v.* BERNSTEIN (1897), 61 J. P. 630, D. C.

SECT. 13.—DANGEROUS AND NOXIOUS BUSINESSES.

See 1894 Act, Part X.; PUBLIC HEALTH.

SECT. 14.—SKY SIGNS.

See, now, 1894 Act, Part XII., London Government Act, 1899 (c. 14), s. 5 (1), Sched. II., Part I.; PUBLIC HEALTH.

Part XII.—Supply of Electricity and Gas.

Electricity.]—*See* ELECTRIC LIGHTING, Vol. XX., pp. 217, 218.
Gas.]—*See* GAS, Vol. XXV., pp. 491–493.

Part XIII.—Tithes.

See ECCLESIASTICAL LAW, Vol. XIX., pp. 487–489, Nos. 3449–3464.

Part XIV.—Customs of London.

SECT. 1.—NATURE AND PROOF.

See, generally, CUSTOM & USAGES, Vol. XVII., pp. 3 *et seq.*

121. Nature—The laws of the City.]—LONDON CORPN. *v.* BERNARDISTON, No. 134, *post.*

—— Of customs generally.]—*See* CUSTOM & USAGES, Vol. XVII., pp. 3–17, 25–35, Nos. 1–175; 266–397.

122. Proof—Certificate of recorder.]—Custom of London to certifie their custom upon the mouth of the recorder.—DAY *v.* SAVADGE (1614), Hob. 85; 80 E. R. 235.

Annotations:—**Reld.** Winton Corpn. *v.* Wilks (1705), 2 Ld. Raym. 1129; Hartop *v.* Hoare (1743), 3 Atk. 44. **Mentd.** Lincoln (Bp.) *v.* Smith (1668), 1 Vent. 3; St. Albans Corpn. *v.* Dobbins (1672), Freem. K. B. 36; London City *v.* Wood (1701), 12 Mod. Rep. 669; Thornby *v.* Fleetwood (1720), 1 Stra. 318; Sharp *v.* Lowther (1735), Lee *temp.* Hard. 292; Hesketh *v.* Braddock (1766), 3 Burr. 1847; Sargent *v.* Reed (1775), 2 Stra. 1228; Rogers *v.* Brenton (1847), 10 Q. B. 26; R. *v.* Rochester (Dean & Chapter) (1851), 20 L. J. Q. B. 467; Lee *v.* Bude & Torrington Ry. (1871), L. R. 6 C. P. 576; R. *v.* Cheshire Lines Committee (1873), 28 L. T. 808.

123. —— ——.]—The custom of London shall be tried by the certificate of the recorder *ore tenus* on a writ directed to the mayor & aldermen.—APPLETON *v.* STOUGHTON (1638), Cro. Car. 516; 79 E. R. 1046.

Annotations:—**Reld.** Hartop *v.* Hoare (1743), 3 Atk. 44; Trustcott *v.* Merchant Tailors' Co. (1856), 11 Exch. 855. **Mentd.** Hobbs *v.* Young (1690), 2 Salk. 610.

124. —— ——.]—LEATHER SELLERS CO. (WARDENS) *v.* BEECON (1681), T. Jo. 149; 84 E. R. 1191.

Annotation:—**Consd.** Piper *v.* Chappell (1845), 14 M. & W. 624.

125. —— ——.]—CHACE *v.* BOX (1699), 1 Ld. Raym. 484; 1 Eq. Cas. Abr. 154; 91 E. R. 1223.

Annotations:—**Reld.** Elliot *v.* Collier (1747), 1 Ves. Sen. 15; Garon *v.* Trippet (1753), Amb. 189. **Mentd.** Cleaver *v.* Spurling (1729), Mos. 179; Fawkner *v.* Watts (1741), 1 Atk. 406; Hume *v.* Edwards (1746), 3 Atk. 450.

126. —— ——.]—Custom of London to be certified at the bar by the recorder *ore tenus*.—PLUMMER *v.* BENTHAM (1757), 1 Burr. 248; 97 E. R. 297.

Annotations:—**Refd.** Crosby *v.* Hetherington (1842), 4 Man. & G. 933; Fox *v.* Purssell (1855), 3 Sm. & G. 242.

127. —— ——.]—The ct. takes notice of such customs of London as appear to have been certified by the recorder.—BLACQUIERE *v.* HAWKINS (1780), 1 Doug. K. B. 378; 99 E. R. 244.

Annotations:—**Refd.** Piper *v.* Chappell (1845), 14 M. & W. 624. **Mentd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239; R. *v.* London Corpn., *Re* Roux *v.* Merton (1872), 27 L. T. 61.

128. —— —— —.]—Upon a custom of the City of London being put in issue, the mayor & aldermen are commanded by *certiorari*, reciting that it pertains to the recorder to try the truth of the issue & to certify the custom, to certify whether there is such a custom as that alleged; & upon the recorder certifying in open ct., the existence or non-existence of the custom pleaded, judgment is entered pursuant to such certificate.—CROSBY *v.* HETHERINGTON (1843), 4 Man. & G. 933; 5 Scott, N. R. 637; 12 L. J. C. P. 261; 134 E. R. 383.

Annotations:—**Refd.** R. *v.* Exeter (Bp.) (1850), 14 J. P. Jo. 351. **Mentd.** Day *v.* Paupierre (1849), 13 Q. B. 802; Morris *v.* Lantour (1864), 9 L. T. 767; London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239.

129. —— —— **Conclusiveness of certificate.**]—If the Lord Mayor & Aldermen have once certified as to the custom of London, the certificate is conclusive & the ct. never refers the same question a second time.—BRUIN *v.* KNOTT (1843), 12 Sim. 436; 6 Jur. 885; 59 E. R. 1200; *on appeal* (1845), 1 Ph. 572, L. C.

Annotation:—**Mentd.** Brown *v.* Smith (1878), 10 Ch. D. 377.

—— —— —.]—*See, also*, CORPORATIONS, Vol. XIII., p. 437, No. 1609.

130. —— **Precedent.**]—Custom of London, though certified, may be made out by precedents.—GREENWOOD'S CASE, PIDDINGTON *v.* MAIN (1726), Mos. 6; 25 E. R. 238.

131. —— —— **City books.**]—A certificate, that it did not appear, whether there was such a custom or not, if not good. Lord Chancellor would not determine the custom of London from the city books, because the law had appointed a proper trial.—ANON. (1726), Mos. 7; 25 E. R. 238, L. C.

132. —— **Judicial notice—Only of customs proved.**]—I cannot take note of the custom [of London] unless proved (LORD MANSFIELD, C.).—STAINTON *v.* JONES (1783), 1 Doug. K. B. 380, n.; 99 E. R. 245.

133. —— —— —.]—BLACQUIERE *v.* HAWKINS, No. 127, *ante*.

—— **Of custom & usages generally.**]—*See* CUSTOM & USAGES, Vol. XVII., pp. 19–22, 35–38, Nos. 199–226: 398–432.

SECT. 2.—EXTINGUISHMENT.

See, generally, CUSTOM & USAGES, Vol. XVII., pp. 23–25, 53, 54.

134. By Act of Parliament—Not by negative Acts.]—The bye-law was good, for this bye-law was founded upon the customs of London, which are of such force, that they shall stand against negative Acts of Parliament. . . . This bye-law is growing, springing, out of the custom, & every man who will trade in London ought to take notice of the customs of the City, which are the laws of the City (*per* CUR.).—LONDON CORPN. *v.* BERNARDISTON (1661), 1 Lev. 14; 83 E. R. 273; *sub nom.* PLAYER *v.* BARNARDISTON, 1 Keb. 32, 35, 39.

135. —— **Affirmative Acts.**]—A custom to elect a scavenger in the borough ct. of Southwark is taken away by an Act of Parliament ordaining that scavengers shall be chosen in London & Westminster, & the liberties thereof, according to the ancient usages thereof, & appointing a new form of election in all other places; for the statute being affirmative destroys a local custom inconsistent with it.—LONDON CORPN. *v.* GATFORD (1675), 2 Mod. Rep. 39; 86 E. R. 928; *sub nom.* ANON., Freem. K. B. 203.

136. —— **22 Car. 2, c. 11—Management of parochial affairs.**]—The union of parishes after the great Fire of London, under above Act, does not destroy the special customs by which, previous to such union, the parishes so united managed their affairs. Therefore, if the parishioners of two parishes, previous to their union under the statute, were accustomed to elect the respective parish clerks concurrently with the rectors, such custom exists after the union; & if a person be appointed to the office of clerk by the rector alone, without the concurrence of the majority of the parishioners, such appointment is invalid.—HARTLEY *v.* COOK (1833), 9 Bing. 728; 5 C. & P. 441; 3 Moo. & S. 230; 2 L. J. C. P. 141; 131 E. R. 787.

137. —— **Prescription Act, 1832 (c. 71), s. 3—Easement of light.**]—Above Act extends to the custom of the City of London authorising one neighbour to obstruct the access of light to another's messuage, etc., by building on an ancient foundation: therefore, in an action for building so as to darken windows which had been enjoyed without interruption for twenty years, the custom of London is no longer a defence.—SALTERS' CO. *v.* JAY (1842), 3 Q. B. 109; 2 Gal. & Dav. 414; 11 L. J. Q. B. 173; 6 Jur. 803; 114 E. R. 448.

Annotations:—**Folld.** Truscott *v.* Merchant Taylors' Co. (1856), 11 Exch. 855. **Refd.** R. *v.* London Corpn. (1847), 13 Q. B. 1; Dent *v.* Auction Mart Co., Pilgrim *v.* Same, Mercers' Co. *v.* Same (1866), L. R. 2 Eq. 238. **Mentd.** Frewen *v.* Phillip (1861), 25 J. P. 676.

138. —— —— —.]—The custom of London which enabled the owner of an ancient house to erect a new house on the old foundations to any height, & so obstruct the access of light through his neighbour's ancient windows is abrogated by above Act.—TRUSCOTT *v.* MERCHANT TAYLORS' CO. (1856), 11 Exch. 855; 26 L. T. O. S. 283; 20 J. P. 132; 2 Jur. N. S. 356; 4 W. R. 295; 156 E. R. 1079; *sub nom.* MERCHANT TAYLORS' CO. *v.* TRUSCOTT, 25 L. J. Ex. 173, Ex. Ch.

Annotations:—**Refd.** Dent *v.* Auction Mart Co., Pilgrim *v.* Auction Mart Co., Mercers' Co. *v.* Auction Mart Co. (1866), L. R. 2 Eq. 238. **Mentd.** Farley *v.* Bonham (1861), 2 John. & H. 177; Frewen *v.* Philipps (1861), 11 C. B. N. S. 449; Jones *v.* Tapling (1862), 12 C. B. N. S. 826; Wheaton *v.* Maple, [1893] 3 Ch. 48; Colls *v.* Home & Colonial Stores, [1901] A. C. 179; Fear *v.* Morgan, [1906] 2 Ch. 406.

139. —— —— —.]—The custom of London as to light is not simply abolished by that statute [above Act], but it is abolished merely for the purposes of sect. 3 (CHITTY, J.).—PERRY *v.* EAMES, SALAMAN *v.* EAMES, MERCERS' CO. *v.* EAMES, [1891] 1 Ch. 658; 60 L. J. Ch. 315; 64 L. T. 438; 39 W. R. 602; 7 T. L. R. 297.

Annotation:—**Mentd.** Wheaton *v.* Maple, [1893] 3 Ch. 48.

—— **Or bye-law—Election of aldermen.**]—*See* Nos. 143, 144, *post*.

SECT. 3.—PARTICULAR CUSTOMS.

140. Election of aldermen—Jurisdiction of mayor & aldermen—To inquire into & adjudicate upon election.]—The Common Council of the City of London have not any cognisance, authority, or

Sect. 3.—*Particular customs.*]

jurisdiction whatsoever, to hear, determine, judge, or examine, concerning the election of any person to be one of the Common Councilmen of the City; but by the immemorial custom of the City, the cognisance & examination of such elections belongs to the King's Ct. of Record, held before the Lord Mayor & aldermen.—BOLTON *v.* JEFFES (1718), 2 Bro. Parl. Cas. 463; 1 E. R. 1066, H. L.; *affg.* S. C. *sub nom.* JEFFS *v.* BOLTON, 11 Mod. Rep. 285.

Annotation:—**Mentd.** Parsons *v.* Willoughby de Broke, Parsons *v.* Bagnall, Parsons *v.* Rideout, Parsons *v.* Birch (1865), 13 W. R. 315.

141. ——— ——— ———.]—To a *mandamus* to the Lord Mayor & aldermen of London to admit & swear in A. to the office of alderman, they returned certain proceedings towards an election at a ward-mote ct., when A. was declared to be elected, & a return thereof made to the ct. of Lord Mayor & aldermen, & that that ct. has had from time immemorial cognisance & jurisdiction to inquire into & adjudicate upon all elections at wardmote cts. to city offices, upon the petition of any party interested; that petitions, by several parties interested, were presented against the return of A.; that the merits were inquired into, & the election declared null & void by the said ct. of Lord Mayor & aldermen; & that A. was not duly elected, wherefore, etc. Traverse of the allegation, that A. was not duly elected. At the trial of the issue, it appeared, that at first, the Lord Mayor appointed three clerks to take the poll; but on the second day, he dismissed two of them. After the number of votes was declared, a scrutiny was demanded, & granted, & then the Lord Mayor dismissed the suitors at the wardmote, "to meet again upon a fresh summons." After this the Lord Mayor went out of office, & his successor issued a fresh summons for holding a wardmote, & there took the scrutiny, & declared A. duly elected, which was returned to the ct. of Lord Mayor & aldermen; who, upon petitions being presented, declared the election void, as stated in the return. Upon a special case, stating these facts:—*Held:* (1) the return was good in form; (2) the custom set out for the Lord Mayor & aldermen to inquire into & adjudicate upon elections, did not oust the jurisdiction of this ct.; (3) the election was not invalid on account of the dismissal of two of the poll clerks, or the change of the presiding officer; (4) the wardmote ct. was not dissolved, but only adjourned, by the dismissal of the suitors to meet again on a fresh summons.—R. *v.* LONDON CORPN. (1829), 9 B. & C. 1; 4 Man. & Ry. K. B. 36; 109 E. R. 1.

Annotations:—*As to* (2) **Reld.** R. *v.* Johnson (1839), Macl. & Rob. 1; Scales *v.* Key (1840), 11 Ad. & El. 819.

142. ——— ———.]—By custom the ct. of Mayor & aldermen of London have always had authority to examine & determine whether or not any person returned to them by the ct. of wardmote as an alderman is, according to the discretion & sound conscience of the Mayor & aldermen, a fit & proper person, & duly qualified in that behalf, whensoever the fitness & qualification of the person so returned has been brought into question.—R. *v.* LONDON CORPN. (1833), 5 B. & Ad. 233; 1 Nev. & M. K. B. 285; 2 L. J. K. B. 186; 110 E. R. 778.

Annotations:—**Reld.** R. *v.* Johnson (1839), Macl. & Rob. 1; R. *v.* Darlington School (1844), 9 Jur. 21; A.-G. *v.* Powis (1853), Kay, 186; *Re* Ashlin, *Ex p.* Glyn (1854), 23 L. T. O. S. 15. **Mentd.** R. *v.* Oundle (1834), 1 Ad. & El. 283; R. *v.* Saddlers Co. (1861), 7 Jur. N. S. 138.

143. ——— ——— ——— **Abrogation of custom by statute or bye-law.**]—A custom of the City of London, that when the inhabitants of any ward shall three times elect & return to the ct. of Mayor & aldermen the same person to be alderman, who shall be by the said ct., according to another custom of the said city, adjudged on such three returns not to be a fit person to support the dignity & discharge the duties of the office, the Mayor & aldermen may elect & admit a fit person, being a freeman, out of the whole body of the citizens, to be alderman of such ward, is a valid custom in law:—*Held:* this custom is not abrogated by 11 Geo. 1, c. 18, nor by the bye-law of the city, by which, after reciting that by the ancient custom of the city, when any ward became vacant of an alderman, the inhabitants thereof, having right to vote, were wont to choose one person only, being a freeman, to be alderman of the ward; for reviving that custom, it was enacted, that from thenceforth in all elections of aldermen of the said city, at the ward-motes, there shall be elected only one able & sufficient citizen & freeman to be returned to the ct. of Mayor & aldermen, which person so elected shall be by them admitted to the office.—R. *v.* JOHNSON (1839), 6 Cl. & Fin. 41; Macl. & Rob. 1; 7 E. R. 613, H. L.

Annotations:—**Folld.** Scales *v.* Key (1840), 11 Ad. & El. 819. **Mentd.** Duckworth *v.* Harrison (1838), 4 M. & W. 432; Humphery *v.* R. (1839), 2 Per. & Dav. 691; Narracott *v.* Narracott & Hesketh (1864), 3 Sw. & Tr. 408; Yeo *v.* Tatem, The Orient (1871), L. R. 3 P. C. 696.

144. ——— ——— ——— ———.]—The custom of the City of London for the ct. of Mayor & aldermen to examine & determine upon petition whether or not any person elected alderman of a ward & returned to the said ct. as such alderman, be according to their discretion & sound consciences, a fit & proper person, duly qualified, is not abrogated by 11 Geo. 1, c. 18, nor by the bye-law of the City, 1713.—SCALES *v.* KEY (1840), 11 Ad. & El. 819; 3 Per. & Dav. 505; 113 E. R. 625.

145. ——— ——— **To declare election of own nominee.**]—R. *v.* JOHNSON, No. 143, *ante*.

146. Election of auditor.]—A *mandamus* to the Mayor & aldermen of London, to admit a person to the office of auditor of the chamberlain's & bridgemasters' accounts, who had served it three years successively, & been elected again the fourth by the livery, refused, because the custom of the City appeared to be, that no person should be elected to, or serve, the said office for more than two years successively.—R. *v.* LONDON CORPN. (1786), 1 Term Rep. 423; 99 E. R. 1174.

147. Erection of hoarding—In front of houses.]—A custom for the Lord Mayor to authorise the erection of a hoarding, obstructing & inclosing a part of the public footway, for such a time as he should think reasonable, is a good custom.—BRADBEE *v.* CHRIST'S HOSPITAL (GOVERNORS) (1842), 4 Man. & G. 714; 2 Dowl. N. S. 164; 5 Scott, N. R. 79; 11 L. J. C. P. 209; 134 E. R. 294.

Annotation:—**Mentd.** R. *v.* Longton Gas Co. (1860), 29 L. J. M. C. 118.

148. Appointment of attorney—By warrant—Without seal or signing.]—The Corpn. of London, which by custom appoints in each year an attorney by warrant, without sealing or signing, is estopped by matter of record to say that his act is not their act.—ARNOLD *v.* POOLE CORPN. (1842), 4 Man. & G. 860; 2 Dowl. N. S. 574; 5 Scott, N. R. 741; 12 L. J. C. P. 97; 7 J. P. 227; 7 Jur. 653; 134 E. R. 354.

Annotations:—**Reld.** R. *v.* Prest (1851), 15 Jur. 554; R. *v.* Fox (1860), 2 L. T. 281; Browne *v.* Barber, [1913] 2 K. B. 553. **Mentd.** Hall *v.* Swansea Corpn. (1844), 5 Q. B. 526; R. *v.* Stamford Corpn. (1844), 6 Q. B. 433; Paine *v.* Strand Union Grdns. (1846), 8 Q. B. 326; Lamprell *v.* Billericay Union (1849), 3 Exch. 283; Clarke *v.* Cuckfield Union Grdns. (1852), Bail Ct. Cas. 81; R. *v.* Francis (1852), 21 L. J. Q. B. 304; R. *v.* Greene (1852), 16

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Banking—Clearance of cheques.]—*See* BANKERS, Vol. III., p. 203, No. 468.

Chamberlain of London—Ownership of property.]—*See* CORPORATIONS, Vol. XIII., p. 372, No. 1037.

Ecclesiastical customs—Holding of parochial office.]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 279, No. 651.

—— **Repair of chancel.**]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 303, Nos. 1018, 1019.

—— **Management of parochial affairs.**]—*See* No. 136, *ante*.

Guarantee — Contribution by sureties.] — *See* GUARANTEE, Vol. XXVI., p. 131, No. 944.

—— **Action by surety.**]—*See* GUARANTEE, Vol. XXVI., p. 139, Nos. 1025, 1026.

Innkeeper—Right to sell horse of guest.]—*See* INNS & INNKEEPERS, Vol. XXIX., p. 22, Nos. 289–293.

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—— **Insurance policy.**]—*See* LIEN, Vol. XXXII., p. 236, No. 205.

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Sale in market overt.]—*See* MARKETS, Vol. XXXIII., pp. 561, 562, Nos. 457–473.

METROPOLITAN.

See ECCLESIASTICAL LAW.

MIDWIVES.

See MEDICINE AND PHARMACY; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

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Part I.—In General.

SECT. 1.—"MINE."

See Coal Mines Regulation Act, 1887 (c. 58), s. 75; Law of Property Act, 1925 (c. 20), s. 205 (1) (ix); Land Registration Act, 1925 (c. 21), s. 3 (xiv); Trustee Act, 1925 (c. 19), s. 68 (6); Settled Land Act, 1925 (c. 18), s. 117 (1) (xv); Universities & College Estates Act, 1925 (c. 24), s. 43 (vii).

1. Primary meaning — Underground excavation.]—Upon the partition of certain lands the mines of lead & coal, & other mines & minerals, were excepted:—*Held:* the term "minerals" included only such substances as were dug out of the earth by means of a mine, that is, by means of a pit or tunnel having a roof overhead, & did not include limestone rock, which in the present instance was worked by means of an open quarry having no roof.—DARVILL *v.* ROPER (1855), 3 Drew. 294; 3 Eq. Rep. 1004; 25 L. T. O. S. 302; 3 W. R. 467; 61 E. R. 915; *sub nom.* DAVVELL *v.* ROPER, 24 L. J. Ch. 779.

Annotations:—**Consd.** Bell *v.* Wilson (1865), 2 Drew. & Sm. 395. **Refd.** A.-G. for Isle of Man *v.* Mylchreest (1879), 4 App. Cas. 294; Tucker *v.* Linger (1882), 21 Ch. D. 18; Glasgow Corpn. *v.* Farie (1888), 13 App. Cas. 657.

2. —— ——.]—In a conveyance of land in Northumberland a reservation was made to the grantor of all "mines or seams of coal, & other mines, metals, or minerals," under the land granted, with liberty to dig, bore, work, lead, & carry away the same, & to make pits, etc.:—*Held:* (1) the term "minerals" included freestone, but the grantor had liberty only to get the freestone by underground mining, & not by working in an open quarry.

(2) What is a *mine*? Upon reference to the lexicographical part of the Encyclopædia Metropolitana, I find it there said that the word "mine" is derived from a Latin word of the lower ages, *minare*, signifying *ducere*, to lead; & the interpretation of the word is "to draw or lead, *sc.*, a way, or passage underground, a subterraneous duct, course, or passage, whether in search of metals or to destroy fortifications, etc." The word "quarry" is to be found in the same dictionary. The word "quarry" is there stated to be derived from the French word *quarriere*, & the derivation is followed by this description, "In the Latin of the lower ages, *quadratarius* was a stonecutter *qui marmora quadrat*, & hence *quarriere*, the place where he quadrates, or cuts the stone in squares; the place where the stone is cut in squares; generally, a stone-pit"; clearly therefore referring to a place upon or above, & not under, the ground (TURNER, L.J.).

(3) Pltfs. are entitled to the account directed by the decree of what has been got by the improper working. There is not, I suppose, any dispute between pltf. & her husband, deft., . . . & it is not therefore material to consider whether pltf., . . . is entitled to the money which may be found due upon the account, by virtue of her separate estate for life, or of the remainder in fee, which is vested in her. The only question as to these moneys can be, whether pltf., . . . is entitled to them, as against the persons having estates in remainder, prior to the ultimate limitation in fee vested in her; & I think . . . that she is so entitled (TURNER L.J.).—BELL *v.* WILSON (1866), 1 Ch. App. 303; 35 L. J. Ch. 337; 14 L. T. 115; 12 Jur. N. S. 263; 14 W. R. 493, L. JJ.

Annotations:—*As to* (1) **Consd.** Hext *v.* Gill (1872), 7 Ch. App. 699; A.-G. *v.* Welsh Granite Co. (1887), 35 W. R. 617. **Refd.** A.-G. for Isle of Man *v.* Mylchreest (1879), 4 App. Cas. 294; Greville *v.* Hemingway (1902), 87 L. T. 443. *As to* (2) **Consd.** Glasgow Corpn. *v.* Farie (1888), 13 App. Cas. 657. **Refd.** Cleveland *v.* Meyrick (1867), 37 L. J. Ch. 125; Mid. Ry. *v.* Checkley (1867), L. R. 4 Eq. 19; Mid. Ry. *v.* Haunchwood Brick & Tile Co. (1882), 20 Ch. D. 552; Mid. Ry. & Kettering, Thrapston & Huntingdon Ry. *v.* Robinson (1889), 15 App. Cas. 19.

3. —— ——.]—The primary meaning of the word "mine" standing alone is an underground excavation made for the purpose of getting minerals. . . . "Minerals," on the other hand, means primarily all substances, other than the agricultural surface of the ground, which may be got for manufacturing or mercantile purposes, whether from a mine, as the word would seem to signify, or such as stone or clay, which are got by open working. . . . The particular signification of each of these words may be varied largely by the context (KAY, J.).—MIDLAND RY. CO. *v.* HAUNCHWOOD BRICK & TILE CO. (1882), 20 Ch. D. 552; 51 L. J. Ch. 778; 46 L. T. 301; 30 W. R. 640.

Annotations:—**Consd.** Glasgow Corpn. *v.* Farie (1888), 13 App. Cas. 657; G. W. Ry. *v.* Blades, [1901] 2 Ch. 624. **Refd.** Mid. Ry. *v.* Miles (1886), 33 Ch. D. 632; Mid. Ry. *v.* Robinson (1887), 37 Ch. D. 386; Ruabon Brick & Terra Cotta Co. *v.* G. W. Ry., [1893] 1 Ch. 427. **Mentd.** Mid. Ry. *v.* Miles (1885), 30 Ch. D. 634.

4. —— ——.]—GLASGOW CORPN. *v.* FARIE, No. 12, *post*.

Mines distinguished from quarries.]—*See* Nos. 23–27, *post*.

5. Whether excavation a "mine"—Question of fact—Dependent on mode of extraction.]—Whether an excavation in the earth, from which limestone is obtained, be a mine or not, is a question of fact.

Where sessions found that the limestone was obtained & raised by sinking shafts perpendicularly down to the stratum, which lay forty or fifty yards below the surface of the ground, & that the stratum was worked by roads & gateheads, & the stone raised to the surface by machinery, or carried under ground to a tunnel, which is the mode used in obtaining coal & ironstone:—*Held:* the property was a limestone mine.—R. *v.* SEDGLEY (INHABITANTS) (1831), 2 B. & Ad. 65; 9 L. J. O. S. M. C. 61; 109 E. R. 1068.

Annotations:—**Folld.** R. *v.* Brettell (1832), 3 B. & Ad. 424; R. *v.* Dunsford (1835), 2 Ad. & El. 568. **Consd.** Cleveland *v.* Meyrick (1867), 37 L. J. Ch. 125. **Refd.** Darvill *v.* Roper (1855), 25 L. T. O. S. 302; Bell *v.* Wilson (1866), 1 Ch. App. 303; Morgan *v.* Crawshay (1871), L. R. 5 H. L. 304. **Mentd.** R. *v.* Randall (1855), 19 J. P. 245; Bourne *v.* Keane, [1919] A. C. 815.

6. —— —— —— **Not on substance extracted.**]—What is a mine, is chiefly a question of fact, to be tried, not by considering the nature of the substance-matter extracted, but by the mode of extracting.—R. *v.* BRETTELL (1832), 3 B. & Ad. 424; 1 L. J. M. C. 46; 110 E. R. 152.

Annotations:—**Folld.** R. *v.* Dunsford (1835), 2 Ad. & El. 568. **Consd.** Darvill *v.* Roper (1855), 3 Drew. 294. **Apld.** Cleveland *v.* Meyrick (1867), 37 L. J. Ch. 125. **Refd.** Bell *v.* Wilson (1866), 1 Ch. App. 303.

7. —— —— —— ——.]—Whether any excavation in the earth be a mine or not, depends upon the mode in which it is worked, & not on the

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PART I. SECT. 1.

a. *What mine includes—Areas & deposit of ore.*]—The word "mine" used in Mechanics' Lien Act, includes areas & the deposit of ore.—PELTON *v.* BLACK HAWK MINING CO. (1903), 40 N. S. R. 385.—**CAN.**

Sect. 1.—"*Mine.*" *Sect.* 2.]

substance obtained from it. But sessions are to apply that principle, & to find as a fact whether it be a mine or not.—R. *v.* DUNSFORD (1835), 2 Ad. & El. 568; 1 Har. & W. 93; 4 Nev. & M. K. B. 349; 2 Nev. & M. M. C. 524; 4 L. J. M. C. 59; 111 E. R. 219.

Annotation:—**Mentd.** R. *v.* Randall (1855), 19 J. P. 245.

8. —— —— —— ——.] — Testator, by codicil, bequeathed "all shares in mines of which he should die possessed" to his wife absolutely. At the date of the codicil & of his death, besides certain mining shares acquired after the date of the codicil, testator possessed ten shares in a co. originally formed for slate, copper & lead mining, but afterwards reconstituted & limited to the working of slate quarries. It being shown, however, that for some years prior to the date of the codicil the co.'s slate works had been, to the knowledge of testator, & at the time of his death still were, carried on almost entirely by underground or mining operations, & not by quarrying:—*Held:* as against residuary legatees, the shares passed under the specific bequest.

I find that the authorities both at law & in equity concur in this, that, if the operations carried on are in fact mining operations, & not surface operations, whatever may be the material gained, whether it be slate, as in the present case, limestone, as in *R.* v. *Sedgley Inhabitants*, No. 5, *ante*, or clay, as in *R.* v. *Brettell*, No. 6, *ante*, the criterion is, not the material obtained, but the mode in which it is obtained (MALINS, V.-C.).—CLEVELAND (DOWAGER DUCHESS) *v.* MEYRICK (1867), 37 L. J. Ch. 125; 17 L. T. 238; 16 W. R. 104.

Annotation:—**Reld.** Jones *v.* Cwmorthen Slate Co. (1879), 4 Ex. D. 97.

9. —— **Slate quarry worked by underground workings.**]—A slate quarry, worked by means of underground workings by levels, is a mine within the intention of Metalliferous Mines Regulation Act, 1872 (c. 77).—SIM *v.* EVANS (1875), 23 W. R. 730; *sub nom.* SIMS *v.* EVANS, 40 J. P. 199.

Annotation:—**Reld.** Jones *v.* Cwmorthen Slate Co. (1879), 4 Ex. D. 97.

10. Slag heap not a mine.]—SCOTT *v.* MIDLAND RY. CO. (1897), 61 J. P. 358; 13 T. L. R. 398; 41 Sol. Jo. 509, D. C.

11. Mine extending over property of several owners—Whether each property a "mine."]—One mine may extend over the properties of twenty different owners; & in my opinion each property may be a "mine" (MELLOR, J.).—VAN MINING CO. *v.* LLANIDLOES OVERSEERS (1876), 1 Ex. D. 310; 45 L. J. M. C. 138; 34 L. T. 692; 40 J. P. 598.

12. What "mine" includes—Depends on intention.]—(1) I cannot help thinking that the true text of what are mines & minerals in a grant was suggested by JAMES, L.J., in *Heat* v. *Gill*, No. 41, *post*, & although the Lord Justice held himself bound by authority so that he yielded to the technical sense which had been attributed to those words I still think (to use his language) that a grant of "mines & minerals" is a question of fact "what these words meant in the vernacular of the mining world, the commercial world, & landowners," at the time when they were used in the instrument (LORD HALSBURY, C.).

"Mines" & "minerals" are not definite terms; they are susceptible of limitation or expansion, according to the intention with which they are used (LORD WATSON).

The meaning of the word "mines" is not, I think, open to doubt. In its primary signification it means underground excavations or underground workings. . . . When used of unopened mines in connection with a particular mineral it means little more than veins or seams or strata of that mineral. . . . The word "minerals" undoubtedly may have a wider meaning than the word "mines." In its widest signification it probably means every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life (LORD MACNAGHTEN).

(2) In certain cases & for certain purposes a railway co. may enter upon lands containing brick earth & use that brick earth, although the land may not be delineated in the deposited plans, & although the powers of the co. to take lands compulsorily may have expired. . . . Neither railway cos. nor persons who construct waterworks require mines as such or are capable of working mines for profit (LORD MACNAGHTEN).—GLASGOW CORPN. *v.* FARIE (1888), 13 App. Cas. 657; 58 L. J. P. C. 33; 60 L. T. 274; 37 W. R. 627; 4 T. L. R. 781, H. L.

Annotations:—*As to* (1) **Consd.** Mid. Ry. & Kettering, Thrapston & Huntingdon Ry. *v.* Robinson (1889), 15 App. Cas. 19; Johnstone *v.* Crompton, [1899] 2 Ch. 190; G. W. Ry. *v.* Blades, [1901] 2 Ch. 624. **Expld.** *Re* Todd, Birleston & N. E. Ry., [1903] 1 K. B. 603. **Consd.** G. W. Ry. *v.* Carpalla United China Clay Co., [1909] 1 Ch. 218; Skey *v.* Parsons (1909), 101 L. T. 103; N. B. Ry. *v.* Budhill Coal & Sandstone Co., [1910] A. C. 116. **Reld.** Scott *v.* Mid. Ry., [1901] 1 K. B. 317; Greville *v.* Hemingway (1902), 87 L. T. 443; Barnard-Argue-Roth-Stearns Oil & Gas Co. *v.* Farquharson, [1912] A. C. 864; Australia Commonwealth *v.* Hazeldell, [1921] 2 A. C. 373. *As to* (2) **Consd.** Jersey *v.* Neath Poor Law Union Grdns. (1889), 22 Q. B. D. 555; Manchester Corpn. *v.* New Moss Colliery, [1906] 1 Ch. 278. **Expld. & Distd.** G. W. Ry. *v.* Carpalla United China Clay Co., [1909] 1 Ch. 218. **Reld.** Eden *v.* N. E. Ry., [1907] A. C. 400. *Generally*, **Reld.** Bishop Auckland Industrial Co-op. Flour & Provision Soc. *v.* Butterknowle Colliery Co. (1904), 73 L. J. Ch. 335; Rugby Portland Cement Co. *v.* L. & N. W. Ry., [1908] 2 K. B. 606.

13. —— ——.] — BARNARD-ARGUE-ROTH-STEARNS OIL & GAS CO., LTD. *v.* FARQUHARSON, No. 55, *post*.

14. —— —— **Vein.**] — ABINGER (LORD) *v.* ASHTON, No. 775, *post*.

See, also, Nos. 19–21, *post*.

15. —— **Unopened mine.**]—CASE OF MINES, R. *v.* NORTHUMBERLAND (EARL), No. 116, *post*.

16. —— ——.]—A mine is not properly so called until it is opened, it is but a vein of coals before; & this was the opinion of Lord Coke (*per* CUR.).—ASTRY *v.* BALLARD (1677), as reported in 2 Mod. Rep. 193; 86 E. R. 1019.

Annotation:—**Reld.** Hodgkinson *v.* Fletcher (1781), 3 Doug. K. B. 31.

17. —— —— **Chamber containing minerals.**]—(1) A lease of waste land of a manor recently inclosed by the lessee, contained a reservation to the lessor, the lord of the manor, of the mines & quarries, with full power to win & work the same, with free wayleave & passage to, from & along the same, on foot or on horseback, with all manner of carriages, & a covenant by the lessor that in working the mines & using the liberties & privileges reserved, he would do as little damage & spoil to the soil & herbage of the premises demised as he conveniently could do:—*Held:* the lessor & those claiming under him were entitled not merely to a right of way for the purpose of working the reserved minerals, but to an absolute wayleave which might rightfully be used for the purpose of working minerals not under the demised property; the lessee was entitled to support for the surface of the land at incident to the demise thereof.

(2) There is no doubt that the whole containing chamber which has the minerals is the mine (WOOD, V.-C.).

(3) Form of the order for an injunction in such

a case.—PROUD *v.* BATES (1865), 6 New Rep. 92; 34 L. J. Ch. 406; 12 L. T. 565; 13 L. T. 61; 11 Jur. N. S. 441.

Annotations:—As to (1) **Consd.** Hamilton *v.* Graham (1871), L. R. 2 Sc. & Div. 166. **Refd.** Wakefield *v.* Buccleuch (1867), L. R. 4 Eq. 613; Ballacorkish Silver, Lead & Copper Mining Co. *v.* Harrison (1873), L. R. 5 P. C. 49; Eardley *v.* Granville (1876), 3 Ch. D. 826; Batten Pooll *v.* Kennedy, [1907] 1 Ch. 256. *Generally*, **Refd.** Whidborne *v.* Eccl. Comrs. for England (1877), 37 L. T. 346.

18. —— —— ——.]—The holder of a mining lease from the Crown is not liable to make compensation for the withdrawal by percolation into his mine of water which would otherwise have flowed into, or having flowed into, would have been retained in the wells & springs of the superjacent land.

It is not a mere liberty to work the mines which the lord has; but the Act [Act of Tynwald, 1703] affirms that he has excepted out of the grant not only the minerals, but that portion of the soil which contains the minerals & which constitutes the "mine" (LORD PENZANCE).—BALLACORKISH SILVER, LEAD & COPPER MINING CO. *v.* HARRISON (1873), L. R. 5 C. P. 49; *sub nom.* BALLACORKISH MINING CO. *v.* DUMBELL, 43 L. J. P. C. 19; 29 L. T. 658; 38 J. P. 148; *sub nom.* DUMBELL *v.* BELLACORKISH SILVER, LEAD & COPPER MINING CO., 22 W. R. 277, P. C.

Annotations:—**Consd.** Eardley *v.* Granville (1876), 3 Ch. D. 826. **Refd.** A.-G. for Isle of Man *v.* Mylchreest (1879), 4 App. Cas. 294.

19. —— —— **Vein.**]—Case in which three grants of land, reserving the minerals, but each reservation varying in substance & expression, were held to have respectively secured, & not to have secured, a right to carry outside minerals underneath & through the land granted.

Coals & coal-mines mean, I apprehend, when unopened mines are spoken of, nothing more nor less than the veins or seams of coal underlying the surface (LORD SELBORNE).

It appears to me, that being upon a grant or reservation of minerals, *primâ facie* it must be presumed that the minerals are to be enjoyed, & therefore that a power to get them must also be granted or reserved, as a necessary incident (LORD CHELMSFORD).—RAMSAY *v.* BLAIR (1876), 1 App. Cas. 701, H. L.

Annotations:—**Consd.** Batten Pooll *v.* Kennedy, [1907] 1 Ch. 256. **Refd.** Powell *v.* Vickerman (1887), 3 T. L. R. 358; Butterley Co. *v.* New Hucknall Colliery Co., [1909] 1 Ch. 37.

20. —— —— — -.] — GLASGOW CORPN. *v.* FARIE, No. 12, *ante*.

21. —— **Workings — Underground road.**] — BATTEN POOLL *v.* KENNEDY, No. 1019, *post*.

22. —— **Cavity after minerals removed.**] BATTEN POOLL *v.* KENNEDY, No. 1019, *post*.

Within Railways Clauses Consolidation Act, 1845 (c. 20), s. 77.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 150, 151, Nos. 328, 336.

Within Waterworks Clauses Act, 1847 (c. 17).]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 151, Nos. 337, 338.

SECT. 2.—"QUARRY."

See Quarries Act, 1894 (c. 42), s. 1.

23. Distinguished from mine — Surface working.]—DARVILL *v.* ROPER, No. 1, *ante*.

24. —— ——.]—BELL *v.* WILSON, No. 2, *ante*.

25. —— —— **Gravel pit.**]—What are called mines & what are minerals probably within the meaning of the Act of Parliament [Railways Clauses Consolidation Act, 1845 (c. 20)] are some beds of gravel or some beds of clay lying near the surface, & it is said they can only be worked from the surface. As far as I know gravel pits are always open to the surface, I never heard of a gravel pit which was worked as a mine (JESSEL, M.R.).—ERRINGTON *v.* METROPOLITAN DISTRICT RY. CO. (1882), 19 Ch. D. 559; 51 L. J. Ch. 305; 46 L. T. 443; 30 W. R. 663, C. A.

Annotations:—**Refd.** Mid. Ry. *v.* Haunchwood Brick & Tile Co. (1882), 20 Ch. D. 552; Mid. Ry. & Kettering, Thrapston & Huntingdon Ry. *v.* Robinson (1889), 15 App. Cas. 19; Ruabon Brick & Terra Cotta Co. *v.* G. W. Ry., [1893] 1 Ch. 427; G. W. Ry. *v.* Blades, [1901] 2 Ch. 624. **Mentd.** Wilkinson *v.* Hull, Barnsley & West Riding Junction Ry. & Dock Co. (1882), 46 L. T. 455; Pountney *v.* Clayton (1883), 11 Q. B. D. 820; Lewis *v.* Weston-Super-Mare L. B. of Health (1888), 59 L. T. 769; G. N. Ry. *v.* I. R. Comrs., [1901] 1 K. B. 416; N. E. Ry. *v.* Reckitt (1913), 109 L. T. 327.

26. —— ——.]—(1) In 1829 land was conveyed by J. in fee to T., reserving all mines of coal, culm, iron, & all other mines & minerals whatsoever, except stone quarries, with power to work the same, & make roads & other works, but the surface not to be disturbed without the surface owner's consent, except for making one road & one sewer, & J. making compensation for all damage. The N. guardians, with consent of the owner of the land, made a sewer passing through a bed of brick earth & clay:—*Held:* J., the mineral owner, was owner of the brick earth & clay, & entitled to compensation from the N. guardians.

(2) The conveyance is of all the lands, tenements, & hereditaments mentioned in the schedule, & if there were no reservation, that would carry all the minerals within the ambit (LORD ESHER, M.R.).

(3) A quarry is a thing which is worked in that way [by taking away the surface] & not by sinking a shaft. . . . But we have here to construe the word "minerals" rather than "mines." Is the word "minerals" which comes after the word "mines," to be controlled by it? That was one of the matters which MELLISH, L.J. discussed & ruled upon in *Hext* v. *Gill*, No. 41, *post*, & I do not understand that it is disputed that on that point he was entirely right when he said that the authorities show that the word "mines" coming before "minerals" does not restrict the sense of the latter (LORD ESHER, M.R.).

(4) It seems to me, therefore, that the rule laid down in *Hext* v. *Gill*, No. 41, *post*, is a rule which arises directly from the character of the transaction, & is a sound rule of construction unless there is something in the context to throw light upon & alter it (BOWEN, L.J.).—JERSEY (EARL) *v.* NEATH POOR LAW UNION GUARDIANS (1889), 22 Q. B. D. 555; 58 L. J. Q. B. 573; 53 J. P. 404; 37 W. R. 388; 5 T. L. R. 337, C. A.

Annotations:—As to (1) **Consd.** Johnstone *v.* Crompton, [1899] 2 Ch. 190; G. W. Ry. *v.* Blades, [1901] 2 Ch. 624. **Apld.** Greville *v.* Hemingway (1902), 87 L. T. 443. **Refd.** Larsen *v.* Sylvester, [1908] A. C. 295; S.S. Knutsford *v.* Tillmanns (1908), 99 L. T. 399; Stoomvaart M. Sophie H. *v.* Merchants' Marine Insce. (1918), 35 T. L. R. 25; S.S. Magnhild *v.* McIntyre, [1920] 3 K. B. 321. *Generally*, **Refd.** *Re* Todd, Birleston & N. E. Ry., [1903] 1 K. B. 603.

27. —— **Extraction in large blocks.**]—It is somewhat difficult to define what a quarry is, but I think that the word generally means a place where the material is got out in a large shape like blocks, & not where it is got in small pieces like coal & ironstone (BRAMWELL, L.J.).—JONES *v.* CWMORTHEN SLATE CO. (1879), 5 Ex. D. 93; 49 L. J. Q. B. 110; 41 L. T. 575; 44 J. P. 168; 28 W. R. 237; 1 Tax Cas. 267, C. A.

Annotation:—**Refd.** Glasgow Corpn. *v.* Farie (1888), 13 App. Cas. 657.

28. What "quarry" includes—Not slag heap.]—SCOTT *v.* MIDLAND RY. CO., No. 1225, *post*.

SECT. 3.—COLLIERIES AND MINING CONCERNS.

29. Includes seams & workings.]—COUNTY OF GLOUCESTER BANK *v.* RUDRY MERTHYR STEAM & HOUSE COAL COLLIERY CO., No. 292, *post.*

30. —— Distinguished from unopened mine.] —I am not disposed . . . to say exactly what a "colliery" means as distinguished from land with minerals under it. It does mean something different no doubt. No conveyancer nor any one else would ever describe mineral property at present unworked as a "colliery." That is to say, no one would describe so many acres of land under which a seam of coal was known to lie as being a colliery when there was no shaft through which to get at the coal, & no underground workings (KEKEWICH, J.).—CHAYTOR *v.* TROTTER (1901), 87 L. T. 33; *revsd.* on other grounds (1902), 87 L. T. 36, C. A.

Annotation:—**Refd.** *Re* Morgan, Vachell *v.* Morgan, [1914] 1 Ch. 910.

31. Colliery a trading concern.] — ROSE *v.* NIXON (1737), cited 2 Jac. & W. at p. 555; 37 E. R. 740, L. C.

Annotations:—**Consd.** Rowe *v.* Wood (1822), 2 Jac. & W. 553. **Refd.** Jefferys *v.* Smith (1820), 1 Jac. & W. 298.

32. ——.]—A colliery is a trade & therefore an account may be taken of the profits here.—STORY *v.* WINDSOR (LORD) (1743), 2 Atk. 630; 26 E. R. 776, L. C.

Annotations:—**Apld.** Fripp *v.* Chard Ry., Fripp *v.* Bridgewater & Taunton Canal, etc., Co. (1853), 11 Hare, 241. **Mentd.** Page *v.* Lever (1794), 2 Ves. 450; Jackson *v.* Rowe (1830), 9 L. J. O. S. Ch. 32.

33. ——.]—PULTENEY *v.* WARREN (1801), 6 Ves. 73; 31 E. R. 944, L. C.

Annotations:—**Mentd.** Cupit *v.* Jackson (1824), M'Cle. 495; Grant *v.* Grant (1830), 3 Sim. 340; Brown *v.* Newall (1837), 2 My. & Cr. 558; East India Co. *v.* Campion (1837), 11 Bli. 158; Howell *v.* Howell (1837), 2 My. & Cr. 478; Attwood *v.* Burton, Same *v.* Bailey, Same *v.* Small (1839), 8 L. J. Ch. 145; Haig *v.* Homan (1841), 8 Cl. & Fin. 320; *Re* Franks (1851), 16 L. T. O. S. 529; Hicks *v.* Sallitt (1854), 3 De G. M. & G. 782; Thomas *v.* Thomas (1855), 1 Jur. N. S. 1160; Knight *v.* Bowyer (1857), 23 Beav. 609; Wright *v.* Chard (1860), 1 De G. F. & J. 567; Sawyer *v.* Goodwin (1867), 36 L. J. Ch. 578; Phillips *v.* Bomfray (1883), 24 Ch. D. 439.

34. ——.]—JEFFERYS *v.* SMITH, No. 198, *post.*

35. ——.] — A mining concern is a trading concern (PARKE, B.).—TREDWEN *v.* BOURNE (1840), as reported in 6 M. & W. 461; 9 L. J. Ex. 290; 151 E. R. 493.

Annotations:—**Consd.** *Re* Bradbury, *Ex p.* Emery (1854), 4 De G. M. & G. 901. **Mentd.** Barnett *v.* Lambert (1846), 15 M. & W. 489; Ricketts *v.* Bennett (1847), 4 C. B. 686; *Re* German Mining Co. (1854), 2 Eq. Rep. 983; Forbes *v.* Marshall (1855), 3 W. R. 480; Peel *v.* Thomas (1855), 3 C. L. R. 397.

SECT. 4.—"MINERALS."

SUB-SECT. 1.—IN GENERAL.

See Law of Property Act, 1925 (c. 20), s. 205 (1) (ix); Land Registration Act, 1925 (c. 21), s. 3 (xiv); Trustee Act, 1925 (c. 19), s. 68 (6); Settled Land Act, 1925 (c. 18), s. 117 (1) (xv); Universities & College Estates Act, 1925 (c. 24), s. 43 (vii).

36. No strict definition attainable.]—No definition of "minerals" is attainable, the variety of meanings which the use of the word "minerals" admits of being itself the source of all the difficulty (LORD LOREBURN, C.).—CALEDONIAN RY. CO. *v.* GLENBOIG UNION FIRECLAY CO., [1911] A. C. 290; 80 L. J. P. C. 128; 104 L. T. 657; 75 J. P. 377, H. L.

Annotations:—**Refd.** Barnard-Argue-Roth-Stearns Oil Co. *v.* Farquharson (1912), 107 L. T. 332; Symington *v.* Calc. Ry., [1912] A. C. 87; Australia Commonwealth *v.* Hazeldell, [1921] 2 A. C. 373.

37. Substance composing crust of the earth.] —The term "mineral" according to the scientific or popular meaning, comprises every one of the productions which constitute what is called the crust of the earth; but that is not the sense in which the ct. would necessarily interpret the word in an exception to a grant, as the intention of the parties must be regarded.—BELL *v.* WILSON (1865), 2 Drew. & Sm. 395; 6 New Rep. 81; 34 L. J. Ch. 572; 12 L. T. 529; 11 Jur. N. S. 437; 13 W. R. 708; 62 E. R. 671; *on appeal* (1866), 1 Ch. App. 303, L. JJ.

Annotations:—**Refd.** Mid. Ry. *v.* Checkley (1867), L. R. 4 Eq. 19; Hext *v.* Gill (1872), 7 Ch. App. 699; A.-G. for Isle of Man *v.* Mylchreest (1879), 4 App. Cas. 294; Mid. Ry. *v.* Haunchwood Brick & Tile Co. (1882), 20 Ch. D. 552; A.-G. *v.* Welsh Granite Co. (1887), 35 W. R. 617; Glasgow Corpn. *v.* Farie (1888), 13 App. Cas. 657; Mid. Ry. *v.* Robinson (1889), 15 App. Cas 19; Greville *v.* Hemingway (1902), 87 L. T. 443. **Mentd.** Cleveland *v.* Moyrick (1867), 37 L. J. Ch. 125.

38. ——.]—The lessees of land, demised for a term of ninety-nine years, while making excavations in pursuance of their lease, discovered embedded in the soil a boat made of oak, & supposed to be at least two thousand years old:—*Held:* the boat at the date of granting the lease belonged to the lessors, whether it was to be deemed a mineral, or part of the soil, or a chattel, & there was nothing in the lease which was sufficient to pass to the lessee any property in the boat; the definition of "minerals" as all substances which can be got from underneath the ground for the purpose of profit" must be taken as confined to all substances actually forming part of the natural soil, & therefore as not including the discovered ancient boat.—ELWES *v.* BRIGG GAS CO. (1886), 33 Ch. D. 562; 55 L. J. Ch. 734; 55 L. T. 831; 35 W. R. 192; 2 T. L. R. 782.

Annotation:—**Mentd.** South Staffordshire Waterworks Co. *v.* Sharman (1896), 74 L. T. 761.

39. ——.]—GLASGOW CORPN. *v.* FARIE, No. 12, *ante.*

All substances other than agricultural surface—Derived from mine or open workings.]—*See* No. 3, *ante.*

40. Product derived from mine.] — BELL *v.* WILSON, No. 2, *ante.*

41. Ordinary commercial meaning assigned.] —By a deed executed in 1799, the lord of a manor granted certain copyholds in fee, reserving all mines & minerals within & under the premises, with full liberty of ingress, egress, & regress to & for the grantor, his heirs, etc., to dig & search for, & to take, use, & work the excepted mines & minerals:—*Held:* kaolin or china clay was a mineral within the reservation; the grantor was not entitled to get the china clay, inasmuch as it could be got only in a manner utterly destructive of the surface, & as the deed did not clearly reserve to him power to destroy the surface, & did not contain any provision for making compensation for injury done to the surface.

The word "minerals" includes every fossil substance, every substance, in fact, of every kind which can be got from underneath the surface & for a profitable purpose. . . . The word "minerals" includes everything which can be got under the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction which would induce the

ct. to give it a more limited meaning (MELLISH, L.J.).

When an owner of both mines & minerals sells the surface, & reserves the minerals & gives himself power to get minerals, he ought to frame his power in such language, if he intends to destroy the surface, that the ct. ought to be able to say that that is clearly the intention of the parties (MELLISH, L.J.).

The long & uniform series of authorities appear to me to have established a very convenient & consistent system, giving the mineral owner every reasonable profit out of the mineral treasures & at the same time saving the landowner's practical enjoyment of his house, gardens, fields & woods without which the grant to him would have been illusory. But for these authorities I should have thought that what was meant by "mines & minerals" in such a grant was a question of fact what these words meant in the vernacular of the mining world & commercial world & landowners at the end of the last century (JAMES, L.J.).

The authorities seem to show that where there is an exception of "mines & minerals," the putting the word "mines" before "minerals" does not restrict the meaning of the word "minerals" (MELLISH, L.J.).—HEXT *v.* GILL (1872), 7 Ch. App. 699; 41 L. J. Ch. 761; 27 L. T. 291; 20 W. R. 957, L. JJ.

Annotations:—**Consd.** Aspden *v.* Seddon (1874), 10 Ch. App. 396, n.; A.-G. for Isle of Man *v.* Mylchreest (1879), 4 App. Cas. 294. **Apld.** Davis *v.* Treharne (1881), 6 App. Cas. 460; Robinson *v.* Milne (1884), 53 L. J. Ch. 1070. **Expld.** Elwes *v.* Brigg Gas Co. (1886), 33 Ch. D. 562. **Apld.** A.-G. *v.* Welsh Granite Co. (1887), 35 W. R. 617. **Consd.** Glasgow Corpn. *v.* Farie (1888), 13 App. Cas. 657. **Foll.** Jersey *v.* Neath Poor Law Union Grdns. (1889), 22 Q. B. D. 555. **Expld.** Johnstone *v.* Crompton, [1899] 2 Ch. 190. **Distd.** G. W. Ry. *v.* Blades, [1901] 2 Ch. 624. **Apld.** Greville *v.* Hemingway (1902), 87 L. T. 443. **Dbtd.** *Re* Todd, Birleston & N. E. Ry., [1903] 1 K. B. 603. He [BOWEN, L.J.] says that *Hext* v. *Gill* is inconsistent with what I there [in *Glasgow Corpn.* v. *Farie* (No. 12, *ante*)] said; & so it is, & I intended what I said to be inconsistent with *Hext* v. *Gill* (LORD HALSBURY, C.). **Consd.** Bishop Auckland Industrial Co-op. Flour & Provision Soc. *v.* Butterknowle Colliery Co. (1904), 73 L. J. Ch. 335. **Apld.** Thomson *v.* St. Catharine's College Cambridge, etc., [1919] A. C. 468. **Reld.** Eardley *v.* Granville (1876), 24 W. R. 528; A.-G. *v.* Tomline (1877), 5 Ch. D. 750; Gill *v.* Dickinson (1880), 5 Q. B. D. 159; Loosemore *v.* Tiverton & North Devon Ry. (1882), 22 Ch. D. 25; Mid. Ry. *v.* Haunchwood Brick & Tile Co. (1882), 20 Ch. D. 552; Bell *v.* Love (1883), 10 Q. B. D. 547; Pountney *v.* Clayton (1883), 11 Q. B. D. 820; Tucker *v.* Linger (1883), 8 App. Cas. 508; Love *v.* Bell (1884), 9 App. Cas. 286; Shafto *v.* Bolckow, Vaughan & Eccl. Comrs. (1888), 4 T. L. R. 527; Consett Waterworks Co. *v.* Ritson (1889), [1922] 2 Ch. 187, n.; Westmoreland *v.* New Sharlston Colliery Co. (1898), 79 L. T. 716; *Re* Constable & Cranswick (1899), 80 L. T. 164; Butterknowle Colliery Co. *v.* Bishop Auckland Industrial Co-op Co., [1906] A. C. 305; G. W. Ry. *v.* Carpalla United China Clay Co. & Clifden (1908), 99 L. T. 869; Butterley Co. *v.* New Hucknall Colliery Co., [1909] 1 Ch. 37; Skey *v.* Parsons (1909), 101 L. T. 103; N. B. Ry. *v.* Budhill Coal & Sandstone Co., [1910] A. C. 116; I. R. Comrs. *v.* Joicey (No. 2), [1913] 2 K. B. 580; Westhoughton U. C. *v.* Wigan Coal & Iron Co., [1919] 1 Ch. 159; Welldon *v.* Butterley Co., [1920] 1 Ch. 130. **Mentd.** Hall *v.* Byron (1877), 4 Ch. D. 667; Newington L. B. *v.* Cottingham L. B. (1879), 12 Ch. D. 725; Hedley *v.* Bates (1880), 49 L. J. Ch. 170; Shafto *v.* Bolckow, Vaughan (1887), 34 Ch. D. 725; Phillips *v.* Thomas (1890), 62 L. T. 793; Leckhampton Quarries Co. *v.* Ballinger & Cheltenham R. D. C. (1904), 68 J. P. 464; Dickens *v.* National Telephone Co., National Telephone Co. *v.* Hythe Corpn. (1911), 75 J. P. 557; Thornhill *v.* Weeks, [1913] 1 Ch. 438.

42. ——.]—GLASGOW CORPN. *v.* FARIE, No. 12, *ante*.

43. ——.] — In the first place, I think it is clear that by the words "or other minerals" exceptional substances are designated, not the ordinary rock of the district. In the second place, I think that in deciding whether or not in a particular case exceptional substances are minerals, the true test is that laid down by LORD HALSBURY in *Glasgow Corpn.* v. *Farie*, No. 12, *ante*. The ct. has to determine "what these words meant in the vernacular of the mining world, the commercial world, & landowners" at the time when the purchase was effected, & whether the particular substance was so regarded as a mineral (LORD LOREBURN, C.).

The purpose of profit may have a bearing upon the question whether certain substances have been recognised as included in the term "minerals," but does not necessarily determine that they have been ordinarily understood to be so included (LORD GORELL).—NORTH BRITISH RY. CO. *v.* BUDHILL COAL & SANDSTONE CO., [1910] A. C. 116; 79 L. J. P. C. 31; 101 L. T. 609; 26 T. L. R. 79; 54 Sol. Jo. 79, H. L.

Annotations:—**Apld.** Calc. Ry. *v.* Glenboig Union Fireclay Co., [1911] A. C. 290. **Consd.** A.-G. *v.* Salt Union, [1917] 2 K. B. 488. **Reld.** Barnard-Argue-Roth-Stearns Oil Co. *v.* Farquharson (1912), 107 L. T. 332; Syndington *v.* Calc. Ry., [1912] A. C. 87; Australia Commonwealth *v.* Hazeldell, [1921] 2 A. C. 373.

44. Whether capability of extraction for profit the test.]—HEXT *v.* GILL, No. 41, *ante*.

45. —— **Substances forming part of natural soil.**]—ELWES *v.* BRIGG GAS CO., No. 38, *ante*.

46. —— **Substances obtained by mining or quarrying.**]—By an inclosure Act, passed in 1812, certain common lands in Wales were allotted, an allotment being made to the king as lord of the manor in respect of his right to the soil. The Act gave the Comrs. of Woods & Forests the right to sell the allotment made to the king, subject to the rights of the king to the "mines, ores, minerals, coal, limestone or matter whatsoever" in or under the same; & contained a proviso reserving to the king his rights to any "mines, ores, minerals, coal, limestone or slate" in the common land, & all rights & royalties previously belonging to the king, & gave a right of compensation to the owners of the land for any damage done in digging, raising, & carrying away such mines, etc.:—*Held*: the word "minerals" included granite, & the Crown was entitled to win the granite by open workings.

The many cases which have been cited go to establish the definition, especially the cases of *A.-G. for Isle of Man* v. *Mylchreest*, No. 52, *post*, & *Hext* v. *Gill*, No. 41, *ante*, where MELLISH, L.J., states the result of the authorities.

It is evident from these cases that "minerals" mean substances which can be got from beneath the surface not by mining only, but also by quarrying for the purposes of profit (LORD ESHER, M.R.).—A.-G. *v.* WELSH GRANITE CO. (1887), 35 W. R. 617; 3 T. L. R. 573, C. A.

Annotation:—**Reld.** Hayles *v.* Pease & Partners, [1899] 1 Ch. 567.

47. —— **Test not conclusive.**]—JERSEY (EARL) *v.* NEATH POOR LAW UNION GUARDIANS, No. 26, *ante*.

48. —— ——.] — NORTH BRITISH RY. CO *v.* BUDHILL COAL & SANDSTONE CO., No. 43, *ante*.

49. —— **Substances having independent value.**]—Defts. were the lessees of certain lands under a lease dated Sept. 30, 1860, granted by the predecessor in title of pltf. The lease contained the following reservation: "except nevertheless & always reserved out of this demise all mines & minerals within or under the said land." Defts. had, for the purpose of obtaining water, commenced to construct a borehole eighteen inches in diameter, & had already bored through a stratum of redrock & a layer of coal from six to eight inches in thickness:—*Held*: although the substances in question could not, as was admitted, be worked at a profit at the present time, they fell within the

Sect. 4.—"Minerals": Sub-sects. 1 & 2.]

reservation in the lease as being substances which had "a use & a value of their own independent of & separable from the rest of the soil."—JOHNSTONE *v.* CROMPTON & Co., [1899] 2 Ch. 190; 68 L. J. Ch. 559; 81 L. T. 165; 47 W. R. 604.

50. —— —— Statutory reservation of minerals.]—The principles governing cases like *Hext* v. *Gill*, No. 41, *ante*, which deal with a reservation of minerals by virtue of a grant or contract, are not applicable to the determination of cases arising out of a statutory reservation of minerals, like that contained in Railways Clauses Consolidation Act, 1845 (c. 20), s. 77.

(2) Though a mineral *primâ facie* includes anything lying under the land which has a value of its own as being capable of being used independently of the land, yet that rule may be modified by the circumstances of the case where the mineral in question is accepted only by virtue of a statutory reservation.—GREAT WESTERN RY. CO. *v.* BLADES, [1901] 2 Ch. 624; 70 L. J. Ch. 847; 85 L. T. 308; 65 J. P. 791; 17 T. L. R. 693; 45 Sol. Jo. 707.

Annotations:—As to (1) **Refd.** Greville *v.* Hemingway (1902), 87 L. T. 443. *As to* (2) **Refd.** *Re* Todd, Birleston & N. E. Ry., [1903] 1 K. B. 603; G. W. Ry. *v.* Carpallo United China Clay Co., [1909] 1 Ch. 218; Skey *v.* Parsons (1909), 101 L. T. 103; N. B. Ry. *v.* Budhill Coal & Sandstone Co., [1910] A. C. 116.

51. Meaning may be varied — By intention of parties.]—BELL *v.* WILSON, No. 37, *ante*.

52. —— ——.]—It was contended for the Crown that the word "minerals" . . . comprehended clay & sand. Doubtless, the word in its scientific & widest sense may include substances of this nature &, when unexplained by the context or by the nature & circumstances of the transaction, or by usage, where evidence of usage is admissible, would, in most cases, do so. But the word has also a more limited & popular meaning, which would not embrace such substances, & it may be shown by any of the above-mentioned modes of explanation that in the particular instrument to be construed, it was employed in this narrower sense (SIR MONTAGUE SMITH).—A.-G. FOR ISLE OF MAN *v.* MYLCHREEST (1879), 4 App. Cas. 294; 48 L. J. P. C. 36; 40 L. T. 764, P. C.

Annotations:—**Consd.** Tucker *v.* Linger (1882), 21 Ch. D. 18. **Refd.** A.-G. *v.* Welsh Granite Co. (1887), 35 W. R. 617.

53. —— ——.]—MIDLAND RY. CO. *v.* HAUNCHWOOD BRICK & TILE CO., No. 3, *ante*.

54. —— ——.]—GLASGOW CORPN. *v.* FAIRIE, No. 12, *ante*.

55. —— ——.]—The words "mines" & "minerals" in an exception in a deed are not definite terms, but are susceptible of limitation or expansion according to the intention with which they are used.—BARNARD-ARGUE-ROTH-STEARNS OIL & GAS CO., LTD. *v.* FARQUHARSON, [1912] A. C. 864; 82 L. J. P. C. 30; 107 L. T. 332; 28 T. L. R. 590; 57 Sol. Jo. 10, P. C.

Annotations:—**Refd.** A.-G. *v.* Salt Union, [1917] 2 K. B. 488; Australia Commonwealth *v.* Hazeldell, [1921] 2 A. C. 373.

56. —— By custom.]—TUCKER *v.* LINGER, No. 70, *post*.

—— By statute.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 150, 151, Nos. 328–338.

57. Whether meaning restricted by use in conjunction with mines.]—DARVILL *v.* ROPER, No. 1, *ante*.

58. ——.]—HEXT *v.* GILL, No. 41, *ante*.

59. ——.]—JERSEY (EARL) *v.* NEATH POOR UNION GUARDIANS, No. 26, *ante*.

SUB-SECT. 2.—WHAT PARTICULAR SUBSTANCES INCLUDED.

60. Question of law.]—(1) Many of the best-known minerals are mixtures of a large variety of different minerals if that word be used in its strict mineralogical sense, but that does not prevent the well-known mixture being in the eye of the law a mineral (FLETCHER MOULTON, L.J.).

(2) I cannot entertain any doubt as to china clay being a mineral. . . . The question is as to the interpretation of an ordinary English word in its proper legal acceptation, & that is for the ct., & is not a matter of evidence (FLETCHER MOULTON, L.J.).—GREAT WESTERN RY. CO. *v.* CARPALLA UNITED CHINA CLAY CO., LTD., [1909] 1 Ch. 218; 78 L. J. Ch. 105; 99 L. T. 869; 73 J. P. 23; 25 T. L. R. 91, C. A.; *affd. on appeal*, [1910] A. C. 83, H. L.

Annotations:—As to (1) **Refd.** Skey *v.* Parsons (1909), 101 L. T. 103; Cale. Ry. *v.* Glenboig Union Fireclay Co., [1911] A. C. 290. *As to* (2) **Refd.** N. B. Ry. *v.* Budhill Coal & Sandstone Co., [1910] A. C. 116.

61. Ancient boat—Not fossilised or petrified.]—ELWES *v.* BRIGG GAS CO., No. 38, *ante*.

62. Artificial formations — Mounds of refuse.]—Pltf. demised coal & iron mines to a co., which, in manufacturing iron from ironstone, produced large quantities of refuse, consisting principally of protoxide of iron & silica, called "tap cinder" or "puddlers' taps." This refuse, which was at the time unsaleable, was thrown on the demised land & accumulated in large mounds. On the determination of the lease pltfs. demised the land & minerals to defts., who only worked the coal, & did not add to the mounds. Afterwards defts. purchased the "stores & other effects" on the land from pltfs. The tap cinder in the meantime had acquired a commercial value, & large quantities of it were sold by defts.:—*Held:* pltfs. were entitled to the mounds & to an account of the proceeds of sale, inasmuch as the mounds, although they might have been removed by the co. during its lease, were not chattels passing under the sale of the stores & effects, & were not iron, or ironstone mines, seams, veins, or beds, opened or unopened, or minerals within defts.' lease.

What is leased is, first, the coal, then the ironstone, & then "all mines, seams, veins, & beds, as well opened as unopened, of all other minerals & clay lying & being within & under the lands from the surface down to & including the silver mine." In my opinion this description applies only to what may be called natural formations in & on the land, not to artificial formations such as these mounds (BIGHAM, J.).—BOILEAU *v.* HEATH, [1898] 2 Ch. 301; 67 L. J. Ch. 529; 78 L. T. 622; 46 W. R. 602.

63. Brick earth.]—The holder of a building lease, where minerals are reserved has a right to dig foundations for buildings about to be erected, & dispose of the materials dug out, but not to do so in order to improve the surface as a building site.

The lessee of a coal mine, under covenant to remove the spoil-bank at the end of his term, was held to have a property in the material of the bank, so as to have a right of action against a stranger removing part of it for brick making.

The right to dig for, work, raise, & get the R. Mine carried with it the right to remove & appropriate such portions of the strata as had to be removed either in making the necessary shafts & other workings to win it or in getting the coal itself when won (NORTH, J.).

In the case of *Midland Ry. Co.* v. *Chechley* (1867), L. R. 4 Eq. 19, in which a sect. was found

in an Act of Parliament very like the exception in the present case, LORD ROMILY pointed out that such words would include every species of mineral which was within the land as distinguished from under it, & would include surface-working as well as mining; & I take the same view as to the words of exception here (NORTH, J.).—ROBINSON *v.* MILNE (1884), 53 L. J. Ch. 1070.

64. ——.] — JERSEY (EARL) *v.* NEATH POOR LAW UNION GUARDIANS, No. 26, *ante*.

65. Brine.] —Defts. owned land on & in which were two vertical shafts used by them for the purpose of pumping to the surface natural brine, *i.e.* water which had become fully saturated with salt in solution. The brine so pumped up was put by deft. to commercial use. It was impossible to ascertain whence the brine had come or where its saturation had taken place, but as there were no surface subsidences within defts.' land the inference was that the brine did not come from & had not been saturated within the boundaries of defts.' land:—*Held:* the brine was a "mineral" within Finance (1909-10) Act, 1910 (c. 8), s. 20, & the mineral rights duty was therefore payable by defts. on the rental value of the rights so to work the brine.—A.-G. *v.* SALT UNION, LTD., [1917] 2 K. B. 488; 86 L. J. K. B. 1026; 117 L. T. 140; 33 T. L. R. 365.

66. Clay.] —A.-G. FOR ISLE OF MAN *v.* MYLCHREEST, No. 52, *ante*.

67. .] — JERSEY (EARL) *v.* NEATH POOR LAW UNION GUARDIANS, No. 26, *ante*.

68. — .] — GEORGE SKEY & CO., LTD. *v.* PARSONS, No. 79, *post*.

—— Within Railways Clauses Consolidation Act, 1845 (c. 20), s. 77.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 150, 151, Nos. 329–332.

—— Within Waterworks Clauses Act, 1847 (c. 17).]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 151, No. 337.

69. China clay.]—HEXT *v.* GILL, No. 41, *ante*.

—— Within Railways Clauses Consolidation Act, 1845 (c. 20), s. 77.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 151, No. 333.

Fire clay—Within Railways Clauses Consolidation Act, 1845 (c. 20), s. 77.] *See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 151, No. 331.

70. Flints—Not when lying on surface.] —Pltf. agreed to let to deft., on an agricultural lease, a farm in the chalk district of Surrey, reserving to the lessor "all mines & minerals." Deft. entered under the agreement, & in the course of husbandry turned up by the plough large quantities of flint stones, which he collected, carried away, & sold; alleging the existence of a local custom permitting to agricultural tenants in the district such carrying away & selling:—*Held:* the reservation of "all mines & minerals" to the lessor was not sufficient to exclude the custom; but in the absence of any proved custom, the reservation of "minerals" to the lessor would include flint stones turned up by the plough.

Considering, then, the peculiarity of the wording, considering the position of the parties & the nature of the custom, it seems to me that the word "minerals" was not intended to be used in such a sense as to cover those flints to which the custom related, though it might include flints not got according to the custom (JESSEL, M.R.).—TUCKER *v.* LINGEE (1882), 21 Ch. D. 18; 51 L. J. Ch. 713; 46 L. T. 894; 30 W. R. 578; C. A.; *on appeal* (1883), 8 App. Cas. 508, H. L.

Annotations: **–Refd.** Jersey *v.* Neath Union Grdns. (1888), 52 J. P. 582; Dashwood *v.* Magniac, [1891] 3 Ch. 306; *Re* Constable & Cranswick (1899), 80 L. T. 164. **Mentd.** Produce Brokers Co. *v.* Olympia Oil & Cake Co., [1916] 1 A. C. 314.

71. Fossil bodies.]—HEXT *v.* GILL, No. 41, *ante*.

—— Within Inclosure Act.]—*See* No. 46, *ante*.

72. Freestone.]—BELL *v.* WILSON, No. 2, *ante*.

73. ——.]—I think myself it is very seldom that freestone is likely to be regarded as a mineral, but whether it be so or not is to be decided in regard to the particular facts of the case (LORD LOREBURN, C.).—SYMINGTON *v.* CALEDONIAN RY. CO., [1912] A. C. 87; 81 L. J. P. C. 155; 106 L. T. 193; 56 Sol. Jo. 87, H. L.

Annotation: **Refd.** Australia Commonwealth *v.* Hazeldell, [1921] 2 A. C. 373.

Granite—Within Inclosure Act.]—*See* COMMONS, Vol. XI., p. 62, No. 891.

74. Gravel.] Gravel & sand are minerals within Quarries Act, 1894 (c. 42), s. 1.—SCOTT *v.* MIDLAND RY. CO., [1901] 1 K. B. 317; 70 L. J. Q. B. 228; 83 L. T. 737; 65 J. P. 135; 49 W. R. 318; 45 Sol. Jo. 166, D. C.

Limestone—Within Railways Clauses Consolidation Act, 1845 (c. 20), s. 77.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 155, No. 366.

75. Mixed mineral substances.] —GREAT WESTERN RY. CO. *v.* CARPALLA UNITED CHINA CLAY CO., LTD., No. 60, *ante*.

76. Sand.]—A.-G. FOR ISLE OF MAN *v.* MYLCHREEST, No. 52, *ante*.

77. — .]—SCOTT *v.* MIDLAND RY. CO., No. 74, *ante*.

78. Sandstone.]—A deed of conveyance upon the sale of a plot of land conveyed the land to the purchaser "except all coal, ironstone, & other mines & minerals, including fireclay, lying or being within or under the lands hereby assured," & it reserved unto the owners of the excepted mines & minerals for the time being full liberty, & power to work & get the coal, ironstone & other minerals by underground working, & to use or allow lessees to use so much of the clay lying within or under the land as might be necessary for making bricks for colliery purposes; & the conveyance of another plot of the land excepted "all mines, beds & quarries of coal, ironstone, & other minerals, including fireclay," lying under the land. The purchaser had opened quarries for quarrying & getting certain sandstone as building stone which lay at a considerable depth below the surface:—*Held:* the sandstone was included within the reservation of the minerals.—GREVILLE *v.* HEMINGWAY (1902), 87 L. T. 443.

79. ——.]—The mines & minerals under certain land were conveyed to A. in 1885. In 1908 the owner of the surface pulled down two cottages & cut the soil in order to lay out a new road. Clay to the depth of 3 feet or 4 feet was moved,

PART I. SECT. 4, SUB-SECT. 2.

66 i. *Clay.*]—SHAFTESBURY *v.* WALLACE, [1897] 1 I. R. 381.—**IR.**

72 i. *Freestone.*]—A clause by which a superior reserved in a feu-contract right to the mines & minerals, did not give him right to a quarry of freestone situated within the lands.—MENZIES *v.* BREADALBANE & HOLLAND (EARL) (1822), 1 Sh. Sc. App. 225; *affg.* (1818), 19 Fac. Coll. 531.—**SCOT.**

b. *Limestone.*]—COMMONWEALTH OF AUSTRALIA *v.* HAZELDELL, LTD., [1921] 2 A. C. 373, P. C. —**AUS.**

c. ——.] — Beds of limestone are included in the definition of "mines & minerals."—FISHBOURNE *v.* HAMILTON (1890), 25 L. R. Ir. 183, 498.—**IR.**

75 i. *Mixed mineral substances.*]—Iron stained cracks in Keewatin rock impregnated in places with a little iron pyrites & perhaps pyrrhotite:—*Held:* not to be a discovery of valuable mineral within the Act.—*Re* RODD (1907), M. C. C. 61; *affd.*, 10 O. W. R. 671.—**CAN.**

76 i. *Sand.*]—STAPLES *v.* YOUNG, [1908] 1 I. R. 135.—**IR.**

d. *Mineral oils.*]—In the original grant from the Crown, all "mines & minerals" were reserved. In a transfer by M. to F. all "mines minerals, & mineral oils" were reserved:—*Held;*

Sect. 4.—"*Minerals*": *Sub-sect.* 2. *Sects.* 5 & 6: *Sub-sect.* 1.]

& a trench 12 feet deep was cut, in which sewer pipes were laid. A. alleged that a seam of clay 1 foot below the surface & a bed of sandstone rock were being interfered with, & A. asked for an injunction to restrain the trespass. There was coal twenty yards below the surface:—*Held*: the surface clay & sandstone were not within the contemplation of the parties when the mines & minerals were granted.—GEORGE SKEY & CO., LTD. *v.* PARSONS (1909), 101 L. T. 103; 25 T. L. R. 708.

—— **Within Railways Clauses Consolidation Act, 1845 (c. 20), s. 77.**] *See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 151, No. 335.

80. Slag.]—SCOTT *v.* MIDLAND RY. CO., No. 1225, *post*.

Stone.]—*See* COMMONS, Vol. XI., p. 61, No. 889.

—— **Within special Act.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 151, No. 338.

81. Tap cinder.]—BOILEAU *v.* HEATH, No. 62, *ante*.

SECT. 5.—"SURFACE," "LAND," ETC.

82. Land—Includes mines.]—CAMPBELL *v.* LEACH, LEACH & THOMAS *v.* CAMPBELL, No. 373. *post*.

83. ——.]—Land, according to English law, includes everything on or under the soil: all buildings that you may erect on it; all mines that you may sink under it (JESSEL, M.R.).—NEWCOMEN *v.* COULSON (1877), 5 Ch. D. 133; 46 L. J. Ch. 459; 36 L. T. 385; 25 W. R. 469, C. A.

Annotations:—**Mentd.** Finch *v.* G. W. Ry. (1879), 5 Ex. D. 254; New Windsor Corpn. *v.* Stovell (1884), 27 Ch. D. 665; Harris *v.* Flower (1904), 90 L. T. 669.

—— **Within Land Clauses Acts.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 107, No. 39.

84. Close—Includes subsoil.]—(1) If the owner of the fee retains the right to the mines & minerals, & has also the possession, he may maintain an action for any invasion of his rights (Wilde, C.J.).

(2) The term "close" might include the surface as well as the subsoil (MAULE, J.).

(3) There is no doubt that different strata of the soil may be the subjects of separate & distinct rights (WILDE, C.J.).

(4) To make trespass maintainable, pltf. must not only have a right to the possession, but must have the actual possession (WILDE, C.J.).

(5) It cannot be denied that the possession of the surface may be in one person & the possession of & the right to the sub-soil, in another. Such rights may be derived by grant; or may be inferred from a long & uniform course of enjoyment, which will be supposed to correspond with the interest created by same grant (WILDE, C.J.).—COX *v.* GLUE (1848), 5 C. B. 533; 17 L. J. C. P. 162; 10 L. T. O. S. 374; 12 Jur. 185; 136 E. R. 987.

Annotations:—*As to* (5) **Reld.** Back *v.* Daniels, [1925] 1 K. B. 526. *Generally*, **Mentd.** Pilgrim *v.* Southampton & Dorchester Ry. (1848), 12 L. T. O. S. 127; Richards *v.* Davies, [1921] 1 Ch. 90.

85. Surface—Includes land except mines.]—We have to consider, whether, when the surface of land, by which is here meant the soil lying over the minerals, belongs to one man, & the minerals belong to another . . . the owner of the minerals may remove them without leaving support (LORD CAMPBELL, C.J.).—HUMPHRIES *v.* BROGDEN (1850), 12 Q. B. 739; 20 L. J. Q. B. 10; 16 L. T. O. S. 457; 116 E. R. 1048; *sub nom.* HUMFRIES *v.* BROGDEN, 15 Jur. 124.

Annotations:—**Reld.** Keyse *v.* Powell (1853), 2 E. & B. 132; Smart *v.* Morton (1855), 5 E. & B. 30; Cale. Ry. *v.* Sprot (1856), 27 L. T. O. S. 264; Holmes *v.* Powell (1856), 8 De G. M. & G. 572; Roberts *v.* Haines (1856), 6 E. & B. 643; Rogers *v.* Taylor (1858), 2 H. & N. 828; Allaway *v.* Wagstaff (1859), 4 H. & N. 681; Bonomi *v.* Backhouse (1859), E. B. & E. 646; Hunt *v.* Peake (1860), John. 705; N. E. Ry. *v.* Elliott (1860), 2 De G. F. & J. 423; Rowbotham *v.* Wilson (1860), 8 H. L. Cas. 348; *Re* Williams *v.* Groucott (1863), 4 B. & S. 149; Wakefield *v.* Buccleuch (1866), L. R. 4 Eq. 613; Richards *v.* Jenkins (1868), 18 L. T. 437; Eadon *v.* Jeffcock (1872), L. R. 7 Exch. 379; Smith *v.* Darby (1872), L. R. 7 Q. B. 716; Lamb *v.* Walker (1878), 3 Q. B. D. 389; Dalton *v.* Angus (1881), 6 App. Cas. 740; Mundy *v.* Rutland (1883), 23 Ch. D. 81; Pountney *v.* Clayton (1883), 11 Q. B. D. 820; Trinidad Asphalt Co. *v.* Ambard, [1899] A. C. 594; Butterley Co. *v.* New Hucknall Colliery Co., [1908] 2 Ch. 475; Howley Park Coal & Cannel Co. *v.* L. & N. W. Ry., [1913] A. C. 11; Davies *v.* Powell Duffryn Steam Coal Co. (1920), 36 T. L. R. 358. **Mentd.** Solomon *v.* Vintners' Co. (1859), 4 H. & N. 585; Todd *v.* Flight (1860), 9 C. B. N. S. 377; Webb *v.* Bird (1861), 10 C. B. N. S. 268; Jordeson *v.* Sutton, Southcoates & Drypool Gas Co. (1899), 80 L. T. 815.

86. ——.]—The surface means not the mere plane surface but all the land except the mines (BOWEN, L.J.).—POUNTNEY *v.* CLAYTON (1883), 11 Q. B. D. 820; 52 L. J. Q. B. 566; 49 L. T. 283; 47 J. P. 788; 31 W. R. 664, C. A.

Annotations:—**Reld.** Consett Waterworks Co. *v.* Ritson (1889), 22 Q. B. D. 318; Mid. Ry. & Kettering, Thrapston & Huntingdon Ry. *v.* Robinson (1889), 15 App. Cas. 19; Ruabon Brick & Terra Cotta Co. *v.* G. W. Ry., [1893] 1 Ch. 427; *Re* Gerard & L. & N. W. Ry. (1895), 64 L. J. Q. B. 260; Manchester Corpn. *v.* New Moss Colliery, [1906] 2 Ch. 564; L. & N. W. Ry. *v.* Hawley Park Coal & Cannel Co., [1911] 2 Ch. 97.

Soil Within Inclosure Acts.]—*See* COMMONS, Vol. XI., pp. 61–63, Nos. 888 897.

SECT. 6.—"OPEN" AND "NEW" MINES OR QUARRIES.

SUB-SECT. 1.—"OPEN" MINES OR QUARRIES.

87. What constitutes an open mine—Question of intention.]—CHAYTOR *v.* TROTTER, No. 240. *post*.

88. —— **Mine where working commenced—For purpose of profit—Though no profit made.**]—ELIAS *v.* SNOWDON SLATE QUARRIES CO., No. 291, *post*.

89. —— **Special or restricted purpose.**]—ELIAS *v.* SNOWDON SLATE QUARRIES CO., No. 291, *post*.

90. —— **Though no mineral extracted.**]—(1) An "opened" mine is a mine which is in course of being worked; & a mine may be being worked if a shaft has been sunk down to it & the mine is capable of being worked through the shaft whenever opportunity arises, though no coal has in fact been hewn. *Semble*: mines which are part of seams other parts of which are being worked are "opened" mines, even if they have to be worked by following the seam by means of fresh pits.

(2) Testator gave all his real & personal estate on trust for sale, conversion, & investment, & to

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"mineral oils" come within the reservation of "minerals" contained in the original grant from the Crown, & therefore M. has no right to reserve "mineral oils."—*Re* MACKENZIE & MANN, LTD. & FOLEY (Sask.) (1909), 10 W. L. R. 668.—**CAN.**

e. Land.]—Minerals are not "land."—COLEMAN TOWN *v.* HEAD SYNDICATE (Alta.), [1917] 1 W. W. R. 1074.—**CAN.**

f. Whinstone & granite.]—PATON *v.* INLAND REVENUE, [1912] S. C. 1165.—**SCOT.**

PART I. SECT. 6, SUB-SECT. 1.

g. What constitutes an open mine—Whether dedication of bog to cutting—For purposes of sale.]—COPPINGER *v.* GUBBINS (1846), 3 Jo. & Lat. 397.—**IR.**

hold the investments, as to two equal fourth parts, on trust to pay the income to two persons during their lives. He declared that the sale & conversion might be postponed for so long as his trustee should think proper, & that the rents, profits, & income arising from unconverted parts of the estate should be paid & applied in the same manner as the income of the proceeds of sale & conversion & he gave his trustee full powers of leasing. Testator owned valuable mining property, part of which had been leased by him in his lifetime by a lease which was still subsisting at his death. The trustee afterwards granted leases of the remaining mining property. Some of it had not been worked during testator's life, though it had been intended ultimately to work it by a pit sunk by the lessees of the part leased by testator. The remaining part of the land leased by the trustee had been worked during testator's life. The working had been discontinued, but he had intended to resume it:—*Held:* the tenants for life were entitled to the full rents & royalties under all the leases.—*Re* MORGAN, VACHELL *v.* MORGAN, [1914] 1 Ch. 910; 83 L. J. Ch. 573; 110 L. T. 903, C. A.

91. — — — **Effect of abandonment.**]—(1) It is always a question of degree, to be established by evidence, whether the working of a mine which has not been formerly worked is waste or not. A tenant for life, though impeachable for waste, may properly work an open mine. A mine not worked for twelve months or two years previously to the tenant for life coming into possession must still be considered as an open mine; but a mine which has not been worked for a hundred years cannot be properly so treated. A mine which has not been worked for twenty or thirty years from the loss of profit attending the working, may, without committing waste, be worked again by a succeeding tenant for life; but if the working of the mine has been abandoned by the owner of the inheritance many years previously, with a view to some permanent advantage to the property, it is doubtful whether a succeeding tenant for life could properly treat that as an open mine. The opening of a fresh pit, also, may not, under some circumstances, amount to the opening of a new mine, but only to the more advantageous working of an old one, & may possibly be done without any injury to the inheritance, if the surface of the land, where it has been opened, was of little or no value to the estate.

(2) *Semble:* if a tenant for life commit waste, the produce does not belong absolutely to the first tenant in tail in *esse* while there is a possibility of prior tenants in tail coming into *esse*.

(3) *Semble:* the tenant for life may work abandoned mines where the previous working has been stopped merely from inability to carry it on at a profit, *secus*, if stopped with a view to the permanent advantage of the estate.—BAGOT *v.* BAGOT, LEGGE *v.* LEGGE (1863), 32 Beav. 509: 2 New Rep. 297; 33 L. J. Ch. 116; 9 L. T. 217; 9 Jur. N. S. 1022; 12 W. R. 35; 55 E. R. 200.

Annotations:—As to (1) **Refd.** Elias *v.* Snowden Slate Quarries Co. (1879), 4 App. Cas. 454; *Re* Maynard's S. E., [1899] 2 Ch. 347. *As to* (2) **N.F.** *Re* Cavendish, Cavendish *v.* Mundy, [1877] W. N. 198. *Generally*, **Mentd.** Re Barrington, Camden *v.* Lyon (1886), 33 Ch. D. 523; Dashwood *v.* Magniac, [1891] 3 Ch. 306; *Re* Williams' Settlmt., Williams Wynn *v.* Williams, [1922] 2 Ch. 750.

92. — — —.]—By ante-nuptial contract of marriage dated 1882 in English form, G., the absolute owner of the estate of C, bound herself to convey, & did convey, her estate to trustees. The settlement contained the usual power of sale, & in the meantime the trustees were to lease the unsold parts, & to hold the net proceeds of such sales as well as net rents & profits of the estate until sold, upon trusts thereinafter declared "with such powers of leasing the land & hereditaments & other powers of leasing the lands & hereditaments & other powers necessary & expedient in the execution of the trust." The trusts were declared, & it was provided that until the estate should be sold the trustees were to apply the rents & profits to the persons & for the purposes to which the annual income of the money arising from the sale of the estate would be paid under the trust. Under the trust the annual income of the proceeds of the sale of the estate was to be paid to G., during her life & after her death to her husband, & after their deaths the trustees were to hold the trust premises & the annual income thereof for the children of the marriage as the parents should appoint. There was one child of the marriage. Stone quarries on a portion of the estate had been worked at intervals for about a century; but during 1882 & for four years before 1882 no quarries had been worked. In 1895, the estate not having been sold, the trustees leased the stone in 45 acres, including the portion already worked at a fixed rent with a royalty on the amount of stone sold:—*Held:* the quarries at the date of the marriage settlement were "opened mines" & the rent & royalty fell to be paid to G. as annual income from the estate, & did not fall to be accumulated for the benefit of the child of the marriage.—GREVILLE-NUGENT *v.* MACKENZIE, [1900] A. C. 83; 69 L. J. P. C. 1; 81 L. T. 793; 16 T. L. R. 43, H. L.

93. — — —.] *Re* CHAYTOR, No. 414, *post*.

94. Application of principles to quarries.]—ELIAS *v.* SNOWDON SLATE QUARRIES CO., No. 291, *post*.

95. — — —.]—GREVILLE-NUGENT *v.* MACKENZIE, No. 92, *ante*.

96. Unopened mine on same estate as open mine—Whether deemed open.]—CAMPBELL *v.* WARDLAW, No 263, *post*.

97. — — **Construction of intention.**]—CHAYTOR *v.* TROTTER, No. 240, *post*.

98. — — — **Same seam of coal—Effect of intervening strip of land.**]—An estate settled by the will of testator comprised two pieces of land separated by a narrow intervening strip of land which belonged to different owners. Under the whole of the lands there was a valuable seam of coal. The piece of land on the north side of the strip had been demised by the settlor to a colliery co., who had worked the coal. The piece of land on the south side of the strip had not been demised by the settlor, nor had the coal thereunder been worked in any way; but it appeared that if the intervening strip had belonged to testator the coal could have been worked from the pit or shaft sunk by the colliery co. On a petition by the tenant for life under the will for the sanction of the ct., under Settled Estates Act, 1877 (c. 18), to a proposed mining lease of a portion of the land on the south side of the strip:—*Held:* by reason of the intervention of the strip of land, the mine to be leased must be deemed to be a separate unopened mine, & therefore three-fourths of the rent under the lease must be set aside & invested.—*Re* MAYNARD'S SETTLED ESTATE, [1899] 2 Ch. 347; 68 L. J. Ch. 609; 81 L. T. 163; 63 J. P. 552; 48 W. R. 60; 43 Sol. Jo. 676.

99. — — — — **Where fresh pits necessary.**]—*Re* MORGAN, VACHELL *v.* MORGAN, No. 90, *ante*.

Sect. 6.—"*Open*" *and* "*new*" *mines or quarries: Sub-sect.* 2. *Sects.* 7 & 8. *Part II. Sect.* 1.]

SUB-SECT. 2.—"NEW" MINES OR QUARRIES.

100. What constitutes opening a new mine—Not working new seams—By old shaft.]—Testator demised all the seams of coal under his estate, but only two seams were worked or known of in his life. After his death, a lower seam was discovered which could only be worked by a new shaft. A new lease being granted after testator's death:—*Held:* the tenant for life under his will was entitled to the annual profits arising from the new seam.

If there be one shaft by which you can work five seams, & which are all let, but only one is worked at first, I am of opinion, that when the lessee begins to work the other seams it cannot be said to be opening a new mine. . . . I agree, that if a man has opened a shaft for mining coal & he finds in another part of his estate mines of lead or ironstone, which could not be got by means of the old shaft or opening, this would be opening a new mine (ROMILLY, M.R.).—SPENCER *v.* SCURR (1862), 31 Beav. 334; 31 L. J. Ch. 808; 9 Jur. N. S. 9; 10 W. R. 878; 54 E. R. 1167.

Annotation:—**Refd.** Cowley *v.* Wellesley (1866), 35 Beav. 635.

101. ——Opening new shaft—For extraction of different mineral.]—SPENCER *v.* SCURR, No. 100, *ante*.

102. ——.]—BAGOT *v.* BAGOT, LEGGE *v.* LEGGE, No. 91, *ante*.

103. ——On same vein.]—ELIAS *v.* SNOWDON SLATE QUARRIES CO., No. 291, *post*.

104. ——Not granting rights of scraping & scouring.]—STEPNEY *v.* CHAMBERS, [1866] W. N. 401.

105. What constitutes fresh pit—Gravel pit.]—COWLEY (EARL) *v.* WELLESLEY, No. 267, *post*.

106. What constitutes opening new quarry—Breaking ground in fresh place—On same rock.]—ELIAS *v.* SNOWDON SLATE QUARRIES CO., No. 291, *post*.

SECT. 7.—"DEVELOPMENT," "LEAVINGS," ETC.

Meaning of words in leases, *see* Part X., Sect. 3, sub-sect. 1, *post*.

107. "Development"—Stage between prospecting & mining proper.]—According to the judgment of the Chief Justice the word "development," in its ordinary meaning as applied to mines, "denotes that stage of work on mineralised ground which intervenes between prospecting & mining proper. First the ground is prospected in order to ascertain whether there are minerals in paying quantities. Then it is developed in order to test whether the minerals which have been found are such as to warrant the working of the property as a mining proposition. When that has been established, the property is actually worked & the minerals are extracted" (LORD ATKINSON).—DOUGLAS *v.* BAYNES, [1908] A. C. 477; 78 L. J. P. C. 13; 99 L. T. 599; 24 T. L. R. 896, P. C.

108. "Leavings" from tin mine—Construction of agreement.]—MINERAL RESIDUE SYNDICATE *v.* LEVANT MINE ADVENTURERS (1891), 7 T. L. R. 654, C. A.

SECT. 8.—"FIXTURES."

See, generally, LANDLORD & TENANT, Vol. XXXI., pp. 181 *et seq.*; MORTGAGE; REAL PROPERTY; SALE OF LAND; SETTLEMENTS.

109. Whether passing as realty or personalty—Fire engine.]—A fire engine set up for the benefit of a colliery by a tenant for life shall be considered as part of his personal estate & go to the exor., for the increase of assets in favour of creditors.—LAWTON *v.* LAWTON (1743), 3 Atk. 13; 26 E. R. 811, L. C.

Annotations:—**Apld.** Ward *v.* Dudley (1887), 57 L. T. 20. **Refd.** Dudley *v.* Warde (1751), Amb. 113; Elwes *v.* Maw (1802), 3 East, 38; Trappes *v.* Harter (1833), 2 Cr. & M. 153; Wake *v.* Hall (1883), 8 App. Cas. 195; Gough *v.* Wood (1894), 42 W. R. 469. **Mentd.** Grymes *v.* Boweren (1830), 6 Bing. 437; *Re* Walsh, *Ex p.* King (1840), 4 Jur. 510; Egerton *v.* Brownlow (1853), 4 H. L. Cas. 1; Bishop *v.* Elliott (1855), 11 Exch. 113; Walmsley *v.* Milne (1859), 7 C. B. N. S. 115; Hill *v.* Bullock, [1897] 2 Ch. 55; *Re* De Falbe, Ward *v.* Taylor, [1901] 1 Ch. 523; *Re* Hulse, Beattie *v.* Hulse, [1905] 1 Ch. 406; *Re* Whaley, Whaley *v.* Rochrich, [1908] 1 Ch. 615.

110. ——.]—Tenant for life, or in tail, erects a fire engine to work a colliery. It shall on his death be considered as part of his personal estate, & not go with the estate to remainderman.—DUDLEY (LORD) *v.* WARDE (LORD) (1751), Amb. 113; 27 E. R. 73, L. C.

Annotations:—**Refd.** Elwes *v.* Maw (1802), 3 East, 38. **Mentd.** Hubbard *v.* Bagshaw (1831), 4 Sim. 326; *Ex p.* Reynal (1841), 2 Mont. D. & De G. 443; Elliott *v.* Bishop (1854), 10 Exch. 496; *Re* De Falbe, Ward *v.* Taylor, [1901] 1 Ch. 523; *Re* Hulse, Beattie *v.* Hulse, [1905] 1 Ch. 406.

111. ——.]—Suppose there was a colliery upon the estate; what consequences would follow from attending to the interests of the succession. Suppose a vein of coal actually working, but almost worn out; but that by sinking lower & erecting a fire-engine, a considerable quantity of coal might be got at. That would be a speculation of profit & loss. If the fire-engine was large, which would occasion a considerable expense, some of them having cost £5,000 or £6,000, the heir might think it most for his interest to have a sum of money laid out to free the colliery; & the personal representative would oppose that. But suppose the expense would be very inconsiderable, then it would be the interest of the heir to oppose the erection of the fire engine, for there would be the coals for him some time or other untouched; but it would be the interest of the personal representative to press it on; because by laying out a small sum, there would be a considerable increase of annual profits (LORD LOUGHBOROUGH, C.).—OXENDEN *v.* COMPTON (LORD) (1793), as reported in 2 Ves. 69; 30 E. R. 527, L. C.

Annotations:—**Mentd.** Cooke *v.* Dealey (1855), 22 Beav. 196; *Re* Leeming (1861), 3 L. T. 686; Dyer *v.* Dyer (1865), 34 Beav. 504; *Re* Smith (1874), 10 Ch. App. 79; Steed *v.* Preece (1874), L. R. 18 Eq. 192; *Re* Freer, Freer *v.* Freer (1882), 22 Ch. D. 622; *Re* Pickard, Turner *v.* Nicholson (1885), 53 L. T. 293; A.-G. *v.* Ailesbury (1887), 12 App. Cas. 672; *Re* Gist, [1904] 1 Ch. 398.

112. ——Question to be determined by master—According to custom in particular locality.]—Let it be referred to the master, to inquire whether the timber & other materials laid down for making waggon ways more commodious for carrying coal or other minerals from coal or other mines; & also fire engines placed for the better working of such mines, are deemed & reputed in the county of Cumberland, & other counties in the north, fixed to the freehold, & pass therewith to the heir or remainderman, or go to the exor.

PART I. SECT. 7.

h. *Tailings—Of quartz.*]—BRILLIANT GOLD MINING CO. *v.* CRAVEN (1898), 9 Q. L. J. 144.—**AUS.**

k. ——*Of gold.*] OLSEN *v.* CANADIAN KLONDYKE MINING CO., LTD., [1917] 2 W. W. R. 640; 24 B. C. R. 114.—**CAN.**

PART I. SECT. 8.

l. *Steam engine.*]—BURNSIDE *v.* MARCUS (1867), 17 C. P. 430.—**CAN.**

m. *Whether passing as realty or personalty—House built on mining claim.*]—TAYLOR *v.* PALMER (1910), 15 W. L. R. 470; 16 B. C. R. 24.—**CAN.**

or administrator of the party erecting the same (LORD NORTHINGTON, LORD KEEPER).—LOWTHER *v.* CAVENDISH (1758), as reported in 1 Eden, 99; 28 E. R. 621; *on appeal, sub nom.* CAVENDISH (LORD) *v.* LOWTHER (1759), 3 Bro. Parl. Cas. 186, H. L.

Annotations:—**Mentd.** Thompson *v.* Lawley (1800), 2 Bos. & P. 303; Watkins *v.* Lee (1802), 6 Ves. 633.

113. —— Materials used for improving waggon ways—Question for master—According to custom in particular locality.]—LOWTHER *v.* CAVENDISH, No. 112, *ante*.

114. —— Machinery annexed to soil—Scottish lease.]—A lease in Scotland is heritable, not moveable or personal, as in England, but descending to the heir of the lessee. Whether the lease be in perpetuity or for a term of years the descent will be the same. When machinery has been annexed to the leasehold soil for the working of coal underneath, it descends with the soil to the heir of the lessee.—BAIN *v.* BRAND (1876), 1 App. Cas. 762, H. L.

Annotations:—**Mentd.** Hobson *v.* Gorringe, [1897] 1 Ch. 182; *Re* Hulse, Beattie *v.* Hulse, [1905] 1 Ch. 406; *Re* Chesterfield's S. E., [1911] 1 Ch. 237.

115. —— —— Freehold—Capable of removal without disturbance of soil.]—A tenant for life of real estate, who was entitled to hold & enjoy the working stock & plant of certain iron mines & collieries situate on the estate, & carry on such iron mines & collieries, erected on the estate, machinery, etc., blast furnaces, & a railway of considerable length connecting the mines & collieries. On his death the question arose whether, in an account between his exors. & the remainderman, the former should be credited with the value of the machinery, etc., or whether the same passed to the remainderman as things annexed to the soil:—*Held*: the machinery annexed to the soil for the purpose of rendering the minerals merchantable, if such machinery was capable of being removed therefrom by disturbing the soil without destroying the land, was machinery which could not be said to be so attached to the land as to become part of it & belong to the owner of the land, but was to be deemed to be trade fixtures which passed to the exor. as personalty.—WARD *v.* DUDLEY (COUNTESS) (1887), 57 L. T. 20; 3 T. L. R. 576.

Part II.—Property in Mines.

SECT. 1.—IN GENERAL.

116. General rule—In owner of surface.]—(1) All mines of gold or silver within the realm, whether in the lands of the Sovereign or his subjects, belong to the Sovereign by prerogative, with liberty to dig & carry away the ores therefrom & with such incidents thereto as are necessary for the getting of the ore. If a mine contain both gold & silver & base metal then whether the gold, silver or the base metal be of greater value, both the gold & silver & the base metal belong to the Sovereign. But where a mine contains only base metal, the proprietor of the soil shall have the ore. (2) That which is not open may be called a mine (LORD DYER). CASE OF MINES, R. *v.* NORTHUMBERLAND (EARL) (1567), 1 Plowd. 310; 75 E. R. 172.

Annotations:—*As to* (1) **Consd.** Rogers *v.* Brenton (1847), 10 Q. B. 26; A.-G. *v.* Morgan, [1891] 1 Ch. 432. **Refd.** Seaman *v.* Vawdrey (1810), 16 Ves. 390; A.-G. of British Columbia *v.* A.-G. of Canada (1889), 14 App. Cas. 295. *Generally*, **Mentd.** Alton Woods Case, A.-G. *v.* Bushopp (1600), 1 Co. Rep. 26 b; Case of Mixed Money (1605), 2 State Tr. 113; Devonshire's Case (1607), 11 Co. Rep. 89 a; Coke's Case (1623), Godb. 289; R. *v.* Hampden (1637), 3 State Tr. 826; Popham *v.* Woolcot (1666), 1 Sid. 291; R. *v.* London (Bp.) & Lancaster (1693), 1 Show. 111; R. *v.* Hornby (1691), 5 Mod. Rep. 29; R. *v.* Cotton (1751), Park. 112; Iggulden *v.* May (1806), 7 East, 237; R. *v.* Smith (1810), Wight. 34; A.-G. *v.* Parsons (1832), 1 L. J. Ex. 103; Giles *v.* Grover (1832), 9 Bing. 128; R. *v.* Dover Corpn. (1835), 1 Cr. M. & R. 726; A.-G. *v.* Briant (1846), 15 M. & W. 169; R. *v.* Edwards (1853), 9 Exch. 32; Woolley *v.* A.-G. of Victoria (1877), 2 App. Cas. 163; Lloyd-Jones *v.* Clark-Lloyd, [1919] 1 Ch. 424.

117. ——— —.]—(1) The general rule being that he who has the surface has the subsoil, it seems to me that the copyholder has possession of the subsoil, though he may have no property in it. . . . As, then, the possession of a mine is in the copyholder, & not in the lord, the former may maintain trespass for an entry upon it (LORD TENTERDEN, C.J.).

(2) A freeholder, or one holding under him for life, for years, or at will, has possession of the soil from the surface to the centre of the earth (LITTLEDALE, J.).—LEWIS *v.* BRANTHWAITE (1831), 2 B. & Ad. 437; 9 L. J. O. S. K. B. 263; 109 E. R. 1205.

Annotations:—*As to* (1) **Refd.** Keyse *v.* Powell (1853), 2 E. & B. 132; Bowser *v.* Maclean (1860), 2 De G. F. & J. 415; Eardley *v.* Granville (1876), 3 Ch. D. 826. *As to* (2) **Refd.** Keyse *v.* Powell (1853), 2 E. & B. 152.

118. ——— —.]—HARRIS *v.* RYDING, No. 945, *post*.

119. ——— —.]—ROGERS *v.* BRENTON, No. 1237, *post*.

120. ——— ———.]—KEYSE *v.* POWELL, No. 254, *post*.

121. ——— ———.]—*Primâ facie*, the owner of the surface of land is entitled to all below it *ex jure naturæ*, & those who claim property in the minerals must show some grant or conveyance by him or from the Crown. The right of such grantee depends on the terms of the deed, but *primâ facie*, if the minerals were to be enjoyed, it is presumed a power to get them was also granted or reserved as a necessary incident.

By an Inclosure Act comrs. were empowered to divide & allot the lands to the parties interested, but it was disputed whether they had the power to separate the minerals from the surface. In 1770 they made an award, giving the surface to P. & the mines to H., & a covenant was added to which P. & H. were parties, whereby P. disclaimed all right to the mines, & H. agreed to hold the mines according to the award, & to work them without molesting the owner of the surface, & without being subject to any action for damage on account of working them by reason of the surface being injured. P. built houses on his surface, which had stood more than twenty years, when they cracked & the surface fell in, & was greatly injured. H. had worked his mines without negligence, & according to the usual practice of the neighbourhood:—*Held*: (1) whether the statute gave the comrs. power to separate the mines from the surface or not, P.'s covenant amounted to a grant to H. of the right to work the mines, & the owner of the surface had no ground of action, though suffering injury by the working of the mines; (2) even if the award was bad, after

Sect. 1.—*In general. Sects.* 2, 3 & 4.]

ninety years' enjoyment it must be presumed that P. had a right to the surface, & H. to work the mines, & H. would not be liable for the injury to the surface by working the mine.—ROWBOTHAM *v.* WILSON (1860), 8 H. L. Cas. 348; 30 L. J. Q. B. 49; 2 L. T. 642; 24 J. P. 579; 6 Jur. N. S. 965; 11 E. R. 463, H. L.; *affg.* (1857), 8 E. & B. 123, Ex. Ch.

Annotations:—*As to* (1) **Consd.** Murchie *v.* Black (1865), 19 C. B. N. S. 190; Hext *v.* Gill (1872), 7 Ch. App. 699; Smith *v.* Darby (1872), L. R. 7 Q. B. 716; Dalton *v.* Angus (1881), 6 App. Cas. 740. **Expld.** Dixon *v.* White (1883), 8 App. Cas. 833; Sitwell *v.* Londesborough, [1905] 1 Ch. 460. **Consd.** Davies *v.* Powell Duffryn Steam Coal Co. (No. 2) (1921), 91 L. J. Ch. 40. **Refd.** Dugdale *v.* Robertson (1857), 3 K. & J. 695; Scots Mines Co. *v.* Leadhills Mines (1859), 34 L. T. O. S. 34; Blackett *v.* Bradley (1862), 1 B. & S. 940; Shafto *v.* Johnson (1863), 8 B. & S. 252, n.; Richards *v.* Harper (1866), 35 L. J. Ex. 130; Williams *v.* Bagnall (1866), 15 W. R. 272; Richards *v.* Jenkins (1868), 18 L. T. 437; Eadon *v.* Jeffcock (1872), L. R. 7 Exch. 379; Aspden *v.* Seddon (1875), 10 Ch. App. 394; Ramsay *v.* Blair (1876), 1 App. Cas. 701; Hall *v.* Byron (1877), 4 Ch. D. 667; Bell *v.* Love (1883), 10 Q. B. D. 547; Pountney *v.* Clayton (1883), 11 Q. B. D. 820; Darley Main Colliery Co. *v.* Mitchell (1886), 11 App. Cas. 127; Consett Waterworks Co. *v.* Ritson (1889), 64 L. J. Ch. 293, n.; Butterknowle Colliery Co. *v.* Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305; Butterley Co. *v.* New Hucknall Colliery Co., [1910] A. C. 381; Westhoughton U. D. C. *v.* Wigan Coal & Iron Co., [1919] 1 Ch. 159; Consett Industrial & Provident Soc. *v.* Consett Iron Co., [1922] 2 Ch. 135. *As to* (2) **Refd.** Murchie *v.* Black (1865), 19 C. B. N. S. 190; Dalton *v.* Angus (1881), 6 App. Cas. 740; Pountney *v.* Clayton (1883), 11 Q. B. D. 820; Westhoughton U. D. C. *v.* Wigan Coal & Iron Co., [1919] 1 Ch. 159. *Generally*, **Mentd.** Bonomi *v.* Backhouse (1859), E. B. & E. 646; Brown *v.* Robins (1859), 4 H. & N. 186; Solomon *v.* Vintners' Co. (1859), 4 H. & N. 585; Jones *v.* Tapling (1862), 8 Jur. N. S. 333; Proud *v.* Bates (1865), 6 New Rep. 92; Woodall *v.* Hingley (1866), 14 L. T. 167; Hammersmith & City Ry. *v.* Brand (1869), L. R. 4 H. L. 171; Buccleuch *v.* Wakefield (1870), L. R. 4 H. L. 377; N. B. Ry. *v.* Park Yard Co., [1898] A. C. 643; G. N. Ry. *v.* I. R. Comrs., [1901] 1 K. B. 416; Davies *v.* Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488; Thomson *v.* Master & Fellows of St. Catharine's College, Cambridge & Mappin's Masbro' Old Brewery, etc. (1918), 118 L. T. 758.

122. —— ——.]—A grant of land carries with it, as we all know, the mineral which may be below the surface. But who ever heard of a grant of the mineral carrying with it the general ownership of the soil? (COCKBURN, C.J.).—MARSHALL *v.* ULLESWATER STEAM NAVIGATION CO. (1863), 3 B. & S. 732; 1 New Rep. 519; 32 L. J. Q. B. 139; 8 L. T. 416; 27 J. P. 516; 9 Jur. N. S. 988; 11 W. R. 489; 122 E. R. 274; *affd.* (1865), 6 B. & S. 570, Ex. Ch.; *subsequent proceedings* (1871), L. R. 7 Q. B. 166.

Annotations:—**Mentd.** Bristow *v.* Cormican (1878), 3 App. Cas. 641; Foster *v.* Wright (1879), 44 J. P. 7; Devonshire *v.* Pattinson & Carlisle Corpn. (1887), 3 T. L. R. 293; Moffatt *v.* Power (1889), 5 T. L. R. 655; A.-G. *v.* Emerson, [1891] A. C. 649; Hindson *v.* Ashby, [1896] 2 Ch. 1; Ecroyd *v.* Coulthard, [1897] 2 Ch. 554; Beaufort *v.* Aird (1904), 20 T. L. R. 602; A.-G. of Southern Nigeria *v.* Holt (Liverpool), A.-G. of Southern Nigeria *v.* MacIver [1915] A. C. 599.

123. —— ——.]—An owner of land in fee simple is, *primâ facie*, entitled to that land down to the centre of the earth.

On motion by defts., claiming the right to search for minerals under fee simple lands of pltfs., for production of title-deeds, such production was refused, on the ground that the *onus* lay upon defts. to show that pltfs. were not entitled to the minerals.—EGREMONT BURIAL BOARD *v.* EGREMONT IRON ORE CO. (1880), 14 Ch. D. 158; 49 L. J. Ch. 623; 42 L. T. 179; 28 W. R. 594.

124. May be severed from ownership of surface.]—Upon a question whether the lord of a manor was entitled to the coals under a freehold tenement within the manor, it is competent to him to show by parol evidence that there was a known distinction within the manor between old & new land, & that in fact the pltf.'s lands lay within the boundary of the new land; & also to show by evidence of general reputation, as well as acts of taking coal under the lands of other freeholders within the same boundary, that the right to the coals under pltf.'s lands was in the lord.

It is of universal experience that one person may have in him a freehold title to land, whilst another has an exclusive right to the mines under it (LORD ELLENBOROUGH, C.J.).—BARNES *v.* MAWSON (1813), 1 M. & S. 77; 105 E. R. 30.

125. ——.]—KEYSE *v.* POWELL, No. 254, *post*.

126. How severable—By grant.]—Though a mine be an inheritance, yet it may be severed from the inheritance by the grant now made; but it is certainly an interest in the land (PRATT, C.J.).—PORT *v.* TURTON (1763), 2 Wils. 169; 95 E. R. 748.

127. ——.]—The *primâ facie* evidence of title to the mines which the possession of the land affords, is in this case remitted by the grant (BULLER, J.).—HODGKINSON *v.* FLETCHER (1781), 3 Doug. K. B. 31; 99 E. R. 523.

128. ——.]—HARRIS *v.* RYDING, No. 945, *post*.

129. ——.]—COX *v.* GLUE, No. 84, *ante*.

130. — **By long user.**]—In trover for copper ore raised under the pltf.'s land:—*Held:* the presumption that the right to the minerals accompanied the fee simple of the land might be rebutted by the absence of enjoyment of the minerals by pltf., & the user by persons not the owners of the soil.—ROWE *v.* GRENFEL (1824), Ry. & M. 396, N. P.

131. —— ——.]—COX *v.* GLUE, No. 84, *ante*.

132. Effect of severance Separate interest in land created.]—PORT *v.* TURTON, No. 126, *ante*.

133. —— ——.]—KEYSE *v.* POWELL, No. 251, *post*.

134. —— ——.]—Where in a feu charter the superior reserves the coal and limestone with the right to work them, giving satisfaction for damage, the right reserved is a right of property, or absolute ownership, & not a mere servitude or easement; the surface & the minerals becoming separate tenements severed in title:—*Held:* in such a case the superior, as absolute proprietor of the reserved coal & limestone, may make a tunnel through them for the conveyance of other minerals belonging to him in the lands adjacent.

Minerals excepted remain in the lessor. The lessee takes no interest or right whatever in them (LORD HATHERLEY, C.).—HAMILTON (DUKE) *v.* GRAHAM (1871), L. R. 2 Sc. & Div. 166.

Annotations:—**Expld.** Eardley *v.* Granville (1876), 3 Ch. D. 826. **Consd.** Ramsay *v.* Blair (1876), 1 App. Cas. 701; Powell *v.* Vickerman (1887), 3 T. L. R. 358. **Apld.** Batten Pooll *v.* Kennedy, [1907] 1 Ch. 256. **Refd.** Ballacorkish Silver, Lead & Copper Mining Co. *v.* Harrison (1873), L. R. 5 P. C. 49.

135. —— —— **Separate stratum.**]—A separate stratum of valuable minerals, reserved to a landowner under land taken by a railway co., would be a separate tenement (FRY, J.).—LOOSEMORE *v.* TIVERTON & NORTH DEVON RY. CO. (1882), 22 Ch. D. 25; 47 L. T. 151; 30 W. R. 628; *on appeal*, 22 Ch. D., p. 44, C. A.; *sub nom.* TIVERTON & NORTH DEVON RY. CO. *v.* LOOSEMORE (1884), 9 App. Cas. 480, H. L.

Annotations:—**Refd.** G. W. Ry. *v.* Blades, [1901] 2 Ch. 624. **Mentd.** Charlton *v.* Rolleston (1884), 28 Ch. D. 237; G. W. Ry. *v.* Swindon & Cheltenham Ry. (1884), 9 App. Cas. 787; Shepherd *v.* Norwich Corpn. (1885), 30 Ch. D. 553; Batson *v.* London School Board (1903), 67 J. P. 457; Mercer *v.* Liverpool, St. Helens & South Lancashire Ry., [1903] 1 K. B. 652; G. W. Ry. *v.* Mid. Ry., [1908] 2 Ch. 644; Wild *v.* Woolwich B. C., [1910] 1 Ch. 35.

136. Ownership of minerals not evidence of title to surface.]—Where, on trespass for pulling down a wall, the issue was, whether certain common land was the soil & freehold of the lord of the manor, on which the pltf. was entitled to a right of common, or the soil & freehold of the pltf.:—*Held:* leases of minerals, etc., granted by the lord to other persons in other parts of the uninclosed waste land were not receivable in evidence, unless it was first shown that the *locus in quo* formed part of one entire waste, to which those leases were applicable; the effect of such leases, if received, would only be to prove that the lord was entitled to the minerals under the *locus in quo* and not to the surface.—TYRWHITT *v.* WYNNE (1819), 2 B. & Ald. 554; 106 E. R. 468.

Annotations:—**Refd.** Crease *v.* Barrett (1835), 1 Cr. M. & R. 919. **Mentd.** Hollis *v.* Goldfinch (1823), 1 B. & C. 205; Doe d. Welsh *v.* Langfield (1847), 16 M. & W. 497; Simpson *v.* Dendy (1856), 2 Jur. N. S. 642.

137. ——.]—MARSHALL *v.* ULLESWATER STEAM NAVIGATION CO., No. 122, *ante*.

138. Ownership of severed minerals—Mine worked by tenant for life—Mineral at pit head on death of tenant for life.]—Suppose testator had been tenant for life of the collieries, & that upon his death, the interest in them had of course gone to another, the coals raised before his decease, & resting at the pit's mouth, would not go along with the collieries, but remain as part of the personal estate of the tenant for life (LORD REDESDALE).—STUART *v.* BUTE (MARQUESS) (1813), 1 Dow, 73; 3 E. R. 626, H. L.

Annotations:—**Mentd.** Wilce *v.* Wilce (1831), 7 Bing. 661; Darby *v.* Darby (1856), 2 Jur. N. S. 271; Waite *v.* Morland (1865), 13 W. R. 963; *Re* Prater, Desinge *v.* Beare (1888), 36 W. R. 561; *Re* Miller, Daniel *v.* Daniel (1889), 61 L. T. 365; *Re* Craven, Crewdson *v.* Craven (1908), 99 L. T. 390.

SECT. 2.—GOLD AND SILVER MINES.

Property in Crown.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 585, Nos. 858-862.

Effect of grant by Crown.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 571, No. 713.

SECT. 3.—MINES UNDER HIGHWAYS.

See, generally, HIGHWAYS, Vol. XXVI., pp. 319-331.

139. Property in owner of soil.]—As to the question whether an ejectment will lie, by the owner of the soil, for land which is subject to passage over it as the king's highway: 1 Roll. Abr. 392, B., pl. 1, 2, is express—"that the King has nothing but the passage for himself & his people; but the freehold & all profits belong to the owner of the soil." So do all the trees upon it, & mines under it, which may be extremely valuable (LORD MANSFIELD).—GOODTITLE d. CHESTER *v.* ALKER (1757), 1 Burr. 133; 1 Keny. 427; 97 E. R. 231.

Annotations:—**Expld.** Thompson *v.* West Somerset Mineral Ry. (1857), 29 L. T. O. S. 7. **Refd.** Harrison *v.* Rutland, [1893] 1 Q. B. 142; City of London Land Tax Comrs. *v.* C. L. Ry., [1913] A. C. 364.

140. —— **Effect of vesting of street in local authority.**]—"Street" therefore in my opinion, includes the surface & so much of the depth as may be not unfairly used as streets are used. It does not include such a depth as would carry with it the right to mines (BRETT, M.R.).—WANDSWORTH BOARD OF WORKS *v.* UNITED TELEPHONE CO. (1884), 13 Q. B. D. 904; 53 L. J. Q. B. 449; 51 L. T. 148; 48 J. P. 676; 32 W. R. 776, C. A.

Annotations:—**Expld.** Finchley Electric Light Co. *v.* Finchley U. D. C., [1903] 1 Ch. 437. **Refd.** Fareham L. B. & Fareham Electric Light Co. *v.* Smith (1891), 7 T. L. R. 443; Holmfirth L. B. *v.* Shore (1895), 59 J. P. 344; Tunbridge Wells Corpn. *v.* Baird (1896), 60 J. P. 788; Noble *v.* Harrison, [1926] 2 K. B. 332. **Mentd.** A.-G. *v.* Conduit Colliery Co., [1895] 1 Q. B. 301; St. Mary, Battersea, Vestry *v.* County of London & Brush Provincial Electric Lighting Co. (1899), 80 L. T. 31; Westminster Corpn. *v.* Johnson, Westminster Corpn. *v.* Fuller, [1904] 2 K. B. 737; Postmaster-General *v.* Liverpool Corpn. (1922), 92 L. J. K. B. 382.

SECT. 4.—MINES UNDER RIVERS AND SEA-SHORE.

141. Property primâ facie in Crown—Mine under foreshore.]—The question is whether pltf. is entitled to recover damages as reversioner, in respect of coals under the river Dee, that might have been gotten, but for the act of deft. in drowning the mine. Now the lease put in, made by pltf. to H. & co., clearly does not extend to these coals, for it demised only the coals under the land beneath the head of the river Dee, not covered by it. No evidence whatever was given as to the title of pltf. to the land covered by the river Dee, or to the coal under it. *Primâ facie* the title would be in the Crown, for it appears that the river Dee is in that part of it an estuary where the tide flows & reflows (LORD DENMAN, C.J.).—HANMER *v.* EYTON (1845), 5 L. T. O. S. 390.

142. —— **Mine under navigable river.**]—The Lord Justice suggests that the right of a riparian owner in a non-navigable river arises from his being the owner of the land to the centre of the stream, whereas in a navigable river the soil is in the Crown. As to this, it may be observed that the soil of a navigable river may, as Lord Hale observes, be private property (LORD CAIRNS, C.).—LYON *v.* FISHMONGERS' CO. (1876), 1 App. Cas. 662; 46 L. J. Ch. 68; 35 L. T. 569; 42 J. P. 163; 25 W. R. 165, H. L.

Annotations: **Mentd.** Bell *v.* Quebec Corpn. (1879), 5 App. Cas. 84; Burgess *v.* Northwich L. B. (1880), 6 Q. B. D. 264; Fritz *v.* Hobson (1880), 14 Ch. D. 542; Vernon *v.* St. James, Westminster, Vestry (1880), 16 Ch. D. 449; Cale. Ry. *v.* Walker's Trustees (1882), 7 App. Cas. 259; Horner *v.* Whitechapel Board of Works (1885), 55 L. J. Ch. 289; Goulden *v.* Thames River Conservators (1887), 4 T. L. R. 187; A.-G. of Straits Settlmt. *v.* Wemyss (1888), 13 App. Cas. 192; North Shore Ry. *v.* Pion (1889), 14 App. Cas. 612; Lawes *v.* Turner & Frere (1892), 8 T. L. R. 584; Ramuz *v.* Southend L. B. (1892), 67 L. T. 169; Hindson *v.* Ashby, [1896] 2 Ch. 1; Thames River Conservators *v.* Smeed, Dean, [1897] 2 Q. B. 334; Ellis *v.* Bedford, [1899] 1 Ch. 494; Chaplin *v.* Westminster Corpn., [1901] 2 Ch. 329; Boyce *v.* Paddington B. C., [1903] 1 Ch. 109; Mellor *v.* Walmesley, [1905] 2 Ch. 164; Wednesbury Corpn. *v.* Lodge Holes Colliery Co. (1906), 5 L. G. R. 43; Jones *v.* Llanrwst U. D. C., [1911] 1 Ch. 393; A.-G. of Southern Nigeria *v.* Holt (Liverpool), A.-G. of Southern Nigeria *v.* MacIver, [1915] A. C. 599; Montreal City *v.* Montreal Harbour Comrs., Tetreault *v.* Montreal Harbour Comrs., A.-G. for Quebec *v.* A.-G. for Canada, [1926] A. C. 299.

Whether included in grant of waste.]—*See* COMMONS, Vol. XI., p. 24, No. 284.

PART II. SECT. 3.

139 i. *Property in owner of soil.*]—WESTERN FREEHOLD G. M. CO. *v.* GREAT WESTERN G. M. CO. (1867), 4 W. W. & A'B. 44.—**AUS.**

139 ii. ——.]—A mining lease, under Mining Statute 1865, though it may include a public road, cannot give any right to mine under half of the road which has previously become private property by virtue of a Crown grant conveying the land abutting upon it.—SHAMROCK CO. *v.* FARNSWORTH (1876), 2 V. L. R. (Eq.) 165.—**AUS.**

139 iii. ——.]—VICTORIA UNITED MINING CO. *v.* PRINCE OF WALES CO. (1879), 5 V. L. R. (Eq.) 92.—**AUS.**

139 iv. ——.]—GARIBALDI MINING CO. *v.* CRAVEN'S NEW CHUM CO. (1884), 10 V. L. R. 233.—**AUS.**

139 v. ——.]—*Ex p.* JACKSON, [1925] 1 D. L. R. 701; [1925] 1 W. W. R. 337; 21 Alta. L. R. 168.—**CAN.**

Sect. 7.—Presumption from acts of ownership: Subsect. 2. Sect. 8. Part III.]

167. Acts of ownership in respect of part of mine—Whether evidence of possession of whole mine—Though right to surface in other parties.]—Evidence of acts of ownership of one part of a mine within a given district, is admissible to show the right of occupation of other parts within same district. This rule holds, although the right to the surface is in parties other than those who claim the minerals.—TAYLOR *v.* PARRY (1840), 1 Man. & G. 604; 1 Scott, N. R. 576; 9 L. J. C. P. 298; 4 Jur. 967; 133 E. R. 474.

Annotations: **Mentd.** Fishmongers' Co. *v.* Dimsdale (1852), 22 L. J. C. P. 44; Holmes *v.* Powell (1856), 8 De G. M. & G. 572; Humphrey *v.* Nowland (1862), 15 Moo. P. C. C. 343.

168. —— —— As against trespasser.]—WILD *v.* HOLT, No. 568, *post*.

169. —— —— Not conclusive.]—THEW *v.* WINGATE, No. 158, *ante*.

170. —— —— Entry under lease of unworked minerals.]—DAVIS *v.* SHEPHERD, No. 844, *post*.

171. —— —— Entry under conveyance of unworked minerals.]—D. & H. agreed between themselves, in writing, to purchase lands then in the market. By this agreement D. was to have the surface at three-fourths, & H. the minerals at one fourth of the whole purchase-money. H. afterwards entered into a contract with the owner of the lands to purchase them from him. The said lands were duly conveyed to D. by the owner thereof, H. being a party to the purchase deed, & executing a release of all his interest in the lands to D. Afterwards, by an indenture of July 12, 1834, D. granted, bargained, & sold to H. his exors., administrators & assigns, all the minerals lying under the said lands, upon terms substantially the same as those contained in the previous agreement between D. & H. The said indenture of July 12, 1834, was not enrolled as a bargain & sale, & there was no livery of seisin to make it operate as a feoffment. There were seven seams of coals & minerals lying under the said lands, & soon after the execution of the last mentioned deed, H. began to work & get the coal under the said lands, & continued so to do between the years 1834 & 1844. He did not, however, go below the two first seams of coal, & on his ceasing to work in 1844, H. left tramways, implements etc., in the tunnels & levels he had made. In 1855, H. by deed, conveyed the minerals, except the two first or upper seams, with power to dig for & get the coal, etc., to pltfs., who shortly afterwards entered, & bored down below the two first seams, in order to try for, but they did not work the coal. D. died in 1848, & in 1857, his devisee & heir-at-law, by deed, granted the said lands, except the coal thereunder theretofore sold & conveyed to H., to S., "subject as to the beds, etc., of coal under the same to the said indenture of July 12, 1834." In 1872, S. granted a lease of the coal under the said lands to defts., & they entered & worked, & got coal under the said lease in 1872. On Jan. 1, 1873, the surviving trustee for sale of D. granted & confirmed unto S. (deft. lessor) & his heirs, all the seams & beds of coal lying under the said lands, "subject to such right or interest as legally passed to H., his exors., administrators, or assigns, under the said indenture of July 12, 1834." H. died in 1861:—*Held:* pltfs., through H., had sufficient possession of all the seams of coal, etc., to entitle them to maintain trespass against defts., who were mere wrong-doers, for intruding upon pltfs.' mines; the deed of July 12, 1834, & the possession taken under it by H., operated to make H. tenant at will to D. of the mines; Stat. Limitations began to run from the first year of such tenancy, & had given pltfs. a good title when the trespasses were committed.

It is true that in cases where a man has entered upon & taken possession of one seam of coal & by lapse of time has acquired some title to it, the law will not assume that his possession extends to all the other seams of coal lying under that particular one; but in the case we have before us it was beyond all doubt intended that H. should have possession, & take possession of all the seams. The agreement clearly shows that (LORD CAIRNS, C.).

I have had some doubt, in the course of argument, as to the operation of the Stat. Limitations in this case. According to "Shepherd's Touchstone," the grant to get mines is an incorporeal hereditament. My doubt is, if the statute would run, as the grantee would not be entitled to bring an ejectment, during that period, for an incorporeal hereditament. I quite agree that H. obtained possession of the mines, & it is equally clear that he gave possession to pltfs. At the time of the trespasses the defts. were mere wrong-doers, in my opinion, the minerals having been excepted from the conveyance of Mar. 28, 1857, &, therefore, pltfs. were entitled to bring trespass against them (MELLISH, L.J.).—LOW MOOR CO. *v.* STANLEY COAL CO., LTD. (1876), 34 L. T. 186, C. A.

172. —— —— Title founded on adverse possession.]—LOW MOOR CO. *v.* STANLEY COAL CO., LTD., No. 171, *ante*.

173. ——]—Where title is founded on an adverse possession the title will be limited to that area of which actual possession has been enjoyed & as a general rule constructive possession of a wider area will only be inferred from actual possession of the limited area, if the inference of such wider possession is necessary to give effect to contractual obligations, or to preserve the good faith & honesty of a bargain.

Pltfs. who were together entitled to one undivided one-sixth part of the mines under a mountain of ninety-two acres, brought an action against defts., who was admittedly entitled to another undivided one-sixth part of the same mines, & asked for an account of the coal worked by him. It was proved in evidence that more than twelve years before the commencement of the action the predecessors in title of deft., under licences from the owners of the other four-sixths of the mines, but without the licence of pltfs. had commenced to work out the coal under the mountain from an area of two acres, & had remained in possession of that worked-out area, or cavity, ever since. Deft. claimed that possession of part of the mine entitled him to constructive possession of the whole area of the mine horizontally & vertically under the mountain:—*Held:* deft., having been in adverse possession of pltfs.' one-sixth part, which must be treated as a separate tenement, for more than the required statutory period, had acquired a good title under Stat. Limitations to the two acre area of which his predecessors had been in actual possession, & no more; therefore, pltfs. were entitled to an account of the coal, except that taken from the two acre area, such account to be limited to six years before action brought.

The line of authorities . . . seems to me to establish that where title is founded on an adverse possession the title will be limited to that area of which actual possession has been enjoyed, & that as a general rule constructive possession of a wider area will only be inferred from actual

possession of the limited area, if the inference of such wider possession is necessary in order to give effect to contractual obligations, or to preserve the good faith & honesty of a bargain (EVE, J.).—GLYN *v.* HOWELL, [1909] 1 Ch. 666; 78 L. J. Ch. 391; 100 L. T. 324; 53 Sol. Jo. 269.

174. —— —— Mines under foreshore in Scotland.]—The right of a proprietor of estates adjoining the sea to work the coal below low-water mark was challenged by the Crown during the proprietor's minority. The estates to which the minor had succeeded consisted in part of entailed & in part of unentailed lands. The administration of the unentailed lands was vested in the testamentary trustees of the minor's father, who were also curators of the minor. These trustees, without the concurrence of the minor, entered into a transaction with the Crown whereby they on their part accepted a lease of the whole coal below low-water mark *ex adverso* of both the entailed & unentailed lands, & the Crown agreed not to claim damages in respect of coal which had been worked in the past. After the proprietor came of age, he accepted an assignment of the lease, & subsequently applied for & obtained from the Crown a reduction of the royalty payable under the lease, & a modification of the whole mode of working the coal. When the proprietor so acted in regard to the lease, he was unaware that he had a claim to some of the coal below low-water mark. In an action brought by the proprietor fourteen years after he had reached majority, concluding (*inter alia*) for a declarator that he was not bound by the lease: *Held:* the actings of the proprietor after he came of age barred him from challenging the lease.—LORD ADVOCATE *v.* WEMYSS, [1900] A. C. 48.

Annotations:—**Mentd.** Parker *v.* Lord Advocate, [1904] A. C. 373, n.; Secretary of State for India *v.* Sir Rajah Chelikani Rama Rao (1916), 85 L. J. P. C. 222; The Fagernes, [1926] P. 185.

175. User of part of surface—Whether evidence of right to minerals under whole area.]—SEDDON *v.* SMITH, No. 161, *ante*.

SECT. 8.—EFFECT OF NON-USER.

176. Non-user not abandonment.]—CRANG *v.* ADAMS (1776), 5 Bro. Parl. Cas. 588; 2 E. R. 881.

177. —— Customary rights of manorial tenants.]—In an action for an injunction to restrain deft. from trespassing on pltf.'s quarry deft. pleaded that the quarry was part of the waste of a manor of which he was both a freehold & a copyhold tenant. & that by custom of the manor the tenants thereof had a right to get stone from the quarry to be used & spent on their respective tenements. Deft. put in evidence the ct. rolls which recorded a presentment dated in 1695, that the freeholders of the manor had a right of getting stone from the waste to be used & spent on their respective tenements:—*Held:* the entry on the rolls was admissible, & was good evidence of the alleged custom, & such a custom was not unreasonable.

It has been urged that such right of common to take stone & sand from the quarry in question has been extinguished by adverse possession or non-user, or something of that kind. In my opinion no such contention has been or could be established (JOYCE, J.).—HEATH *v.* DEANE, [1905] 2 Ch. 86; 74 L. J. Ch. 466; 92 L. T. 643; 21 T. L. R. 404.

—— .]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 438, 439, Nos. 1094–1098.

178. What amounts to abandonment.]—By a colonial Act cts. for mining purposes are constituted, composed of a warden & assessors, & it is provided by sect. 193 that a minute of the decision of the assessors shall be entered in the register, & that the warden shall make an order in accordance therewith. Applts. occupied land in Victoria for mining purposes, & obtained a Crown lease of the land. A small part of the land occupied by applts. was omitted from the lease. Resps. took possession of so much of the land as was not included in the lease. Applts. then sued resps. in the ct. of mines to remove them & to recover damages. A majority of the assessors found that resps. had not encroached on the land. This finding was not entered in the register, nor did the warden make any order in accordance therewith:—*Held:* intentional abandonment is only to be proved by cogent evidence of the existence of such intention, & the fact that the lease did not include all the land occupied by applts. was not sufficient evidence of abandonment.—WALHALLA GOLD MINING CO. *v.* MULCAHY (1871), 40 L. J. P. C. 41.

179. Necessity for absence of possession by owner—& possession of party claiming title.]—THEW *v.* WINGATE, No. 158, *ante*.

—— —— —.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 433, 434, 435, Nos. 1064, 1065, 1076.

Part III.—Amalgamation and Absorption Schemes.

See, generally, Mining Industry Act, 1926 (c. 28).

180. Within Mining Industry Act, 1926 (c. 28), s. 7 (2)—Scheme in "National Interest"—Terms "Fair & equitable."]—*Re* DENABY & CADEBY MAIN COLLIERIES, LTD. (1927), 13 T. L. R. 322.

PART II. SECT. 8.

178 i. *What amounts to abandonment.*]—DUNLOP *v.* NICOLL, 21 C. L. T. 84.—CAN.

178 ii. ——.]—VICTOR *v.* BUTLER (1901), 8 B. C. R. 100; 1 M. M. Cas. 438.—CAN.

Part IV.—Right to work Mines and Quarries.

SECT. 1.—**IN GENERAL.**

181. Right of working incidental to grant or reservation of minerals.]—CARDIGAN (EARL) *v.* ARMITAGE, No. 992, *post*.

182. ——.]—DURHAM & SUNDERLAND RY. CO. *v.* WALKER, No. 1027, *post*.

183. ——.]—ROWBOTHAM *v.* WILSON, No. 121, *ante*.

PART IV. SECT. 1.

n. *Stakes & staking—Necessity for accuracy.*]—*Re* CRATE (1866), 3 W. W. & A'B. I. 13.—**AUS.**

o. —— —— ——.]—*Re* MALEGA BARRENS, *Ex p.* MCLEOD (1887), 20 N. S. R. (8 R. & G.) 14.—**CAN.**

p. —— ——.]—To constitute a valid location, the statutory provisions as to blazing must be complied with.—ALDOUS *v.* HALL MINES CO. (1897), 6 B. C. R. 394; 1 M. M. Cas. 213.—**CAN.**

q. —— ——.] — The erection of rock monuments instead of legal posts, as required by the Mineral Act, invalidates a location.—CALLANAN *v.* GEORGE (1898), 1 M. M. Cas. 242; 8 B. C. R. 116; 21 C. L. T. 600.—**CAN.**

r. —— ——.] — COPLEN *v.* CALLAHAN (1899), 21 C. L. T. 9; 30 S. C. R. 555.—**CAN.**

t. —— ——.]—MADDEN *v.* CONNELL (B. C.) (1899), 20 C. L. T. 30; 30 S. C. R. 109.—**CAN.**

a. —— ——.]—Accuracy in giving the approximate bearings in staking out a minerals claim is as necessary in the case of a fractional claim as in any other.—COLLOM *v.* MANLEY (B. C.) (1902), 32 S. C. R. 371. **CAN.**

b. —— ——.]—The location line of a fractional mineral claim must be marked by the blazing of trees or the setting of posts in the same manner as that of a full sized claim.—SNYDER *v.* RANSOM, RANSOM *v.* SNYDER (1903), 10 B. C. R. 182; 2 M. M. Cas. 77.—**CAN.**

c. —— ——.] — CLARK *v.* DOCKSTEADER (B. C.) (1905), 36 S. C. R. 622.—**CAN.**

d. —— *Land subject of lease or application for lease.*] — ANTONY *v.* DILLON (1889), 15 V. L. R. 240.—**AUS.**

e. —— ——.]—HARTLEY *v.* MATSON (Y. T.) (1902), 32 S. C. R. 644.—**CAN.**

f. —— *Whether priority given—In order of application after staking.*]—A.-G. *v.* MCDONALD (1870), 8 N. S. R. 125.—**CAN.**

g. —— —— ——.]—*Re* ISA MINING CO. & FRANCEY (1907), 10 O. W. R. 31; M. C. C. 26.—**CAN.**

h. —— —— ——.]—*Re* MCNEIL & MCCULLY & PLOTKE (1908), M. C. C. 262; 13 O. W. R. 6; 17 O. L. R. 621.—**CAN.**

k. —— —— ——.] — STAHL *v.* FRANCIS (1908), 9 W. L. R. 44.—**CAN.**

l. —— —— ——.] — ROBERTSON *v.* STAHL (Y. T.) (1909), 11 W. L. R. 401.—**CAN.**

m. —— —— ——.] — CAMPSALL *v.* ALLEN (1912), 23 O. W. R. 140; 4 O. W. N. 130; 7 D. L. R. 18.—**CAN.**

aa. —— —— ——.]—*Re* SMITH & MCPHERSON (1921), 69 D. L. R. 477; 51 O. L. R. 457.—**CAN.**

bb. —— *Whether condition precedent to lease.*]—"Occupying & staking off" is not a condition precedent to all leases in an unproclaimed district.—MOTT *v.* LOCKHART (1883), 8 App. Cas. 568; 52 L. J. P. C. 61.—**CAN.**

cc. —— *Whether mere renewal of claim can extend boundaries.*]—MILLER *v.* CAMPBELL (1903), Cout. 280.—**CAN.**

dd. —— *Necessity for restaking — Validity of right to location.*]—ST. LAURENT *v.* MERCIER (Y. T.) (1903), 33 S. C. R. 314.—**CAN.**

ee. —— *Size & sufficiency of.*] — PINE CREEK *v.* PEARSE (B. C.) (1906), 3 W. L. R. 425.—**CAN.**

ff. —— ——.] — *Re* CASHMAN & COBALT & JAMES MINES, LTD. (1907), M. C. C. 70; *affd.*, 10 O. W. R. 658.—**CAN.**

gg. —— —— *Irregularity after staking—Who may take advantage of.*]—No irregularity arising after staking can be taken advantage of by an adverse or junior staker.—BALTON *v.* EVANS (Y. T.) (1909), 12 W. L. R. 116.—**CAN.**

hh. —— ——.]—LLOYD *v.* NICHOLAS (Y. T.) (1909), 12 W. L. R. 38.—**CAN.**

kk. —— ——.]—*Re* SPURR & PENNY *v.* MURPHY (1909), 14 O. W. R. 1239; M. C. C. 390; 1 O. W. N. 287.—**CAN.**

ll. —— ——.]—CROSSLEY *v.* SCANLAN (B. C.) (1910), 14 W. L. R. 573.—**CAN.**

mm. —— ——.]—BAPTIST *v.* ERICKSON (Y. T.) (1910), 15 W. L. R. 1.—**CAN.**

nn. —— ——.]—In order to effect a valid location of a claim under British Columbia Placer Mining Act, strict compliance with the provisions of the Act as to size & placing of the boundary posts is essential.—DEISLER *v.* SPRUCE CREEK POWER CO. (1914), 28 W. L. R. 329; 17 D. L. R. 506; 21 B. C. R. 441.—**CAN.**

oo. —— *On town site — Whether allowed.*]—*Re* KLONDIKE CITY TOWNSITE (Y. T.) (1906), 5 W. L. R. 526.—**CAN.**

pp. —— —— —— ——.]—WESTERN & NORTHERN LANDS CORPN. *v.* GOODWIN (1908), 18 O. L. R. 63; 13 O. W. R. 177; M. C. C. 230.—**CAN.**

qq. —— *Sufficiency of representation work.*]—PALMGREEN *v.* TABOR, O'FALLON *v.* PATTON (1907), 6 W. L. R. 791.—**CAN.**

rr. —— ——.]—HOCKING *v.* WENZELL (1907), 6 W. L. R. 658.—**CAN.**

tt. —— ——.]—A.-G. FOR CANADA (BACKE) *v.* ERICKSON (1908), 9 W. L. R. 140.—**CAN.**

aaa. —— *Meaning of word "hill."*]—JONES *v.* JOYAL (Y. T.) (1907), 6 W. L. R. 407.—**CAN.**

bbb. —— *Claim not at discovery stake.*]—*Re* BLYE & DOWNEY (1908), M. C. C. 120; 11 O. W. R. 323; 12 O. W. R. 986.—**CAN.**

ccc. —— *Previous staking without recording — Whether subsequent staking valid.*]—*Re* MUNRO & DOWNEY (1908), 14 O. W. R. 523; M. C. C. 193; 19 O. L. R. 249.—**CAN.**

ddd. —— *Onus of proof that lands are prospecting lands.*]—*Re* SMITH & HILL (1909), 14 O. W. R. 881; M. C. C. 349; 19 O. L. R. 577.—**CAN.**

eee. —— *Application after further discovery—Whether first claim staked abandoned.*]—*Re* WRIGHT & COLEMAN DEVELOPMENT CO. (1909), M. C. C. 103; *revsd.*, 12 O. W. R. 248; 13 O. W. R. 900.—**CAN.**

fff. —— *Land previously granted as a placer claim.*]—A miner has the right to stake a quartz mineral claim upon ground that has previously been granted as a placer claim.—SMITH *v.* YUKON GOLD CO. (Y. T.) (1911), 19 W. L. R. 68.—**CAN.**

ggg. —— *"Creek" claim.*]—Under the mining laws of the Yukon Territory a "creek" claim cannot be staked so as to cross & occupy land on both sides of a river.—YUKON GOLD *v.* BOYLE CONCESSION (Y. T.) (1916), 34 W. L. R. 436; 10 W. W. R. 585.—**CAN.**

hhh. —— *Implied agreement to stake claim for employer.*]—NICHOLSON *v.* MUSTARD, [1921] 3 W. W. R. 890; 62 D. L. R. 445.—**CAN.**

kkk. —— *Crown lands—Consideration.*]—A petition of right for a refund of $5 per acre out of the $10 per acre paid by petitioner to the Crown for title to coal & petroleum rights in lands under the sea dismissed, since the surface of the lands in question had not been leased or alienated to anyone else.—KETCHEN *v.* R. (B. C.), [1926] 3 W. W. R. 767.—**CAN.**

lll. —— *Exterior & interior angles unpegged.*] — PEARCE *v.* GREVILLE (1897), 15 N. Z. L. R. 735.—**N.Z.**

mmm. —— *Repegging of same claim —Whether amounting to abandonment of earlier application.*]—Repegging by appct. for a claim, & making a fresh application for the same ground pegged out & applied for before, is an abandonment of the earlier application.—HORN *v.* BOAG (1904), 23 N. Z. L. R. 517.—**N.Z.**

nnn. *Certificate — Of improvements —Extension of time for action—When allowed.*]—*Re* "GOLDEN BUTTERFLY FRACTION" & "COUNTESS" MINERAL CLAIMS (1896), 1 M. M. Cas. 125; 5 B. C. R. 445.—**CAN.**

ooo. —— —— *What claimants are barred thereby.*]—A certificate of improvements under Mineral Act, 1891, s. 46, is a bar only to adverse claims to the location advanced by other claimants under Mineral Act, & is not a bar to the rights of claimants of the land, as land, to whom the Mineral Act procedure does not apply.—NELSON & FORT SHEPPARD RY. CO. *v.* JERRY (1897), 5 B. C. R. 396; 1 M. M. Cas. 161.—**CAN.**

ppp. —— —— *Effect of.*] — *Re* AMERICAN BOY MINERAL CLAIM (1899), 7 B. C. R. 268; 1 M. M. Cas. 304.—**CAN.**

qqq. —— —— *Obtained by fraud.*]—HAND *v.* WARREN (1899), 7 B. C. R. 42; 1 M. M. Cas. 376.—**CAN.**

rrr. —— —— ——.] — A.-G. *v.* DUNLOP (1900), 7 B. C. R. 312; 1 M. M. Cas. 408.—**CAN.**

ttt. —— —— *Who may apply for —Part owner of mineral claim.*]—BENTLEY *v.* BOTSFORD (1901), 21 C. L. T. 492; 8 B. C. R. 128.—**CAN.**

aaaa. —— —— *Adverse action.*] — DOCKSTADER *v.* CLARK (1907), 24 C. L. T. 43.—**CAN.**

bbbb. —— —— ——.]—COLLISTER *v.* REID (B. C.), [1919] 3 W. W. R. 229; 47 D. L. R. 509.—**CAN.**

cccc. —— *Of work—What irregularities cured thereby—Defects in location.*]—Defects in a location made *bonâ fide* in endeavouring to avoid encroaching upon other locations, & which do not mislead, are cured by a certificate of work.—WATERHOUSE *v.* LIETCHILD (1897), 1 M. M. Cas. 153; 6 B. C. R. 424.—**CAN.**

dddd. —— —— ——.]—RAMMELMEYER *v.* CURTIS, POWERS *v.* CURTIS (1900), 8 B. C. R. 383.—**CAN.**

eeee. —— —— ——.]—LAWR *v.* PARKER (1901), 8 B. C. R. 223; 1 M. M. Cas. 456.—**CAN.**

ffff. —— —— *Effect of recording*

184. ——.]—RAMSAY *v.* BLAIR, No. 19, *ante*.

185. ——.] — MARSHALL *v.* BORROWDALE PLUMBAGO MINES & MANUFACTURING CO., LTD. (1892), 8 T. L. R. 275.

Easements & rights affecting mines.]—*See* Part XIII., *post*.

Lessee's right of working.]—*See* Part XI., Sect. 3, sub-sect. 2, *post*.

SECT. 2.—RIGHTS DEPENDENT ON EXTENT OF OWNER'S INTEREST.

SUB-SECT. 1.—ABSOLUTE OWNERS.

186. Committee of lunatic—Right to consent to working lunatic's mine By owner of adjoining land.]—Agreement by the committee of a lunatic, that coal under the lunatic's estate should be worked by the owner of the adjoining land, established under the circumstances.—*Ex p.* TABBART (1801), 6 Ves. 428 ; 31 E. R. 1127, L. C.

SUB-SECT. 2.—CO-OWNERS AND PARTNERS.

A. Co-Owners.

187. Right of individual co-owner—To work common property—Limited to extent of own share.]—JOB *v.* POTTON, No. 554, *post*.

188. Account—Allowances for necessary expenditure—Special allowances.]—*Allowance* in respect of advances for supplies to a West India estate by persons, acting as consignees, not under a regular appointment, but with permission of the owners, or by one tenant in common ; if not upon the ground of lien by the colonial law or usage,

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certificate.]—GELINAS *v.* CLARK (1901), 21 C. L. T. 261 ; 8 B. C. R. 12. **CAN.**

a. —— —— *Necessity for joining Attorney-General as party When certificate impeached.*]—CLEARY *v.* BOSCOWITZ (1901), 22 C. L. T. 41 ; 8 B. C. R. 225.—**CAN.**

b. —— —— *Application of Mineral Act.*]—WINDSOR *v.* COPP (1905), 12 B. C. R. 213 ; 3 W. L. R. 291.—**CAN.**

c. —— *Of free miner—Sufficiency of proof of title.*]—SCHOMBERG *v.* HOLDEN (1899), 6 B. C. R. 419 ; 1 M. M. Cas. 290.—**CAN.**

d. —— —— *Lapse of.*]— GRUTCHFIELD *v.* HARBOTTLE (1900), 20 C. L. T. 395 ; 7 B. C. R. 344.—**CAN.**

e. —— —— —— *Whether special certificate revives title.*]—WOODBURY MINES *v.* POYNTZ (1903), 24 C. L. T. 107 ; 10 B. C. R. 181.—**CAN.**

f. —— —— *Necessity for payment of certificate fees—Before renewal of grant issued.*] *Re* MORRISON (Y. T.) (1907), 6 W. L. R. 606. **CAN.**

g. —— —— ——.] — ENGINEER MINING CO. *v.* FRASER, [1923] 1 D. L. R. 536 ; [1923] A. C. 228 ; [1923] 1 W. W. R. 419 ; *affg.*, 68 D. L. R. 409. **CAN.**

h. Mining Recorder Filing of adverse claim—Whether condition precedent to action.]—KILBOURNE *v.* MCGUIGAN (1897), 5 B. C. R. 233 ; 1 M. M. Cas. 142.—**CAN.**

k. —— —— *Time for.*] — DUMAS GOLD MINES, LTD. *v.* BOULTBEE (1901), 10 B. C. R. 511.—**CAN.**

l. —— —— .]—*Re* PETRAKOS (1906), 9 O. W. R. 367 ; 13 O. L. R. 650 ; M. C. C. 22. **CAN.**

m. —— *Power to refuse registration of claim—Of member of North West Mounted Police.*]—*Re* MACLENNAN (Y. T.) (1907), 7 W. L. R. 209. **CAN.**

n. —— —— *Grounds for rejection.*]—An application for a mining claim should not be rejected because it includes land covered with water. —*Re* SINCLAIR (1908), M. C. C. 179 ; 12 O. W. R. 138.—**CAN.**

o. —— *Recorder's certificate set aside —Mistake.*]—*Re* ROGERS & MCFARLAND (1909), M. C. C. 407 ; 14 O. W. R. 913 ; 19 O. L. R. 622.—**CAN.**

p. —— —— *Fraud.*]—WEKUSKO MINES, LTD. *v.* MAY, [1926] 1 D. L. R. 461 ; [1926] 1 W. W. R. 225 ; 35 Man. L. R. 386.—**CAN.**

q. —— *Recorder's map showing more extensive boundaries than claim filed —Effect of.*] — The boundaries of a claim which a staker acquires under Mines Act are delimited by the claim as filed & the fact that the claim as shown upon the map in the office of the Mining Recorder shows more extensive boundaries does not extend the area of the claim.—*Re* OLMSTEAD & EXPLORATION SYNDICATE OF ONTARIO (1913), 24 O. W. R. 974 ; 5 O. W. N. 8 ; 13 D. L. R. 750. **CAN.**

r. —— *Certificate of—Whether final.*] —*Re* HEATH & ROSE, [1925] 3 D. L. R. 289 ; 57 O. L. R. 67. **CAN.**

t. Locations & relocations—Validity of one location depending upon another.] —RUTHERFORD *v.* MORGAN, 2 M. M. Cas. 211.—**CAN.**

aa. —— *Necessity for written permission of Commissioner to relocate.*]—GRANGER *v.* FOTHERINGHAM (1894), 3 B. C. R. 590. **CAN.**

bb. —— *Validity of record.*]—ATKINS *v.* COY (1896), 5 B. C. R. 6 ; 1 M. M. Cas. 88. **CAN.**

cc. —— *Provisions of Mineral Act —Whether imperative.*] BLEEKIR *v.* CHISHOLM (1896), 8 B. C. R. 148. **CAN.**

dd. —— —— —— ——.]—A *bonâ fide* attempt to comply with the provisions of the Act does not mean merely an attempt to locate a claim of the size & form contemplated by the Act, but means an attempt to comply with the formalities prescribed by the Act.—RICHARDS *v.* PRICE (1897), 5 B. C. R. 362 ; 1 M. M. Cas. 156. **CAN.**

ee. —— *Necessity for recording Within prescribed time.*] FRANCOEUR & MCDONALD *v.* ENGLISH (1897), 6 B. C. R. 63 ; 1 M. M. Cas. 203. **CAN.**

ff. Sufficiency of proof In absence of fraud.] GIBSON *v.* MCARTHUR & LUKEMAN (1899), 1 M. M. Cas. 382 ; 7 B. C. R. 59. **CAN.**

gg. What may be included in one location.] Two plots of ground separated by an intervening valid location, cannot, although within the statutory limit of 1,500 feet, be included in one location.—DART *v.* ST. KEVERNE MINING CO. (1899), 7 B. C. R. 56 ; 1 M. M. Cas. 331.—**CAN.**

hh. —— *Location on same vein on another's location—Public policy.*]—When one free miner locates a mineral claim & locates another claim on the same vein in the name of another free miner, such a proceeding is contrary to public policy, & a violation of the Mineral Act & amendments, & the free miner requires no interest in the second location.—ALEXANDER *v.* HEATH (1899), 8 B. C. R. 95 ; 1 M. M. Cas. 333.—**CAN.**

kk. —— *Lapsed location reverts to Crown.*]—CRANSTON *v.* ENGLISH CANADIAN CO. (1900), 7 B. C. R. 266 ; 1 M. M. Cas. 394. **CAN.**

ll. —— *Location under wrong statute—Whether relocation permissible.*] —Where a placer claim has been erroneously located pursuant to the provisions of an obsolete statute, it is permissible to relocate it in accordance with the existent statute, & no formal abandonment is necessary.—WHEELDEN *v.* CRANSTON (1905), 12 B. C. R. 189.—**CAN.**

mm. —— *When relocation certificate necessary.*]—GRANT *v.* TREADGOLD (Y. T.) (1906), 1 W. L. R. 173.—**CAN.**

nn. —— *Apex location—Justification of encroachment.*]—WHITE CO. *v.* STAR MINING & MILLING CO. (B. C.) (1909), 41 S. C. R. 377. **CAN.**

oo. —— *Withdrawal of lands from entry Powers of Commissioner.*]—SMITH *v.* CANADIAN KLONDIKE MINING CO. (Y. T.) (1911), 16 W. L. R. 196.—**CAN.**

pp. —— *Relocation on occupied land Whether open to location as mineral claim.*] FARRELL & FARRELL *v.* FITCH & HAZLEWOOD & BRITISH COLUMBIA SOUTHERN RY. CO. (1912), 17 B. C. R. 507.—**CAN.**

qq. —— *Lands wrongly described in Crown patent.*]—*Re* FINUCANE & PETERSON LAKE MINING CO., LTD. (1914), 32 O. L. R. 128 ; 7 O. W. N. 191. **CAN.**

rr. Placer mining Record of—On what validity depends.]—The validity of a placer mining record primarily depends upon the mere belief of the locator based upon indications he has observed on the claim in the existence of a deposit of placer gold therein.—TANGHE *v.* MORGAN (1904), 2 M. M. Cas. 178 ; 11 B. C. R. 76 ; 25 C. L. T. 19. **CAN.**

tt. —— *When application for grant will be refused Lessee in possession Covenants in lease duly performed.*] —SEGUIN *v.* BOYLE, [1922] 1 A. C. 162, P. C.—**CAN.**

aaa. Right to do experimental work When refused.]—CENTRE STAR MINING CO. *v.* IRON MASK MINING CO. (1898), 6 B. C. R. 355 ; 1 M. M. Cas. 267. **CAN.**

bbb. Right of squatter to work mine.] —ESQUIMALT & NANAIMO RY. CO. *v.* MCGREGOR (B. C.) (1905), 2 W. L. R. 530. **CAN.**

ccc. Lands of Crown withdrawn from exploration.] Where lands of the Crown have been withdrawn from exploration, the officials, acting under the Mines Act of Ontario, are justified in refusing to recognise a mining claim made after such withdrawal.—FLORENCE MINING CO. *v.* COBALT MINING CO. (1910), 102 L. T. 375, P. C. **CAN.**

ddd. Rights of discoverer.]—Under Ontario Mining Act, R. S. O., 1914, what a discoverer is entitled to is 20 acres laid out in the manner imperatively & minutely, with diagrams, prescribed by the Act.—*Re* NEILLY & LESSARD (1917), 38 O. L. R. 440 ; 33 D. L. R. 634. **CAN.**

PART IV. SECT. 2, SUB-SECT. 1.

eee. Mines under pipes of waterworks—Statutory notice to waterworks necessary before working mine.]—EDINBURGH WATER TRUSTEES *v.* CLIPPENS OIL CO. (1898), 25 R. (Ct. of Sess.) 504 ; 35 Sc. L. R. 425 ; 5 S. L. T. 298.—**SCOT.**

Sect. 2.—Rights dependent on extent of owner's interest: Sub-sect. 2, A., B. & C. (a).]

upon the nature of the subject, requiring expenditure; as in the case of mines, alum works, etc., distinguished from a mere landed estate in this country.

That principle of English law, that would in this country be given in equity to a person having a species of landed estate, which however could not be represented as mere landed property; as a tenant in common of soil containing mines or alum works; in the management of which there must be expenditure incurred, as between the tenants; & I have no conception that the ct. would in such cases give the account between them without making allowances that would not be given in the case of an estate to be managed in the ordinary course of husbandry (LORD ELDON, C.).—SCOTT *v.* NESBITT (1808), 14 Ves. 438; 33 E. R. 589, L. C.

Annotations:—**Refd.** Sayers *v.* Whitfield (1829), 1 Knapp, 134. **Mentd.** Farquharson *v.* Balfour (1836), 8 Sim. 210; *Re* Courtney, *Ex p.* Pollard (1840), 4 Deac. 27; Shaw *v.* Simpson (1842), 1 Y. & C. Ch. Cas. 732; Mansfield *v.* Ogle (1855), 24 L. J. Ch. 450; Morrison *v.* Morrison (1855), 2 Sm. & G. 564; Fraser *v.* Burgess (1860), 13 Moo. P. C. C. 314; Bertrand *v.* Davies (1862), 31 Beav. 429; Twynam *v.* Hudson (1862), 31 L. J. Ch. 577; *Re* Harriott, *Ex p.* Pengelley (1863), 8 L. T. 854; *Re* Leith's Estate, Chambers *v.* Davidson (1866), L. R. 1 P. C. 296; Securities & Properties Corpn. *v.* Brighton Alhambra (1893), 62 L. J. Ch. 566; Duder *v.* Amsterdamsch Trustees Kantoor, [1902] 2 Ch. 132.

189. —— —— —— **Severing & bringing to bank.**]—JOB *v.* POTTON, No. 554, *post*.

190. —— —— —— **General partnership account.**] The case is similar to that of mines worked by co-owners without partnership, where the real estate is not partnership property. . . . Any co-owner can transfer his interest to a stranger, which a partner cannot do. . . . The co-owner is entitled to an account of what the other co-owners have received in excess of their share, but has no right to a general partnership account (FARWELL, L.J.).—ADAIR *v.* NEW RIVER CO., LTD. & METROPOLITAN WATER BOARD (1908), 25 T. L. R. 193, C. A.; *affd. sub nom.* METROPOLITAN WATER BOARD *v.* ADAIR & NEW RIVER CO. (1911), 27 T. L. R. 253, H. L.

191. —— —— —— A. by a voluntary settlement conveyed two shares in certain mines to trustees for ninety-nine years if A. should so long live, in trust for A.'s brother-in-law B. during the said term if he should so long live, with remainder as to one share in trust for A.'s sister C., & as to the other share, in trust, for D. the son of B. & C., to hold to them respectively for the residue of the said term if they should so long respectively live. Upon the death of B., in the lifetime of A., C. & D. entered into possession of their respective shares. A. afterwards, by a deed of gift executed in 1826, conveyed all his remaining interest in the premises to D., & died in 1830. After A.'s death, C. continued by mistake in possession of the share which had been settled upon her until her death in 1835. In 1839, D., upon examination of the deed of 1826 which was in his possession, found out the mistake, & he immediately filed his bill against the exors. of C. for an account of the rents & profits received by her since the death of A.:—*Held:* inasmuch as D. had been guilty of laches in not finding out the mistake earlier, by the means which were in his power, he was entitled to an account only for the period allowed by analogy to Stat. Limitations, which in this case was six years before the filing of the bill, & an additional period during which he was abroad.

Where the rents of mines are reserved by means of payment of produce *in specie*, the profits will be considered as accruing to the lessor at the time of receiving such produce, & not at the time of the sale of it; & therefore the statute will run from the time of such receipt, & not from the time of such sale.

There can be no ouster between tenants in common in possession; & therefore if one takes more than his share of the rents, the only remedy is account; either by action under the statute of Anne or by bill in equity.—DENYS *v.* SHUCKBURGH (1840), 4 Y. & C. Ex. 42; 5 Jur. 21; 160 E. R. 912.

Annotations:—**Distd.** Eccl. Comrs. for England *v.* N. E. Ry. (1877), 4 Ch. D. 845. **Consd.** Baker *v.* Courage, [1910] 1 K. B. 56. **Refd.** Roberts *v.* Eberhardt (1853), 2 Eq. Rep. 780; Gibbs *v.* Guild (1881), 8 Q. B. D. 296; Adair *v.* New River Co. & Metropolitan Water Board (1908), 25 T. L. R. 193.

192. —— **Mesne profits—On ouster.**]—DENYS *v.* SHUCKBURGH, No. 191, *ante*.

193. —— **To participation in profits—Joint estate in two properties held in severalty.**]—Pltf. & deft. being each entitled in severalty in fee to one of two contiguous estates excepting the coal mines under such estates respectively, were also owners of the coal under both estates in undivided moieties as tenants in common. For the purpose of raising from under both estates the coal to which pltf. & deft. were entitled in common, a shaft was sunk in deft.'s estate, & was used for that purpose. Afterwards the same shaft was used for the purpose of raising through & by means of the same the coal belonging to adjoining proprietors:—*Held:* pltf. was entitled to participate in the profits made by the use of the shaft in raising the adjoining coal, though the shaft was sunk in deft.'s estate. CLEGG *v.* CLEGG (1861), 3 Giff. 322; 31 L. J. Ch. 153; 5 L. T. 411; 8 Jur. N. S. 92; 10 W. R. 75; 66 E. R. 433.

Annotation:—**Refd.** Hunter *v.* Stewart (1861), 4 De G. F. & J. 168.

194. Appointment of receiver.]—WYNGET *v.* HEATHCOTE (undated), cited 4 Y. & C. Ex. 187; 160 E. R. 973; *sub nom.* WINYATT *v.* HEATHCOTE, 9 L. J. Ex. Eq. at p. 31.

Annotation:—**Refd.** Roberts *v.* Eberhardt (1853), Kay, 148.

195. —— **After sale directed—Failure to agree on plan for working.**]—It was found, on looking into the title, that there was no power to assign without a licence, & that the persons entitled to give such licence entirely objected to any change in the possession. . . . This certainly would throw a difficulty in the way of a sale by auction . . . whereas it does not show that similar difficulties would exist in the case of a sale by private contract. . . . It was simply the case of part owners of a mine without any partnership, under which circumstances the doctrine laid down by LORD EDON in the case of *Jeffereys* v. *Smith*, No. 198, *post*, would apply . . . namely, that where such part owners cannot agree on a plan for working the mine, the ct. will take care that it shall be worked in a reasonable way, & it will interfere, I apprehend, till a sale takes place, just as much as if the mine were to be carried on perpetually, & with that object will appoint a manager to act under the direction of the ct. (WOOD, V.-C.).—LEES *v.* JONES (1857), 3 Jur. N. S. 954.

Powers of absolute disposition.]—*See* Part V., Sect. 1, sub-sect. 5, *post*.

191 i. *Right of individual co-owner—Account.*]—BALCOM *v.* HISELER (1910), 7 E. L. R. 577.—CAN.

B. Co-Owners in Mine and Partners in Working.

196. Extent of rights of working — Interference with mutual rights.]—JEFFERYS *v.* SMITH, No. 198, *post.*

197. —— ——.]—(1) Where tenants in common of a mine have been working it in partnership, or where the mine itself is the partnership property, the ct. will not appoint a receiver or manager at the instance of one of the partners, in a suit which does not seek to dissolve the partnership. Nor, even in a suit to dissolve the partnership, will the ct. appoint a receiver on an interlocutory application, merely upon evidence that the partners do not co-operate in the management of the business; but to sustain such an application it must be shown that one partner has interfered so as to prevent the business being carried on.

It is certainly not the ordinary practice of this ct. to direct an account between partners, except upon a bill for the dissolution of the partnership concern. It is true, that it is not now necessary to ask for a dissolution in every case in which relief is sought respecting partnership affairs; but I apprehend, that, where a bill seeks for an account, that is one of the cases in which a dissolution must be prayed. Unless some special ground is raised, the general accounts cannot be taken without asking for a dissolution of the firm (PAGE WOOD, V.-C.).

(2) A managing partner of a mine has authority to defray all the necessary & proper expenses incidental to the beneficial working of the mine out of the joint profits derived from the sale of minerals.—ROBERTS *v.* EBERHARDT (1853), Kay, 148; 2 Eq. Rep. 780; 23 L. J. Ch. 201; 22 L. T. O. S. 253; 2 W. R. 125; 69 E. R. 63.

Annotations:—*As to* (1) **Refd.** Marsden *v.* Kaye (1857), 30 L. T. O. S. 197; Medwin *v.* Ditcham (1882), 47 L. T. 250.

198. Appointment of receiver Interference.]—Receiver appointed of mines, in which several persons were interested, the concern, from the nature of the subject, being a species of trade, & not a mere tenancy in common in land.

It appears to me . . . upon general principles, without reference to the particular circumstances of any case, that where persons are concerned in such an interest in land as a mining concern is, this ct. will appoint a receiver, although they are tenants in common of it (LORD ELDON, C.). JEFFERYS *v.* SMITH (1820), 1 Jac. & W. 298; 37 E. R. 389, L. C.

Annotations:—**Consd.** Fripp *v.* Chard Ry., Fripp *v.* Bridgewater & Taunton Canal, etc., Co. (1853), 11 Hare, 241; Roberts *v.* Eberhardt (1853), Kay, 148; County of Gloucester Bank *v.* Rudry Merthyr Steam & House Coal Colliery Co., [1895] 1 Ch. 629. **Refd.** Bentley *v.* Bates (1840), 4 Y. & C. Ex. 182; Lees *v.* Jones (1857), 3 Jur. N. S. 954; Burt *v.* Bull & Ward (1894), 64 L. J. Q. B. 232. **Mentd.** Whitehouse *v.* Hickman (1823), 2 L. J. O. S. Ch. 59; Tatam *v.* Williams (1844), 3 Hare, 347; Albert (Prince) *v.* Strange (1849), 1 H. & Tw. 1.

199. —— ——.]—ROBERTS *v.* EBERHARDT, No. 197, *ante.*

200. —— **Whether on ground of non-co-operation.**]—ROBERTS *v.* EBERHARDT, No. 197, *ante.*

201. —— **Request for dissolution — Whether condition precedent.**]—ROBERTS *v.* EBERHARDT, No. 197, *ante.*

202. Rights inter se—Account—Dissolution—Whether condition precedent.]—BENTLEY *v.* BATES, No. 206, *post.*

203. —— —— —— ——.]—ROBERTS *v.* EBERHARDT, No. 197, *ante.*

204. —— **To defray expenses incurred in working—Out of joint profits.**]—ROBERTS *v.* EBERHARDT, No. 197, *ante.*

Powers of absolute disposition.]—*See* Part V., Sect. 1, sub-sect. 1, *post.*

C. Partners.

(a) In General.

See, generally, PARTNERSHIP.

205. Mining partnership distinguished from ordinary partnership.]—Mines are, for many purposes, partnership property. They are liable to the debts of the partnership & debts to the co-partnership; & notwithstanding the bkpcy. of a partner indebted to the co-partnership, the accounts are to be taken beyond the time of the bkpcy., & up to the time of the sale; the debts of the partnership are first to be satisfied, & out of the bkpt.'s share repayment is to be made to the co-partnership of what is due to it from him.

The general principle is, that all property, acquired for the purpose of a trading concern, whether it be of a personal or real nature, is to be considered as partnership property, & is to be first applied accordingly in satisfaction of the demands of the partnership. It is true a mining concern differs in some particulars from a common partnership the shares are assignable & the death or bkpcy. of the holder of shares does not operate as a dissolution; but it has been repeatedly held to be in the nature of a trading concern (LEACH, M.R.).—FEREDAY *v.* WIGHTWICK (1829), Taml. 250; 1 Russ. & M. 45; 48 E. R. 100.

Annotations:—**Consd.** Ricketts *v.* Bennett (1847), 17 L. J. C. P. 17. **Mentd.** Phillips *v.* Phillips (1832), 1 My. & K. 649; Ferguson *v.* Sprang (1834), 3 Nev. & M. K. B. 665; Randall *v.* Randall (1835), 7 Sim. 271, Chillingworth *v.* Chillingworth (1837), 8 Sim. 404; Dale *v.* Hamilton (1846), 5 Hare, 369; Darby *v.* Darby (1856), 3 Drew. 495.

206. ——.]—(1) Mtgee. of the share of one tenant in common of a mine, may maintain a bill for an account against the mtgor. & the co-tenants in common.

(2) On a bill for an account of the dealings & transactions of a mining partnership, it is not necessary to pray for a dissolution of the concern.

I do not agree, that in a case between joint

PART IV. SECT. 2, SUB-SECT. 2. B.

f. Rights inter se—To defray expenses incurred in working Failure to pay full share—Termination of partnership by refund of part expenses paid.]—HAMILTON *v.* HAMILTON (1874), R. E. D. 78. **CAN.**

g. —— —— *Expenses advanced by one partner in consideration of transfer of share Right of transferor to recover expenses advanced.*]—WESTHAVER *v.* BROUSSARD (1893), 25 N. S. R. (13 R. & G.) 323.—**CAN.**

h. —— —— *Right of partner to recover advances to other partners for share of expenses.*]—MARINO *v.* SPROAT, 1 M. M. Cas. 481.—**CAN.**

k. Evidence.]—Where parties are working placer claims together it takes very little evidence to show that they have become co-partners as well as co-owners. SABIN *v.* PINE CREEK POWER CO., LTD., 2 M. M. Cas. 111. **CAN.**

PART IV. SECT. 2, SUB-SECT. 2.—C. (a).

l. Liability as between partners Money advanced by partner to cover expenses—Right to recover at law.]—COLLINS *v.* LOCKE (1879), 5 V. L. R. (L.) 13. **AUS.**

m. Rights as between partners—To share in claims staked on knowledge acquired through partnership.]—ARMES *v.* RUSSELL & SCHWARTZ (1924), 33 B. C. L. 303; [1924] 1 W. W. R. 825; *revsg.*, [1923] 3 W. W. R. 216. **CAN.**

n. Working partnership — Partner ceasing work loses share of profits.]—JORGENSEN *v.* BOYCE (1896), 22 V. L. R. 408. **AUS.**

o. What amounts to mining partnership Acquisition of land for purpose of working with others in shares Fortuitous acquisition insufficient.]—CURATOR OF INTESTATE ESTATES *v.* GRAHAM (1913), 15 W. A. L. R. 93.—**AUS.**

p. Account of profits — Whether proceeds of sale of part of share of one partner deemed profits.]—LOUCKS *v.* WALLBRIDGE (1871), 31 U. C. R. 32.—**CAN.**

q. —— *Purchase of mining lease for joint benefit.*]—WILLIAMS *v.* JENKINS (1871), 18 Gr. 536.—**CAN.**

r. —— *Bare agreement to work mine for share of profits—No interest in*

Sect. 2.—Rights dependent on extent of owner's interest: Sub-sect. 2, C. (a) & (b), & D.]

tenants, or tenants in common, of a colliery, one party can compel another to sell his share & dissolve the concern previously to taking the account (LORD ABINGER, C.B.).

(3) Here the partnership is in land. Now nothing is better known at law, than that such a partnership has not all the incidents of a common mercantile partnership. . . . The partners in such a concern cannot sign promissory notes, or give bills of exchange to bind each other (LORD ABINGER, C.B.).—BENTLEY *v.* BATES (1840), 4 Y. & C. Ex. 182; 9 L. J. Ex. Eq. 30; 4 Jur. 552; 160 E. R. 971.

Annotations: *As to* (1) **Refd.** Redmayne *v.* Forster (1866), 35 L. J. Ch. 847. *As to* (2) **Refd.** Roberts *v.* Eberhardt (1853), 2 Eq. Rep. 780. *As to* (3) **Consd.** Dodds *v.* Preston (1888), 59 L. T. 718. *Generally*, **Mentd.** Adair *v.* New River Co. & Metropolitan Water Board (1908), 25 T. L. R. 193.

— — **Effect of bankruptcy or death of one partner —Whether partnership dissolved thereby.**]—*See* Nos. 214–217, *post.*

207. Liability as between partners — Bills of exchange & promissory notes—Authority of partners to give or sign—So as to bind each other.]—BENTLEY *v.* BATES, No. 206, *ante.*

208. —— Money borrowed for partnership purposes—Payment of wages.]—As it is not according to the usual course of business for the manager of a mine to borrow moneys for the purpose of carrying on the mine, where money is lent to the managers of a mine the party lending must look to the power of borrowing with which the manager is invested, & can recover over only against the parties who have authorised the borrowing; but, as wages must become due to the miners, & goods must be bought upon credit by the managers of the mine, the shareholders are therefore considered to have authorised the manager to have incurred such expenses & debts.

Where a partner in a trade has duly & properly advanced money of his own for the purposes of the partnership business, so as to become justly a creditor in account with the partnership for the amount, an implied contract is raised by mercantile usage & the general course of trade dealings for interest, so as to entitle the partner making the advance to have his account with the firm credited with interest accordingly although his partners may not have authorised & may not have known of the transaction—at least in the absence of any express contract to the contrary.—*Re* GERMAN MINING CO., *Ex p.* CHIPPENDALE (1853), 4 De G. M. & G. 19; 22 L. J. Ch. 926; 21 L. T. O. S. 221; 17 Jur. 745; 43 E. R. 415, L.JJ.; *subsequent proceedings* (1854), 4 De G. M. & G. 44, L. JJ.

Annotations:—**Mentd.** *Re* Norwich Yarn Co., *Ex p.* Bignold (1856), 22 Beav. 143; Darke *v.* Williamson (1858), 22 J. P. 705; *Re* Electric Telegraph Co. of Ireland, Troup's Case (1860), 29 Beav. 353; *Re* Magdalena Steam Navigation Co. (1860), John. 690; *Re* Era Assce., Williams' Case, Anchor Case (1862), 1 Hem. & M. 672; Selwyn *v.* Harrison (1862), 2 John. & H. 334; *Re* Catholic Publishing & Bookselling Co. (1864), 3 New Rep. 551; Lowndes *v.* Garnett & Moseley Gold Mining Co. of America (1864), 3 New Rep. 601; *Re* Cork & Youghal Ry. (1869), 4 Ch. App. 752, n.; Martin *v.* Powning (1869), 4 Ch. App. 356; *Re* National Permanent Benefit Bldg. Soc., *Ex p.* Williamson (1869), 5 Ch. App. 309; *Re* Durham County Permanent Investment Land & Bldg. Soc., Davis' Case, Wilson's Case (1871), L. R. 12 Eq. 516; Crampton *v.* Varna Ry. (1872), 41 L. J. Ch. 817; Yorkshire Railway Wagon Co. *v.* Maclure (1881), 19 Ch. D. 478; Blackburn Bldg. Soc. *v.* Cunliffe, Brooks (1882), 22 Ch. D. 64, n.; *Re* Pumfrey, Worcester City & County Banking Co. *v.* Blick (1882), 22 Ch. D. 255; *Re* Norwich Equitable Fire Insce., Brasnett's Case (1884), 54 L. J. Ch. 227; Strickland *v.* Symons (1884), 26 Ch. D. 245; *Re* Companies Acts, *Ex p.* Watson (1888), 21 Q. B. D. 301; *Re* Wrexham, Mold & Connah's Quay Ry., [1899] 1 Ch. 440; Hardoon *v.* Belilios, [1901] A. C. 118.

209. —— Contribution in respect of losses Loss occasioned by negligence of one partner.]—Where the managing partner of a colliery works beyond the limits of the partnership colliery without proper inquiry as to such limits, &, after notice from the adjoining proprietor, continues his workings without consulting his co-partners, when it is evident that his right to work in the disputed area is extremely doubtful, & the utmost possible profits very small, his co-partners are not liable to contribute to the damages awarded to the adjoining proprietor in an action against the managing partner; & the fact that they have assented to the action being referred to arbn. does not in any way affect their liability. The co-partners, in their defence to his suit, alleged that the managing partner had wilfully & knowingly trespassed upon the adjoining colliery, but failed to prove that allegation:—*Held:* as no additional costs had been occasioned by the allegation, pltf. could not be relieved from any part of the costs.—THOMAS *v.* ATHERTON (1878), 10 Ch. D. 185; 48 L. J. Ch. 370; 40 L. T. 77, C. A.

210. Rights as between partners — Lien on interest of defaulting partner.]—FEREDAY *v.* WIGHTWICK, No. 205, *ante.*

211. —— Repayment of money lent for partnership purposes.]—*Re* GERMAN MINING CO., *Ex p.* CHIPPENDALE, No. 208, *ante.*

Powers of absolute disposition.]—*See* Part V., Sect. 1, sub-sect. 5, *post.*

(b) *Dissolution and Appointment of Receiver.*

See, generally, PARTNERSHIP; RECEIVERS.

212. Whether dissolution decreed—To prejudice of other party—No reasonable apprehension of loss.]—Where the proprietors of two adjoining estates, the one containing fields of coal, the other, besides coal, having salt works belonging to it proper for the consumption of the small coal, entered into a contract for one hundred & twenty-four years, to carry on the coal & salt works as a joint concern,

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mine conferred.]—MCDONALD *v.* GELDERT (1874), 9 N. S. R. 551.—**CAN.**

t. —— *Transfer of portion of interest in mine for valuable consideration—Insufficient by itself.*] STUART *v.* MOTT (N. S.) (*circa* 1886), 14 S. C. R. App. 734.—**CAN.**

a. —.]—LABINE *v.* LABINE (1914), 26 O. W. R. 170; 6 O. W. N. 100; 16 D. L. R. 871.—**CAN.**

b. *Agreement to acquire mining rights—Construction—Land containing minerals owned by one party—Lease of other property granted to one partner—Objection of lessor to other partners—Whether partnership property.*] GOOLD *v.* STOCKTON (1891), 31 N. B. R. R. 57.—**CAN.**

c. *Right to determine partnership—Fraudulent abstraction & conversion of mineral by partner.*]—BRINDAMOUR *v.* ROBERT, ROBERT *v.* BRINDAMOUR (Y. T.) (1907), 6 W. L. R. 821.—**CAN.**

d. —— *Failure to contribute statutory work—Vesting of lands in other partners.*]—IRISH *v.* SMITH (1912), 21 O. W. R. 297; 3 O. W. N. 711; 2 D. L. R. 230.—**CAN.**

e. *Abandonment of mine — By all partners—Return of one.*]—Where two miners working in partnership at a claim abandon it for two years & cease to work as partners, one of the partners may obtain a fresh certificate for the claim & work it independently of the rights of the former partnership.—MCKINNON *v.* COLLIE (1886), 4 N. Z. L. R. 298 (S. C.).—**N.Z.**

f. —— *By one partner.*]—A mining partner who absents himself from the partnership claim, but without the intention of abandonment, cannot be deprived of his share by the remaining partners merely obtaining an order for possession. A partner in a claim can only be got rid of, against his will, by a dissolution.—SMITH *v.* O'DONOGHUE (1875), 1 N. Z. Jur. N. S. 1.—**N.Z.**

g. *Partnership or joint tenancy.*]—In the absence of an agreement to the contrary, a gold-mining claim taken up under Mining Act is partnership property, & not property held by the proprietors as joint tenants.—GALLAGHER *v.* TALTY (1888), 7 N. Z. L. R. 35.—**N.Z.**

& for that purpose executed to each other mutual leases or tacks, that is, W. set in tack for one hundred & twenty-four years, to C., his heirs & assignees, & to himself, W., his heirs & assignees, betwixt them, certain seams of coal, & C. in the same manner set in tack for one hundred & twenty-four years to himself & W., & their respective heirs, certain coalfields & salt pans :—*Held :* this was a lawful contract, & binding on the heirs taking up the succession & representing the parties ; & when the concern was prosperous, & there was no reasonable apprehension of loss, the heir of one of the parties was not entitled to a dissolution to the prejudice of the other party.—WARNER *v.* CUNNINGHAM (1815), 3 Dow, 76 ; 3 E. R. 994, H. L.

213. —— Lunacy of one partner.] — ROWLANDS *v.* EVANS, WILLIAMS *v.* ROWLANDS, No. 367, *post.*

214. What operates as dissolution — Whether bankruptcy of one partner.]—FEREDAY *v.* WIGHTWICK, No. 205, *ante.*

215. —— ——.]—In cases of mines bkpcy. is not, as in other cases, a dissolution of the peculiar kind of partnership which exists (ERSKINE, C.J.).—*Re* BORRON, *Ex p.* BROADBENT (1834), 1 Mont. & A. 635 ; 4 Deac. & Ch. 3 ; *sub nom. Re* BARROW, *Ex p.* BROADBENT, 3 L. J. Bcy. 95, Ct. of R.

Annotation :—**Dbtd.** Dodds *v.* Preston (1888), 59 L. T. 718.

216. —— ——.]—Three persons were working mines in partnership, when one of them became bkpt. There was no agreement that the partnership should continue after the bkpcy. of a partner : —*Held :* the partnership was dissolved by the bkpcy.—DODDS *v.* PRESTON (1888), 59 L. T. 718, C. A.

217. —— Whether death of one partner.] Testator entitled by leases of unequal duration, to iron mines & works, by will gave a pecuniary legacy to B. "as a capital for him to become a partner with my exor. of one-fourth share in the trade of all those works as long as the lease endures," & gave all the residue of his real & personal estates to H. & his wife, & appointed H. exor. By a codicil he gave to C. "three-eighths of the concerns at this iron work & of the premises at C., so the partnership will stand, at my demise, C. three-eighths, H. three-eighths, B. two-eighths. C., H., & B., jointly carried on the works for two years after testator's death, selling iron manufactured by them not only from ore procured from testator's mines, but from ore & old wrought iron which they purchased, but not merely for the purpose of mixing with the produce of testator's mines for improving the iron. C. at the end of two years, purchased B.'s share, & the business was carried on in the same manner by C. & H. till H. died. There was no written or other agreement for the duration of the partnership :—*Held :* this was not a mere joint interest in the produce of land, but a trading partnership ; it was dissolved by the death of H., & the fact of C. & H. having purchased & taken assignments to a trustee for themselves, of some of the rents reserved by the leases, did not furnish any inference of an agreement to continue the partnership for any definite period ; & a sale of the property was ordered on motion.

It seems difficult to establish that this is an interest in land, distinct from a partnership in trade, a mere interest in land, in which partition could take place (LORD ELDON, C.).—CRAWSHAY *v.* MAULE, MAULE *v.* CRAWSHAY (1818), 1 Wils. Ch. 181 ; 1 Swan. 495 ; 37 E. R. 79, L. C.

Annotations :—**Consd.** Foreday *v.* Wightwick (1829), 1 Russ. & M. 45 ; Roberts *v.* Eberhardt (1853), Kay, 148. **Apld.** Wild *v.* Milne (1859), 26 Beav. 504. **Reld.** Randall *v.* Randall (1835), 7 Sim. 271 ; Laycock *v.* Bulmer (1843), 2 L. T. O. S. 101 ; Dale *v.* Hamilton (1846), 5 Hare, 369 ; Ricketts *v.* Bennett (1847), 4 C. B. 686 ; Fripp *v.* Chard Ry., Fripp *v.* Bridgewater & Taunton Canal, etc., Co. (1853), 11 Hare, 241 ; Darby *v.* Darby (1856), 3 Drew. 495. **Mentd.** Baxter *v.* Brown (1845), 7 Man. & G. 198 ; Ekins *v.* Brown (1854), 1 Ecc. & Ad. 400 ; Frost *v.* Moulton (1856), 21 Beav. 596 ; Baker *v.* Met. Ry. (1862), 31 Beav. 504 ; Griffiths *v.* Bracewell, Bracewell *v.* Griffiths (1865), 35 Beav. 43.

218. —— ——.]—FEREDAY *v.* WIGHTWICK, No. 205, *ante.*

219. Whether necessary part of claim in action for account.]—BENTLEY *v.* BATES, No. 206, *ante.*

220. Right to dissolve—Partnership at will—Burden of proof.]—Pltf. was lessee of seams of coal for a term of years & had abandoned the working of the upper seams as unprofitable. In 1815 he entered into partnership for working the upper seams with deft., his colliery manager. In 1857 the upper seams having been worked as far as could be done from the existing pits, deft., with the privity & approbation of pltf., sunk a new pit at considerable expense, which was defrayed out of the partnership moneys. In 1858, differences having arisen, pltf. gave deft. notice to dissolve the partnership, which notice deft. refused to receive, insisting that the understanding had been that the partnership should continue for the whole duration of the lease. The new pit was only just finished. No express agreement as to the duration of the partnership was proved :—*Held :* the burden of establishing that there was more than a partnership at will lay upon deft., & in the absence of such proof pltf. was entitled to dissolve the partnership at his pleasure, & deft. could not claim any interest in the seams of coal.—BURDON *v.* BARKUS (1862), 4 De G. F. & J. 42 ; 31 L. J. Ch. 521 ; 7 L. T. 116 ; 8 Jur. N. S. 656 ; 45 E. R. 1098, L. JJ.

Annotation :—**Reld.** Pocock *v.* Carter, [1912] 1 Ch. 663.

221. Appointment of receiver.]—By the deed of partnership of a colliery, it was amongst other things provided that if additional capital should be required to carry on the works it should be contributed in proportion to the shares which each partner had in the partnership. The working of the mine had been unsuccessful & it required further capital to carry on the works. A notice to the bankers had been given by one of the partners that he should not hold himself liable for any further advances to be made by them on account of the partnership, and he refused to contribute any further capital as stipulated by the co-partnership deed. On bill filed by some of the other partners praying for the usual accounts to be taken, & for a receiver & manager to conduct the concerns of the partnership & for a dissolution, if necessary :—*Held :* pltfs. were entitled to a receiver & manager until the hearing.—MARSDEN *v.* KAYE (1857), 30 L. T. O. S. 197.

Sale of partnership property.]—*See* Part V., Sect. 1, sub-sect. 5, *post.*

D. Equitable Owners.

See, generally, PARTNERSHIP.

222. Effect of renewal of partnership lease—By one or more of partners without privity of others — Constructive trust.]—Parties interested jointly with others in a lease cannot take to themselves the benefit of a renewal to the exclusion of the others so jointly interested with them.

The administratrix of a deceased partner assigned all the interest of that partner in the partnership premises unto or in trust for the parties entitled to his estate :—*Held :* (1) this assignment did not deprive the administratrix of her right to claim, as part of deceased partner's

Sect. 2.—Rights dependent on extent of owner's interest: Sub-sect. 3, A. & B.]

it. The coal & ironstone therein lay in eight seams. Two of the seams had not been actually worked, though a cross-heading passed through one of them. Testator, since he purchased the property, had expended a large sum in providing new machinery, & had put working capital to a larger amount into the business. The question was, whether pltf. was entitled as tenant for life under the will, to work for his own benefit all seams of coal & ironstone comprised in the freehold portion of the colliery:—*Held:* the whole course of dealing with the property indicated an intention on the part of the owner to treat all the seams as mines which were opened, therefore, all the eight seams of coal, including the two which had not been actually worked, were to be treated as opened at the time of testator's death; this view was confirmed by the words of the will, which not only showed that all the seams were treated as one commercial entity, but also got over the difficulty arising from the fact that the freehold & leasehold parts were differently dealt with in the will, a conclusion which was fortified by the powers thereby conferred on the trustees.

Everyone agrees nowadays that the question whether a mine is an "opened" mine or not an "opened mine" when one is dealing with the question of the rights of any person who has a life estate in the land, is a question which depends really upon the intention of the settlor or testator (WILLIAMS, L.J.).—CHAYTOR *v.* TROTTER (1902), 87 L. T. 36, C. A.

Annotation:—**Consd.** *Re* Morgan, Vachell *v.* Morgan, [1914] 1 Ch. 910.

241. —— **Tenant for years.**] — SAUNDERS' CASE, No. 230, *ante*.

242. —— ——.]—A. being seised in fee of a manor, grants the said manor, messuages, land, commons, & mines. The grantee leases "all the messuages, lands, tenements, & hereditaments, that he had in the said manor." The lessee, notwithstanding the word mines is omitted in the lease, may work all mines that were open at the time of the demise, but he cannot open a new mine.—ASTRY *v.* BALLARD (1677), 2 Mod. Rep. 193; 1 Freem. K. B. 445; 3 Keb. 723; 2 Lev. 185; T. Jo. 71; 86 E. R. 1019.

Annotation:—**Refd.** Hodgkinson *v.* Fletcher (1781), 3 Doug. K. B. 31.

243. —— ——.]—ELIAS *v.* SNOWDON SLATE QUARRIES CO., No. 291, *post*.

244. —— **Assignee of estate.**] — SAUNDERS' CASE, No. 230, *ante*.

245. —— **Tenant in dower.**]—Dower is not due of mines, or strata, unopened, whether under the husband's soil or under the soil of others. If land assigned for dower contain an open mine, tenant in dower may work it for her own benefit.—STOUGHTON *v.* LEIGH (1808), 1 Taunt. 402; 127 E. R. 889.

Annotation:—**Consd.** *Re* Kemeys-Tynte, Kemeys-Tynte *v.* Kemeys-Tynte, [1892] 2 Ch. 211.

246. To work unopened mines—Tenant for life.]—SAUNDERS' CASE, No. 230, *ante*.

247. —— ——.]—One seised in fee conveys the lands & all trees & mines to trustees in fee, to the use of A. for life, remainders over; A. cannot open the mines or cut down the trees.—WHITFIELD *v.* BEWIT (1724), 2 P. Wms. 240; 2 Eq. Cas. Abr. 589; 24 E. R. 714, L. C.

Annotations:—**Consd.** Daly *v.* Beckett (1857), 24 Beav. 114. **Refd.** *Re* Barrington, Gamlen *v.* Lyon (1886), 33 Ch. D. 523. **Mentd.** Garth *v.* Cotton (1753), 3 Atk. 751; Lee *v.* Alston (1789), 1 Ves. 78; Powlett *v.* Bolton (1797), 3 Ves. 374; Hony *v.* Hony (1824), 1 Sim. & St. 568; Parrott *v.* Palmer (1834), 3 My. & K. 632; Seagram *v.* Knight (1867), 2 Ch. App. 628; Dashwood *v.* Magniac, [1891] 3 Ch. 306; White *v.* Summers, [1908] 2 Ch. 256.

248. —— ——.]—PLYMOUTH *v.* ARCHER, No. 231, *ante*.

249. —— ——.]—VINER *v.* VAUGHAN, No. 232, *ante*.

250. —— ——.]—The estate of a widow in her dower, as between her & the heir-at-law of her late husband, is that of a tenant for life of the property, with remainder over, & although, where there are unopened mines under her land, she cannot open them herself, she can prevent the heir-at-law opening them without her consent.—DICKIN *v.* HAMER (1860), 1 Drew. & Sm. 284; 29 L. J. Ch. 778; 2 L. T. 276; 62 E. R. 387.

251. —— —— **Through or by means of old shaft.**]—FERRAND *v.* WILSON, No. 238, *ante*.

252. —— **Tenant for years.**] — SAUNDERS' CASE, No. 230, *ante*.

253. —— ——.]—ASTRY *v.* BALLARD, No. 242, *ante*.

254. —— ——.]—A close, held by copyhold tenure, contained an unopened coal mine. B. was tenant, from year to year, of the close to the copyholder in fee: B. in fact occupied the surface; & it did not appear that in the demise to B. there had been any exception or reservation of the mine. While B. was such tenant, in 1821, the copyholder in fee granted the mine, for valuable consideration, to B. & P. In 1832 B.'s tenancy from year to year ceased:—*Held:* before & at the time of the grant of 1821, B. was in possession of the mine by virtue of his tenancy from year to year, though without the right to work the mine; he therefore, by the grant, became possessed of the mine for the term without actual entry; & that his possession enured to the benefit both of himself & P.

At the time when the lease was executed & the term granted by it commenced, B., one of the lessees, was tenant of the farm under which the minerals demised lie. Being in possession of the surface, in point of law he was in possession of the minerals. He had no right to work the minerals. If he had done so it would have been waste; but the lessor could not have sued him in trespass; &, if strangers had worked the minerals even without breaking the surface, B. might have maintained trespass against them. The surface & the minerals may be dissevered in title & become separate tenements . . . but the presumption is to the contrary (LORD CAMPBELL, C.J.).—KEYSE *v.* POWELL (1853), 2 E. & B. 132; 1 C. L. R. 598; 22 L. J. Q. B. 305; 21 L. T. O. S. 126; 17 Jur. 1052; 118 E. R. 718.

Annotations:—**Refd.** Randall *v.* Stevens (1853), 2 E. & B. 641; Bowser *v.* Maclean (1860), 2 De G. F. & J. 415; Eardley *v.* Granville (1876), 3 Ch. D. 826. **Mentd.** Lewis *v.* Baker, [1905] 1 Ch. 46.

255. —— ——.]—SPENCER *v.* SCURR, No. 100, *ante*.

256. —— ——.]—CLEGG *v.* ROWLAND, No. 374, *post*.

257. —— ——.]—ELIAS *v.* SNOWDON SLATE QUARRIES CO., No. 291, *post*.

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v. GIBBINGS (1858), 9 I. C. L. R. 223; 11 Ir. Jur. 64.—IR.

l. To work stone & lime quarries—Tenant for life.]—SWINTON *v.* ROXBURGH (DUCHESS) (1814), 17 Fac. Coll. 532.—**SCOT.**

m. To work lime quarry—Tenant for life—Conditional on reservation of sufficient lime for use of lands.]—ROXBURGHE (DUKE) *v.* ROXBURGHE (DUCHESS DOWAGER) (1816), 19 Fac. Coll. 65.—**SCOT.**

258. —— —— Not impeachable for waste.]—(1) Lessee for years *sans* waste, remainder in fee to a bishop, lessee enjoined from digging the ground for brick.

(2) Lessee for years *sans* waste may open mines.—LONDON (BP.) *v.* WEB (1718), 1 P. Wms. 527; 2 Eq. Cas. Abr. 758; 24 E. R. 501, L. C.

Annotation:—**Mentd.** Chamberlyne *v.* Dummer (1792), 3 Bro. C. C. 549.

259. —— Dowress.]—DICKIN *v.* HAMER, No. 250, *ante*.

260. To restrain working by remainderman - Tenant for life.]—DICKIN *v.* HAMER, No. 250, *ante*.

As to open & new mines & quarries generally, *see* Part 1., Sect. 6, *ante*.

B. Rents, Royalties and Profits.

See, generally, SETTLEMENTS.

261. Right of tenant for life—General rule.]—DALY *v.* BECKETT, No. 425, *post*.

262. —— ——.]—The tenant for life of an estate on which there are open mines receives the royalties payable in respect of the minerals gotten, though they are really instalments of the purchase-money of part of the inheritance (JESSEL, M.R.).—BRIGSTOCKE *v.* BRIGSTOCKE (1878), 8 Ch. D. 357; 47 L. J. Ch. 817; 38 L. T. 760; 26 W. R. 761, C. A.

Annotation:—**Refd.** *Re* Rodes, Sanders *v.* Hobson, [1909] 1 Ch. 815.

263. —— ——.]—Testator directed his trustees to pay to his wife "the whole annual produce & rents of the residue of his estates both heritable & movable." Coal & iron mines were leased by the testator before his death. His trustees afterwards leased others. In a question whether the wife was entitled to the rents of those opened after the testator's death:—*Held:* in law she was not entitled; there was nothing in the trust deed which showed that she was to have such a benefit.

[It has been argued] that inasmuch as testator in his lifetime opened some minerals in some parts of his estate, it is to be assumed that his intention was to open the other minerals in the other parts of his estate & that the consequence of his having opened the minerals in a part of his estate is that there is no difference at all between opened & unopened minerals . . . I think that . . . to presume such an intention as that would be at once to repeal & make of no effect all the numerous cases which draw a distinction between opened & unopened mines (LORD BLACKBURN).

The numerous cases which bear upon this subject . . . all say that if a mine is opened, unless there is something to show a contrary intention, which there may well be, the intention is that the person with a limited interest shall take the annual produce (LORD BLACKBURN).—CAMPBELL *v.* WARDLAW (1883), 8 App. Cas. 641, H. L.

Annotations:—**Apld.** Dashwood *v.* Magniac, [1891] 3 Ch. 306; Chaytor *v.* Trottor (1902), 87 L. T. 33. **Refd.** Home *v.* Belhaven & Stenton, [1903] A. C. 327.

264. —— Rents & profits of property demised by settlor.]—SPENCER *v.* SCURR, No. 100, *ante*.

265. —— ——.]—Testator, having purchased a piece of land, opened it as a brickfield, & it was open at his death. By his will he devised it to trustees upon trust to sell when, in their discretion, it may seem advisable; & he directed that the rents & profits should, until sale, be considered as part of his personal estate, & be applicable & applied in such manner as the dividends or interest to arise from the investments of the sale moneys. He then gave the income of the investments to a tenant for life, with remainder, as to the capital, over. Royalties became payable after testator's death. The trustees did not sell for ten years, but allowed the brickfield to be worked out, being of opinion that by holding the land for the present they might sell it at a higher price afterwards for building purposes:—*Held:* the tenant for life was entitled to the royalties absolutely, & not merely to the income which they would have produced if invested.—MILLER *v.* MILLER (1872), L. R. 13 Eq. 263; 41 L. J. Ch. 291; 20 W. R. 324.

Annotations:—**Apld.** *Re* North, Garton *v.* Cumberland, [1909] 1 Ch. 625. **Mentd.** Leppington *v.* Freeman (1891), 65 L. T. 145.

266. —— Rents & royalties on property demised by trustees—Under implied authority from settlor.]—Testator, part of whose property consisted of land with brick earth upon it which was being worked under a lease granted by him at a royalty, gave his real estate to trustees upon trust, to pay the rents, issues & profits to certain persons for their lives, with remainders over. The will contained a trust for sale after the death of the last surviving tenant for life, & a direction that until sale the trustees should cause the real estate to be kept "in good & tenantable order & repair":—*Held:* the trustees had an implied power to let the brickfield from year to year, & the whole of the rents & royalties must be paid to the tenants for life for the time being.—*Re* NORTH, GARTON *v.* CUMBERLAND, [1909] 1 Ch. 625; 78 L. J. Ch. 344.

267. —— Profits from sale of products by trustees.]—The produce of the sale of gravel on the waste lands, & likewise the fines payable on grants of waste lands made by the trustees, & moneys payable in consideration of the waiver by the trustees of restrictive conditions in grants made by them, but not where the grants were made by testator, & likewise preliminary fines paid to the trustees as lords of the manor on the enfranchisement of copyholds by persons admitted before July 1, 1853, pursuant to 15 & 16 Vict. c. 51, were respectively to be treated as income.

I think that the money so produced by the sale of gravel belongs to the tenant for life. The whole of the gravel or sand or the waste land must be treated as a mine, & earth gravel pit as if it were a fresh pit in the mine (LORD ROMILLY, M.R.).—COWLEY (EARL) *v.* WELLESLEY (1866), L. R. 1 Eq. 656; 35 Beav. 635; 14 L. T. 245; 14 W. R. 528; 55 E. R. 1043.

Annotations:—**Refd.** Honywood *v.* Honywood (1874), L. R. 18 Eq. 306; Brigstocke *v.* Brigstocke (1878), 8 Ch. D. 357; Elias *v.* Snowden Slate Quarries Co. (1879), 4 App. Cas. 454; Dashwood *v.* Magniac, [1891] 3 Ch. 306; *Re* Kemeys-Tynte, Kemeys-Tynte *v.* Kemeys-Tynte, [1892] 2 Ch. 211; *Re* Maynard's S. E., [1899] 2 Ch. 347.

268. —— Rents & royalties on property settlor had contracted to demise—Mine not opened in settlor's lifetime.]—*Re* KEMEYS-TYNTE, KEMEYS-TYNTE *v.* KEMEYS-TYNTE, No. 406, *post*.

269. —— Consideration for purchase of lands contracted to be demised—Residuary devise upon trust for sale.]—By his will testator gave his residuary real & personal estate to a trustee upon trust for conversion, & to invest & pay the proceeds to his wife for life, & after her death to his children. There was no power given by the will to postpone conversion, nor any express gift of the income before conversion. Part of testator's real estate consisted of land comprised in a mining lease

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PART IV. SECT. 2, SUB-SECT. 3.—B.

n. *Right of tenant for life—Share of mineral rents & power to concur with remainderman in renewal of leases—Renewal conditional on no substantial danger of exhaustion.*]—WARDLAW *v.* WARDLAW'S TRUSTEES (1875), 2 R. (Ct. of Sess.) 368; 12 Sc. L. R. 251.—**SCOT.**

o. —— *Proceeds of mines open & abandoned at death of settlor.*]—

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which empowered the lessee to dig chalk on certain portions of the land demised, & to take additional chalk land, provided that he paid, by way of consideration for the purchase of the same, at the rate of £900 per acre. The estate was being administered by the ct., new trustees had been appointed, & a sale of the real estate directed, but no sale had yet taken place:—*Held:* the moneys received & to be received by the trustees of the will from the lessee in respect of the purchase of the additional chalk land must be treated by them as income & not capital.—*Re* DARNLEY (EARL), CLIFTON *v.* DARNLEY, [1907] 1 Ch. 159; 76 L. J. Ch. 58; 95 L. T. 706; 23 T. L. R. 93; 51 Sol Jo. 82.

Annotation:—**Consd.** *Re* Oliver, Wilson *v.* Oliver, [1908] 2 Ch. 74.

270. —— Intermediate rents, royalties & profits —Residuary devise upon trust for sale—Discretionary trust.]—MILLER *v.* MILLER, No. 265, *ante*.

271. —— —— —— ——.]—*Re* MORGAN, VACHELL *v.* MORGAN, No. 90, *ante*.

272. —— —— **Future trust.**]—*Re* NORTH, GARTON *v.* CUMBERLAND, No. 266, *ante*.

273. —— Rents & royalties on property included in residuary devise—Accruing after expiry of period for postponement of conversion.]—Testator devised his residue upon trust to convert with power to postpone conversion for twenty-one years, & with a direction that the surplus income of the unconverted estate during the twenty-one years & all accumulations thereof should go in augmentation of capital. The residue was settled on trusts for tenants for life & remainderman. The trustees under powers in the will granted a mining lease, & retained the leased property unconverted for more than twenty-one years:—*Held:* (1) the rents & royalties under the mining lease during the twenty-one years ought to be invested, & the income therefrom ought to be invested & accumulated; (2) after the twenty-one years, the tenants for life of settled shares in the residue were entitled to receive out of the rents & royalties such an annual sum as in the opinion of the ct. would under all the circumstances of the case be a fair equivalent for the annual income that would have resulted if the estate had been converted.—WENTWORTH *v.* WENTWORTH, [1900] A. C. 163; 69 L. J. P. C. 13; 81 L. T. 682; 16 T. L. R. 81, P. C.

Annotations:—As to (2) **Consd.** *Re* Woods, Gabellini *v.* Woods, [1904] 2 Ch. 4. *Generally*, **Mentd.** *Re* Oliver, Wilson *v.* Oliver, [1908] 2 Ch. 71; *Re* Beech, Saint *v.* Beech, [1920] 1 Ch. 40.

274. —— Profits from leasehold collieries included in residuary devise—Enjoyment in specie.]—Testator, seised of real estate, & possessed of leasehold collieries which he was working, by his will devised all his real estate, "& also" all his leasehold estates, "& " all his "goods, chattels, & credits" to three trustees, so that they should have the legal estate, upon trust, as to one moiety for his married daughter for life, not to her separate use, then to her husband, one of the trustees, for life, then to her first son absolutely; & as to the other moiety for his only other child, an unmarried daughter, for her separate use for life, without restraint upon anticipation, then to her children, & in default which happened, upon the trusts of the other moiety. He empowered the married daughter, & her husband, & also the unmarried daughter, to appoint portions to be raised & paid out of his "said real & personal estates respectively." He empowered the unmarried daughter to appoint any part not exceeding one-half of the "rents, issues, & profits, interest, dividends, & annual income" of her moiety during the lifetime of any husband for his use. The trustees were empowered to "levy & raise & pay & apply," for advancement any part or parts of the moieties; & to pay & apply such part as they should think fit of "the income & annual produce" for maintenance. He gave power to the trustees to lease "all or any part" of his "said freehold or leasehold estates" for twenty-one years; to "alter, vary & transpose" the "state of investment of the property," provided that the same should consist of "real estate, securities upon real estate, or shares in the public funds," for which purpose, & also for the purpose of "raising" such sums of money as it might become "necessary to raise in pursuance of the powers," to "sell & convert into money" all or any part of the "said trust estates," or to mortgage the same. He then empowered the trustees, "in case they shall deem it beneficial so to do," to continue the collieries & either to increase or abridge the business thereof, & all losses, costs, charges, & expenses of carrying on the business should be "borne, paid, & defrayed" out of his "real & personal estate," & also to procure any lease of the collieries to be renewed, & to continue the business after such renewal.

Testator died in 1834. The son-in-law was the sole proving exor., & was the only acting trustee until the marriage of the unmarried daughter in 1835, shortly after which date her husband was appointed co-trustee. The trustees continued & enlarged the colliery business for thirty-seven years, taking leases of additional collieries, making large profits, & greatly increasing the value of the plant.

Upon suit by the eldest son of the elder daughter, claiming to have the profits over £4 per cent. on the value of the collieries at the death of testator capitalised, & made to form part of the estate:—*Held:* there was sufficient indications of intention in the will to exclude the operation of the rule in *Howe* v. *Lord Dartmouth* (1802), 7 Ves. 137, & the tenants for life were entitled to the enjoyment *in specie* of the produce of all the collieries.—THURSBY *v.* THURSBY (1875), L. R. 19 Eq. 395; 44 L. J. Ch. 289; 32 L. T. 187; 23 W. R. 500.

275. —— Retention of wasting securities by trustees—Rate of interest.]—Interest at 3, & not at 4, per cent., must at the present day be computed in applying the principle of *Brown* v. *Gellatly* (1867), L. R. 2 Ch. 751, whereby, when wasting securities, forming part of the residuary estate of a testator given upon trust for conversion, are retained under a power to postpone conversion, the tenant for life is entitled during the period of postponement to interest on the value of the securities.

Where, in such a case, the interest at 3 per cent. is paid out of the actual income of the wasting securities to the tenant for life, & the balance is invested as capital of the estate, the tenant for life is entitled to the income of the invested fund.—*Re* WOODS, GABELLINI *v.* WOODS, [1904] 2 Ch. 4; 73 L. J. Ch. 204; 90 L. T. 8; 48 Sol. Jo. 207.

Annotations:—**Apld.** *Re* Chaytor, Chaytor *v.* Horn, [1905] 1 Ch. 233. **Reld.** *Re* Beech, Saint *v.* Beech, [1920] 1 Ch. 40. **Mentd.** Liverpool Corpn. *v.* Walker (1907), 77 L. J. K. B. 46.

BAILLIE'S TRUSTEES *v.* BAILLIE (1891), 19 R. (Ct. of Sess.) 220; 29 Sc. L. R. 196.—**SCOT.**

p. —— *Free annual income & produce of estate—Net proceeds of collieries a part of free annual income.*]—

STRAIN'S TRUSTEES *v.* STRAIN (1893), 20 R. (Ct. of Sess.) 1025; 30 Sc. L. R. 906; 1 S. L. T. 155.—**SCOT.**

276. —— ——.]—Testator devised & bequeathed all his real & personal estate not by his will otherwise disposed of to trustees upon trust to sell & convert the same, with power to postpone conversion as long as the trustees thought proper & to retain any investments subsisting at his death, whether of the kind thereinafter authorised or not, & out of the proceeds to pay debts & legacies, & at the discretion of the trustees to invest the residue & to stand possessed of the residuary trust moneys & the investments for the time being representing the same, thereinafter called "the residuary trust funds," in trust to pay the income thereof to his wife during her life. At the time of his death testator was possessed of preference & ordinary shares in a coal mining co. The ordinary shares, although not of a wasting character, were not authorised by the investment clause in the will. The trustees therefore sold some of them, & proposed to sell more on a favourable opportunity. They declined to pay to the widow in the meantime the full dividends on the ordinary shares thus retained:—*Held:* in the absence of any express or implied gift of the income pending conversion, the widow was entitled only to interest at 3 per cent. on the value of the ordinary shares at testator's death, & the rest of those dividends must be invested. This rule was well settled, & applied to unauthorised securities whether they were of a wasting character or not.—*Re* CHAYTOR, CHAYTOR *v.* HORN, [1905] 1 Ch. 233; 74 L. J. Ch. 106; 92 L. T. 290; 53 W. R. 251.

Annotations:—**Refd.** *Re* Bates, Hodgson *v.* Bates (1906), 23 T. L. R. 15; *Re* Wilson, Moore *v.* Wilson, [1907] 1 Ch. 394; *Re* Hall, Hall *v.* Hall, [1916] 2 Ch. 488; *Re* Booch, Saint *v.* Booch, [1920] 1 Ch. 40. **Mentd.** *Re* Inman, Inman *v.* Inman, [1915] 1 Ch. 187.

277. —— ——.]—By his will testator gave his personal estate to his wife for life & after her death to other persons, & appointed his wife & pltf. trustees of his will. By a codicil testator empowered his trustees to carry on his businesses of a colliery owner & farmer, & gave them a general discretion "to retain any investments" belonging to him at his death without being responsible for any loss occasioned thereby. Testator was a director of a coal co., limited, which had wide powers of engaging in colliery & other businesses under its articles & memorandum of association, & possessed a considerable reserve fund. At the time of his death testator was possessed of three hundred & thirty-six fully paid up shares of £50 each in the coal co., & in pursuance of their power under the codicil the trustees retained them:—*Held:* the shares were hazardous, but not wasting securities, & the power to retain investments was sufficient to exclude the operation of the rule in *Howe v. Dartmouth (Earl)* (1802), 7 Ves. 137 a; the tenant for life was therefore entitled to the income of the shares so long as the trustees thought fit to retain them.—*Re* BATES, HODGSON *v.* BATES, [1907] 1 Ch. 22; 95 L. T. 753; 23 T. L. R. 15; 51 Sol. Jo. 27; *sub nom. Re* BATES, HODSON *v.* BATES, 76 L. J. Ch. 29.

Annotations:—**Refd.** *Re* Wilson, Moore *v.* Wilson, [1907] 1 Ch. 394; *Re* Nicholson, Eade *v.* Nicholson, [1909] 2 Ch. 111.

C. Ownership of Minerals Improperly Worked.

278. Property in remainderman.]—BELL *v.* WILSON, No. 2, *ante*.

279. —— **Unless acts of tenant for life adopted.**]—Where tenant for life has committed waste by opening mines, the produce of the mines belongs to the remainderman, & the tenant for life is not even entitled to the interest; but if the remainderman adopts the acts of the tenant for life for other purposes, he may be debarred from enforcing his rights to this extent.—GRESLEY *v.* MOUSLEY (1862), 3 De G. F. & J. 433; 31 L. J. Ch. 537; 6 L. T. 86; 8 Jur. N. S. 320; 10 W. R. 222; 45 E. R. 940, L. JJ.

Annotations:—**Mentd.** Cauricarde *v.* Henning (1861), 30 Beav. 175; Bateman *v.* Hunt, [1904] 2 K. B. 530; Powell *v.* Browne (1907), 97 L. T. 167.

280. Whether property in owner of first estate of inheritance in esse.]—(1) Minerals were devised by will upon trust for B. for life without impeachment of waste, with remainder on trust for deft. for life without impeachment of waste, with remainders over. During the life, & also after the death of B., part of these minerals were won by instroke by the owners of adjoining mines, who had trespassed innocently & paid compensation moneys for so doing:—*Held:* the moneys paid in respect of the minerals so won during the respective lives of B. & deft., belonged to the estate of B. & to deft. respectively.

(2) If a tenant for life who is impeachable of waste improperly commits waste by cutting trees or digging minerals, such trees or minerals when severed become at once the property of the owner of the first estate of inheritance *in esse* (KAY, J.).—*Re* BARRINGTON, GAMLEN *v.* LYON (1886), 33 Ch. D. 523; 56 L. J. Ch. 175; 55 L. T. 87; 35 W. R. 164; 2 T. L. R. 774.

Annotations:—*As to* (1) **Consd.** *Re* Williams' Settlmt., Williams Wynn *v.* Williams, [1922] 2 Ch. 750. *Generally*, **Refd.** *Re* Robinson's Settlmt. Trusts, [1891] 3 Ch. 129; *Re* Fullerton's Will, [1906] 2 Ch. 138.

281. —— **Possibility of prior tenants in tail coming into esse.**]—BAGOT *v.* BAGOT, LEGGE *v.* LEGGE, No. 91, *ante*.

D. Remedies for Improper Working.

See, generally, Part VI., Sect. 2, *post*.

282. Action of trover.]—CLAVERING *v.* CLAVERING (1729), as reported in MOS. 219; 25 E. R. 359.

Annotations: **Refd.** Spencer *v.* Scurr (1862), 31 Beav. 334; Elias *v.* Snowden Slate Quarries Co. (1879), 4 App. Cas. 454; Glasgow (Lord Provost & Magistrates) *v.* Farie (1888), 13 App. Cas. 657; *Re* Maynard's S. E., [1899] 2 Ch. 317; Greville-Nugent *v.* Mackenzie, [1900] A. C. 83; *Re* Hall, Hall *v.* Hall, [1916] 2 Ch. 488.

283. Account.]—The ct. always distinguishes between digging of mines & cutting of timber, because the digging of mines is a sort of trade; & there are many cases where this ct. will relieve & decree an account of ore taken, when in any other tort or wrong done it has refused relief (LORD HARDWICKE, C.). JESUS COLLEGE *v.* BLOOM (1745), Amb. 54; 3 Atk. 262; 27 E. R. 31.

Annotations:—**Distd.** Lansdowne *v.* Lansdowne (1815), 1 Madd. 116. **Consd.** Parrott *v.* Palmer (1834), 3 My. & K. 632. **Refd.** Garth *v.* Cotton (1753), 3 Atk. 751; Hony *v.* Hony (1824), 1 Sim. & St. 568; Wright *v.* Pitt (1870), L. R. 12 Eq. 408. **Mentd.** Johnstone *v.* Hall (1856), 2 K. & J. 414; Sawyer *v.* Goodwin (1867), 36 L. J. Ch. 578.

284. —— —— **Notwithstanding lapse of time.**]—(1) In 1873, pltf., the reversioner on the term of five hundred years, filed a bill to restrain the termor from working the slate quarries during the term, & for an account of profit:—*Held:* if the quarries had been opened by the termor without the authority of the reversioner, pltf. would have been entitled to the relief prayed, notwithstanding the lapse of time.—ELIAS *v.* GRIFFITH (1878), 8 Ch. D. 521; 48 L. J. Ch. 203; 38 L. T. 871; 26 W. R. 869, C. A.; *affd. sub nom.* ELIAS *v.* SNOWDON SLATE QUARRIES CO. (1879), 4 App. Cas. 454, H. L.

Annotations:—**Refd.** Dashwood *v.* Magniac, [1891] 3 Ch. 306; *Re* Maynard's S. E., [1899] 2 Ch. 347; Chaytor *v.* Trotter (1902), 87 L. T. 33.

—— **Against estate of deceased wrong-doer**—**Date from which interest charged.**] — *See* SETTLEMENTS.

Sect. 2.—Rights dependent on extent of owner's interest: Sub-sect. 3, D.; sub-sects. 4 & 5. Sect. 3: Sub-sects. 1 & 2.]

285. Injunction.]—FLAMANG'S CASE (*circa* 1783), cited 7 Ves. at p. 308; 32 E. R. 126, L. C.

Annotations:—**Folld.** Mitchell *v.* Dors (1801), 6 Ves. 147. **Consd.** Thomas *v.* Oakley (1811), 18 Ves. 184. **Refd.** Hanson *v.* Gardiner (1802), 7 Ves. 305; Smith *v.* Collyn (1803), 8 Ves. 89; Crockford *v.* Alexander (1808), 15 Ves. 138; A.-G. *v.* Hallett (1847), 16 M. & W. 569.

286. ——.]—LONDON (BP.) *v.* WEB, No. 258, *ante*.

287. ——.]—VINER *v.* VAUGHAN, No. 232, *ante*.

288. ——.]—FERRAND *v.* WILSON, No. 238, *ante*.

289. —— **Though working only threatened.**]—If a person has only threatened to open mines, pltf may certainly come into this ct., to restrain deft. from doing it.

It is not necessary to stay till waste is actually committed, where the intention appears, & the person insists on his right to do it.

Though no proof appears of waste, yet if tenant for life insists on a right to do it, & has none, the reversioner may have an injunction.—GIBSON *v.* SMITH (1741), 2 Atk. 182; Barn. Ch. 491; 26 E. R. 514, L. C.

290. —— **Notwithstanding lapse of time.**]—ELIAS *v.* GRIFFITH, No. 284, *ante*.

SUB-SECT. 4.—FIDUCIARY OWNERS.

See Settled Land Act, 1925 (c. 18), s. 102 (2) (*c*).

SUB-SECT 5.—RAILWAY, CANAL, AND OTHER STATUTORY COMPANIES

See Sect. 6, *post*.

SECT. 3.—RIGHTS DEPENDENT ON NATURE OF PROPERTY.

SUB-SECT. 1.—MORTGAGED LANDS.

See Part IX., *post*, & *generally*, MORTGAGE.

291. Working open mines—By mortgagee in possession—Rights of mortgagee.]—(1) Where a mine or quarry has been opened for a restricted or definite purpose, as to obtain fuel, or the means of repairing a particular tenement on the estate, that would not give the tenant for life, or other owner of an estate impeachable for waste, the right to work it for commercial profit.

(2) The opening of a quarry by a mtgor. in possession enures to the benefit of the mtgee. of a term, so as to render him dispunishable for waste if he work the quarry during the term.

(3) Where it is proved that a quarry was worked, & that there was a lease which would authorise the workings, it will be presumed after a great lapse of time that the workings took place under the lease, & the burden of proof will lie on a party who seeks to show that they were unauthorised.

(4) Sale of the produce is not a necessary criterion of the difference between a mine or quarry which is, & one which is not, to be considered open in a legal sense.

(5) Where there is an open mine or quarry, the sinking of a new pit on the same vein, or breaking ground in a fresh place on the same rock, is not necessarily the opening of a new mine or quarry.—ELIAS *v.* SNOWDON SLATE QUARRIES CO. (1879), 4 App. Cas. 454; 48 L. J. Ch. 811; 41 L. T. 289; 43 J. P. 815; 28 W. R. 51, H. L.; *affg.* S. C. *sub nom.* ELIAS *v.* GRIFFITH (1878), 8 Ch. D. 521, C. A.

Annotations:—*As to* (1) **Consd.** Chaytor *v.* Trotter (1902), 87 L. T. 33. *As to* (5) **Refd.** *Re* Maynard's S. E., [1899] 2 Ch. 347. *Generally*, **Refd.** Dashwood *v.* Magniac, [1891] 3 Ch. 306.

292. —— —— ——.]—The mtgee. of colliery property held under a mining lease is entitled to have a receiver & manager appointed, as such a security involves the right to work the colliery business, & the fact that the mtgee. has taken possession does not deprive him of such right.

It would be a mere mockery to a mtgee. of a colliery, whether by assignment or a sub-lease, to tell him he is not to touch the minerals (LINDLEY, L.J.).—COUNTY OF GLOUCESTER BANK *v.* RUDRY MERTHYR STEAM & HOUSE COAL COLLIERY CO., [1895] 1 Ch. 629; 64 L. J. Ch. 451; 72 L. T. 375; 43 W. R. 486; 39 Sol. Jo. 331; 2 Mans. 223; 12 R. 183, C. A.

Annotations:—**Refd.** Stamford Spalding & Boston Banking Co. *v.* Keeble (1913), 82 L. J. Ch. 388. **Mentd.** Poole *v.* Downes (1897), 76 L. T. 110; Owen & Ashworth's Claim, Whitworths Claim, [1900] 2 Ch. 272; Duck *v.* Tower Galvanizing Co., [1901] 2 K. B. 314; Ruben *v.* Great Fingall Consolidated, [1904] 1 K. B. 650; Premier Industrial Bank *v.* Carlton Manufacturing Co. & Crabtree, [1909] 1 K. B. 106; *Re* Fireproof Doors, Umney *v.* The Co., [1916] 2 Ch. 142; Dey *v.* Pullinger Engineering Co., [1921] 1 K. B. 77; Underwood *v.* Bank of Liverpool & Martins, Same *v.* Barclays Bank, [1924] 1 K. B. 775.

293. —— —— **To what expenses mortgagee committed.**]—Mtgee. in possession of mines not bound to expend more than a prudent owner.

To put a case by way of illustration; suppose a person is mtgee. of a mine which is likely to be much improved by a large expenditure; if he were owner, he might speculate for himself much as he pleased. . . . But can a mtgee. be required to do that? . . . I apprehend that he cannot, & that at the utmost he is not bound to advance more than a prudent owner (LORD ELDON, C.).—ROWE *v.* WOOD (1822), 2 Jac. & W. 553; 37 E. R. 740, L. C.

294. —— —— **Recovery of expenditure—In excess of security.**]—NORTON *v.* COOPER, No. 660, *post*.

295. —— —— —— **For necessary repairs.**]—In taking the accounts under the decree in a redemption action against a mtgee. in possession, the mtgee. is entitled to "necessary repairs," under the head of "just allowances"; but, to entitle him to "permanent improvement," or "substantial repairs," he must make out a case for them at the trial.—TIPTON GREEN COLLIERY CO. *v.* TIPTON MOAT COLLIERY CO. (1877), 7 Ch. D. 192; 47 L. J. Ch. 152: 26 W. R. 348.

296. —— —— —— **For permanent improvements.**]—TIPTON GREEN COLLIERY CO. *v.* TIPTON MOAT COLLIERY CO., No. 295, *ante*.

297. —— —— **Innocent wrongdoers—Extent of liability.**]—ABERDARE & PLYMOUTH CO., LTD *v.* HANKEY (1887), 3 T. L. R. 493.

298. —— **By authority of mortgagee in possession—In breach of covenant—Extent of liability.**]—TAYLOR *v.* MOSTYN, No. 462, *post*.

As to open & new mines generally, *see* Part I., Sect. 6, *ante*.

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q. Development of mine by holder of option to purchase—Operation as trustee for vendor until exercise of option.]—GROBE *v.* DOYLLE (1906), 12 B. C. R. 191; 2 M. M. Cas. 327.—CAN.

r. Trustees with power to work mines for term of trust—Necessity for joinder with tenant for life in petition for sale.]—*Ex p.* PUXLEY (1868), 2 I. R. Eq. 237.—IR.

299. Working unopened mines—By mortgagee in possession—Speculative working—To be at hazard of mortgagee.]—Mtgee. in possession, though answerable, beyond fraud, for wilful default, is to take the fair rents & profits not bound to engage in, & will not be allowed for speculation & adventure.—HUGHES *v.* WILLIAMS (1806), 12 Ves. 493; 33 E. R. 187.

Annotations:—**Refd.** Millett *v.* Davey (1862), 31 Beav. 470. **Mentd.** Wragg *v.* Denham (1836), 2 Y. & C. Ex. 117; Cocks *v.* Gray (1857), 5 W. R. 749.

300. —— —— Liability to be charged with receipts—& disallowed expenses.]—A mtgee. in possession, who had opened & worked mines on the mortgaged estate, charged with his receipts but disallowed his expenses.—THORNEYCROFT *v.* CROCKETT (1818), 16 Sim. 445; 12 L. T. O. S. 288; 12 Jur. 1081; 60 E. R. 946.

Annotations:—**Folld.** Hood *v.* Easton (1856), 2 Giff. 692. **Refd.** Millett *v.* Davey (1862), 31 Beav. 470. **Mentd.** Jennings *v.* Jordan (1881), 6 App. Cas. 698.

301. —— —— —— —— —— —— ——.]—(1) Pltf., being the owner in fee of certain hereditaments with a coal mine underneath, mortgaged the same to defts. L. in fee. Pltf. covenanted to confirm any leases which L. might make, but L. was not authorised to work or lease the mine. Pltf.'s mine was surrounded on all sides by mines in the possession of defts. T. & J. Defts. T. & J., without the knowledge of pltf., asked & obtained leave of L. to explore & work pltf.'s mine. Defts. T. & J., without entering into any lease or agreement, explored & worked the mine, & raised & sold coal to a large amount. On bill by pltf. to redeem:—*Held:* defts. T. & J. were necessary parties to the suit.

(2) In equity, following *Thorneycroft* v. *Crockett*, No. 300, *ante*, where the subject-matter of the pledge has been abstracted, the mtgee. is liable to be charged for all sums received in respect of the property abstracted & sold, without any deductions.

But upon the whole of this case, looking at pltf. as a mtgor. who comes to have his pledge restored upon an equitable adjustment of rights, looking at all defts., & finding that, through the wrongful & unauthorised acts of defts., the mtgee., the dominion over the mtged. property is asserted, which as between him & the persons to whom he gave the dominion has been abused—as between these parties I must consider both of them liable to the mtgor. . . . it has been said with perfect truth & accuracy by the counsel for deft. L., that the bill twice asserts that he was not mtgee. in possession. That is perfectly true, but the bill at the same time asserts that the coal was wrought & won by defts. T. & J., & this is set forth in a perfectly unambiguous manner; for it says, "that after the discovery that the coal had been worked, the solrs. of pltf. applied to, & had an interview with deft. L. respecting the working of the coal by T. & J., & deft. L. stated that he had never authorised T. & J. to work the coal, & that he did not know that they had done so, but that they had some time before applied to him for leave to work the same, & he had stated to them that he had no objection provided it was wrought under the inspection of C." Now, when I look at the answer of T. & J. & the answer of L., I find a perfect accordance with that statement. It is a fact incontrovertible, that there was the statement on the part of L. to allow defts. T. & J. to work the mine for the purpose of exploring the coal, & by means of that arrangement the property was to be abstracted, for which therefore, as it is acquired by the dealing of a person who has obtained access to the mine by the act of the mtgee., I must hold the mtgee. responsible, & for that purpose there are charges in the bill which charge specifically as against L. the conduct of these people, & seek to make him liable (STUART, V.-C.).—HOOD *v.* EASTON (1856), 2 Giff. 692; 27 L. T. O. S. 295; 2 Jur. N. S. 729; 4 W. R. 575; 66 E. R. 290; *on appeal*, 2 Jur. N. S. 917, L. JJ.

Annotation:—**Refd.** Elias *v.* Griffith (1878), 8 Ch. D. 521.

302. —— —— —— —— ——.]—Where a mortgaged estate is of an insufficient value to pay the mtge., a mtgee., on entering into possession, may open mines & cut timber, & he will be charged only with the net profits. But where the estate is sufficient, a mtgee. in possession has no such right, & if he opens & works mines, he will be charged with the gross receipts, & will be disallowed the expenses of working.

The burden of proof is thrown upon the mtgee., of showing that the security was insufficient, has been fulfilled on the present occasion (ROMILLY, M.R.).—MILLETT *v.* DAVEY (1862), 31 Beav. 470; 32 L. J. Ch. 122; 7 L. T. 551; 9 Jur. N. S. 92; 11 W. R. 176; 51 E. R. 1221.

303. —— —— Mortgage security insufficient—Burden of proof of insufficiency.]—MILLETT *v.* DAVEY, No. 302, *ante*.

304. —— —— —— Mortgagee charged with net profits.]—MILLETT *v.* DAVEY, No. 302, *ante*.

305. —— —— By adjoining owners—By authority of mortgagee—Joint liability.]—HOOD *v.* EASTON, No. 301, *ante*.

306. Mine opened by mortgagor in possession—Enures to benefit of mortgagee.]—ELIAS *v.* SNOWDON SLATE QUARRIES CO., No. 291, *ante*.

SUB-SECT. 2.—LANDS AGREED TO BE SOLD OR LEASED.

As to rights of purchaser of land pending completion, generally, *see* SALE OF LAND.

307. Liability of contractor to contractee—For minerals worked—Completion of contract delayed.]—When a vendor of a coal mine, against whom a suit for specific performance was brought, had, during his delay of completion worked the mine for his own benefit: *Held:* the purchaser was entitled to compensation on an estimate of the marked value of the coal *in situ*: *i.e.*, the value at the place where it was to be sold, less the cost of severing & taking it from the mine to that place.—BROWN *v.* DIBBS (1877), 37 L. T. 171; 25 W. R. 776, P. C.

Annotation:—**Apld.** Leppington *v.* Freeman (1891), 65 L. T. 115 (*see* 66 L. T. 357).

308. —— —— During interval between date of contract & date of completion—Open mine or quarry.]—On a contract for the sale of lands comprising an open stone quarry in lease at the date of the contract, the vendor is entitled by the ordinary rule of law—in the absence of any stipulation relating thereto in the contract—to the rents & royalties received from the lessee in the interval between the date of the contract & the time fixed for completion. *Semble:* the same rule would be applicable to the profits arising from the stone worked in that interval by the vendor himself, if such quarry were in hand.—LEPPINGTON *v.* FREEMAN (1891), 66 L. T. 357; 40 W. R. 348, C. A.

—— —— Licencor.]—*See* No. 901, *post*.

309. —— For rents & royalties—During interval between date of contract & date of completion—Open mine or quarry.]—LEPPINGTON *v.* FREEMAN, No. 308, *ante*.

Liability of purchaser—In respect of minerals worked before completion.]—*See* Nos. 614, 728, *post*.

Sect. 3.—Rights dependent on nature of property: Sub-sects. 3 & 4. Sects. 4, 5, 6, 7 & 8.]

SUB-SECT. 3.—CHURCH LANDS.

See ECCLESIASTICAL LAW, Vol. XIX., pp. 511, 512, Nos. 3711–3721.

SUB-SECT. 4.—COPYHOLD LANDS.

See, generally, COPYHOLDS, Vol. XIII., pp. 80 *et seq.*

As to copyhold tenure & manorial rights generally, *see, now,* Law of Property Act, 1922 (c. 16), ss. 128–145. Scheds. XII.–XV.; Law of Property Amendment Act, 1924 (c. 5), sched. II.

310. Concurrence of both lord & tenant necessary—For absence of special custom.]—The copyholder has possession not only of the surface, but of everything below the surface, including minerals. But the property in the minerals is in the lord. The result is, that, in the absence of special custom, neither the lord nor the copyholder can work the minerals but the concurrence of both is necessary (COZENS-HARDY, M.R.).—INLAND REVENUE COMRS. *v.* JOICEY (No. 2), [1913] 2 K. B. 580; 82 L. J. K. B. 784; 108 L. T. 738; 29 T. L. R. 537, C. A.

Annotations:—**Refd.** *Re* Markham Main Colliery (1925), 134 L. T. 253. **Mentd.** Davies *v.* Powell Duffryn Steam Coal Co. (1920), 36 T. L. R. 358.

Effect of special customs.] *See* Sect. 5, *post.*

SECT. 4.—**RIGHTS IN NATURE OF PROFITS À PRENDRE.**

311. Right to take coal—As distinguished from ownership of whole stratum of coal.]—The right to the whole of a given sub-stratum of coal lying under a close, is a right to land, & cannot be claimed by prescription: a right to take coal is different. —WILKINSON *v.* PROUD (1843), 11 M. & W. 33; 12 L. J. Ex. 227; 7 Jur. 284.

Annotations:—**Refd.** Rowbotham *v.* Wilson (1857), 8 E. & B. 123. **Mentd.** Carlyon *v.* Lovering (1857), 1 H. & N. 784.

Nature of bare licences.]—*See* Part XII., Sect. 1, sub-sect. 2, *post.*

Whether profit à prendre claimable by custom.]—*See* COMMONS, Vol. XI., p. 35, Nos. 462–463 & EASEMENTS, Vol. XIX., pp. 204–205.

Common in the soil.]—*See* COMMONS, Vol. XI., pp. 21–22.

312. Prescriptive right of freehold tenants to dig in waste—Enforcement of right—Representative action.] WARRICK *v.* QUEEN'S COLLEGE, OXFORD (1871), 6 Ch. App. 716; 40 L. J. Ch. 780; 25 L. T. 254; 19 W. R. 1098, L. C.

Enjoyment of prescriptive right—Cannot be unlimited.]—*See* EASEMENTS, Vol. XIX., p. 206, No. 1575.

SECT. 5.—**CUSTOMARY RIGHTS AFFECTING MANORIAL LANDS.**

See, generally, COPYHOLDS, Vol. XIII., pp. 80–83.

Copyhold tenure.]—*See, now,* Law of Property Act, 1922 (c. 16), ss. 128–145. Scheds. XII.–XV.; Law of Property Amendment Act, 1924 (c. 5), sched. 2.

Customary right of tenant to mine.]—*See* COMMONS, Vol. XI., p. 35, Nos. 469, 470.

Rights of landlord under inclosure award.]—*See* COMMONS, Vol. XI., p. 83, Nos. 1022 *et seq.*

Rights of lord of manor—In sub-soil of waste.]—*See* COMMONS, Vol. XI., p. 42, Nos. 574–581.

Remedies of lord of manor.]—*See* COPYHOLDS, Vol. XIII., p. 82, Nos. 1030–1032.

Remedies of tenant.]—*See* COPYHOLDS, Vol. XIII., p. 82, Nos. 1033–1035.

See, also, COPYHOLDS, Vol. XIII., pp. 29, 49, 147, 149, Nos. 258–262, 584, 1888, 1943.

SECT. 6.—**RIGHTS OF RAILWAY, CANAL AND OTHER STATUTORY COMPANIES.**

313. Working mine for profit—Ultra vires—Railway company.]—It was suggested that coals might be necessary for the purpose of the railway & that thereupon the co. might work a coal mine for that purpose, if, by so doing, it could obtain coals cheaper than by the purchase of them. . . . The answer to this argument appears to me to depend upon the facts of each particular case. If, in truth, the real object of the colliery was to supply the railway with cheaper coals, it would be proper to allow the accidental additional profit of selling coals to others; but of the principal object of the colliery was to undertake the business of raising & selling coals, then it would be a perversion of the funds of the company (LORD ROMILLY, M.R.).—LYDE *v.* EASTERN BENGAL RY. CO. (1866), 36 Beav. 10; 55 E. R. 1059.

Annotations:—**Refd.** A.-G. *v.* N. E. Ry., [1906] 2 Ch. 675; Douchar *v.* Gas Light & Coke Co., [1924] 2 Ch. 426.

314. ——————.]—ECCLESIASTICAL COMRS. FOR ENGLAND *v.* NORTH EASTERN RY. CO., No. 558, *post.*

315. ——————.]—I am far from saying that a railway co. ought to be permitted to carry on the trade of ironmasters, or colliery proprietors, or rolling stock manufacturers, not casually, not incidentally, not collaterally, in the *bonâ fide* conduct of their own property & business, but as really a distinct & separate trade. I can conceive that such a case might be properly considered by the A.-G., & considered by this ct., as a fraud on the legislature which had created & authorised the co. only for what it professed & undertook to do; but, at all events, it must be something great, something substantial, to warrant such interference (JAMES, L.J.).—A.-G. *v.* GREAT EASTERN RY. CO. (1879), 11 Ch. D. 449; 48 L. J. Ch. 428; 40 L. T. 265; 27 W. R. 759, C. A.; *on appeal* (1880), 5 App. Cas. 473, H. L.

Annotations:—**Mentd.** A.-G. *v.* Shrewsbury (Kingsland) Bridge Co. (1882), 21 Ch. D. 752; Guinness *v.* Land Corpn. of Ireland (1882), 22 Ch. D. 349; L. & N. W. Ry. *v.* Price (1883), 11 Q. B. D. 485; Small *v.* Smith (1884), 10 App. Cas. 119; Wenlock River Dee Co. (1885), 10 App. Cas. 354; Harris *v.* De Pinna (1886), 33 Ch. D. 238; Henderson *v.* Bank of Australasia (1888), 40 Ch. D. 170; Johns *v.* Balfour (1889), 5 T. L. R. 389; Sheffield & South Yorkshire Permanent Bldg. Soc. *v.* Aizlewood (1889), 44 Ch. D. 412; Foster *v.* L. & C. & D. Ry., [1895] 1 Q. B. 711; A.-G. *v.* L. & N. W. Ry., [1900] 1 Q. B. 78; L. C. C. *v.* A.-G., [1902] A. C. 165; A.-G. *v.* Mersey Ry., [1907] 1 Ch. 81; *Re* Kingsbury Collieries & Moore's Contract, [1907] 2 Ch. 259; Peel *v.* L. & N. W. Ry., [1907] 1 Ch. 5; Metropolitan Water Board *v.* Soloman (1908), 77 L. J. Ch. 517; A.-G. *v.* West Gloucestershire Water Co., [1909] 2 Ch. 338; Amalgamated Soc. of Ry. Servants *v.* Osborne, [1910] A. C. 87; Vacher *v.* London Soc. of Compositors, [1912] 3 K. B. 547. *Re* Woking Urban Council (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300; Dundee Harbour Trustees *v.* Nicol, [1915] A. C. 550;

t. *Statutory mining company—Whether power to drill for oil.*]—ALBERTA DRILLING CO. *v.* DOME OIL CO. (1915), 30 W. L. R. 145; 8 W. W. R. 996; 8 Alta. L. R. 340; 52 S. C. R. 561.—CAN.

County Hotel & Wine Co. *v.* L. & N. W. Ry., [1918] 2 K. B. 251; R. *v.* Bedfordshire County Council, *Ex p.* Seal, [1920] 2 K. B. 465; A.-G. *v.* Fulham Corpn., [1921] 1 Ch. 440; A.-G. *v.* Westminster City Council, [1924] 2 Ch. 416; Donchar *v.* Gas Light & Coke Co., [1925] A. C. 691.

316. —— —— ——.]—GLASGOW CORPN. *v.* FARIE, No. 12, *ante*.

See, generally, RAILWAYS.

317. —— —— **Harbour company.**]—ECCLESIASTICAL COMRS. FOR ENGLAND *v.* NORTH EASTERN RY. CO., No. 558, *post*.

318. —— —— **Waterworks company.**]—GLASGOW CORPN. *v.* FARIE, No. 12, *ante*.

Compensation for mines & minerals—Land purchased under compulsory powers.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 150 *et seq.*

SECT. 7.—RIGHT TO WORK TO OBTAIN MATERIALS FOR ROADS, ETC.

319. Materials for construction of railways.]—LYDE *v.* EASTERN BENGAL RY. CO., No. 313, *ante*.

320. ——.]—GLASGOW CORPN. *v.* FARIE, No. 12, *ante*.

——.]—*See, generally*, Railways Clauses Consolidation Act, 1845 (c. 20), ss. 32–44; RAILWAYS.

Materials for repair of highways.]—*See* HIGHWAYS, Vol. XXVI., pp. 353–357.

Materials for construction of waterworks.]—*See* Waterworks Clauses Act, 1847 (c. 17), s. 12; WATER SUPPLY.

Rights of railway canal & other statutory companies.]—*See* Sect. 6, *ante*.

SECT. 8.—MINES (WORKING FACILITIES AND SUPPORT) ACT, 1923.

321. Grant of right to work—Consideration of public interest.]—The decision of the ct. in respect of an application in pursuance of Mines (Working Facilities & Support) Act, 1923 (c. 20), for the grant of the right to work certain specific minerals in accordance with the provisions of that statute, is not merely one for agreement between appcts. & objectors; the public interest must also be considered & safeguarded by the ct., &, whatever the terms which any party thinks may be appropriate in his own interest, it is the duty of the ct. to see that both the national interest & the interests of all concerned are protected.—*Re* NUNNERY COLLIERY CO.'S APPLICATION (1924), 69 Sol. Jo. 52.

322. —— **Practice of Railway & Canal Commission.**]—The practice of the Railway & Canal Commission is to hear all objectors to applications for the grant of the right to work minerals & then the decide whether the main application should be granted & afterwards insert protective clauses into the minutes to give the objectors the proper legal safeguards to which they are entitled. Where a claim is made to let down the surface the Commission has power to give authority for this being done on giving adequate compensation to any person whose property is likely to be affected by the subsidence.—*Re* SHEFFIELD COAL CO., LTD. & ASTON COAL CO., LTD. (1925), 42 T. L. R. 8.

323. —— —— **Apportionment of royalties.**]—Under Mines (Working Facilities & Support) Act, 1923 (c. 20), s. 4 (2), the Railway & Canal Commission will determine the proper division of royalties obtained from coal worked under the Act as between the lord of the manor & copyholders. The ownership of the minerals is in the lord of the manor, the possession in the copyholders. All the facts of the case will be taken into consideration by the commission:—*Held:* on the particular facts of this case a fair & proper division of the royalty would be two thirds to the lord of the manor & one third to the copyholders; in the absence of special custom the concurrence of both the lord of the manor & the copyholder is necessary before the minerals underlying the copyhold land can be worked & taken away; the commission must apportion the royalties payable by appcts. under Mines (Working Facilities & Support) Act, 1923 (c. 20), on the basis of a willing grantor & a willing grantee.—*Re* MARKHAM MAIN COLLIERY, LTD. (1925), 134 L. T. 253; 41 T. L. R. 672.

324. —— —— **National interest to be considered—Grant in terms of agreement between rival applicants.**]—Where rival appcts. for the right to work coal in a certain area agree to divide the area between themselves, the ct. will not make an order in the terms of the agreement unless it is expedient in the national interest so to make it, & the ct. may specify matters in regard to which the agreement must be modified.—*Re* CHARLESWORTH (J. & J.), LTD. & BRIGGS (HENRY), SON & CO., LTD. (1926), 43 T. L. R. 100.

325. —— —— **Comparison of value of & damage to surface works with value of minerals.**]—A colliery co. applied to the Railway & Canal Commission under Mines (Working Facilities & Support) Act, 1923 (c. 20), s. 5 (1), (2), (3), to work certain minerals in accordance with the provisions of sect. 1 of that Act. The minerals consisted of three seams of coal the first 110 yards from the surface, the second 145 yards from the surface, & the third 345 yards from the surface. The three seams lay under two parcels of land containing about 20 acres. The minerals were owned in such small parcels as not to be economically workable by themselves. The co. held interests in adjoining coal under various leases. In the case of the deepest seam they had reached a point where working & winning the coal could be commenced almost immediately, but in the case of the two shallow seams the workings were at a distance which would take some ten years to traverse in one case & fifteen or twenty in the other. Across the area, the subject of the application, there was a canal built under an Act of Parliament which threw an obligation on the canal co. to keep the waters of the canal navigable. There was no obligation on the canal co. to keep the water at a fixed level, but in practice, in order to keep the canal navigable, the water could not be allowed to fall below a certain fixed level. The colliery co. claimed the right to let down the surface, & a right of underground wayleave for the purpose of access to or conveyance of minerals. An undertaking was offered by the colliery co. to repair a railway bridge over the canal & to make good any damage done by subsidence. The canal co. objected to the application on the ground that, in spite of the Act of Parliament forming them, they were still entitled to their common law right of lateral support. If the three seams were worked there would be serious damage to the banks & the bed of the canal. If only the deepest of the three seams were worked damage due to the subsidence could be repaired. They, therefore, only objected to the two shallow seams being worked. The mineral owners of the coal underlying the area, the subject of the applica-

Sect. 8.—Mines (Working Facilities and Support) Act, 1923. Part V. Sect. 1: Sub-sect. 1, A. & B.; sub-sect. 2, A. & B.; sub-sect. 3, A. & B.; sub-sect. 4.]

tion, appeared before the Commission on the grounds that they were entitled to royalties in a lump sum or according to the gradual winning of the coal, & that a duty should lie on the colliery co. to endeavour to negotiate privately the purchase of the mineral rights:—*Held:* (1) in determining whether restrictions should be imposed on the winning of coal in any area, the subject of the application, the Commission will take into consideration the value of any works on the surface & the cost of repairing damage likely to be caused thereto by subsidence, as compared with the value of the minerals, & the importance in the national interest of the preservation of such works as compared with the importance in the national interest of working & winning the coal. In the circumstances the Commission would only grant leave to work the deepest of the three seams; (2) the refusal of the Commission to grant the application, save as to the deepest seam, was not final or *res judicata*, & the colliery co. could make another application later for the right to work this coal should the conditions change.

The Commission will act as a jury & assess the amount of royalty to be paid to the mineral owners & decide on the method of payment.—*Re* MANNERS COLLIERY CO., LTD. (1926), 42 T. L. R. 773.

326. Award of Railway & Canal Commission—Whether final or res judicata.]—*Re* MANNERS COLLIERY CO., LTD., No. 325, *ante*.

327. Grant of facilities for conveyance & carrying away of coal—Aerial ropeway Over land not comprised in mining lease.]— Under Mines (Working Facilities & Support) Act, 1923 (c. 20), ss. 1 (2), 5 (2), the Railway & Canal Commission has jurisdiction to grant facilities for the conveyance & carrying away of coal over land other than that contained in the ambit of the mining co.'s lease. The Commission, however, refused to sanction a scheme for an aerial ropeway for the conveyance of coal from the Tilmanstone colliery to Dover Harbour, on the grounds that, though a scheme for a ropeway would be put forward which would be feasible & in the national interest, the particular scheme for which sanction was asked was incomplete, & the plans were inaccurate & illusory, & on the evidence the Commission was unable to say whether the arrangements at the Dover end were feasible or in the national interest.—*Re* TILMANSTONE (KENT) COLLIERIES, LTD.'S APPLICATION (1927), 43 T. L. R. 349.

Part V.—Powers Incidental to Ownership.

SECT. 1. —**POWERS OF ABSOLUTE DISPOSITION.**

SUB-SECT. 1.—ABSOLUTE OWNERS UNDER DISABILITY.

A. Infants.

See, generally, INFANTS, Vol. XXVIII., pp. 188 *et seq.*

B. Lunatics.

See, generally, LUNATICS, Vol. XXXIII., p. 212, No. 1185.

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SUB-SECT. 2.—LIMITED OWNERS.

A. Under Settled Land Acts.

See Settled Land Act, 1925 (c. 18), ss. 38, 49, 50, 118, sched. IV., 4; &, *generally*, SETTLEMENTS.

328. Sale of minerals apart from surface—Under Settled Estates Acts—Jurisdiction of court.]—The ct. has power, under the Leases & Sales of Settled Estates Act, 1856 (c. 120) to authorise the sale & conveyance of minerals apart from the surface of the land.—*Re* MALLIN'S SETTLED ESTATES (1861), 3 Giff. 126; 30 L. J. Ch. 929; 4 L. T. 435; 9 W. R. 588; 66 E. R. 351.

Annotation:—**Folld.** *Re* Gray's S. E., [1875] W. N. 106.

329. - - - - - - - - - -.]—The Leases & Sales of Settled Estates Act, 1856 (c. 120) empowers the ct. to authorise the sale & conveyance of minerals situate under a settled estate, apart from the surface thereof.—*Re* LAW (1861), 7 Jur. N. S. 511.

330. - - - - - - - - - -.]—The ct. has jurisdiction under Leases & Sales of Settled Estates Act, 1856 (c. 120) to order a sale of mines apart from the surface, with rights of using the surface for the workings, reserving a rent in respect of the surface damaged from time to time.—*Re* MILWARD'S ESTATE (1868), L. R. 6 Eq. 248; 16 W. R. 1078.

Annotation:—**Folld.** *Re* Gray's S. E., [1875] W. N. 106.

331. - - - - - - - - - -.]—*Re* GRAY'S SETTLED ESTATES, [1875] W. N. 106.

332. - - - - **With easement over surface.**]—*Re* MILWARD'S ESTATE, No. 330, *ante*.

See, now, Settled Land Act, 1925 (c. 18), s. 119 (2).

Application of purchase-money.]—*See* SETTLEMENTS.

B. Under Lands Clauses Consolidation Acts:

See Lands Clauses Consolidation Act, 1845 (c. 16), s. 7, & COMPULSORY PURCHASE OF LAND, Vol. XI., p. 163, Nos. 413-416.

Apportionment of compensation.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 248, Nos. 1500-1503.

SUB-SECT. 3.—FIDUCIARY OWNERS.

A. Trustees with Power of Sale.

See, now, Law of Property Act, 1925 (c. 20), s. 28 (1); Trustee Act, 1925 (c. 19), ss. 12 (2), 57.

333. Whether sale with reservation of minerals authorised.]—A power of sale & exchange does not authorise trustees to sell the lands with a reservation of the minerals.—BUCKLEY *v.* HOWELL (1861), 29 Beav. 546; 30 L. J. Ch. 524; 4 L. T. 172; 7 Jur. N. S. 536; 9 W. R. 541; 54 E. R. 739.

Annotations:—**Expld.** *Re* Gladstone, Gladstone *v.* Gladstone, [1900] 2 Ch. 101. **Consd.** *Re* Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824. **Refd.** *Re* Nevill & Newell's Contract (1899), 69 L. J. Ch. 94; *Re* Rutland's S. E., Rutland *v.* Bristol, [1900] 2 Ch. 206.

334. —— **Sale distinguished from lease.**]—*Re* GLADSTONE, GLADSTONE *v.* GLADSTONE, No. 392, *post*.

335. Power of court to authorise sale with reservation.]—The ct. has power under 25 & 26 Vict. c. 108 to give a general direction that persons

having powers of sale & exchange in a settlement or will which do not expressly authorise the reservation of mines & minerals on a sale of the settled property, or the sale of minerals apart from the land, may exercise the powers as if they did authorise such reservation or separation.—*Re* WYNN'S DEVISED ESTATES (1873), L. R. 16 Eq. 237; 43 L. J. Ch. 95; 28 L. T. 615; 21 W. R. 695.

336. ——.]—*Re* COLEMAN'S WILL (1908), 52 Sol. Jo. 794.

337. —— **Without reference to any particular sale.**]—Under 25 & 26 Vict. c. 108, s. 2, an order will be made on petition authorising the sale of lands, with a reservation of the minerals, & also the sale of the minerals apart from the residue of the land, in general terms, without reference to any particular sale.—*Re* WILLWAY'S TRUSTS (1863), 1 New Rep. 469; 32 L. J. Ch. 226.

Annotation:—**Folld.** *Re* Skinner, [1896] W. N. 68.

338. —— **Whether beneficiaries necessary parties.**]—Upon all applications to the ct. under 25 & 26 Vict. c. 108, s. 2, the beneficiaries must appear & consent thereto.—*Re* BROWN'S TRUSTS (1862), 1 New Rep. 13; 32 L. J. Ch. 275; 7 L. T. 346; 9 Jur. N. S. 349; 11 W. R. 19.

Annotations:—**Folld.** *Re* Palmer (1872), 41 L. J. Ch. 511. **Refd.** *Re* Woodcock's Trustees (1893), 37 Sol. Jo. 250.

339. — ——.]—The *cestuis que trust* ought to be made parties to an application under 25 & 26 Vict. c. 108. s. 2, for sale of the surface apart from the minerals.—*Re* PALMER'S WILL (1872), L. R. 13 Eq. 408; 41 L. J. Ch. 511.

Annotations:—**Folld.** *Re* Hirst's Mortgage (1890), 45 Ch. D. 263. **Refd.** *Re* Woodcock's Trustees (1893), 37 Sol. Jo. 250.

340. —— —— **Infants.**]—Petition under 25 & 26 Vict. c. 108 by trustees with an absolute power of sale for the sanction of the ct. to the sale of minerals apart from the surface. The beneficiaries, who were all infants, were not made parties to the petition. The ct. made the order without directing service on the beneficiaries.—*Re* WADSWORTH'S TRUST (1890), 63 L. T. 207.

Annotation:—**Refd.** *Re* Woodcock's Trustees (1893), 37 Sol. Jo. 250.

341. —— —— —.]—*Re* WOODCOCK'S TRUSTEES (1893), 37 Sol. Jo. 250.

342. —— —— **Infants entitled in remainder.**] *Re* HARDSTAFF'S SETTLEMENT TRUST (1899), 44 Sol. Jo. 119.

343. —— — — **Entitled in remainder.**]—A petition under 25 & 26 Vict. c. 108, s. 2, by trustees of settled land with power of sale, exercisable with the consent of the tenant for life, for leave to sell the land & minerals separately, need not be served on the beneficiaries entitled in remainder.—*Re* PRYSE'S ESTATES (1870), L. R. 10 Eq. 531; 39 L. J. Ch. 760; 18 W. R. 1064.

Annotations:—**Folld.** *Re* Powell's Will (1874), 23 W. R. 151; *Re* Nagle's Trusts (1877), 6 Ch. D. 104.

344. — —— — —.] A petition was presented, under 25 & 26 Vict. c. 108, by trustees with a power of sale, & the first tenant for life, & the tenant for life in remainder, for leave to sell the land & minerals separately: *Held:* the next remainderman need not be served with the petition.—*Re* POWELL'S WILL (1874), 23 W. R. 151.

345. —— — —.]—A petition under 25 & 26 Vict. c. 108, s. 2, by trustees having power to sell settled lands with the consent of the tenant for life, for leave to sell the land & minerals separately, need not be served on the remaindermen.—*Re* NAGLE'S TRUSTS (1877), 6 Ch. D. 104.

346. —— —— ——.]—*Re* SKINNER, [1896] W. N. 68.

347. —— —— **Out of jurisdiction & known to object.**]—*Re* SKINNER, [1896] W. N. 68.

348. —— **Evidence of benefit from sale—Sufficiency of.**]—*Re* WOODCOCK'S TRUSTEES (1893), 37 Sol. Jo. 250.

349. —— **Directions not to sell minerals.**]—P., who died in 1881, devised all his real estate to trustees upon trust for sale & to stand possessed of the proceeds upon trust for his wife & children in succession; & the will contained the following words: "Whereas I have by great labour & exertion & large expenditure acquired certain valuable mineral lands forming part of my estate, & it is my earnest wish & desire that the same shall remain in my family for a considerable number of years, so that they may enjoy the benefit to be derived from the development thereof; now I hereby express my will to be, that the trusts for sale contained in my said will shall not be exercised in so far as they relate to my said mineral lands & estate until after the decease of the survivor of my present sons & daughters." It had become impossible to work the minerals. On petition by the trustees & most of the beneficiaries under the will, asking for a sale under Settled Estates Act, 1877 (c. 18), of certain parts of the estate for building purposes without reserving the minerals:—*Held:* the words of the will did not amount to an express declaration that the powers of the Act should not be exercised, & the ct. had power to order the sale.—*Re* PEAKE'S SETTLED ESTATES, [1893] 3 Ch. 430; 63 L. J. Ch. 109; 69 L. T. 281; 42 W. R. 125; 37 Sol. Jo. 682; 3 R. 722.

Annotation:—**Mentd.** *Re* Newen, Newen *v.* Barnes, [1894] 2 Ch. 297.

B. Personal Representatives.

Sale excepting minerals.] — *See* EXECUTORS, Vol. XXIV., pp. 577, 578, Nos. 6136–6138.

SUB-SECT. 4.—MORTGAGEES.

See, now, Law of Property Act, 1925 (c. 20), ss. 92, 101 (2), &, *generally,* MORTGAGE.

350. Exercise of power of sale—Right to sever mines & surface.]—Apart from recent legislation a mtgee. with an ordinary power of sale could not sell mines separately from the surface, any more than a trustee for sale could do so (COTTON, L.J.).—*Re* YATES, BATCHELDOR *v.* YATES (1888), 38 Ch. D. 112; 57 L. J. Ch. 697; 59 L. T. 47; 36 W. R. 563; 4 T. L. R. 388, C. A.

Annotations: **Refd.** West London Syndicate *v.* I. R. Comrs., [1898] 2 Q. B. 507; *Re* Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824. **Mentd.** *Re* Lusty, *Ex p.* Lusty (1888), 37 W. R. 304; Gimpson *v.* Coles (1889), 23 Q. B. D. 465; Stevens *v.* Marston (1890), 60 L. J. Q. B. 192; *Re* Brooke, Brooke *v.* Brooke, [1894] 2 Ch. 600; Small *v.* National Provincial Bank of England, [1894] 1 Ch. 686; Johns *v.* Ware, [1899] 1 Ch. 359; Born *v.* Turner, [1900] 2 Ch. 211; *Re* Rogerstone Brick & Stone Co., Southall *v.* Wescomb, [1919] 1 Ch. 110.

351. — — **Sanction of court.**] Mtgees. are within 25 & 26 Vict. c. 108, & may have liberty to sell under their power of sale, with a reservation of the mines & minerals in the land sold, & incidental powers of working them. It is not necessary for mtgees., in order to exercise the power of selling with such a reservation, to serve the petition on any subsequent incumbrancers.—*Re* BEAUMONT'S MORTGAGE TRUSTS (1871), L. R. 12 Eq. 86; 40 L. J. Ch. 400; 19 W. R. 767.

Annotations:—**Folld.** *Re* Wilkinson's Mortgaged Estates (1872), L. R. 13 Eq. 634. **Consd.** *Re* Hirst's Mortgage (1890), 63 L. T. 444. **Refd.** *Re* Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824.

Sect. 1.—*Powers of absolute disposition: Sub-sects.* 4, 5, 6, 7 & 8. *Sect.* 2: *Sub-sect.* 1, *A. & B.; sub-sect.* 2, *A. (a).*]

352. —— —— —— ——.]—Mtgees. in possession with a power of sale, after filing a bill for disclosure, & setting down the cause for hearing on motion for a decree, presented a petition, not intituled in the cause, but in the matter of 25 & 26 Vict. c. 108, for liberty to sell the surface, excepting the mines & minerals, of the hereditaments comprised in the mtge. deeds:—*Held:* they were entitled to the order asked.—*Re* WILKINSON'S MORTGAGED ESTATES (1872), L. R. 13 Eq. 634; 41 L. J. Ch. 392.

Annotation:—**Consd.** *Re* Hirst's Mortgage (1890), 63 L. T. 444.

353. —— ——.]—Petition by a mtgee. of land, under 25 & 26 Vict. c. 108, s. 2, for the sanction of the ct. to his selling the surface of the mtged. property, with a reservation of the mines & minerals thereunder, must be served on the mtgor.—*Re* HIRST'S MORTGAGE (1890), 45 Ch. D. 263; 60 L. J. Ch. 48; 63 L. T. 444; 38 W. R. 685.

354. Sale with reservation of mines—Service of petition—Subsequent incumbrancers.]—*Re* BEAUMONT'S MORTGAGE TRUSTS, No. 351, *ante*.

355. — — —— **Mortgagor.**] — *Re* HIRST'S MORTGAGE, No. 353, *ante*.

SUB-SECT. 5.—CO-OWNERS AND PARTNERS.

356. Co-owners—Not entitled to all incidents of partnership.]—BENTLEY *v.* BATES, No. 206, *ante*.

357. —— **Right to sell share.**]—ADAIR *v.* NEW RIVER CO., LTD. & METROPOLITAN WATER BOARD, No. 190, *ante*.

358. —— **Right to compel another to sell share.**] —BENTLEY *v.* BATES, No. 206, *ante*.

359. —— **Right to call for sale of whole.**] — STEWARD *v.* BLAKEWAY, No. 366, *post*.

360. —— **Right to partition.**] — CRAWSHAY *v.* MAULE, MAULE *v.* CRAWSHAY, No. 217, *ante*.

361. —— —— **Form of order.**] — LAWE *v.* STONEY, [1876] W. N. 141

362. —— —— —— **Co-owners tenants for life.**]—Partition, at the suit of tenants for life, of property devised & bequeathed to trustees, who were directed by the will to work quarries & dispose of the stones therefrom, with power for that purpose to make roads, refused.—TAYLOR *v.* GRANGE (1880), 15 Ch. D. 165; 49 L. J. Ch. 794; 43 L. T. 233, C. A.

Annotations:—**Refd.** Waite *v.* Bingley (1882), 30 W. R. 698; Dodd *v.* Cattell, [1914] 2 Ch. 1.

363. Partners—Right to compel sale of whole—On dissolution—By order of court.]—CRAWSHAY *v.* MAULE, MAULE *v.* CRAWSHAY, No. 217, *ante*.

364. —— —— —— —— **Agreement to contrary.**]—Bill by surviving partners, against the exors. of a partner who had died thirteen years before the institution of the suit, for an account of the partnership dealings & transactions, charging that deceased partner was indebted to the firm at the time of his death, dismissed with costs, on the ground of the lapse of time, no new liabilities of the former partnership appearing to have arisen, or become known, after the death of deceased partner. By an agreement between some of the partners in a colliery, reciting, that it was apprehended it would be competent for one partner to determine the joint interest & bring the partnership property to sale, & that the death of any partner would have that effect; & that they were desirous that their interests should be so far several, that the share of any partner should be transmissible to his representatives, & that the partnership interest should not be determined, & the entire property sold, without the consent of the majority in value, but each should be competent to sell his own share only; it was agreed that each of them should hold to himself, transmissible to his own representatives or assigns, an aliquot share of certain of the partnership property, & that their joint holding should not be subject to the ordinary terms applying to partnership property so as to entitle any one of them to a sale without the concurrence of such majority, or to dissolve the partnership, or so as to cause a total dissolution of partnership by the death of any one of them:—*Held:* this was not an agreement by the parties that the representatives of a partner, after his death, should continue partners with the survivors, & contribute to the working of the colliery on their joint account; but was only an agreement that none of the partners or their representatives should be entitled to a sale of more than his own share of the partnership property.—TATAM *v.* WILLIAMS (1844), 3 Hare, 347; 67 E. R. 415.

Annotation:—**Mentd.** Knox *v.* Gye (1872), L. R. 5 H. L. 656.

365. —— —— ——.] — Several persons, who were jointly entitled to several leases of a colliery, worked it in copartnership:—*Held:* on a dissolution, one of the co-owners of the leases could not insist on a partition, though there might be no debts, but the whole must be sold.—WILD *v.* MILNE (1859), 26 Beav. 504; 53 E. R. 993.

Annotation:—**Mentd.** *Re* Grundy, Kershaw (1881), 17 Ch. D. 108.

366. —— —— ——.] — The Vice-Chancellor founds his judgment upon this, that on the dissolution of a partnership all the partnership property is liable to be sold at the instance of any one of the partners. In the present case no one of the so-called partners could have insisted on such a sale (SELWYN, L.J.).—STEWARD *v.* BLAKEWAY (1869), 4 Ch. App. 603, L. JJ.

Annotations:—**Refd.** A.-G. *v.* Hubbuck (1883), 10 Q. B. D. 488; *Re* Hulton, Hulton *v.* Lister (1890), 62 L. T. 200; Davis *v.* Davis, [1894] 1 Ch. 393.

367. —— **What sale ordered—Sale by auction.**] —Several persons, having obtained a mining lease for sixty years, entered into partnership in "the business of iron ore workers" for that period. The business consisted of winning & selling hematite iron in an unmanufactured state. One of them having become lunatic, the ct. dissolved the partnership & directed the whole concern to be sold by an indifferent person, with liberty to the parties to bid.

By partnership articles between A., B., & C., it was agreed, that, upon the sale by a partner of his share in a mining concern, his co-partners should have a right of pre-emption. A. gave to B. notice of his intention to sell, after which B. became a lunatic, & the option not having been exercised for some time, A. sold to C.:—*Held:* B.'s right of pre-emption was lost.

I think that the value of the whole must be ascertained by a sale by auction, & that some

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PART V. SECT. 1, SUB-SECT. 5.

a. Co-owners—Lapse of free miner's certificate—Accrual of share to other co-owner.]—VAN NORMAN CO. *v.* MCNAUGHT (1902), 23 C. L. T. 63; 32 S. C. R. 690.—**CAN.**

b. Partners — Sale of partnership property—Effect of lapse of free miner's certificate on right to share of proceeds of sale.]—ARCHIBALD *v.* MCNERHANIE (B. C.) (1899), 29 S. C. R. 564.—**CAN.**

c. Joint tenants.]—If one of two

indifferent person well acquainted with these matters should be directed to sell the property, & that all parties should have liberty to bid (ROMILLY, M.R.).—ROWLANDS *v.* EVANS, WILLIAMS *v.* ROWLANDS (1861), 30 Beav. 302; 31 L. J. Ch. 265; 5 L. T. 658; 8 Jur. N. S. 88; 10 W. R. 180; 54 E. R. 905.

Annotation :—**Mentd.** Pawsey *v.* Armstrong (1881), 50 L. J. Ch. 683.

368. —— —— Sale by private treaty—Special circumstances.]—LEES *v.* JONES, No. 195, *ante*.

369. —— —— Immediate sale—Partner in embarrassed position.]—The partners in a mine being hopelessly embarrassed, & their position becoming more critical every day, the ct. interfered against a dissentient partner on motion before the hearing, & ordered an immediate sale of the mine & partnership property.—HEATH *v.* FISHER (1868), 38 L. J. Ch. 14; 19 L. T. 805; 17 W. R. 69.

370. —— Right to partition—On dissolution.]—WILD *v.* MILNE, No. 365, *ante*.

—— **Right to assign share.**]—*See* Part IV., Sect. 2, *ante*.

SUB-SECT. 6.—THE CROWN.

See CONSTITUTIONAL LAW, Vol. XI., p. 585, Nos. 858–862, &, *generally*, pp. 581 *et seq.*

SUB-SECT. 7.—DUCHY OF CORNWALL.

Revenues of Duchy of Cornwall—Mining rights in assessionable manors.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 591, Nos. 925–927.

Extinguishment of manorial incidents.]—*See* Law of Property Act, 1922 (c. 16), s. 141.

SUB-SECT. 8.—ECCLESIASTICAL CORPORATIONS.

See, generally, ECCLESIASTICAL LAW, Vol. XIX., pp. 498 *et seq.*

SECT. 2.—POWERS TO GRANT LEASES AND LICENCES.

SUB-SECT. 1.—ABSOLUTE OWNERS UNDER DISABILITY.

A. Infants.

See, generally, INFANTS, Vol. XXVIII., pp. 199 *et seq.*

B. Lunatics.

See, generally, LUNATICS, Vol. XXXIII., p. 136, Nos. 137–139.

SUB-SECT. 2.—LIMITED OWNERS.

A. Express Powers.

(a) In General.

371. Insertion of powers in settlement—Whether "usual powers."]—There is a palpable distinction between inserting in a settlement powers for the management & better enjoyment of the settled estates which are beneficial to all parties, & powers which confer personal privileges on particular parties. . . . But powers of leasing, of sale & exchange, &, where there is any joint property, or there are any mines, or any land put for building purposes, powers of partition, of leasing mines, & of granting building leases, are powers for the general management & better enjoyment of the estates; & such powers are beneficial to all parties (SHADWELL, V.-C.).—HILL *v.* HILL (1834), 6 Sim. 136; 58 E. R. 545.

372. —— Settlement of personal property—Settlement of subsequently acquired freehold property with similar powers.]—In a settlement of personal property, the parties covenanted to settle all future acquired property upon the same trusts, etc., & subject to the same powers, etc., or as near thereto as the nature & tenure of the property would admit of:—*Held:* this authorised the insertion of a power to grant mining leases in the settlement of subsequently acquired freeholds, the prior owner having granted such leases, though the mines had never been effectually worked under them. SCOTT *v.* STEWARD (1859), 27 Beav. 367; 54 E. R. 144.

373. Construction of powers—Powers expressed in general terms—Whether leasing of unopened mines authorised.]—C. granted a lease for twenty-one years to L. & T. of certain mines on his estate. The mines were part of the estate which on the marriage of his son he had settled on that son for life & after the death of such son to secure a jointure on his wife for life with remainder over to the sons of the marriage in tail, with remainder over, with power to the said son to let leases in possession for twenty-one years, reserving the best rent. The son, tenant for life, before the expiration of the first mentioned lease, granted a lease to L. alone of the mines for twenty-six years. L. & T. on the faith of this last mentioned lease incurred expenses. After some years, a bill was filed to set aside the lease as not conforming to the power & as not reserving the most improved rent: *Held:* the first lease must be presumed to have been surrendered; the second lease would bind the remainderman for twenty-one years; & the rent reserved not being a gross sum for all the mines but separate on each, the power was well executed as to the open mines though not of mines unopened.

The intention of the settlement is clear: as this mine was in lease at the time of the settlement, & twelve years then to come of the term, & must be understood to have been settled for the benefit of all claiming under it, the words "manors, lands, & tenements" well carry the mine (LORD DE GREY, C.J.).—CAMPBELL *v.* LEACH, LEACH & THOMAS *v.* CAMPBELL (1775), Amb. 740; 27 E. R. 478.

Annotations :—**Consd.** Clegg *v.* Rowland (1866), L. R. 2 Eq. 160. **Refd.** Daly *v.* Beckett (1857), 24 Beav. 114. **Mentd.** Modwin *v.* Sandham (1789), 3 Swan. 685; *Re* Smyth, *Ex p.* Smyth (1818), 1 Swan. 337; Morgan *v.* Milman (1852), 10 Hare, 279.

374. —— —— —— No leases to be made dispunishable of waste.]—Where a lease of land & the mines thereunder is granted, & there are upon the property open & unopen mines, the lessee cannot work the unopen mines; *a fortiori*, where a power is given to grant leases of land & the mines, & there are open & unopen mines, the power cannot authorise the granting of a lease of the unopen mines.

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joint transferees of an undivided interest in a mineral claim rejects the transfer, no title passes to the other.—COOK *v.* DENHOLM (1901), 8 B. C. R. 39.—**CAN.**

PART V. SECT. 2, SUB-SECT. 2.—A. (a).

373i. *Construction of powers—Powers expressed in general terms—Whether leasing of unopened mines authorised.*]—A power to lease lands, without mentioning mines, does not *per se* authorise a lease of unopened mines.—*Re* REYNOLDS, REYNOLDS *v.* REYNOLDS (1909), 10 S. R. N. S. W. 109.—**AUS.**

Sect. 2.—Powers to grant leases and licences: Subsect. 2, A. (a), (b), (c), (d) & (e), & B. (a).]

A power of leasing hereditaments, etc., in a settlement, contained a clause to the effect that no lessee should be made dispunishable of waste :— *Held:* the clause alone sufficiently imported that the power did not authorise a lease of an unopen mine.—CLEGG *v.* ROWLAND (1866), L. R. 2 Eq. 160; 35 L. J. Ch. 396; 14 L. T. 217; 14 W. R. 530.

Annotations:—**Distd.** *Re* Barker, Wallis *v.* Barker (1903), 88 L. T. 685. **Folld.** *Re* Baskerville, Baskerville *v.* Baskerville, [1910] 2 Ch. 329. **Apld.** *Re* Daniels, Weeks *v.* Daniels (1912), 106 L. T. 792. **Folld.** *Re* Harter, Harter *v.* Harter (1913), 57 Sol. Jo. 444.

375. —— —— ——.]—*Re* DANIELS, WEEKS *v.* DANIELS, No. 408, *post.*

376. —— —— **Whether leasing of wayleaves authorised.**]—Lessees of wayleaves under a lease, granted by a copyhold tenant in fee of the land, entered into a negotiation for a new lease with the tenant for life under the lessor's will, which gave the tenant for life power of leasing. A correspondence ensued, in the course of which the tenant for life offered to grant a new lease at a certain rent, which offer was accepted by the lessees. The original lease contained a clause usual, if not universal, in the leases in the neighbourhood, giving the lessees the option of determining the lease on notice. The correspondence respecting the new lease was silent as to the insertion of such a clause, but one of the earliest letters alluded to the proposed lease as a renewal of the former :—*Held:* (1) the lessees might have understood that such a clause was intended to be inserted in the new lease without putting a perverse or absurd construction on the correspondence, &, whether such understanding was correct or incorrect, or was confined or not confined to the lessees, they ought not to be ordered to accept the lease without such a clause; (2) the tenant for life had not, under the will or otherwise, power to grant such a lease, & the reversioner, though able to fulfil the agreement, was not entitled to demand a specific performance of it.—RICKETTS *v.* BELL (1847), 1 De G. & Sm. 335; 10 L. T. O. S. 105; 11 Jur. 918; 63 E. R. 1093.

377. —— —— **Whether grant for term exceeding limited owner's life authorised.**]—A gift of a power to lease mines & minerals, following the gift of a life estate in the real property of which they form part, though expressed in general terms, does not of necessity imply a power in the tenant for life to make a lease exceeding the term of his own life. A. devised his estates to his daughter for her life, without impeachment of waste, & then to her issue, male & female, & in default of such issue, over. The will gave the daughter, or any person in possession under the limitations in the will, power to work or to make a lease of the mines. She was to receive & pay over to trustees the rents & profits of the mines, which were to be applied to the purchase of other estates, of which she was to receive the rents for her own life. While in possession she made a lease, reciting the will & granting a term of sixty years :—*Held:* the lease was not warranted by the power, for that on the whole will it appeared to be the intention of testator to restrict her to making a lease for her own life only.—VIVIAN *v.* JEGON (1868), L. R. 3 H. L. 285; 37 L. J. C. P. 313; 19 L. T. 218, H. L.; *affg.* S. C. *sub nom.* JEGON *v.* VIVIAN (1867), L. R. 2 C. P. 422, Ex. Ch.; *subsequent proceedings, sub nom.* JEGON *v.* VIVIAN (1871), 6 Ch. App. 742, L. C.

Annotations:—**Mentd.** Ashton *v.* Stock (1877), 6 Ch. D. 719; *Re* Aldam's S. E., [1902] 2 Ch. 46.

378. —— **With all usual & necessary "liberties & privileges"—Grant of liberty to erect cottages authorised.**]—A power was reserved to a tenant for life to lease collieries & coal mines, together with all such powers, authorities, accommodations, liberties & privileges as shall be necessary, or are usually contained in leases of collieries or mines in the county, place or neighbourhood where the collieries or mines are situate, for seeking, winning, working, drawing, taking & carrying away the coals within & under the same, so as the lessees be not made dispunishable for waste by any express words therein contained. A lease of a coal mine in execution of this power gave power to the lessee & his workmen to seek for, win, work, draw, take & carry away the coal, & also to build & set up in & upon the mines all such enginehouses, machine offices, countinghouses, warehouses, workshops, workmen's cottages, stables, huts, bridges, walls, erections, buildings & accommodations as shall be *bonâ fide* necessary or proper for or in the due prosecution & carrying on of the said works & premises, with liberty to dig & use stones, slates, & brick earth, & materials required for the collieries & works or buildings thereby authorised :—*Held:* this lease was not necessarily void as being in excess of the power, but depended on whether the power in the lease was such as was necessary or usually contained in leases of collieries or mines in the neighbourhood.—MORRIS *v.* RHYDYDEFED COLLIERY CO. (1858), 3 H. & N. 885; 28 L. J. Ex. 119: 32 L. T. O. S. 163; 5 Jur. N. S. 339; 7 W. R. 95; 157 E. R. 726, Ex. Ch.

Annotation:—**Refd.** *Re* Reveley's S. E. (1863), 32 L. J. Ch. 812.

379. —— **Powers authorising building leases & leases of mines with or without surface—Letting of building land with exception of minerals authorised.**]—Where under a settlement a tenant for life has power to lease all or any part of the settled lands for building purposes, & also power to lease mines of coal, iron, or other materials, either with or without surface lands, those powers enable him to lease the settled lands for building purposes, reserving the minerals under the lands so leased.—*Re* RUTLAND'S (DUKE) SETTLED ESTATES, RUTLAND (DUKE) *v.* BRISTOL (MARQUIS), [1900] 2 Ch. 206; 69 L. J. Ch. 603; 44 Sol. Jo. 484.

(b) Exercise of Powers.

380. Validity—Grant of reversionary lease for ninety-nine years—By way of mortgage.]—(1) In 1843 M., the tenant for life, by a deed reciting the leasing power, in consideration of £6,000 paid to him by C., demised the mines including a mining lease made by testator to E. in 1829, which would expire in 1848, to C. for ninety-nine years at a peppercorn rent, subject to redemption on payment of £6,000 & interest. The deed contained an appointment of a receiver of the rents & royalties payable by the present & future tenants, & did not oblige C. to work the mines; but the tenant for life covenanted to grant, or concur in granting such further leases as C. should require :—*Held:* this deed was a valid exercise of the power of leasing mines, & created a good legal mtge. for an absolute term of ninety-nine years.

(2) The lease of 1829 contained covenants by the lessee to leave sufficient pillars of coal to support the roof, & these covenants were embodied by reference in the mtge. of 1843. In May, 1850, M. granted to J. as a trustee for S., P. & B. an ordinary mining lease for forty years, subject to a dead rent & royalties, which contained a covenant by the lessee not to remove pillars without the consent of M. or his assigns, or other the persons

entitled to the colliery. M. after this conveyed absolutely all his interest in the property to the trustees of his eldest son, who had become entitled in fee in remainder. Afterwards J., with the concurrence of the parties claiming under S., P. & B., granted an underlease to L. & S. authorising them to remove some of the pillars, which they proceeded to do, alleging that J. & the persons claiming under S., P. & B. were the persons entitled to consent:—*Held:* during the continuance of the lease of May, 1850, the pillars could not be worked without the consent of the assigns of M., who became such after the execution of that deed, & such working must be restrained at the suit of the son's trustees.—MOSTYN *v.* LANCASTER, TAYLOR *v.* MOSTYN (1883), 23 Ch. D. 583; 52 L. J. Ch. 848; 48 L. T. 715; 31 W. R. 686, C. A.

381. —— After alienation of life estate.]—When a person has under several instruments a power of appointment over the same subject-matter, & makes an appointment in exercise of "every power" enabling him in that behalf, the power first in point of time is exercised; & if effectually exercised there remains no subject-matter on which the other powers can operate. The ct. may also consider which power is most beneficial to the donee of the power.

By a settlement made in 1876 estates were limited, in the events which happened, to A. for life, remainder to B. for life, with remainders over. The settlement contained a power for every person "as & when he should be entitled to the possession or the receipt of the rents & profits" of the settled estates, to grant mining leases reserving the best rents or royalties "by the acre, ton, or otherwise" without taking any fine or premium. During A.'s life B. absolutly alienod his reversionary life interest for value. A. died in 1882. Between the coming into operation of Settled Land Act, 1882 (c. 38), & of Settled Land Act, 1890 (c. 69), & after the later Act, B. granted mining leases reserving rents varying with the selling price of the minerals gotten, which was in accordance with the custom of the county. All the leases were granted in exercise of "every power" enabling B. in that behalf. Questions having arisen as to the validity of the leases, & whether they were granted under the power in the settlement or under the power in Settled Land Acts:—*Held:* (1) it was competent for B. to exercise the power of leasing in the settlement notwithstanding that he has alienod his life estate; (2) the reservation of rents varying with the selling price of the minerals was within the power & valid; (3) the leases were granted under the power in the settlement, which was first in point of date, & not under the power in Settled Land Acts; (4) assuming the leases were granted under Settled Land Acts, the "conflict" referred to in Settled Land Act, 1882 (c. 38), s. 56, meant a conflict between provisions connected with the execution of the power, *e.g.* the consent of a third party, & not with the result of subject-matter of the power.—LONSDALE (EARL) *v.* LOWTHER, [1900] 2 Ch. 687; 83 L. T. 312; *sub nom.* LONSDALE (EARL) *v.* CRAWFURD, 69 L. J. Ch. 686; 16 T. L. R. 509; 44 Sol. Jo. 626.

Annotation:—As to (4) **Reid.** *Re* Osborne & Bright, [1902] 1 Ch. 335.

382. Reservation of "best rent"—Rent in kind.]—CAMPBELL *v.* LEACH, LEACH & THOMAS *v.* CAMPBELL, No. 373, *ante*.

383. —— Rent varying with local selling price of minerals.]—LONSDALE (EARL) *v.* LOWTHER, No. 381, *ante*.

Compare Sub-sect. 2, B. (*b*), *post*.

Unauthorised leases by limited owners.]—*See* Sub-sect. 2, A. (*c*), *post*.

(c) Incidents of Powers.

384. "Casual profit"—Dead rent on unexpired term of surrendered lease—Lease granted apart from Settled Land Acts.]—In the absence of *mala fides*, money paid to a legal life tenant as the consideration for accepting the surrender of a lease [of mines], granted without recourse to the powers of the Settled Land Acts, belongs to him as a casual profit.—*Re* HUNLOKE'S SETTLED ESTATES, FITZROY *v.* HUNLOKE, [1902] 1 Ch. 941; 71 L. J. Ch. 530; 86 L. T. 829.

Annotations:—**Distd.** *Re* Rodes, Sanders *v.* Hobson, [1909] 1 Ch. 815. **Apld.** *Re* Penrhyn's Settlmt., Penrhyn *v.* Pennant, [1922] 1 Ch. 500.

385. —— —— Lease granted under Settled Land Acts.]—Where a legal tenant for life grants a lease [of mines] under the power conferred upon him by Settled Land Act, 1882 (c. 38), s. 6, money paid as the consideration for accepting the surrender of the lease belongs to him as a casual profit.—*Re* PENRHYN'S SETTLEMENT, PENRHYN (LORD) *v.* PENNANT, [1922] 1 Ch. 500; 91 L. J. Ch. 490; 126 L. T. 789; 66 Sol. Jo. 315.

Compare No. 393, *post*.

(d) Under Which of Several Powers Leases take Effect.

See, generally, POWERS.

386. Power first in point of time—Though interests of limited owner may be considered.]—LONSDALE (EARL) *v.* LOWTHER, No. 381, *ante*.

(e) Effect of Unauthorised Grant of Lease.

387. Liability of tenant for life—Specific performance of part able to be performed—& damages as to remainder.]—CLEATON *v.* GOWER (1674), Cas. *temp.* Finch, 164; 23 E. R. 90.

388. —— Whether entitled to restrain lessee's working—By joinder with remainderman.]—Tenant for life having made a lease of coal-mines amounting to a forfeiture, cannot join the remainderman in a bill for an injunction.—WENTWORTH *v.* TURNER (1795), 3 Ves. 3; 30 E. R. 862, L. C.

B. Powers under Settled Land Acts.

(a) In General.

See, now, Settled Land Act, 1925 (c. 18), ss. 41, 45-47, 50, 51 (4), &, *generally,* SETTLEMENTS.

389. Incidents to power of leasing—Grant of right to let down surface.]—A tenant for life of settled land has power under Settled Land Act, 1882 (c. 38), s. 6, to grant a lease of a right to let down the surface of the land by mining operations.

By his marriage settlement S. conveyed land of which he was owner in fee to uses under which he was now tenant for life. The deed contained an exception from the conveyance of all mines under the land in question with power to work the same; any person exercising those reserved rights was to make reasonable compensation to the trustees of the settlement for all damages caused to the inheritance, & also to the persons for the time being entitled to the surface of the land for damage to things upon the surface:—*Held:* S. had no power under the exception to authorise lessees to work the mines so as to let down the surface of the settled land; but as a tenant for life he could under Settled Land Act, 1882 (c. 38), s. 6, grant them a lease of a right to do so.—SITWELL *v.* LONDESBOROUGH (EARL), [1905] 1 Ch. 460; 53 W. R.

Sect. 2.—Powers to grant leases and licences: Subsect. 2, B. (a), (b) & (c).]

445 ; *sub nom. Re* SITWELL, SITWELL *v.* LONDESBOROUGH (EARL), 74 L. J. Ch. 254.

Annotation :—**Mentd.** Thomson *v.* St. Catherine's College, Cambridge & Mappin's Masbro Old Brewery, St. Catherine's College, Cambridge *v.* Rosse (No. 2) (1918), 118 L. T. 758.

390. —— Grant of wayleave—To continue after workings ceased.]—*Re* ALDAM'S SETTLED ESTATE, No. 397, *post.*

See, also, No. 422, *post.*

391. —— Whether minerals may be reserved in lease of surface.]—Settled Land Act, 1882 (c. 38), does not enable a tenant for life to lease the surface, reserving the minerals.—*Re* NEWELL & NEVILL'S CONTRACT, [1900] 1 Ch. 90 ; 69 L. J. Ch. 94 ; 81 L. T. 581 ; 48 W. R. 181 ; 44 Sol. Jo. 88.

Annotation :—**Overd.** *Re* Gladstone, Gladstone *v.* Gladstone, [1900] 2 Ch. 101.

392. —— ——.]—Under the power to lease settled land conferred on a tenant for life by Settled Land Act, 1882 (c. 38), s. 6, a lease may be made of the surface of land reserving the mines & minerals beneath it.

As to *Buckley* v. *Howell*, No. 333, *ante*, in which ROMILLY, M.R., held that a power of sale & exchange given by a will to trustees did not authorise them to sell land with a reservation of the minerals . . . the decision applied to a sale, not to a lease (LINDLEY, M.R.).—*Re* GLADSTONE, GLADSTONE *v.* GLADSTONE, [1900] 2 Ch. 101 ; 69 L. J. Ch. 455 ; 82 L. T. 515 ; 48 W. R. 531 ; 16 T. L. R. 361 ; 44 Sol. Jo. 448, C. A.

Annotations :—**Apld.** *Re* Rutland's S. E., Rutland *v.* Bristol, [1900] 2 Ch. 206. **Consd.** *Re* Aldam's S. E., [1902] 2 Ch. 46. **Refd.** *Re* Chaplin & Staffordshire Potteries Waterworks Co.'s Contract, [1922] 2 Ch. 824. **Mentd.** Brown *v.* Peto, [1900] 2 Q. B. 653 ; *Re* Handman & Wilcox (1902), 71 L. J. Ch. 263.

—— ——.]—*See, now,* Settled Land Act, 1925 (c. 18), s. 50.

393. —— "Casual profit"—Whether tenant for life entitled to money paid on surrender of lease.]—Money paid to an equitable tenant for life by a lessee as consideration for accepting a surrender of a lease, which has been granted by the tenant for life under the powers of Settled Land Acts, does not belong to him as a casual profit, but must be paid by instalments to him & other persons entitled to the rent.—*Re* RODES, SANDERS *v.* HOBSON, [1909] 1 Ch. 815 ; 78 L. J. Ch. 434 ; 100 L. T. 959.

Annotations :—**Refd.** *Re* Wix, Hardy *v.* Lemon, [1916] 1 Ch. 279. **Mentd.** *Re* Lacon's Settlmt., Lacon *v.* Lacon, [1911] 2 Ch. 17.

394. —— —— Damages for breach of covenant.]—C., who died in 1891, by his will appointed plffs. exors. & trustees, & devised his residuary real estate upon trust to pay the net rent & profits thereof, including the produce of mines & quarries, to or permit the same to be received by deft. T., & after the death of deft. upon the trusts in the will mentioned. Testator gave the trustees powers of managing real estate & of determining what part of the produce of mines & quarries should be applied as capital or income.

By lease dated Feb. 7, 1898, which lease was determined on June 12, 1912, deft. as tenant for life under Settled Land Act, 1882 (c. 38), demised to lessees a quarry, part of the real estate. The lessees covenanted that when part of the quarry was exhausted they would fill it up fit for agricultural purposes "under a penalty to be recovered as rent in arrear or as liquidated damages by the lessor of £150 an acre." The lessees left 2 acres, 3 roods, 5 poles uncovered in breach of their covenant, & arranged to pay at the rate of £150 per acre in respect of this land a sum amounting to £416 6*s.* 10*d.*, which sum had been paid to deft. On a summons by the trustees asking whether deft. was entitled to retain all or any part of such sum or whether it should be held by them as capital :—*Held :* deft. was entitled to retain such sum.—*Re* DEALTRY, DAVENPORT *v.* DEALTRY (1913), 108 L. T. 832.

See, also, No. 384, *ante.*

395. Under Settled Estate Acts—Power of court to sanction—Particular lease.]—On a petition by an assignee of a tenant for life of landed estate, the ct., while empowering petitioner to grant a particular mining lease, refused him a general power of leasing mines without the consent of all parties interested in the property.—*Re* HUTCHINSON'S TRUSTS (1866), 14 L. T. 129 ; 12 Jur. N. S. 244 ; 14 W. R. 473.

396. —— ——.]—*Re* DUDLEY'S SETTLED ESTATES (1882), 26 Sol. Jo. 359.

Annotation :—**Refd.** A.-G. *v.* Salt Union, [1917] 2 K. B. 488.

——.]—*See, now,* Settled Land Act, 1925 (c. 18), s. 119 (2).

(b) Rent.

See, now, Settled Land Act, 1925 (c. 18), ss. 42, 45.

397. General rule—Best rent must be reserved.]—(1) A tenant for life in granting a mining lease under the powers of Settled Land Act, 1882 (c. 38), may (*a*) reserve no minimum rent for the first year & then a minimum rent on an ascending scale from the second to the fifth years ; (*b*) may reserve a nominal rent only during the residue of the term after all the saleable coal has been worked out under the provisions of the lease ; (*c*) may include in the lease a wayleave for foreign coal without reserving any separate rent, though the wayleave is to continue during the residue of the term after all the saleable coal has been worked out & after the cesser of the minimum rent.

(2) A "fixed or minimum rent" under Settled Land Act, 1882 (c. 38), s. 9 (1) (ii), need not be an uniform rent.

The requirements of the Settled Land Acts are that the best rent should be reserved which can be reasonably obtained, regard being had to all the circumstances of the case, & that due regard should be had to the interests of all parties entitled under the settlement. Whether any particular lease satisfies these requirements must depend on the evidence, which should not be couched in general language, but should set out the material circumstances & state the grounds for the conclusion arrived at.

The object of a fixed or minimum rent is twofold ; to provide a specified income on which the tenant for life may rely ; & as a security that the mine will be worked & worked with reasonable rapidity (STIRLING, L.J.).—*Re* ALDAM'S SETTLED ESTATE, [1902] 2 Ch. 46 ; 71 L. J. Ch. 552 ; 86 L. T. 510 ; 50 W. R. 500 ; 18 T. L. R. 579 ; 46 Sol. Jo. 482, C. A.

398. Rent reserved need not be uniform.]—*Re* LOWTHER'S ESTATES (1891), MacSwinney, Law of Mines, Quarries & Minerals, 4th ed. p. 189.

Annotation :—**Consd.** *Re* Aldam's Settlmt. (1901), 86 L. T. 76.

399. —— "Rent in kind."] — LONSDALE (EARL) *v.* LOWTHER, No. 381, *ante.*

400. ——.]—*Re* ALDAM'S SETTLED ESTATE, No. 397, *ante.*

401. Whether statutory requirements fulfilled—Question of fact.]—*Re* ALDAM'S SETTLED ESTATE, No. 397, *ante.*

Compare Sect. 2, sub-sect. 2, A. (*b*), *ante.*

(c) Capitalisation of Part of Rent.

See Settled Land Act, 1925 (c. 18), ss. 47, 119 (2).

402. When capitalisation of rent unnecessary —"Contrary intention" in settlement.]—Upon a summons under the Settled Land Act, 1882 (c. 38), to obtain the opinion & direction of the ct. as to the effect of the Act upon certain clauses in a settlement where an infant tenant in tail was entitled to possession:—*Held:* the rents derived from mining leases were to be applied by the trustees in manner directed by the settlement as coming within the term "contrary intention" expressed in sect. 11 of the Act.—*Re* NEWCASTLE'S (DUKE) ESTATES (1883) 24 Ch. D. 129; 52 L. J. Ch. 645; 48 L. T. 779; 31 W. R. 782.

Annotations:—**Folld.** *Re* Rayer, Rayer *v.* Rayer, [1913] 2 Ch. 210. **Refd.** *Re* Hanbury's S. E. (1913), 57 Sol. Jo. 646. **Mentd.** Constable *v.* Constable (1886), 32 Ch. D. 233.

403. —— ——.]—With reference to the mining leases, there is, I think, a contrary intention shown in the settlement; therefore whatever is derived under these leases, will all be treated as income (CHITTY, J.).—*Re* BAGOT'S SETTLEMENT, BAGOT *v.* KITTOE, as reported in [1894] 1 Ch. 177; 63 L. J. Ch. 515.

Annotations:—**Refd.** *Re* Hanbury's S. E. (1913), 57 Sol. Jo. 646; *Re* Rayer, Rayer *v.* Rayer, [1913] 2 Ch. 210. **Mentd.** *Re* Newen, Newen *v.* Barnes, [1894] 2 Ch. 297; *Re* Hunt, Pollard *v.* Geake (1900), 44 Sol. Jo. 314; *Re* Money Kyrle, Money Kyrle *v.* Money Kyrle (1900), 69 L. J. Ch. 780; *Re* Richardson, Richardson *v.* Richardson, [1900] 2 Ch. 778; *Re* Berchtold, Berchtold *v.* Capron, [1923] 1 Ch. 192; *Re* Stamford & Warrington, Payne *v.* Grey (1925), 94 L. J. Ch. 294.

404. —— ——.]—(1) Upon an application by the widow, who had married again, to ascertain whether she was entitled to the whole of the mining rents & royalties in respect of mining leases granted under the powers of the Settled Land Acts:—*Held:* there was in the will a sufficient expression of a "contrary intention" to exclude the operation of Settled Land Act, 1882 (c. 38), s. 11, & there was no obligation upon appct. to set aside as capital any part of the rents, royalties & profits, under mining leases, pursuant to that sect.

(2) The quality of appct.'s estate could not, of itself, be treated as amounting to the expression of a "contrary intention" in the settlement.—*Re* HANBURY'S SETTLED ESTATES, [1913] 2 Ch. 357; 82 L. J. Ch. 428; 109 L. T. 358; 29 T. L. R. 621; 57 Sol. Jo. 646.

405. —— —— **Lease granted under statute.**]—Under Settled Land Act, 1882 (c. 38), s. 11, a portion of the rents of a mining lease are to be set aside as capital money unless a contrary intention appears in the settlement. If a contrary intention appears in the settlement sect. 11 is excluded, although the tenant for life grants the mining lease under the Act & not under the power contained in the settlement.—*Re* RAYER, RAYER *v.* RAYER, [1913] 2 Ch. 210; 82 L. J. Ch. 461; 109 L. T. 304; 57 Sol. Jo. 663.

406. —— **Lease in pursuance of contract entered into by prior absolute owner.**]—(1) The owner of an estate contracted to lease coal to be worked by instroke from adjoining mines in the occupation of the intended lessees. The owner died before his coal was rented or the leases granted:—*Held:* tenant for life, though unpeachable for waste, was entitled to the rent & royalties.

(2) Settled Land Act, 1882 (c. 38), s. 11, does not apply to a mining lease granted by a tenant for life, for giving effect to a contract entered into by a predecessor who was absolute owner.—*Re* KEMEYS-TYNTE, KEMEYS-TYNTE *v.* KEMEYS-TYNTE, [1892] 2 Ch. 211; 61 L. J. Ch. 377; 66 L. T. 752; 40 W. R. 423; 36 Sol. Jo. 380.

Annotation:—*As to* (1) **Refd.** *Re* Hall, Hall *v.* Hall, [1916] 2 Ch. 488.

407. —— **Lease granted under power in will—Though power also available under Settled Land Acts.**]—LONSDALE (EARL) *v.* LOWTHER, No. 381, *ante*.

408. Evidence of "contrary intention"—Direction in will to pay rents of unopened mines to tenant for life.]—(1) A power to lease "lands" does not enable the donee to lease unopened mines.

(2) A lease of unopened mines by trustees of a will, & *cestuis que trust* which is not within a power in the will, & which could not be validly made out of the estates, of the *cestuis que trust*, but which could be made under the Settled Land Acts, will be treated as made under those Acts, & three-fourths of the rent & royalties must be set aside as capital.

(3) A direction in a will to pay the rents of unopened mines to a tenant for life is not an expression of a "contrary intention" within Settled Land Act, 1882 (c. 38), s. 11.—*Re* DANIELS, WEEKS *v.* DANIELS, [1912] 2 Ch. 90; 81 L. J. Ch. 509; 106 L. T. 792; 56 Sol. Jo. 519.

Annotations:—*As to* (1) **Folld.** *Re* Harter, Harter *v.* Harter (1913), 57 Sol. Jo. 444. *As to* (3) **Refd.** *Re* Rayer, Rayer *v.* Rayer, [1913] 2 Ch. 210.

409. —— **Gift by will of rent & profits.**]—*Re* DANIELS, WEEKS *v.* DANIELS, No. 408, *ante*.

410. —— **Quality of estate—Must be read with form of bequest.**]—*Re* HANBURY'S SETTLED ESTATES, No. 404, *ante*.

411. "Impeachable for waste in respect of minerals"—Person with life interest in land subject to trust for sale.]—A person who is entitled for his life to the income of the money to arise from the sale of settled land & to the rents & profits of the settled land until sale, although to be deemed a tenant for life under Settled Land Act, 1882 (c. 38), s. 63, is not, properly speaking, "impeachable for waste in respect of minerals" within sect. 11. Nevertheless, where a lease of unopened minerals is made by such a person under the Act, three-fourths of the rents & royalties should be set aside as capital moneys arising under the Act, & the residue only should go as rents & profits.—*Re* RIDGE, HELLARD *v.* MOODY (1885), 31 Ch. D. 504; 55 L. J. Ch. 265; 34 W. R. 159; *sub nom. Re* RIDGE, HILLARD *v.* MOODY, 54 L. T. 549, C. A.

Annotations:—**Consd.** *Re* Hodgkinson, Hodgkinson *v.* Hodgkinson (1924), 132 L. T. 526. **Refd.** *Re* Chaytor, [1900] 2 Ch. 801; *Re* Hall, Hall *v.* Hall, [1916] 2 Ch. 488.

412. —— ——.]—Testator by his will in 1890 devised the residue of his real & personal estate to trustees upon trust for sale & conversion with a direction to invest the proceeds & to pay the annual income to his widow & after her death as to both capital & income in trust for all his children in equal shares & he declared that the trustees of his will should have power to postpone the sale & conversion but the unsold real estate & the outstanding personal estate should be subject to the trusts thereinbefore contained of the rents & yearly produce thereof & be deemed annual income for the purposes of the trusts & the unsold real estate should be deemed to be converted as from the time of his death & be transmissible as personal estate accordingly. Testator died in 1892 leaving his widow the sole extrix. & trustee of his will & six children surviving him. Shortly after his death his widow as such extrix. & trustee agreed to grant a lease of unopened mines under certain parts of testator's estate to E. & C., two of her

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sons, & in 1905 a lease was executed by E. & C. who worked the mines & minerals & paid the rents & royalties to the widow, but the lease was never executed by her. The sanction of the ct. to the lease was not obtained under Settled Land Act, 1884 (c. 18), s. 7. C. died leaving deft. H. his legal personal representative & the widow died in 1923. Deft. H., as the legal personal representative of C., who took no benefit under the will of the widow, now claimed on this summons that the estate of the widow was accountable to the estate of her late husband, testator, for three-fourths of the rents & royalties she had received under the lease during her lifetime :—*Held :* the widow was estopped from denying the validity of the lease, having taken the benefit of the lease, therefore Settled Land Act, 1882 (c. 38), s. 11, became operative & she, the equitable tenant for life, not being unimpeachable for waste under the terms of the will was only entitled to receive one-quarter of the rents & royalties under the lease & ought to have added the remaining three-quarters to capital. Consequently her estate was liable to account to her husband's estate for the three-quarters received by her during her lifetime, the Statutes of Limitations not running in her favour, she being the sole trustee of the will & having herself received the rents & royalties.—*Re* HODGKINSON, HODGKINSON *v.* HODGKINSON (1924), 132 L. T. 526.

413. —— Absence of express provision that tenant for life unimpeachable.]—*Re* RIDGE, HELLARD *v.* MOODY, No. 411, *ante*.

414. ————.]—A tenant for life under Settled Land Act, 1882 (c. 38), of mineral land, though not declared unimpeachable for waste by the settlement, is not as regards open mines "impeachable for waste in respect of minerals" within sect. 11, & may therefore grant a lease of such mines upon the terms of setting aside one-fourth only of the rent as capital money arising under the Act.

The evidence shows that both the seams have been worked for coal, & had been worked by testator, but that was some time ago. It is said that in consequence of the lapse of time they are no longer open, but must be treated as abandoned mines. I do not agree with that view. It seems to me there is no evidence of abandonment, & those seams ought to be treated as open mines. As regards the Victoria seam, which is 14 fathoms below the Brockwell seam, which is next above it, it is admitted that it has never been worked, & it does not seem to me that within the authorities it can be treated as an open mine (STIRLING, J.).—*Re* CHAYTOR, [1900] 2 Ch. 804 ; 69 L. J. Ch. 837 ; 49 W. R. 125 ; 16 T. L. R. 546 ; 44 Sol. Jo. 674.

Annotation :—**Refd.** *Re* Hall, Hall *v.* Hall, [1916] 2 Ch. 488.

415. Capitalised rent passes with surface.]—Testatrix, having an absolute power of appointment, gave the surface of land to her nephew, & the minerals under it to others. Under Settled Estates Act, 1856 (c. 120), a lease of the minerals had previously been made, & a part of the rents received had been set aside, & was in the hands of trustees to be invested under the Act in the purchase of other land :—*Held :* the rents so set aside were lands in the hands of the trustees & passed with the surface.—*Re* SCARTH (1879), 10 Ch. D. 499 ; 40 L. T. 184 ; 27 W. R. 499.

416. Leases subject to subsequent settlement.]—Settled Land Act, 1882 (c. 38), s. 11, governs the distribution, as between the limited owner & the remaindermen under a settlement of the rents & royalties derived from mining leases granted under the powers of the Act by the persons having the limited interest under such settlement, but it does not affect the rights of the limited owner & remaindermen under a subsequent settlement to which mines already demised have become subject, & in such a case those rights are governed either by the provisions of the settlement or by the law relating to open mines.

Pltf. was entitled under his marriage settlement, made in 1886, during his life, to the rents, until sale, of one undivided third part, thereby settled, of certain mines devised & settled by the will of his father. In 1895 & 1902 he joined with the tenant for life of one other third part & the owner in fee of the remaining third part in the granting leases of the mines. Subsequently one-half of one of the other third shares devolved upon pltf. subject to the leases, & being caught by the terms of the conveyance in his marriage settlement became subject to it :—*Held :* pltf. was entitled, during his life or until sale, to receive the whole of the rents & profits derived from the one-sixth share in question during the continuance of the leases.—*Re* HALL, HALL *v.* HALL, [1916] 2 Ch. 488 ; 86 L. J. Ch. 59 ; 115 L. T. 481.

417. Leases invalid under Settled Land Act.]—A tenant for life, impeachable for waste, under a settlement which included real estate & unopened mines severed from the surface, which was not included in the settlement, granted a take-note or licence for three years to search for & work gold & other ores in the mines subject to the rights of the Crown, if any. The tenant for life subsequently acquired a lease from the Crown for twenty-one years of the gold & silver ores in the mines together with a release of the Crown's statutory right of pre-emption over the base ores. He then granted further take-notes & leases of the mines for short terms, all of which expired during his life, & received rents & premiums. None of the take-notes or leases were valid under Settled Land Acts, under which alone he had power to deal with the mines. On the expiration of the Crown lease he obtained a renewal for a further period of twenty-one years, & granted valid separate sub-leases of the gold & silver ores & of the base materials for the residue of the Crown term less one day. On the death of the tenant for life in 1916 the tenant in tail in remainder, who had barred the entail, brought an action against the exors. of the tenant for life claiming the amount of the premiums & three-fourths of the rents received by him, & a declaration that pltf. was entitled to the subsisting Crown lease subject to & with benefit of the sub-leases. SARGANT, J., held that the take-notes & leases for short terms being invalid under the Settled Land Acts the rents & premiums received thereunder could not be recovered by pltf., & the subsisting Crown lease & sub-leases did not belong to the estate. The Ct. of Appeal affirmed the first part of the decision of SARGANT, J., but reversed the second, on the ground that the tenant for life had used his position to obtain the Crown lease, & that so far as the release of the right of pre-emption over the base ores was concerned that lease extended to something which was included in the settlement. He must therefore be taken to have acquired the lease as trustee for the beneficiaries, & pltf. was entitled to the unexpired portion of the lease subject to & with benefit of the sub-leases.—LLOYD-JONES *v.* CLARK-LLOYD, [1919] 1 Ch. 424 ; 88 L. J. Ch. 278 ; 120 L. T. 578 ; 35 T. L. R. 273 ; 63 Sol. Jo. 317, C. A.

SUB-SECT. 3.—FIDUCIARY OWNERS.

See Settled Land Act, 1925 (c. 18), s. 112; &, *generally*, TRUSTS & TRUSTEES.

418. Whether trustees may obtain leasing powers from court—Apart from statute—Trustees for infants—Leases beneficial to infants.]—The ct. cannot, independent of the statute, authorise trustees for infants to grant a mining lease, although the legal estate is vested in such trustees, & such leases would be beneficial to the infants.—WOOD *v.* PATTESON (1847), 10 Beav. 541; 50 E. R. 690.

Annotations:—**Refd.** *Re* Shaw's Trusts (1871), L. R. 12 Eq. 124; *Re* Howarth (1873), 8 Ch. App. 416, n.

419. —— Under statute—What is a settled estate.]—An estate devised to trustees upon trust to sell absolutely, & to invest the proceeds of the sale in real or personal securities, & to pay the income to A. for life, & after her death to her children, followed by a declaration giving the trustees a full discretion as to the time & mode of sale, & a direction that, until sale, the income of the unsold estate should be applied as would have been that of the sale proceeds, is such a "settled estate" that the ct. will empower the trustees to grant leases of it for mining purposes.—*Re* GREENE'S SETTLED ESTATES (1864), 11 L. T. 301; 10 Jur. N. S. 1098.

420. —— —— Form of lease not settled by court.]—The ct. will grant an order under Settled Estates Act, 1856 (c. 120), s. 10, & 27 & 28 Vict. c. 45, s. 2, vesting in trustees powers of granting mining leases, without inserting in such order a clause requiring a form of lease to be settled in chambers.—*Re* DORNING'S SETTLED ESTATES (1865), 13 L. T. 494; 14 W. R. 125.

421. —— Lease of contiguous land necessary for effective working of minerals.]—The ct., in making an order for a lease of mines under Settled Estates Act, 1856 (c. 120), will, in a proper case, authorise a lease, not only of the mines themselves, but also of so much land as may appear necessary for the convenient & effective working of the minerals.—*Re* REVELEY'S SETTLED ESTATES (1863), 32 L. J. Ch. 812; 8 L. T. 450; 11 W. R. 744.

422. —— Lease of wayleaves.]—*Re* WALLACE'S (LORD) SETTLED ESTATES, [1869] W. N. 66.

Compare No. 397, *ante*.

See, now, Settled Land Act, 1925 (c. 18), s. 119 (2).

423. Whether right to grant leases implied—Trust for sale.]—Leases may be granted for the sale of an estate directed by a will to be sold.—JERVOISE *v.* CLARKE (1821), Madd & G. 96; 56 E. R. 1028.

424. Whether right to grant tenancy from year to year implied—Trust for sale—& direction for estate to be kept in "good & tenantable order & repair."]—*Re* NORTH, GARTON *v.* CUMBERLAND, No. 266, *ante*.

425. Whether right to grant leases of unopened mines implied—General power of leasing—Over land & mines.]—An estate, with the mines & minerals, was settled, & power was given to the trustees to demise the hereditaments & the coal & minerals, etc., but so as the lessees should not be dispunishable for waste:—*Held:* (1) the last clause was repugnant, & the trustees might demise mines, both opened & unopened at the date of the settlement; (2) the royalty reserved by the lease was in the nature of rent, & was payable to the tenant for life, & did not form *corpus*.

All the authorities establish this: that the produce of the mines is made part of the annual profits of the estate, & that whether in royalties, or in whatever other way it is produced, it forms part of those profits, & that it is not to be treated like timber cut, where the produce of it is invested, & the interest only is paid to the tenant for life. I am of the opinion that the produce of the mines belongs to the tenant for life (ROMILLY, M.R.).—DALY *v.* BECKETT (1857), 24 Beav. 114; 3 Jur. N. S. 751; 5 W. R. 514; 53 E. R. 301.

Annotations:—*As to* (1) **Consd.** CLEGG *v.* ROWLAND (1866), 35 L. J. Ch. 396; *Re* Kemeys-Tynte, Kemeys-Tynte *v.* Kemeys-Tynte, [1892] 2 Ch. 211. **Dbtd.** *Re* Baskerville, Baskerville *v.* Baskerville, [1910] 2 Ch. 329.

426. —— —— —.]—CLEGG *v.* ROWLAND, No. 374, *ante*.

427. —— Over land.]—Testator settled his real estate, making no mention of mines or minerals, & gave his trustees a general & unrestricted power of leasing any portion of his estate, but no special power of granting mining leases. After testator's death seams of coal were discovered under a portion of his estate. There had never been any open workings of mines on any part of his estate:—*Held:* the trustees might under the power demise the unopened mines.—*Re* BARKER, WALLIS *v.* BARKER (1903), 88 L. T. 685.

Annotations: **Distd.** *Re* Harter, Harter *v.* Harter (1913), 57 Sol. Jo. 444. **Refd.** *Re* Daniels, Weeks *v.* Daniels, [1912] 2 Ch. 90.

428. —— —— ——.]—Testator gave power to the trustees of his will to let from year to year, or for a term of years, his real or leasehold property at such rent & subject to such conditions as they should think fit, & to accept the surrender of leases & tenancies, to expend money on improvements, & generally to manage the property according to their absolute discretion. There were opened & unopened mines on the estate:—*Held:* the trustees had no power to grant leases of unopened mines.—*Re* HARTER, HARTER *v.* HARTER (1913), 57 Sol. Jo. 444.

429. —— "Building or other leases."]—Testatrix by her will devised to her trustees her undivided share in certain lands upon trust for sale, conversion, & investment & gave them power to postpone such sale & conversion, & declared that whilst any part thereof should remain unsold it should be lawful for her trustees to let & manage & to join with any other person or persons in letting & managing all such part thereof as for the time being should remain unsold, & also gave them power to grant any building or other leases for such term at such rents & upon such conditions as they might think fit. There were mines of coal & other minerals existing under the lands, some of the mines being open & others unopened:—*Held:* the trustees had power to join with the persons entitled to the other undivided shares in the lands in granting mining leases, but the power did not extend to unopened mines.—*Re* BASKERVILLE, BASKERVILLE *v.* BASKERVILLE, [1910] 2 Ch. 329; 79 L. J. Ch. 687; 103 L. T. 90; 26 T. L. R. 584.

Annotations:—**Folld.** *Re* Daniels, Weeks *v.* Daniels, [1912] 2 Ch. 90; *Re* Harter, Harter *v.* Harter (1913), 57 Sol. Jo. 444.

430. Right to join in grant of lease of opened mines—Trustees of undivided share in mines.]—*Re* BASKERVILLE, BASKERVILLE *v.* BASKERVILLE, No. 429, *ante*.

PART V. SECT. 2, SUB-SECT. 3.

d. *Whether right to grant leases implied—Trust with power to sell.*]—NAISMITH'S TRUSTEES *v.* NAISMITH, [1909] S. C. 1380; 46 Sc. L. R. 844; [1909] 2 S. L. T. 127.—**SCOT.**

Sect. 2.—Powers to grant leases and licences: Subsects. 3, 4, 5 & 6. Part V. Sect. 1: Sub-sect 1.]

431. Exercise of leasing powers—During life of tenant for life impeachable for waste.]—Testator, after giving certain legacies & annuities, which, with his debts, etc., were charged upon his real estate, in case the personal estate should be insufficient, devised the residue of his real estate to A. & B. in trust for the heirs of his body issuing & in default of such issue, to the use of the trustees, in trust to pay the rents, issues, & profits to C. for life, but impeachable of waste for cutting down any timber during the life of C. or for pulling down any house or building without erecting a new one of equal value in its stead, or "for digging or getting any part of any coal or cannel opened, or to be opened, otherwise than under & by virtue of & agreeable to the power thereinafter given for that purpose"; remainder to D. for life, impeachable of waste for the same matters as those in respect of which C. was impeachable, except for cutting timber; remainder to the trustees, to support contingent remainders; remainder to E. in tail male; with several other remainders over, & the ultimate remainder (reversion) to the right heirs of testator. Then followed a power to "the person or persons (except C.) who by virtue of the limitations thereinbefore expressed should, for the time being, be seised of, or entitled to, the actual freehold of the hereditaments thereby devised in strict settlement, or to the annual rents, issues, & profits thereof," to grant leases, in possession, of the mines, at : mine-rent; & a similar power to grant leases of the lands: —*Held:* the trustees, who had the legal estate during the life of C., had during her life power to grant leases of the coal or cannel mines.—LEIGH *v.* BALCARRES (EARL) (1848), 6 C. B. 847; 136 E. R. 1481.

432. —— Grant of one lease of two estates held on different trusts.]—Two contiguous estates were devised to trustees upon trust for distinct *cestuis que trust*. By an order made under Settled Estates Act, 1856 (c. 120), power was given to the trustees to grant mining leases in conformity with & subject to the provisions of Settled Estates Act, 1856 (c. 120); such leases to be granted with the consent of the respective tenants for life if of age. The trustees & the two tenants for life entered into an agreement with defts. to grant them a mining lease of the two estates for forty years, or fifty years if the ct. should consent; both estates were intended to be comprised in the same lease, & the rents & royalties were to be reserved as if they were one estate, & there was to be one shaft for working the minerals under both estates; & it was also agreed that the lessors should be at liberty to apply to the ct. under the Settled Estates Act for further powers of leasing:—*Held:* the trustees had no power to grant such a lease of the two estates, & specific performance of the agreement was refused.—TOLSON *v.* SHEARD (1877), 5 Ch. D. 19; 46 L. J. Ch. 815; 36 L. T. 756; 41 J. P. 423; 25 W. R. 667, C. A.

Annotation:—**Mentd.** Brown *v.* Peto, [1900] 1 Q. B. 346.

SUB-SECT. 4.—MORTGAGEES.

See Law of Property Act, 1925 (c. 20), s. 99.

433. Jurisdiction of court to sanction.]—Mtgees. of land, which was in the possession of a receiver appointed by the ct. in foreclosure proceedings, applied to the ct. before any foreclosure order had been made to sanction an exclusive licence for a term of years, & at a premium & royalties, to work deposits of peat on the mortgaged land:—*Held:* the ct. had no power to sanction the licence.—STAMFORD, SPALDING & BOSTON BANKING CO. *v.* KEEBLE, [1913] 2 Ch. 96; 82 L. J. Ch. 388; 109 L. T. 310.

SUB-SECT. 5.—ECCLESIASTICAL CORPORATIONS.

See Settled Land Act, 1925 (c. 18), s. 29.

See ECCLESIASTICAL LAW, Vol. XIX., pp. 511, 512, Nos. 3711–3721.

SUB-SECT. 6.—THE CROWN.

See, generally, CONSTITUTIONAL LAW, Vol. XI., pp. 583–585, Nos. 843–852, 858–862.

434. Crown with bare reservation of royal mines—Licence to search.]—Where the Crown has only a bare reservation of royal mines, they cannot grant a licence to any person to come upon another man's estate & search for such mines. But when mines are once opened, they can restrain the owner of the soil from working them, & can either work the mines themselves, or grant a licence for others to work them.—LYDDALL *v.* WESTON (1739), 2 Atk. 19; 26 E. R. 409, L. C.

Annotations:—**Consd.** Seaman *v.* Vawdrey (1810), 16 Ves. 390; Lloyd-Jones *v.* Clark-Lloyd, [1919] 1 Ch. 424. **Mentd.** Hillary *v.* Waller (1805), 12 Ves. 239.

435. —— Opened mines.] — LYDDALL *v.* WESTON, No. 434, *ante*.

PART V. SECT. 2, SUB-SECT. 6.

e. *Reservation of minerals — No right to injure surface of land—Where right to enter & dig not reserved.*]—[illegible] *v.* BERTON (1851), 2 All. 321.—**CAN.**

f. *Application for lease—Prospecting lease—Refusal on ground that area covered by lease outstanding.*]—*Re* WIER (1896), 31 N. S. R. (19 R. & G.) 97.—**CAN.**

g. *Injunction to restrain application refused—Action before certificate of improvements proper remedy.*]—NELSON & FORT SHEPPARD RY. CO. *v.* DUNLOP (1900), 7 B. C. R. 411; 1 M. M. Cas. 414.—**CAN.**

h. —— *Whether prior licence to search a condition precedent.*]—*Re* GREENER (1900), 33 N. S. R. 406.—**CAN.**

k. —— *For lease or licence—Substantial compliance with form sufficient.*]—A.-G. *v.* WAVERLEY GOLD MINING CO. (1902), 35 N. S. R. 192.—**CAN.**

l. —— *Hydraulic lease — No contract with Crown for location until consent granted.*]—SMITH *v.* R., FROOKS *v.* R. (1908), 40 S. C. R. 258.—**CAN.**

m. *Title of Crown grantee.*] — A Crown grant of a mineral claim vests such a title at least in the grantee that a squatter upon such lands must show a better title or move off.—SPENCER *v.* HARRIS (1899), 6 B. C. R. 466; 1 M. M. Cas. 294.—**CAN.**

n. *Power of Crown to make reservations beyond statutory provisions.*]—LA ROSE MINING CO. *v.* TEMISKAMING & NORTHERN ONTARIO RY. CO., C. R., [1909] A. C. 347.—**CAN.**

Part VI.—Rights Incidental to Ownership.

SECT. 1.—POSSESSION.

SUB-SECT. 1.—RIGHT TO EXCLUSIVE POSSESSION—PROCEEDINGS FOR RECOVERY OF POSSESSION.

436. Whether action for recovery of possession lies—Salt-pit.]—SANDERS *v.* PARTRIDGE (1607), Noy, 132; 74 E. R. 1095.

437. —— ——.]—An ejectment will lie for a coal mine, or a salt pit.—COMYN *v.* KYNETO (1607), Cro. Jac. 150; 79 E. R. 131.

438. —— **Coal mine.**]—COMYN *v.* WHEATLY (1607), Noy, 121; 74 E. R. 1095.

439. —— ——.]—COMYN *v.* KYNETO, No. 437, *ante*.

440. —— ——.]—An ejectment "*de mineris carbonum* in Gateside" is good, without showing how many; for by mines of coal in a certain district the number is understood by the practice & usage of the coal countries.—WHITTINGHAM *v.* ANDREWS (1692), 4 Mod. Rep. 143; 1 Salk. 255; 87 E. R. 311; *sub nom.* ANDREWS *v.* WHITTINGHAM, Cart. 277.

Annotation:—**Refd.** Low Moor Co. *v.* Stanley Coal Co. (1875), 33 L. T. 436.

441. —— **Stratum of coal.**]—By an inclosure Act it was provided that it should be lawful for the lord of the manor for the time being from time to time to come upon the commons & waste lands intended to be inclosed, to search for & raise any coal & ironstone being in or under the commons & waste lands.

The comrs. allotted certain plots of land to S. & E., which afterwards vested in deft., who in 1845 worked the coal under one of the plots of land, in 1847 under a second, in 1848 under a third, in 1849 under a fourth, & in 1855 under a fifth. Pltfs., who claimed the coal under the lord of the manor at the time of the inclosure Act, commenced, in 1867, an action of trespass for working the coal:—*Held:* the action was maintainable, for the acts of trespass committed more than twenty years before suit could not be relied upon as constituting a possession adverse to pltfs., there being no sufficient evidence that the then owner of the mines was aware that the acts of trespass were being committed.

A right to mines may be gained by possession & an ejectment may lie for a stratum of coal (KELLY, C.B.).—DARTMOUTH (EARL) *v.* SPITTLE (1871), 24 L. T. 67; 19 W. R. 444.

Annotation:—**Refd.** Glyn *v.* Howell, [1909] 1 Ch. 666.

442. —— **Tin-bound.**]—DOE d. FALMOUTH (EARL) *v.* ALDERSON, No. 1242, *post*.

443. —— **Surface & mines.**]—Ejectment lies for land & a coalpit.—HAREBOTTLE *v.* PLACOCK (1604), Cro. Jac. 21; 79 E. R. 17.

444. —— ——.]—Demise by lease of certain lands, together with the mines under them, with liberty to dig for ore in other mines under the surface of other lands not demised; the tenant fraudulently concealed a declaration in ejectment delivered to him, & suffered judgment to go by default. The declaration in ejectment did not mention mines at all, but the sheriff, in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised to the tenant, & also of those mines in which he had liberty to dig:—*Held:* although the latter could not be recovered under the declaration in ejectment, still that the tenant by his own act had estopped himself from taking that objection, & in an action for the value of three years' improved rent, under 11 Geo. 2, c. 19, the landlord might recover the treble rent, in respect not only of the demised premises, but of the mines in which the tenant had only a liberty to dig. The improved or rack rent mentioned in 11 Geo. 2, c. 19, s. 12, is not the rent reserved, but such a rent as the landlord & tenant might fairly agree on at the time of delivering the declaration in ejectment, in case the premises were then to be let.

Here the ejectment is to recover, among other things, a certain number of acres of common land. Under certain common lands there are mines. The ejectment might be to recover these lands or not, according as the tenant was or was not in possession of the surface land; for if he was in possession of such land, there can be no doubt that the mines under it might be recovered (BAYLEY, J.).—CROCKER *v.* FOTHERGILL (1819), 2 B. & Ald. 652; 106 E. R. 503.

445. —— **Open mines.**]—Account of profits of coal mines not decreed without showing possession; the bill retained, with liberty to bring ejectment.

Deft. having got possession, the lessee's plain remedy was, as the mines were open, to have brought an ejectment (LORD HARDWICKE, C.).—SAYER *v.* PIERCE (1719), 1 Ves. Sen. 232; 27 E. R. 1002, L. C.

Annotations:—**Consd.** Parrott *v.* Palmer (1834), 3 My. & K. 632. **Refd.** Haigh *v.* Jaggar (1845), 2 Coll. 231.

446. —— **Unopened mines.**]—(1) Property was settled in 1747 to M. for life, with remainder to his three daughters in tail general. In 1788 a deed of partition was made of the several parcels comprised in the settlement, with an express exception of all mines & minerals already opened or thereafter to be opened. There was in that deed a covenant to levy a fine; & in about a month afterwards a fine was levied, & the enumeration of the premises was in the very terms used in the deed to describe the premises of which partition was to be made, not mentioning mines & minerals:—*Held:* the deed & fine making together one conveyance, the operation of the fine was limited to the words of the deed, & consequently it had no operation upon the mines or minerals.

(2) An objection was made that ejectment could not be maintained for unopened mines, which might have no existence:—*Held:* that objection, if of any weight, was obviated by the consent rule.—DOE d. LORD *v.* KINGSBURY (1848), 10 L. T. O. S. 442.

447. —— **By licencee of minerals.**]—CROCKER *v.* FOTHERGILL, No. 444, *ante*.

448. —— ——.]—(1) The owner of the fee granted to A., his partners, fellow-adventurers, etc., free liberty to dig for tin & all other metal, throughout certain lands therein described, & to

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PART VI. SECT. 1, SUB-SECT. 1.

o. Onus of proof of title.]—CLARKE *v.* HANEY (1899), 8 B. C. R. 130; 1 M. M. Cas. 281.—**CAN.**

p. ——.]—VOIGT *v.* GROVES (1906), 12 B. C. R. 170; 3 W. L. R. 428.—**CAN.**

q. ——.]—CALDWELL *v.* DAVYS (1900), 7 B. C. R. 156; 1 M. M. Cas. 387.—**CAN.**

r. Failure by both parties to prove title.]—RYAN *v.* MCQUILLAN (1899), 6 B. C. R. 431; 1 M. M. Cas. 289.—**CAN.**

Sect. 1.—*Possession: Sub-sects.* 1 *&* 2. *Sect.* 2: *Sub-sect.* 1, *A.*]

raise, make merchantable, & dispose of the same to their own use; & to make adits, etc., necessary for the exercise of that liberty, together with the use of all waters & watercourses, excepting to the grantor liberty for driving any new adit within the lands thereby granted, & to convey any watercourse over the premises granted, *habendum* for twenty-one years; covenant by the grantee to pay one-eighth share of all ore to the grantor, & all rates, taxes, etc., & to work effectually the mines during the term; & then, in failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor:—*Held:* this deed did not amount to a lease, but contained a mere licence to dig & search for minerals, & the grantee could not maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee.

The words import a grant of such parts . . . only as should, upon the licence & power given to search & get, be found within the described limits, which is nothing more than the grant of a licence to search & get, irrevocable, indeed, on account of its carrying an interest, with a grant of such of the ore only as should be found & got, the grantor parting with no estate or interest in the rest. If so the grantee had no estate or property in the land itself, or any particular portion thereof, or in any part of the ore, metals or minerals, ungot therein; but he had a right of property only, as to such part thereof as upon the liberties granted to him should be dug & got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it . . . & is not sufficient to support the present action of ejectment (ABBOTT, C.J.).

(2) The grantee commenced working the mines, but after some time discontinued, not being prevented by the want of water, or any other inevitable accident. The grantor, after some lapse of time, verbally authorised other persons to dig for ore throughout part of the land described in the deed, & met those persons on part of the land, & pointed out the boundaries within which they were to exercise the liberty; & himself subsequently entered into a mining adventure with other persons, which was carried on within the limits described in the indenture; & afterwards, in consideration of the surrender of the first grant, & of certain payments, demised the premises to a lessee for twenty-one years; & upon the execution of this lease, the original deed was delivered up, but there was no surrender in writing:—*Held:* these acts amounted to a re-entry by the grantor, inasmuch, as unless referred to the exercise of that right, they would be acts of trespass by him.—DOE d. HANLEY *v.* WOOD (1819), 2 B. & Ald. 724; 106 E. R. 529.

Annotations:—As to (1) **Distd.** Joncs *v.* Reynolds (1836), 4 Ad. & El. 805. **Consd.** Muskett *v.* Hill (1839), 5 Bing. N. C. 694. **Distd.** Rogers *v.* Brenton (1847), 10 Q. B. 26. **Consd.** Martyn *v.* Williams (1857), 1 H. & N. 817. **Distd.** Low Moor Co. *v.* Stanley Coal Co. (1876), 34 L. T. 186. **Reid.** R. *v.* Trent & Mersey Canal Co. (1825), 3 L. J. O. S. K. B. 140; Vice *v.* Thomas (1842), 4 Y. & C. Ex. 538; *Re* Stroud (1849), 8 C. B. 502; Watson *v.* Spratley (1854), 10 Exch. 222; Griffiths *v.* Jenkins (1864), 3 New Rep. 489; Roads *v.* Trumpington Overseers (1870), L. R. 6 Q. B. 56; Sutherland *v.* Heathcote, [1892] 1 Ch. 475. *Generally*, **Reid.** Holmes *v.* Powell (1856), 8 De G. M. & G. 572. **Mentd.** Prendergast *v.* Turton (1841), 11 L. J. Ch. 22; Lee *v.* Stevenson (1858), E. B. & E. 512.

449. ——— ———.]—LOW MOOR CO. *v.* STANLEY COAL CO., LTD., No. 171, *ante*.

SUB-SECT. 2.—LOSS OF RIGHT TO RECOVER POSSESSION BY LAPSE OF TIME.

Application of Real Property Limitation Acts—Severance of surface & minerals.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 438, 439, 440, Nos. 1093, 1099–1103.

In Duchy of Cornwall.]—*See* Duchy of Cornwall Act, 1844 (c. 105), ss. 73, 74.

SECT. 2.—RIGHTS AGAINST PERSONS WRONGFULLY TAKING MINERALS.

SUB-SECT. 1.—NATURE OF REMEDY.

A. Action for Account.

450. Right to account.]—Where a mine owner had passed his boundary, & taken coals from his neighbour's mine:—*Held:* he was liable to account for the value of the coals at the pit's mouth, with just allowances for the cost of raising, but not of getting or severing.—LLYNVI CO. *v.* BROGDEN (1870), L. R. 11 Eq. 188; 40 L. J. Ch. 46; 23 L. T. 518; 19 W. R. 196.

Annotations:—**Folld.** Eccl. Comrs. for England *v.* N. E. Ry. (1877), 4 Ch. D. 845. **Reid.** Jegon *v.* Vivian (1871), 40 L. J. Ch. 389; Trotter *v.* Maclean (1879), 13 Ch. D. 574; Tucker *v.* Linger (1882), 21 Ch. D. 18.

451. ———.] — ECCLESIASTICAL COMRS. FOR ENGLAND *v.* NORTH EASTERN RY. CO., No. 558, *post*.

452. ———.]—By the decree made in this suit in 1870, it was declared that defts. H. & F., & the estate of deceased deft. W., were answerable for all minerals gotten or removed from under pltfs.' farm; & an inquiry was directed what quantities of minerals had been so gotten or removed, & it was ordered that the value at the pit's mouth of all mineral so gotten or removed, with just allowances for carriage, but none for getting, should be certified. The decree was silent as to interest, no claim for interest being made at the hearing.

After the decree defts. H. & F. died, & the suit was continued, so far as the inquiry was concerned, against their representatives.

The Official Referee having, in Dec. 1889, reported the value at the pit's mouth of the minerals taken to be £9,028 6*s*., pltfs., upon the further consideration of the suit in 1891, claimed to be entitled to damages in the nature of interest on that amount on the ground that the action was in the nature of an action of trover or trespass *de bonis asportatis* within Civil Procedure Act, 1833 (c. 42), s. 29:—*Held:* the action must be treated as an equitable action to recover the benefits that defts. or their respective estates had received from the wrongful taking of the minerals belonging to pltfs., & not as an action of trover or trespass; &, although according to the settled practice in the case of such an equitable action, pltfs. might, at the hearing, have been allowed interest on the value of the minerals wrongfully taken, yet,

t. *Right to account — Crown — Where mining rights of land trespassed upon reserved to Crown.*]—A.-G. *v.* GEE (1863), 2 W. & W. 122.—**AUS.**

a. *For whom account ordered — One of several tenants in common.*]—One of two tenants in common of land, leased part of it as a stone quarry:—*Held:* the other tenant in common was entitled to an injunction against further quarrying, & to an account against the lessee for one moiety of what had been already quarried.—GOODENOW *v.* FARQUHAR (1873), 19 Gr. 614.—**CAN.**

pltfs. not having claimed interest at the hearing & the decree being silent as to interest, it was too late to claim it for the first time twenty years after the date of the decree.

This action is not an action for money had & received. Defts. are not required to account for what they have received, but for the value of the coal raised, that is to say the market price or value after making just allowances (LINDLEY, L.J.).

It was suggested . . . that the action might be treated as an action for use & occupation, but it is clear that that cannot be so, because such an action will not lie where there has been a trespass (LOPES, L.J.).—PHILLIPS *v.* HOMFRAY, [1892] 1 Ch. 465; 61 L. J. Ch. 210; 66 L. T. 657; 36 Sol. Jo. 199, C. A.

Annotation :—**Refd.** Omnium Insce. Corpn. *v.* United London & Scottish Insce. (1920), 36 T. L. R. 386.

453. ——.]—GLYN *v.* HOWELL, No. 173, *ante*.

454. For whom account ordered—Lord of manor.]—WINCHESTER (BP.) *v.* KNIGHT, No. 456, *post*.

455. —— One of several tenants in common—Not consenting to operation.]—JOB *v.* POTTON, No. 554.

456. Against whom account ordered—Personal representatives of wrongdoer.]—Lord of a manor may bring a bill for an account of ore dug, or timber cut, by deft.'s testator.—WINCHESTER (BP.) *v.* KNIGHT (1717), 1 P. Wms. 406; 2 Eq. Cas. Abr. 226, pl. 7; 24 E. R. 447, L. C.

Annotations :—**Distd.** Jesus College *v.* Bloom (1745), 1 Amb. 54. **Consd.** Powell *v.* Aiken (1858), 4 K. & J. 343. **Refd.** Bourne *v.* Taylor (1808), 10 East, 189; Salisbury *v.* Gladstone (1861), 9 H. L. Cas. 692; Portland *v.* Hill (1866), L. R. 2 Eq. 765; Phillips *v.* Homfray, [1892] 1 Ch. 465. **Mentd.** Pultency *v.* Warren (1801), 6 Ves. 73; Lansdowne *v.* Lansdowne (1815), 1 Madd. 116; Peek *v.* Gurney (1873), L. R. 6 H. L. 377.

457. —— ——.]—By the decree in 1870 it was declared that H. & F. & the estate of their deceased partner were liable to pltfs. for minerals taken by them under pltfs.' farm, & that H. & F. were liable to compensate pltfs. for user of all roads & passages under the farm, & inquiries were directed: (*a*) as to the quantity of minerals taken & their value; (*b*) what quantities of minerals had been carried by defts. through the roads or passages under the farm; (*c*) what upon the result of the second inquiry, ought to be paid by defts. as way-leave for the user of the roads & passages; (*d*) whether the farm, & the mineral property of pltfs. under it, had sustained any & what damage by reason of the way in which defts. had worked under the farm. Pending these inquiries F. died, & his extrix. moved to stay proceedings under inquiries (*b*), (*c*) & (*d*):—*Held :* proceedings under inquiries (*b*) & (*c*) must be stayed, for that, apart from cases of breach of contract, a remedy for a wrongful act done by a deceased person cannot be pursued against his estate, unless property or the proceeds or value of property belonging to another person have been appropriated by deceased person & added to his estate.—PHILLIPS *v.* HOMFRAY (1883), 24 Ch. D. 439; 49 L. T. 5; 32 W. R. 6; *sub nom.* PHILLIPS *v.* HOMFRAY, HOMFRAY *v.* PHILLIPS, 52 L. J. Ch. 833, C. A.; *on appeal, sub nom.* PHILLIPS *v.* FOTHERGILL (1886), 11 App. Cas. 466, H. L.

Annotations :—**Refd.** Williams *v.* Raggett (1877), 46 L. J. Ch. 849; Phillips *v.* Homfray, [1892] 1 Ch. 465. **Mentd.** Batthyany *v.* Walford (1887), 36 Ch. D. 269; Finlay *v.* Chirney (1888), 20 Q. B. D. 494; Concha *v.* Murrieta, De Mora *v.* Concha (1889), 40 Ch. D. 543; The Duke of Buccleuch, [1892] P. 201; Peebles *v.* Oswaldtwistle U. D. C. (1896), 65 L. J. Q. B. 499; *Re* Duncan, Terry *v.* Sweeting, [1899] 1 Ch. 387; Ellis *v.* Wadeson, [1899] 1 Q. B. 714; Jackson *v.* Watson, [1909] 2 K. B. 193; R. *v.* Spokes, *Ex p.* Buckley (1912), 107 L. T. 290; Quirk *v.* Thomas, [1915] 1 K. B. 798; Geipel *v.* Peach, [1917] 2 Ch. 108; A.-G. *v.* De Keyser's Royal Hotel, [1920] A. C. 508; Brocklebank *v.* R., [1925] 1 K. B. 52.

458. —— ——.]—WRIGHT *v.* LEIGH (1888), 4 T. L. R. 573, C. A.

459. —— ——.]—PHILLIPS *v.* HOMFRAY, No. 457, *ante*.

See, also, EXECUTORS, Vol. XXIV., pp. 648, 649.

460. —— **Against mortgagee.**]—HOOD *v.* EASTON, No. 301, *ante*.

461. —— —— **Wrongful working by mortgagor in possession.**]—Where a trespass was committed on pltfs.' mine, & an air course & level roads made through it underground to connect adjoining collieries in mtge. to defts., & large quantities of pltf.'s coal were thereby fraudulently gotten & removed without their knowledge:—*Held :* (1) defts., the mtgees., could not be made accountable for any portion removed by their mtgor. while they allowed him to remain in possession notwithstanding the proceeds of the coal, so wrongfully removed by him, had found their way week by week but without notice of the fraud, into defts.' hands, & notwithstanding they continued the use of the air course & roads after taking possession, retained in their employment as manager of the collieries the person by whose agency the fraud had been perpetrated; (2) this ct. had no jurisdiction to give pltfs. compensation in respect of consequential injury by reason of large portions of their coal being rendered unworkable & useless to them; (3) defts., the mtgees., could not be allowed to retain the user of the air course or roads, although the continuance of that user might be no special injury to pltfs.; (4) not having themselves made such apertures, they could not be ordered to fill them up; (5) all the proceeds having been traced to the mtgees. & no portion retained by the agent, the latter could not in this ct. be made personally chargeable for the value of the coal removed notwithstanding his own fraudulent conduct in the transaction.

(6) Form of order, under such circumstances, & of decree for an account against the mtgor. & mtgees. & as to the allowances to be made to defts. in respect of the coal for which they were held accountable.—POWELL *v.* AIKEN (1858), 4 K. & J. 343; 70 E. R. 144.

Annotations :—*As to* (1) **Refd.** Elias *v.* Griffith (1878), 8 Ch. D. 521. *As to* (2) **Refd.** Hilton *v.* Woods (1867), L. R. 4 Eq. 432. *As to* (6) **Refd.** Llynvi Co. *v.* Brogden (1870), L. R. 11 Eq. 188. *Generally,* **Refd.** Bowser *v.* Maclean (1860), 2 De G. F. & J. 415.

462. —— ——.]—Pltfs. were mtgees. in possession of a colliery, & were also treated by the ct. as lessees of the same colliery under a lease for a fixed term of years at a rent & a certain royalty for all coal gotten. The lease contained covenants to leave pillars of coal to support the roof & not to work or remove the pillars. The mtgees. underlet the colliery & gave their sub-lessees permission to work & remove the pillars, which they did:—*Held :* in taking the accounts as against mtgees. in possession, the mtgees. having allowed their sub-lessees to take the coal, must be treated as having taken it themselves, &, having so taken it wrongfully in breach of the covenants in the lease, must be charged, not with the amount of the royalty reserved, but with the full value of the coal, subject to a deduction for the costs of bringing it to the surface, but not for the costs of severance; & the foreclosure, which had been made absolute before the appeal was heard, was reopened.—TAYLOR *v.* MOSTYN (1886), 33 Ch. D. 226; 55 L. J. Ch. 893; 55 L. T. 651, C. A.

Annotation :—**Mentd.** *Re* Gregory, Love, Francis *v.* The Co., [1916] 1 Ch. 203.

Sect. 2.—Rights against persons wrongfully taking minerals: Sub-sect. 1, A., B., C. & D.]

463. Nature of account—Market price or value after making just allowances.]—PHILLIPS *v.* HOMFRAY, No. 457, *ante*.

B. Injunction.

See, generally, INJUNCTION, Vol. XXVIII., pp. 361 *et seq.*

464. Right to injunction.]—TAYLOR *v.* CRAMPTON (1721), Bunb. 95; 145 E. R. 608.

465. —— Trespass to minerals.]—SMITH *v.* CLARKE (1771), 2 Dick. 455; 21 E. R. 346, L. C.

466. —— ——.]—FLAMANG'S CASE (*circa* 1783), cited 7 Ves. at p. 308; 32 E. R. 126, L. C.

Annotations:—**Folld.** Mitchell *v.* Dors (1801), 6 Ves. 147. **Consd.** Thomas *v.* Oakley (1811), 18 Ves. 184. **Refd.** Hanson *v.* Gardiner (1802), 7 Ves. 305; Smith *v.* Collyer (1803), 8 Ves. 89; Crockford *v.* Alexander (1808), 15 Ves. 138; A.-G. *v.* Hallett (1847), 16 M. & W. 569.

467. —— ——.]—Injunction where deft. having begun to take coal in his own land had worked into that of pltf.—MITCHELL *v.* DORS (1801), 6 Ves. 147; 31 E. R. 984, L. C.

Annotations:—**Refd.** Crockford *v.* Alexander (1808), 15 Ves. 138; Haigh *v.* Jaggar (1845), 2 Coll. 231. **Mentd.** Smith *v.* Collyer (1803), 8 Ves. 89; Lowndes *v.* Bettle (1864), 3 New Rep. 409.

468. —— ——.]—Injunction against trespass upon irremediable mischief, in nature of waste, on a bill by the lord of a manor & his lessees against taking stones, having a peculiar value, found at the bottom of the sea within the limits of the manor.—COWPER (EARL) *v.* BAKER (1810), 17 Ves. 128; 34 E. R. 50, L. C.

Annotation:—**Mentd.** Lowndes *v.* Bettle (1864), 3 New Rep. 409.

469. —— ——.]—The jurisdiction against waste by injunction & account applied to trespass, by exceeding a limited right to enter & take stone from a quarry; being a destruction of the inheritance; as in the case of timber, coal, etc.—THOMAS *v.* OAKLEY (1811), 18 Ves. 184; 34 E. R. 287, L. C.

Annotations:—**Refd.** Bowser *v.* Maclean (1860), 2 De G. F. & J. 415; Lowndes *v.* Bettle (1864), 33 L. J. Ch. 451. **Mentd.** Haigh *v.* Jaggar (1845), 2 Coll. 231.

470. —— ——.]—NORWAY *v.* ROWE, No. 226, *ante*.

471. —— ——.]—In cases of trespass, not in one of a single but of a continuous kind & especially in case of mines, the ct. would grant an injunction, the case being in the nature of a nuisance (KINDERSLEY, V.-C.).—HOPKINS *v.* CADDICK (1851), 18 L. T. O. S. 236.

472. —— ——.]—Where houses of pltfs. were injured by mining operations of deft. in adjoining land which would have caused the soil to subside without the additional weight of the houses, decree made for perpetual injunction & compensation.—HUNT *v.* PEAKE (1860), John. 705; 29 L. J. Ch. 785; 25 J. P. 5; 6 Jur. N. S. 1071; 70 E. R. 603.

Annotations:—**Refd.** Richards *v.* Jenkins (1868), 18 L. T. 437; Llynvi Co. *v.* Brogden (1870), L. R. 11 Eq. 188; Birmingham Corpn. *v.* Allen (1877), 46 L. J. Ch. 673. **Mentd.** Dalton *v.* Angus (1881), 6 App. Cas. 740.

473. —— ——.]—A motion for an injunction to restrain working into adjoining coal mines, having stood over on an undertaking, & the ct. having refused adversely to order an inspection, the application was renewed & inspection pressed for, no affidavits having been filed by defts., although some were prepared, & there being only an imperfect plan:—*Held:* pltfs. undertaking to answer such damage as the ct. should award, an *interim* order must be made until a specified day, the motion to stand over till the day previous; there must be an order to view, defts. to be at liberty meantime to bring on the motion, & apply to discharge the order to view.—WHALEY *v.* BRANCKER (1864), 10 L. T. 155; 10 Jur. N. S. 535; 12 W. R. 595.

474. —— ——.]—HILTON *v.* WOODS, No. 552, *post*.

475. —— —— Minerals not intended to be included in grant.]—Pltfs. were seised in fee of lands to which their predecessors derived title under a conveyance in the reign of Queen Elizabeth, wherein the grantor reserved to himself & his heirs male a rentcharge of 7*s.* 8*d.*, & which contained a proviso that the grantee & his heirs should not dig or get any coal upon the lands for sale, but only such as should be burned or employed thereon. Deft. claiming title under a demise from a descendant of the same grantor, had for more than twenty years worked from mines of his own under adjacent lands, into, & had taken coals from, the mines under pltfs.' lands:—*Held:* (1) the proviso in the original conveyance was a covenant, & not a repugnant condition, & it did not affect the amount of damages which pltfs. were entitled to claim, as, under it, the grantee was still entitled to get all the coal for his own use, though not to sell it; (2) deft. had not acquired any title to the mine by possession under the Stat. Limitations, & pltfs. were entitled to an injunction with an account for six years; (3) as the deft. had been working under a *bonâ fide* belief as to his title, he was entitled, in taking the account, to an allowance of his expenses of severing the coal as well as bringing it to bank.

I can well understand that there might be cases in which, from the manner of working coal, a person who began to work it, & was a mere wrong-doer & trespasser, might have acquired a title to a certain seam or area of coal, & that, by the mode of driving the levels & opening a certain area of coal, there might have been possession acquired to the whole thing as a mine or as a seam of coal, & not merely to the particular quantity of coal that was actually hewn & gotten (HALL, V.-C.).

The property being coal, if a trespasser takes away that coal, I cannot measure the damage in any other way than by the value of that coal. I cannot discount it in any way by the consideration of whether it would ever have been gotten or not for the purpose of being employed upon the tenement & premises (HALL, V.-C.).

As to the time during which the account is to go, that is clearly covered by the statute (HALL, V.-C.).—ASHTON *v.* STOCK (1877), 6 Ch. D. 719; 25 W. R. 862.

Annotations:—*As to* (2) **Apld.** Thompson *v.* Hickman, [1907] 1 Ch. 550. *As to* (3) **Refd.** Trotter *v.* Maclean (1879), 13 Ch. D. 574.

476. —— ——.]—Where from inadvertence in granting a long lease a lease renewable for ever, mines . . . which were not known or thought of were not included in the lease, & where the landlord could not enter upon the mines because he did not reserve the power; . . . in such a case as that, where the tenant chooses to take upon himself to

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PART VI. SECT. 2, SUB-SECT. 1.—B.

465 i. *Right to injunction—Trespass to minerals.*]—STAR FREEHOLD CO. *v.* EVANS FREEHOLD CO. (1867), 4 W. W. & A'B. 6.—**AUS.**

465 ii. —— ——.]—M'DOUGALL *v.* JOHANSEN (1908), 8 W. L. R. 955; 9 W. L. R. 151.—**CAN.**

b. —— —— *Minerals under public street.*]—BAND OF HOPE & ALBION CONSOLS CO. *v.* ALL SAINTS CO. (1871), 2 V. R. 83.—**AUS.**

c. —— —— ——.]—BAND OF HOPE QUARTZ MINING CO. *v.* WILLIAMS FREEHOLD MINING CO. (1879), 5 V. L. R. (Eq.) 257.—**AUS.**

carry away the minerals bodily . . . there should be an injunction to prevent it (LORD BLACKBURN). —DOHERTY *v.* ALLMAN (1878), 3 App. Cas. 709; 39 L. T. 129; 42 J. P. 788; 26 W. R. 513, H. L.

Annotations :—**Mentd.** Tucker *v.* Linger (1882), 21 Ch. D. 18; Dashwood *v.* Magniac, [1891] 3 Ch. 306; *Re* McIntosh & Pontypridd Improvements Co. (1891), 61 L. J. Q. B. 164; Meux *v.* Cobley, [1892] 2 Ch. 253; West Ham Central Charity Board *v.* East London Waterworks Co., [1900] 1 Ch. 624; Metropolitan Electric Supply Co. *v.* Ginder (1901), 70 L. J. Ch. 862; Bickmore *v.* Dimmer (1902), 88 L. T. 78; McEacharn *v.* Colton, [1902] A. C. 104; Formby *v.* Barker, [1903] 2 Ch. 539; Osborne *v.* Bradley, [1903] 2 Ch. 446; Elliston *v.* Reacher, [1908] 2 Ch. 374; Leng *v.* Andrews (1908), 78 L. J. Ch. 80; Rose *v.* Spicer, Rose *v.* Hyman, [1911] 2 K. B. 234; Sunderland Orphan Asylum *v.* River Wear Comrs. (1911), 106 L. T. 288; Sharp *v.* Harrison, [1922] 1 Ch. 502; Kelly *v.* Barrett, [1924] 7 Ch. 379.

477. —— Threatened trespass to minerals.]—WILSON *v.* GREY (1866), L. R. 3 Eq. 117; 36 L. J. Ch. 62.

478. —— Improper taking.]—Perpetual injunction granted to restrain the tenant of a farm, in part of which was a pool, through which ran a stream from the mountains, depositing, in its passage, mineral substances, from taking & carrying away from & out of the bed & bottom of the pool, or any part thereof, any soil, oxide of iron, ochre, shine, deposit or other mineral substances, & from puddling, loosening, disturbing & floating, & from causing to be puddled, loosened, disturbed or floated off, any soil, oxide of iron, ochre, shine, deposits or mineral substances already deposited, or thereafter to be deposited, upon the beds of the pool, the right of pltfs. to the several mineral substances having been established by a verdict in an action at law brought by them against deft., & not in an issue or action directed by the ct.—THOMAS *v.* JONES (1842), 1 Y. & C. Ch. Cas. 510; 62 E. R. 993.

479. —— Improper working.]—The proprietors of a coal mine had so worked their mine by opening cuttings to draw off the water therein that they had caused the neighbouring & adjoining mine of pltfs. to be flooded, & from such openings defts. had also abstracted coal from their neighbours' mine, & sold the same for their own benefit.

An injunction was granted to restrain deft. from further proceedings; to stop up the existing openings & cuttings; from making another further opening which would have the effect complained of; for compensation for what damage had been sustained by pltfs.; & for an account of the value of the coal abstracted.

I shall, also, in addition to the usual costs, direct that the costs properly incurred by pltfs. in ascertaining the openings in deft.'s mine which had caused the injurious flow of water into pltfs.' mine should be paid by defts. (JAMES, V.-C.).—PLANT *v.* STOTT (1869), 21 L. T. 106.

480. —— ——.]—PHILLIPS *v.* HOMFRAY, FOTHERGILL *v.* PHILLIPS, No. 548, *post*.

481. —— ——.]—Where defts. by removing the lateral support of their land caused the asphalt or pitch which formed the main ingredient of pltfs.' land to melt & ooze forth in their own land & thereupon appropriated it to their own use :—*Held* : an injunction was rightly granted by the first ct. to restrain them, & damages were recoverable both for injury caused by subsidence of pltfs.' surface & for loss of the pitch.—TRINIDAD ASPHALT CO. *v.* AMBARD, [1899] A. C. 594; 68 L. J. P. C. 114; 81 L. T. 132; 48 W. R. 116, P. C.

Annotation :—**Refd.** Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822.

482. —— At suit of reversioner.]—A.-G. *v.* TOMLINE, No. 502, *post*.

See, also, COPYHOLDS, Vol. XIII., p. 82, Nos. 1030–1032, 1034.

483. Grounds on which injunction granted — Mines a species of trade.]—FLAMANG'S CASE (*circa* 1783), cited 7 Ves. at p. 308 : 32 E. R. 126, L. C.

Annotations :—**Refd.** Mitchell *v.* Dors (1801), 6 Ves. 147; Hanson *v.* Gardiner (1802), 7 Ves. 305; A.-G. *v.* Hallett (1847), 16 M. & W. 569. **Mentd.** Smith *v.* Collyer (1803), 8 Ves. 89; Crockford *v.* Alexander (1808), 15 Ves. 138; Thomas *v.* Oakley (1811), 18 Ves. 184.

484. —— ——.]—ROSE *v.* NIXON (1737), cited 2 Jac. & W. at p. 555; 37 E. R. 740, L. C.

Annotations :—**Consd.** Rowe *v.* Wood (1822), 2 Jac. & W. 553. **Refd.** Jefferys *v.* Smith (1820), 1 Jac. & W. 302.

485. —— ——.]—JEFFERYS *v.* SMITH, No. 198, *ante*.

486. —— Trespass causing irreparable damage.]—FLAMANG'S CASE (*circa* 1783), cited 7 Ves. at p. 308; 32 E. R. 126, L. C.

Annotations :—**Refd.** Mitchell *v.* Dors (1801), 6 Ves. 147; Hanson *v.* Gardiner (1802), 7 Ves. 305; Smith *v.* Collyer (1803), 8 Ves. 89; Crockford *v.* Alexander (1808), 15 Ves. 138; Thomas *v.* Oakley (1811), 18 Ves. 184; A.-G. *v.* Hallett (1847), 16 M. & W. 569.

487. —— Defendant refusing to bring action at law.]—Suit by a copyholder against a tenant of lands within the manor, to restrain deft. from taking stone from lands in his occupation. Deft. by his answer alleged, that it was & had been a common practice in the manor, to remove the stone which laid immediately under the surface, for the benefit of cultivation. At the hearing, the ct. made a decree for a perpetual injunction, deft. declining to try his right to take the stone in an action by law, to be brought against him by pltf.—CUDDON *v.* MORLEY (1848), 7 Hare, 202; 68 E. R. 82.

——.]—*See, further*, INJUNCTION, Vol. XXVIII., pp. 389 *et seq.*

C. Money Had and Received.

See CONTRACT, Vol. XII., p. 567, No. 4722.

D. Trespass.

See Civil Procedure Act, 1833 (c. 42), &, *generally*, TRESPASS.

488. Right to maintain.]—CLEGG *v.* DEARDEN, No. 1077, *post*.

489. ——.]—DARTMOUTH (EARL) *v.* SPITTLE, No. 441, *ante*.

490. —— Copyholder.]—The lord of a manor, as such, has no right, without a custom, to enter upon the copyholds within his manor, under which there are mines & veins of coal, in order to bore for & work the same : & the copyholder may

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477 i. —— *Threatened trespass to minerals.*]—NOBLE FIVE CONSOLIDATED MINING & MILLING CO., LTD. *v.* LAST CHANCE MINING CO. (1903), 23 C. L. T. 252; 9 B. C. R. 514.—**CAN.**

d. —— *Agreed boundary line outside land of both parties—Acquisition of outside land by one party—Injunction refused to other for breach of agreement, for want of title to outside land.*]—BAND OF HOPE & ALBION CONSOLS REGISTERED *v.* ST. GEORGE & BAND OF HOPE UNITED CO. REGISTERED (1870), 1 V. R. 183.—**AUS.**

e. —— *Interested parties.*]—Landlords may join with their tenants in a suit for injury to the soil; & the A.-G. representing the Crown may join in the same suit for an injunction to restrain mining for gold & an account of gold removed; the same act, defts.' mining, being a common injury to all. —A.-G. *v.* BOYD (1872), 3 V. R. (Eq.) 192.—**AUS.**

f. —— *Trespass to minerals reserved.*]—STAPLES *v.* HARPUR (1866), 17 Ir. Jur. 121.—**IR.**

PART VI. SECT. 2, SUB-SECT. 1.—D.

488 i. *Right to maintain.*]—TRABOLD *v.* MILLER (1903), Cout. 281.—**CAN.**

g. —— *Lessee of Crown in possession under gold mining lease.*]—ALADDIN GOLD MINING CO. REGISTERED *v.* ALADDIN & TRY-AGAIN UNITED GOLD MINING CO. REGISTERED (1869), 6 W. W. & A'B. 266.—**AUS.**

h. —— *Applicant for mining lease of claim not regularly marked out—No action against persons entering & staking according to regulations.*]—

Sect. 2.—Rights against persons wrongfully taking minerals: Sub-sect. 1, D., E. & F.; sub-sect. 2, A., B. & C.]

maintain trespass against him for so doing.—BOURNE *v.* TAYLOR (1808), 10 East, 189; 103 E. R. 747.

Annotation:—**Refd.** Rogers *v.* Taylor (1857), 1 H. & N. 706.

491. When action maintainable—Necessity for actual possession.]—COX *v.* GLUE, No. 84, *ante*.

492. —— ——.]—A person having only an *interesse termini* cannot maintain an action on a covenant for quiet enjoyment; neither can he maintain an action for trespass, or for damages.—WALLIS *v.* HANDS, [1893] 2 Ch. 75; 62 L. J. Ch. 586; 68 L. T. 428; 41 W. R. 471; 9 T. L. R. 288; 37 Sol. Jo. 284; 3 R. 351.

—— ——.]—*See, also*, No. 117, *ante*, No. 497, *post*.

493. —— **Necessity for title.**]—Resp., who held land under a grant from the Crown by which all mines & minerals were expressly reserved to the Crown, brought an action against applts. for the removal of minerals from under his land. After the commencement of the action he obtained a statement in writing from the Crown that no claim was made on the part of the Crown to the minerals in question:—*Held:* this statement had no retrospective effect so as to vest in resp. a title to the minerals at the commencement of the action & the action would not lie.—FERNANDO *v.* DE SILVA (1912), 82 L. J. P. C. 111; 107 L. T. 670, P. C.

494. Who may maintain action—Licencee.]—Trespass & not case will lie for encroaching on a lead mine, though pltf. has no property in the soil above the mine, but only a liberty of digging.—HARKER *v.* BIRKBECK (1764), 3 Burr. 1556; 1 Wm. Bl. 482; 97 E. R. 978.

Annotations:—**Apld.** Low Moor Co. *v.* Stanley Coal Co. (1875), 33 L. T. 436. **Refd.** Muskett *v.* Hill (1839), 5 Bing. N. C. 694; Weeton *v.* Woodcock (1839), 5 M. & W. 587; Sutherland *v.* Heathcote, [1891] 3 Ch. 504. **Mentd.** Beck d. Fry *v.* Phillips (1772), 5 Burr. 2827; Scott *v.* Shepherd (1773), 2 Wm. Bl. 892; Chambers *v.* Donaldson (1809), 11 East, 66; Humphrey *v.* Nowland (1862), 15 Moo. P. C. C. 343.

495. —— **Acquisition of title under Statute of Limitations.**]—LOW MOOR CO. *v.* STANLEY COAL CO., LTD., No. 171, *ante*.

496. —— **Copyholder.**]—LEWIS *v.* BRANTHWAITE, No. 117, *ante*.

497. —— ——.]—(1) In an ordinary copyhold manor the estate of the copyhold is in the soil throughout except as regards trees, mines, & minerals, the property in which remains in the lord. When the lord has removed minerals the space left belongs to the copyholder. The right of the lord is not like that of a vendor of freeholds who has reserved mines, & remains the owner of the vacant space from which minerals have been removed. In a Crown manor, where the Crown & its lessees were by custom entitled to enter on the land for the purpose of working the minerals, deft., the lessee of the Crown mines, who was also lessee of the S. mine outside the manor, claimed a right to use a crut or underground way beneath the land of the pltfs., who were copyholders of part of the manor, for the purpose of conveying minerals from the S. mine to the deep pit by which the manorial mines were worked, & thence by a branch railway constructed by deft. over part of the same copyhold to the main line:—*Held:* such user was a trespass, &, no case of acquiescence on the part of pltfs. or their predecessor in title having been established, they were entitled to an injunction to restrain deft. from carrying the S. minerals over or under their copyhold land.

(2) If a stranger takes the minerals, the copyholder can bring trespass against the stranger for interfering with his possession, & the lord may bring trover, or whatever the form of action may be now, against the stranger to recover the minerals (JESSEL, M.R.).

(3) If a freeholder grants lands, excepting mines, he severs his estate vertically, *i.e.* he grants out his estate in parallel horizontal layers, & the grantee only gets the parallel layer granted to him, & does not get any underlying mineral layer or stratum (JESSEL, M.R.).

(4) He has used the words "reservation of the minerals," meaning an exception of the mines (JESSEL, M.R.).—EARDLEY *v.* GRANVILLE (1876), 3 Ch. D. 826; 45 L. J. Ch. 669; 34 L. T. 609; 24 W. R. 528.

Annotations:—*As to* (1) **Distd.** Tucker *v.* Linger (1882), 21 Ch. D. 18. **Refd.** Powell *v.* Vickerman (1887), 3 T. L. R. 358; Derry *v.* Sandors, [1919] 1 K. B. 223. *As to* (3) **Distd.** Ruabon Brick & Terra Cotta Co. *v.* G. W. Ry., [1893] 1 Ch. 427. **Foll.** Batten Pooll *v.* Kennedy, [1907] 1 Ch. 256. **Consd.** Thomson *v.* St. Catharine's College, Cambridge, etc., [1919] A. C. 468. **Refd.** G. W. Ry. *v.* Cefn Cribbwr Brick Co., [1894] 2 Ch. 157. *Generally*, **Mentd.** Webb *v.* Knight, Hedley *v.* Webb (1901), 70 L. J. Ch. 663.

—— —— **Against lord of manor.**]—*See* COPYHOLDS, Vol. XIII., p. 82, No. 1033.

498. Against whom action maintainable—Whether against personal representatives of trespasser.]—WRIGHT *v.* LEIGH (1888), 4 T. L. R. 573, C. A.

See, generally, EXECUTORS, Vol. XXIV., pp. 647, 648, Nos. 6739, 6740.

E. Trover.

See, generally, TROVER.

499. Right to maintain action.]—MARTIN *v.* PORTER, No. 567, *post*.

500. ——.]—The jury are to determine what damages shall be given: if there was fraud or negligence on the part of the deft., they may give, as damages under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin* v. *Porter*, No. 567, *post*; but, if they think that deft. was not guilty of fraud or negligence, but acted fairly & honestly in the full belief that he had a right to do what he did, they may give the fair value of the coals as if the coal field had been purchased from pltf. (PARKE, B.).—WOOD *v.* MORKWOOD (1841), 3 Q. B. 440, n.; 114 E. R. 575, N. P.

Annotations:—**Expld.** Hood *v.* Easton (1856), 2 Giff. 692. **Foll.** Hilton *v.* Woods (1867), L. R. 4 Eq. 432. **Consd.** Llynvi Co. *v.* Brogden (1870), L. R. 11 Eq. 188; Jegan *v.* Vivian (1871), 6 Ch. App. 742. **Apprvd.** Livingstone *v.* Rawyards Coal Co. (1880), 5 App. Cas. 25. **Refd.** Trotter *v.* Maclean (1879), 13 Ch. D. 574; Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n.

501. —— **Tenant of copyhold.**]—PLAYER *v.* ROBERTS (1632), W. Jo. 243; 82 E. R. 128.

Annotations:—**Apld.** Bourne *v.* Taylor (1808), 10 East, 189. **Mentd.** Vandeput *v.* Lord (1718), 1 Stra. 78.

502. —— —— **Against lord of manor.**]—(1) Copyhold land was let to a tenant from year to year:—*Held:* digging for coprolitics by the lord was damage to the reversion which the reversioner was entitled to restrain.

(2) A lord having entered on copyholds & dug

HIGGINS *v.* DYER (1875), 1 N. Z. Jur. N. S. 26.—**N.Z.**

493 i. *When action maintainable—Necessity for title.*]—Complainants are not bound to show a perfect title, & if they have miners' rights & are in *bonâ fide* possession of the ground under a *bonâ fide* contract of purchase, they can maintain an action for trespass against mere wrongdoers.—AH TAN *v.* KAPATZO (1875), 1 N. Z. Jur. N. S. 16.—**N.Z.**

k. *Assessment of damages—Appointment of arbitrator.*]—PALGRAVE MINING CO. *v.* MCDONALD (1891), 24 N. S. R. (12 R. & G.) 70.—**CAN.**

for coprolities:—*Held:* the copyholder was entitled to the net price of the coprolities, less such sum as would have induced some one to do the work of getting them.—A.-G. *v.* TOMLINE (1877), 5 Ch. D. 750; 46 L. J. Ch. 654; 36 L. T. 684; 25 W. R. 803.

Annotation:—**Refd.** Elwes *v.* Brigg Gas Co. (1886), 33 Ch. D. 562.

503. —— Lord of manor — Against tenant.]—DEARDEN *v.* EVANS (1839), 5 M. & W. 11; 2 Horn & H. 7; 8 L. J. Ex. 171; 3 Jur. 703; 151 E. R. 5; *sub nom.* DEERLING *v.* EVANS, 3 J. P. 404.

504. —— —— —— Or stranger.]—EARDLEY *v.* GRANVILLE, No. 497, *ante*.

F. Use and Occupation.

See, generally, LANDLORD & TENANT, Vol. XXXI., pp. 275 *et seq.*

505. Whether action lies.]—PHILLIPS *v.* HOMFRAY, No. 457, *ante*.

SUB-SECT. 2.—ACCESS TO AND INSPECTION OF MINE.

A. In General.

See R. S. C., Ord. 50, r. 3.

506. Purpose for which access granted—Ascertainment of boundaries.]—LEWIS *v.* MARSH, No. 990, *post*.

507. —— ——.]—A.-G. *v.* CHAMBERS (1849), 12 Beav. 159; 50 E. R. 1020.

Annotation:—**Refd.** Bennett *v.* Griffiths (1861), 3 E. & E. 467.

508. —— ——.]—In an action of trespass against an adjoining colliery owner, order made for inspection of that part of defts.' mine which lay under or near the mine of pltf. & to measure the coal taken away from under pltf.'s land. Order to inspect the whole of defts.' mines to remove barriers & take samples refused.—COOPER *v.* INCE HALL CO., [1876] W. N. 21; 2 Char. Cham. Cas. 67; Bitt. Prac. Cas. 103.

509. —— Ascertainment of extent of trespass.]—The owner of a mine sought relief against the owner of an adjoining mine for an alleged trespass in working into pltf.'s mine:—*Held:* pltf., upon making out a *primâ facie* case, was entitled to an interlocutory order for the inspection of deft.'s mine; the denial by deft. of the trespass was not a sufficient ground for refusing the order, & it did not depend upon the balance of testimony.

Suppose a man had a right to the surface, & that another person was entitled to the minerals. If the latter insisted that the former had sunk a shaft & was abstracting his minerals, would not this ct. allow an inspection, in order that the fact in dispute might be ascertained? . . . Pltf. is entitled to an inspection but it must be at his own expense, & on giving deft. reasonable notice. Pltf. must have an order to inspect at all reasonable times upon giving one day's notice, so far as may be necessary to ascertain whether deft. has worked into pltf.'s land, & how far & to what extent, with liberty to measure, dial & make all such plans or surveys as may be necessary for that purpose, & to use deft.'s machinery for descending & ascending, doing no injury to pltf.'s works, & paying deft. any expenses which he may incur (ROMILLY, M.R.).—BENNITT *v.* WHITEHOUSE (1860), 28 Beav. 119; 29 L. J. Ch. 326; 2 L. T. 45; 6 Jur. N. S. 528; 8 W. R. 251; 54 E. R. 311.

510. —— Ascertainment of openings causing flooding.]—PLANT *v.* STOTT, No. 479, *ante*.

511. —— Stopping up passages into mine.]—PHILLIPS *v.* HOMFRAY, FOTHERGILL *v.* PHILLIPS (1871), 6 Ch. App. 770.

Annotations:—**Refd.** Williams *v.* Raggett (1877), 46 L. J. Ch. 849; Phillips *v.* Homfray, Homfray *v.* Phillips (1883), 52 L. J. Ch. 833. **Mentd.** Whitwham *v.* Westminster Brymbo Coal & Coke Co., [1896] 2 Ch. 538.

512. —— Measurement of coal removed.]—COOPER *v.* INCE HALL CO., No. 508, *ante*.

513. Inspection as between co-defendants.]—Claims being made against two defts. severally in the same action:—*Held:* under R. S. C., Ord. 50, r. 3, inspection could not be granted to one deft. of property belonging to another deft. when there was no right in question as between them in the action.—SHAW *v.* SMITH (1886), 18 Q. B. D. 193; 56 L. J. Q. B. 174; 56 L. T. 40; 35 W. R. 188; 3 T. L. R. 216, C. A.; *revsg.* S. C. *sub nom.* SHAW *v.* PEASE 3 T. L. R. 168.

Annotations:—**Refd.** Cory *v.* Cory, [1923] 1 Ch. 90. **Mentd.** Eden *v.* Weardale Iron & Coal Co. (1887), 34 Ch. D. 223; Marshall *v.* Langley, [1889] W. N. 222; Alcay & Gandia Ry. & Harbour Co. *v.* Greenhill (1896), 74 L. T. 345; Spokes *v.* Grosvenor Hotel Co., [1897] 2 Q. B. 124; Birchal *v.* Birch, Crisp, [1913] 2 Ch. 375.

514. Order for inspection after reference.]—BARNETT *v.* ALDRIDGE COLLIERY CO., LTD. (1887), 4 T. L. R. 16.

Annotation:—**Refd.** Macalpine *v.* Calder, [1893] 1 Q. B. 545.

515. Removal of obstructions to inspection.]—LONSDALE (EARL) *v.* CURWEN (1799), 3 Bli. 168; 4 E. R. 566.

Annotations:—**Apld.** East India Co. *v.* Kynaston (1821), 3 Bli. 153. **Refd.** Bennitt *v.* Whitehouse (1860), 28 Beav. 119; Bennett *v.* Griffiths (1861), 3 E. & E. 467.

516. ——.]—WALKER *v.* FLETCHER (1804), 3 Bli. 172; 4 E. R. 568.

Annotation:—**Consd.** Bennett *v.* Griffiths (1861), 3 E. & E. 467.

517. ——.]—BARNETT *v.* ALDRIDGE COLLIERY CO., LTD. (1887), 4 T. L. R. 16.

Annotation:—**Refd.** Macalpine *v.* Calder, [1893] 1 Q. B. 545.

See, also, No. 1061, *post*.

B. Mode of obtaining Order.

518. Interlocutory application.]—LEWIS *v.* MARSH, No. 990, *post*.

519. ——.]—BENNITT *v.* WHITEHOUSE, No. 509, *ante*.

520. ——.]—WHALEY *v.* BRANCKER, No. 473, *ante*.

521. ——.]—COOPER *v.* INCE HALL CO., [1876] W. N. 24; 2 Char. Cham. Cas. 67; Bitt. Prac. Cas. 103.

C. Contents of Order.

522. Notice of inspection.]—WALKER *v.* FLETCHER (1804), 3 Bli. 172; 4 E. R. 568.

Annotation:—**Apld.** Bennett *v.* Griffiths (1861), 3 E. & E. 467.

PART VI. SECT. 2, SUB-SECT. 2.—A.

l. *Order for inspection — Refusal where suspicion of applicanon for improper purpose.*]—UNITED HAND & BAND OF HOPE CO. *v.* WINTER'S FREEHOLD CO. (1872), 3 V. R. (Eq.) 77.—**AUS.**

m. —— *Discretion of judge.*]—In an action for trespass to his mine, an order was obtained by pltf., from a judge at chambers, for inspection of deft.'s mine, below the surface upon complying with certain terms fixed by the judge:—*Held:* the order was within the discretion of the judge granting it, & that the ct. could not interfere with that discretion.—GRAY *v.* HARDMAN (1896), 28 N. S. R. (16 R. & C.) 235.—**CAN.**

n. *Purpose for which order for inspection granted—Preservation of evidence when danger of flooding.*]—ESQUIMALT & NANAIMO RY. CO. *v.* NEW VANCOUVER COAL CO. (1898), 6 B. C. R. 194.—**CAN.**

o. —— *Ascertainment of extent of trespass.*]—STAR MINING & MILLING CO., LTD. LIABILITY *v.* BYRON N. WHITE CO. (FOREIGN) (1907), 13 B. C. R. 234.—**CAN.**

Sect. 2.—Rights against persons wrongfully taking minerals: Sub-sect. 2, C. & D.; sub-sects. 3, 4 & 5, A. (a), (b), (c) & (d).]

523. ——.]—LEWIS *v.* MARSH (1849), 8 Hare, 97; 13 L. T. O. S. 89; 68 E. R. 288.

524. ——.]—A.-G. *v.* CHAMBERS (1849), 12 Beav. 159; 50 E. R. 1020.

Annotations:—**Folld.** Bennitt *v.* Whitehouse (1860), 2 L. T. 45. **Refd.** Bennett *v.* Griffiths (1861), 3 E. & E. 467.

525. ——.]—BENNITT *v.* WHITEHOUSE, No. 509, *ante*.

526. ——.]—COOPER *v.* INCE HALL CO., [1876] W. N. 24; Bitt. Prac. Cas. 103; 2 Char. Cham. Cas. 67.

527. Names & descriptions of persons viewing.]—WALKER *v.* FLETCHER (1804), 3 Bli. 172; 4 E. R. 508.

Annotation:—**Mentd.** Bennett *v.* Griffiths (1861), 3 E. & E. 467.

528 ——.]—LEWIS *v.* MARSH (1849), 8 Hare, 97; 13 L. T. O. S. 89; 68 E. R. 288.

529. Lodgment of security.]—Pltf. & defts. were adjacent mine owners. Pltf. having reason to believe that defts. had encroached upon his mine, obtained permission from them to make an inspection of their mine, when he found a recently erected wall at the boundary between the two mines, which prevented him from ascertaining whether defts. had encroached upon his mine or not. Application by him to defts. for permission to take down a portion of this wall in order to complete the inspection having been refused, pltf. applied to a judge at chambers, under C. L. P. Act, 1854 (c. 125), s. 58, for an order for inspection. The judge, upon being satisfied that a portion of defts.' wall could be safely removed, & an inspection behind it made without danger to life, & with no further detriment to defts. than a temporary suspension of their works, made an order that pltf. should inspect defts.' mine at & behind the wall, & should be at liberty, so far as was necessary for the purpose of the inspection, to make a driftway through the wall; before making the inspection giving security to the satisfaction of the master to the extent of £500, or depositing that sum with the master, to abide any order the ct. might make as to indemnifying defts. from any loss or damage they might sustain in consequence of the inspection:—*Held:* refusing a motion on behalf of defts. for a rule calling on pltf. to show cause why this order should not be set aside, the order was good, & not in excess of the judge's jurisdiction under the statute.—BENNETT *v.* GRIFFITHS (1861), 3 E. & E. 467; 30 L. J. Q. B. 98; 3 L. T. 735; 7 Jur. N. S. 284; 9 W. R. 332; 121 E. R. 517.

Annotation:—**Refd.** Perkins *v.* L. & N. W. Ry. (1874), 1 Ry. & Can. Tr. Cas. 327.

D. Costs.

530. Borne by party inspecting.]—BENNITT *v.* WHITEHOUSE, No. 509, *ante*.

531. Discretion of court.]—PLANT *v.* STOTT, No. 479, *ante*.

532. ——.]—An order was made in chambers for the inspection of defts.' property, the costs of inspection to be paid by pltf.:—*Held:* under R. S. C., Ord. 52, r. 3, the judge had a discretion to order pltf. to pay the costs & the order being made in his discretion, pltf. had no right without leave to appeal from it.—MITCHELL *v.* DARLEY MAIN COLLIERY CO. (1883), 10 Q. B. D. 457; 52 L. J. Q. B. 394; 31 W. R. 549, D. C.

Annotation:—**Refd.** Ashworth *v.* English Card Clothing Co. (1904), 52 W. R. 507.

SUB-SECT. 3.—DISCOVERY OF DOCUMENTS.

See, generally, DISCOVERY, Vol. XVIII., pp. 42 *et seq.*

533. Production of title deeds—Irrelevant parts sealed.]—WAYNE'S MERTHYR CO. *v.* POWELL'S DYFFRYN STEAM COAL CO., [1880] W. N. 141.

——.]—*See* DISCOVERY, Vol. XVIII., pp. 143, 151, 154, Nos. 917, 1025, 1049.

Interrogatories as to title.]—*See* DISCOVERY, Vol. XVIII., pp. 219, 227, Nos. 1664, 1743.

SUB-SECT. 4.—LOSS OF REMEDY.

534. Effect of release.]—ECCLESIASTICAL COMRS. FOR ENGLAND *v.* NORTH EASTERN RY. CO., No. 558, *post*.

535. Account limited to six years.]—ASHTON *v.* STOCK, No. 475, *ante*.

536. ——.]—GLYN *v.* HOWELL, No. 173, *ante*.

——.]—*See* LIMITATION OF ACTIONS, Vol. XXXII., pp. 518, 523, 524, Nos. 1759, 1794–1801.

—— **Fraudulent concealment.**]—*See* LIMITATION OF ACTIONS, Vol. XXXII., p. 526, No. 1816.

—— **As between mortgagor & mortgagee.**]—*See* LIMITATION OF ACTIONS, Vol. XXXII., p. 423, No. 1004.

In cases of subsidence.]—*See* Part XIII., Sect. 1, sub-sect. 4, B. (*a*), *post*.

SUB-SECT. 5.—DAMAGES.

A. Measure of Damage.

(a) In General.

537. Whether costs of bringing to bank always allowed.]—JOB *v.* POTTON, No. 554, *post*.

538. ——.]—TROTTER *v.* MACLEAN, No. 549, *post*.

539. ——.]—JOICEY *v.* DICKINSON, No. 550, *post*.

540. Action by copyholder against lord of the manor—Gross amount produced by sale—Less cost of working & profit.]—A.-G. *v.* TOMLINE, No. 502, *ante*.

(b) Bonâ fide Belief in Title or Expectation of Title.

541. Value of minerals at pit's mouth—Less costs of severance & bringing to bank.]—WOOD *v.* MOREWOOD, No. 500, *ante*.

542. ——.]—JEGON *v.* VIVIAN, No. 701, *post*.

543. ——.]—ASHTON *v.* STOCK, No. 475, *ante*.

544. ——.]—JOICEY *v.* DICKINSON, No. 550, *post*.

545. ——.] CLEMENTS *v.* MATTHEWS, No. 572, *post*.

546. ——.]—TROTTER *v.* MACLEAN, No. 549, *post*.

(c) Fraudulent Taking.

547. Value of minerals at pit's mouth—Less cost of bringing to bank.]—WOOD *v.* MOREWOOD, No. 500, *ante*.

548. ——.]—(1) The owners of a colliery entered into a contract with an adjoining landowner for the purchase of his estate, without disclosing the fact, of which he was ignorant, that they had, without authority, gotten a considerable quantity of coal from under it:—*Held:* the ct. would not enforce the contract at the suit of

the purchasers, though the sale was not shown to be at an undervalue.

(2) In a suit by the landowner:—*Held:* the landowner was entitled to the value of the coals gotten under his land, with an allowance for raising, but none for getting, & to compensation in the way of wayleave & royalty for all minerals gotten by the defts. from their own mines & carried under his land.

(3) If a man knows that he has committed a trespass of a very serious character upon his neighbour's property, & finding it convenient to screen himself from the consequences, makes a proposal for the purchase of that property, he certainly ought to communicate to the person with whom he is dealing the exact state of the circumstances of the case, & to say to him, "I regret that from mistake . . . I have taken some two thousand tons of your coal. . . . I am ready to buy the property out & out, or I am ready to submit to the consequences of an action or an arbitration, or what you like, with reference to this coal which I have taken" (LORD HATHERLEY, C.).

(4) The ct. has now the power to grant compensation in respect of a continuously accruing damage *de die in diem*, arising from a continuous trespass underground, which can only be stopped by injunction restraining any further conveyance of coal through resp.'s property (LORD HATHERLEY, C.).—PHILLIPS *v.* HOMFRAY, FOTHERGILL *v.* PHILLIPS (1871), 6 Ch. App. 770, L. C.

Annotations:—As to (2) **Apld.** Williams *v.* Raggett (1877), 46 L. J. Ch. 849; Whitwham *v.* Westminster Brymbo Coal & Coke Co., [1896] 2 Ch. 538.

549. —— ——.]—The owner of a mine commenced to work from his own mine into an adjoining mine vested in trustees, in the *bonâ fide* belief that he was about to obtain from them a contract authorising him so to work, & gave to one of the trustees notice that he was about to commence working:—*Held:* (1) the working, though no contract was afterwards entered into, & the trustees had no power to make one, ought to be treated on the same footing as if it had been commenced inadvertently, & in taking an account of the minerals gotten without authority deft. was allowed the cost of severing them, as well as the cost of bringing them to bank; (2) from the time that notice was given to deft. that no contract would be made with him authorising him to work, his working was treated as fraudulent, & he was allowed only the cost of bringing the minerals to bank.

(3) So long as a wrongful working is to be treated as inadvertent Stat. Limitations applies, & the account will only be directed for six years from the issue of the writ.

(4) The *onus* is on deft. to show that minerals gotten by him were gotten before the six years.—TROTTER *v.* MACLEAN (1879), 13 Ch. D. 574; *sub nom.* TROTTER *v.* MACLEAN, TROTTER *v.* VAUGHAN, TROTTER *v.* FLETCHER, 49 L. J. Ch. 256; 42 L. T. 118; 28 W. R. 244.

Annotations:—As to (2) **Apprvd.** Joicey *v.* Dickinson (1881), 45 L. T. 643. **Refd.** Bulli Coal Mining Co. *v.* Osborne, [1899] A. C. 351. *As to* (3) **Consd.** Bulli Coal Mining Co. *v.* Osborne, [1899] A. C. 351. **Refd.** *Re* Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co. (1899), 68 L. J. Q. B. 252. *Generally*, **Mentd.** Rains *v.* Buxton (1880), 14 Ch. D. 537.

550. —— ——.]—(1) In assessing the amount of damages to be paid where another person's coal has been wrongfully taken by an adjoining mine owner, if the wrongful working was by inadvertence simply, or under a *bonâ fide* mistake of title, the wrongful worker is entitled to deduct from the market value both costs of severance & of bringing to bank. If the wrongful act has been fraudulent, negligent, wilful, or wholly unauthorised & unlawful, only the costs of bringing to bank are allowed. But in no case is the wrongful getter deprived of the costs of bringing to bank.

(2) Defts. & pltfs. were the owners of adjoining coal mines. Defts.' servants, without the knowledge of defts., trespassed on the mine of pltf., & therefrom took coal, which was brought to the mouth of defts.' pit:—*Held:* in taking an account of the money to be paid by defts. for the coal wrongfully taken, defts. were not entitled to deduct from the market value of the coal at the pit's mouth the costs of severing the coal, but were entitled to deduct the cost of bringing the coal to bank.—JOICEY *v.* DICKINSON (1881), 45 L. T. 643; 26 Sol. Jo. 109, C. A.

551. —— ——.]—Where a colliery co. wilfully & secretly took coal from an adjoining property, & the fact was not brought to light for many years afterwards, & no laches could be attributed to the adjoining owner in not discovering the existence of the wrongful workings:—*Held:* Stat. of Limitations had no application & the adjoining owner was entitled to recover from the wrongdoers the value of the coal so wrongfully taken, &, in the case of a winding-up, then to prove for that amount.—BULLI COAL MINING CO. *v.* OSBORNE, [1899] A. C. 351; 68 L. J. P. C. 49; 80 L. T. 430; 47 W. R. 545; 15 T. L. R. 257, P. C.

Annotation:—**Refd.** Oelkers *v.* Ellis, [1914] 2 K. B. 139.

(*d*) *Inadvertent Taking.*

552. Value of minerals at pit's mouth—Less costs of severance & bringing to bank.]—(1) In assessing compensation for coal already gotten by deft., the ct., being of opinion that he had worked it inadvertently, & not fraudulently, held that he was to pay only the fair value of such coal, as if he had purchased the mine from pltf.

(2) Pltf. is entitled . . . to the injunction which is asked for against the future working of the coal by deft. (MALINS, V.-C.).—HILTON *v.* WOODS (1867), L. R. 4 Eq. 432; 36 L. J. Ch. 941; 16 L. T. 736; 15 W. R. 1105.

Annotations:—As to (1) **Consd.** Llynvi Co. *v.* Brogden (1870), L. R. 11 Eq. 188; Trotter *v.* Maclean (1879), 13 Ch. D. 574. **Refd.** Eccl. Comrs. for England *v.* N. E. Ry. (1877), 4 Ch. D. 845. *Generally*, **Mentd.** Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n.

553. —— ——.]—Where coal has been wrongfully taken by working into the mine of an adjoining owner, the trespasser, in the absence of any suggestion of fraud, will be treated as the purchaser at the pit's mouth, & must pay the market value of the coal at the pit's mouth, less the actual disbursements, not including any profit or trade allowances, for severing & bringing it to bank, so as to place the owner in the same position as if he had himself severed & raised the coal.—*Re* UNITED MERTHYR COLLIERIES CO. (1872), L. R. 15 Eq. 46; 37 L. J. P. 148; 21 W. R. 117.

Annotation:—**Refd.** Trotter *v.* Maclean (1879), 13 Ch. D. 574.

554. —— ——.]—It is not destructive waste for a tenant in common of a coal mine to get, or to licence another to get, the coals, he, the working tenant, not appropriating to himself more than his share of the proceeds. Pltf., a tenant in

p. *Value of minerals removed—Less cost of raising & extracting.*]—LEHAN *v.* DILLON (1893), 19 V. L. R. 730.—AUS.

Sect. 2.—Rights against persons wrongfully taking minerals: Sub-sect. 5, A. (d), (e), (f), (g) & (h), & B.]

common of a coal mine, had notice of negotiation, which was followed by a lease for three years, in which he did not join, by his two-co-tenants, dated in Dec. 1865, of two undivided thirds of the coal with licence to work the coal. Under this licence some coal, but considerably less than two-thirds of the whole, was raised, & one-third of the royalty was kept by the licencee for pltf. A negotiation for a further licence was on foot, when in Oct. 1872, pltf. filed the bill against his co-tenants & the licencee, praying for an inquiry as to the value of the coals raised: & an account against all defts. as trespassers; for an injunction & receiver; & for damages:—*Held:* the working was not a trespass; & pltf. electing to dismiss the bill with costs against his co-tenants, decree, without costs, against the licencee for an account of the value at the pit's mouth of the coal raised, less costs of getting & raising, & for payment of one-third to pltf.

No authority has been referred to, & I believe none can be found, to say that the rights of tenants in common in a mine are not as extensive as can be suggested for each of these tenants to do what he wills with the undivided property, provided always that he does not take more than his share. . . . If a wrongdoer does an act which, if it were the case of a chattel, & capable of sustaining an indictment, would amount to larceny—then the most rigorous mode of taking the accounts is that which is adopted against him. If it has been by inadvertence, or by negligence, not culpable as tortious, in any other sense—then pltf. is entitled to the value of the coal at the pit's mouth, allowing nothing for the mere severance, but allowing for the transport of the coal to the pit's mouth (BACON, V.-C.).—JOB *v.* POTTON (1875), L. R. 20 Eq. 84; 44 L. J. Ch. 262; 32 L. T. 110; 23 W. R. 588.

Annotation:—**Distd.** Glyn *v.* Howell, [1909] 1 Ch. 666.

555. —— ——.]—TROTTER *v.* MACLEAN, No. 549, *ante*.

556. —— ——.]—L. was the owner of a small piece of land surrounded by coal mines which had been let to R. R. by mistake worked the coal under L.'s land, & L. sued R. for the value. L.'s land was so small that he could not have worked his coal with profit to himself:—*Held:* L. was not entitled to recover from R. the full value of the coal, but only a sum equal to a royalty at the rate paid for the adjacent coal, plus surface damage.—LIVINGSTONE *v.* RAWYARDS COAL CO. (1880), 5 App. Cas. 25; 42 L. T. 334; 44 J. P. 392; 28 W. R. 357, H. L.

Annotations:—**Consd.** Tucker *v.* Linger (1882), 46 L. T. 198. **Distd.** Taylor *v.* Mostyn (1886), 33 Ch. D. 226. **Consd.** Whitwham *v.* Westminster Brymbo Coal & Coke Co., [1896] 2 Ch. 538; Bulli Coal Mining Co. *v.* Osborne, [1899] A. C. 351; Eden *v.* N. E. Ry., [1907] A. C. 400. **Refd.** Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n.; Dreyfus *v.* Peruvian Guano Co. (1889), 42 Ch. D. 66. **Mentd.** *Re* A. B. & Co. (No. 2), [1900] 2 Q. B. 429.

557. —— ——.]—JOICEY *v.* DICKINSON, No. 550, *ante*.

558. —— **Less costs of bringing to bank only.**]—Pltfs., who were owners of a coal mine, claimed damages against the owners of an adjoining mine for having broken their barriers & worked their coal. The wrongful acts were committed in 1863 while the adjoining mine was being worked by the Hartlepool Ry. Co. The boundaries of the two mines were settled by mutual agreement in 1862, & after some lengthy negotiations a release was executed in 1864 by which all previous wrongful acts were condoned & released on both sides. An Act of Parliament was passed in 1863 by which the Hartlepool Ry. Co. were to sell their mines within five years; & in 1865 the railway co. was amalgamated with deft. co., & all their assets & liabilities were transferred to them:—*Held:* (1) although it was *ultra vires* of the railway co. to work mines, the Act of 1863 implied that the co. were to have power to work their mines until the mines were sold, & upon the amalgamation with deft. co. the latter became liable for the wrongful acts of their predecessors.

That it is *ultra vires* of a railway co. as harbour co. to work collieries does not & cannot, in my opinion, admit of the slightest doubt (MALINS, V.-C.).

(2) The wrongful acts committed in 1863 were not condoned by the release of 1864, pltfs. having had no ground for suspecting that while the release was in negotiation the previous settlement of boundaries had been broken.

(3) There must be an account of all coals & other materials worked by the W. H. Company from the W. C. Colliery & the mines therein comprised, & the value of such coal at the pit's mouth, making to defts. all just allowances for the costs & expenses incurred by them in bringing such coal to the pit's mouth, but not including the cost of getting or severing the coal (MALINS, V.-C.).—ECCLESIASTICAL COMRS. FOR ENGLAND *v.* NORTH EASTERN RY. CO. (1877), 4 Ch. D. 845; 47 L. J. Ch. 20; 36 L. T. 174.

Annotations:—*As to* (3) **Refd.** Trotter *v.* Maclean (1879), 13 Ch. D. 574. *Generally.* **Refd.** *Re* Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co. (1899), 68 L. J. Q. B. 252; Bulli Coal Mining Co. *v.* Osborne, [1899] A. C. 351. **Mentd.** Gibbs *v.* Guild (1881), 8 Q. B. D. 296.

(e) Negligent Taking.

559. Value of minerals at pit's mouth—Less cost of bringing to bank.]—WOOD *v.* MOREWOOD, No. 500, *ante*.

560. —— ——.]—JOICEY *v.* DICKINSON, No. 550, *ante*.

561. —— ——.]—TAYLOR *v.* MOSTYN, No. 462, *ante*.

(f) Owner Standing By.

562. Value of minerals at pit's mouth—Less costs of severance & bringing to bank.]—JEGON *v.* VIVIAN, No. 701, *post*.

563. —— ——.]—TROTTER *v.* MACLEAN, No. 549, *ante*.

(g) Unauthorised or Unlawful Taking.

564. Value of minerals at pit's mouth—Less costs of bringing to bank.]—LLYNVI CO. *v.* BROGDEN, No. 450, *ante*.

565. —— ——.]—JOICEY *v.* DICKINSON, No. 550, *ante*.

566. Loss of value of unworked coal.]—Deft. wrongfully worked pltfs.' coal, so that some coal left in large pillars was rendered partly by the

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PART VI. SECT. 2, SUB-SECT. 5.—A. (e).

559 i. *Value of minerals at pit's mouth—Less cost of bringing to bank.*]—The measure of damages for ore negligently abstracted by trespass workings is the same as if the trespass is wilful, & only the cost of bringing the ore to the bank will be allowed. The value of the ore so abstracted is its value to its owner at the time of the taking.—LAST CHANCE MINING CO., LTD. *v.* AMERICAN BOY MINING CO., LTD., 2 M. M. Cas. 150.—CAN.

PART VI. SECT. 2, SUB-SECT. 5.—A. (g).

q. *Actual damage must be shown.*]—An attempt to locate another claim on the same ground during the close season is merely an unauthorised trespass, a "jumping." Unless actual

effect of crushing less valuable to work :—*Held :* inasmuch as the physical constitution of the unworked coal was changed, damages would be given for the injury to the unworked coal.—WILLIAMS *v.* RAGGETT (1877), 46 L. J. Ch. 849 ; 37 L. T. 96 ; 25 W. R. 874.

(h) Wilful Taking.

567. Value of minerals at pit's mouth—Deduction of costs of bringing to bank.]—Where deft., in working his coal mine, broke through the barrier, & worked the coal under the land adjoining, belonging to pltf., & raised it for purposes of sale. In trespass for such working :—*Held :* the proper estimate of damages was the value of the coal when gotten, without deducting the expense of getting it.

I remain of the same opinion as I entertained at the trial [that pltf. would have been entitled in an action of trover to the value of the coal as a chattel] (PARKE, B.).—MARTIN *v.* PORTER (1839), 5 M. & W. 351 ; 2 Horn & H. 70 ; 151 E. R. 149.

Annotations :—**Apld.** Morgan *v.* Powell (1842), 3 Q. B. 278. **Folld.** Wild *v.* Holt (1842), 9 M. & W. 672. **Consd.** Reid *v.* Fairbanks (1853), 13 C. B. 692 ; Hilton *v.* Woods (1867), L. R. 4 Eq. 432. **Apld.** Llynvi Co. *v.* Brogden (1870), L. R. 11 Eq. 188. **Consd.** Jegon *v.* Vivian (1871), 6 Ch. App. 742 ; Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n. **Apld.** Whitwham *v.* Westminster Brymbo Coal & Coke Co., [1896] 2 Ch. 538. **Refd.** Wood *v.* Morewood (1841), 3 Q. B. 440, n. ; Hood *v.* Easton (1856), 2 Giff. 692 ; Phillips *v.* Homfray, Fothergill *v.* Phillips, (1871), 6 Ch. App. 770 ; Brown *v.* Dibbs (1877), 37 L. T. 171 ; Trotter *v.* Maclean (1879), 13 Ch. D. 574 ; Dreyfus *v.* Peruvian Guano Co. (1889), 42 Ch. D. 66 ; Phillips *v.* Homfray (1890), 59 L. J. Ch. 547. **Mentd.** Whitham *v.* Kershaw (1885), 16 Q. B. D. 613.

568. —— ——.]—(1) In trespass for breaking & entering pltf.'s mine & taking coals, evidence of working by pltf. in another part of same mine, within 80 yards of the place of the alleged trespass, coupled with a statement by deft., that he had got the coal, & was willing to pay such amount as should be settled by arbn., was held to be evidence of pltf.'s being in possession of the place where the trespass was committed.

(2) In trespass for taking coals from pltf.'s mine, where deft. is a mere wrongdoer, the measure of damages is the value of the coals at the time when they first existed as chattels, & deft. is not entitled to any deduction for the expense of getting them, or for a rent payable to the mine owner on coals got from the mine.

As to the damages, the jury are at liberty to give the full value of the coals, calculated at the time when they first exist as chattels, without deducting the expense of getting them, according to the rule laid down in the case of *Martin* v. *Porter*, No. 567, *ante*, which is a very salutary one, because the parties must know—at least they may know by proper drilling—that they are trespassing on their neighbours' property (PARKE, B.).—WILD *v.* HOLT (1842), 9 M. & W. 672 ; 1 Dowl. N. S. 876 ; 11 L. J. Ex. 285 ; 152 E. R. 284.

Annotations :—*As to* (2) **Consd.** Jegon *v.* Vivian (1871), 40 L. J. Ch. 389. **Refd.** Chew *v.* Holden (1843), 1 L. T. O. S. 625 ; Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n.

569. —— ——.]—In trespass for digging pltf.'s coals in his mine, & taking & converting them, the proper measure of damages is the value of the coal when it was first severed from the mine : if deft. has afterwards removed the coal & brought it to the pit's mouth, pltf. cannot recover damages according to the increased value given to it by these operations, though he may have had no opportunity of claiming the coal before they were performed. Deft., therefore, in trespass, must be allowed in damages for his expense & labour in removing the coal & bringing it to the pit's mouth, but not in first severing it from the mine.—MORGAN *v.* POWELL (1842), 3 Q. B. 278 ; 2 Gal. & Dav. 721 ; 11 L. J. Q. B. 263 ; 6 Jur. 1109 ; 114 E. R. 513.

Annotations :—**Apld.** Llynvi Co. *v.* Brogden (1870), L. R. 11 Eq. 188 ; Burmah Trading Corpn. *v.* Mirza Mahomed Ally Shorazee & Burmah Co. (1878), L. R. 5 Ind. App. 130. **Refd.** Hood *v.* Easton (1856), 2 Giff. 692 ; Hilton *v.* Woods (1867), L. R. 4 Eq. 432 ; Jegon *v.* Vivian (1871), 6 Ch. App. 742 ; Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n. **Mentd.** Whitham *v.* Kershaw (1885), 16 Q. B. D. 613.

570. —— ——.]—In trespass for taking coal from a mine, where deft. is a wrongdoer, the measure of damages is the price that could be got for it when taken out of the mine, & not the value of it at the shaft.—CHEW *v.* HOLDEN (1843), 1 L. T. O. S. 625.

571. —— ——.]—JOICEY *v.* DICKINSON, No. 550, *ante*.

572. —— ——.]—It appears to me to be analogous to the case of miners working adjoining mines where one takes the coal of the other. If he does so, knowing that he has no right to it & with the intention of appropriating to himself the coal of the other, he gets no allowance whatever for the expense of getting it, but if he does it with the honest belief that it is his own coal, he is entitled to the expense of severing it & bringing it up (COTTON, L.J.).—CLEMENTS *v.* MATTHEWS (1883), 11 Q. B. D. 808 ; 52 L. J. Q. B. 772, C. A.

Annotations :—**Mentd.** Joseph *v.* Lyons (1884), 15 Q. B. D. 280 ; Reeves *v.* Barlow (1884), 12 Q. B. D. 436 ; *Re* Clarke, Coombe *v.* Carter (1887), 36 Ch. D. 348 ; Tailby *v.* Official Receiver (1888), 13 App. Cas. 523.

B. Damages in nature of Interest.

See Civil Procedure Act, 1833 (c. 42), s. 29.

573. Right to damages in nature of interest—Action for account.]—PHILLIPS *v.* HOMFRAY, No. 457, *ante*.

—— **Reference to special referee.**]—*See* JUDGMENTS, Vol. XXX., p. 176, No. 445.

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damage be shown, nominal damages only will be awarded for the trespass.—KOOTENAY MINING APPEALS (1884), 1 M. M. Cas. 31 ; 1 B. C. R. pt. 2, 39.—**CAN.**

PART VI. SECT. 2, SUB-SECT. 5.—A. (h).

r. *Value of minerals at pit's mouth—Without deduction of cost of raising & extracting—Application of doctrine of per confusionem.*]—A.-G. *v.* LANSELL (1884), 10 V. L. R. 84.—**AUS.**

t. —— —— ——.] — LAMB *v.* KINCAID (Y. T.) (1907), 38 S. C. R. 516.—**CAN.**

a. —— ——.]—In the case of a wilful trespasser, the amount of damages to be assessed against him, following the harsher rule, should be the full value of the gold recovered without any deduction being made for the expenses incurred in recovering the same.—OLSEN *v.* DESJARLAIS (Y. T.) (1910), 15 W. L. R. 72.—**CAN.**

b. —— ——.]—YUKON GOLD CO. *v.* BOYLE CONCESSIONS, LTD. (B. C.), [1919] 3 W. W. R. 145.—**CAN.**

c. —— ——.]—Where defts. without leave quarried on the land of pltf. & removed a large quantity of stone therefrom :—*Held :* pltf. was entitled to recover by way of damages the value of the stone after it had been quarried & defts. were not entitled to a deduction therefrom of the cost they had incurred in quarrying the stone.—DAJIBA ANANDRAV *v.* BOMBAY-BARODA & CENTRAL INDIA RY. CO. (1869), 6 Bom. A. C. 235.—**IND.**

d. —— *Deduction of cost of hauling but not cost of severance.*]—Where one claimholder has committed a wilful & tortious trespass & conversion of his neighbour's diamondiferous soil, the measure of damages is the net value of the ground when delivered at the margin of the mine, after allowing for the cost of hauling, but without deducting the cost of severance.—HALL *v.* COMPAGNIE FRANÇAISE DES MINES DE DIAMANTS DU CAP (1883), 1 H. C. 464.—**S. AF.**

e. *Harsher rule — No deductions allowed—Not necessarily applicable.*]—FLEMING *v.* MCNEILL (1903), 7 TERR. L. R. 192.—**CAN.**

Sect. 2.—Rights against persons wrongfully taking minerals: Sub-sect. 5, C. Sects. 3 & 4. Part VII. Sects. 1 & 2; Sub-sect. 1.]

C. Application of Damages Recovered as between Limited Owners.

574. Right of lessee.]—J. demised land to pltf. at an annual rent for twenty-one years, with liberty to dig half an acre of brick earth annually; the lessee covenanted that he would not dig more, or if he did, that he would pay an increased rent of £375 per half acre, being after the same rate that the whole brick earth was sold for. A stranger dug & took away brick earth; the lessee recovered against him the full value of it:—*Held:* he was entitled to retain the whole damages.—ATTERSOLL *v.* STEVENS (1808), 1 Taunt. 183; 127 E. R. 802.

Annotation:—**Distd.** Toleman *v.* Portbury (1870), L. R. 5 Q. B. 288.

575. Right of tenant for life not impeachable for waste.]—*Re* BARRINGTON, GAMLEN *v.* LYON, No. 280, *ante*.

—— **Compensation for minerals compulsorily acquired.]**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 248, Nos. 1500–1503.

SECT. 3.—**REMEDIES FOR MALICIOUS DAMAGE.**

See CRIMINAL LAW, Vol. XV., pp. 1034–1035.

SECT. 4.—**COMPENSATION FOR MINERALS TAKEN UNDER STATUTORY POWERS.**

NOTE.—*The references in this section are to pages & numbers in* COMPULSORY PURCHASE OF LAND, Vol. XI.

Notice of intention to work & counter-notice.]—*See* pp. 154–156, 159–161.

Compensation where mining communications affected.]—*See* p. 156, Nos. 369, 370.

Compensation when working stopped—Railway Clauses (Consolidation) Act, 1845 (c. 20).]—*See* pp. 156, 157, Nos. 371–376.

—— **Waterworks Clauses Act, 1847 (c. 17).]**—*See* pp. 157, 158, Nos. 377–380.

—— **Public Health Act, 1875 (c. 55).]**—*See* p. 158, No. 381

—— **Private Acts.]**—*See* pp. 161–163, Nos. 401–412.

Compensation where minerals unworked but likely to prove profitable.] — *See* p. 126, No. 163.

Mineral contents of land taken—Burden of proof.] —*See* p. 131, No. 189.

Superfluous lands—Whether minerals apart from surface included.]—*See* p. 283, No. 2120.

Part VII.—Contracts.

SECT. 1.—**IN GENERAL.**

See Law of Property Act, 1925 (c. 20), s. 40.

See, generally, CONTRACT, Vol. XII., pp. 118–172.

576. Application of Statute of Frauds—"Interest in land"—Agreement to share profit & loss of colliery—Not affecting ownership of land.]—The Lord Chancellor upon appeal affirmed the decree upon the points decided at the Rolls; & held further, that the case was not within Stat. Frauds; the question being, whether a partnership subsisted in the trade of a colliery: a question of fact to be tried by evidence, as upon an issue; the interest in the lease passing, as an incident to the trade, by operation of law; & the evidence from books & letters was admitted; & an issue refused.

The case is merely a case of agreement to share profit & loss in the trade of a colliery; which does not at all affect the ownership of the land (LORD LOUGHBOROUGH, C.).—FORSTER *v.* HALE (1800), 5 Ves. 308; 31 E. R. 603, L. C.; *affg.* (1798), 3 Ves. 696.

Annotations:—**Consd.** Dale *v.* Hamilton (1846), 5 Hare, 369; *Re* Matthews's Settlmt., Smith *v.* Matthews (1861), 3 De G. F. & J. 139. **Reld.** Gray *v.* Smith (1889), 43 Ch. D. 208; Isaacs *v.* Evans (1899), 16 T. L. R. 113; *Re* De Nicols, De Nicols *v.* Curlier, [1900] 2 Ch. 410. **Mentd.** Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196.

577. —— —— —— Involving purchase of interest in land itself.]—An agreement between A., a lessee of a mine, & B., to become partners in the mine, paying the reserved rent, sub-letting the mine at a royalty, & dividing the profits:—*Held:* to be within Stat. Frauds, & not sufficiently proved by a receipt signed by A. & given to B. for a sum as B.'s share of the head rent of the mine, the sum being exactly half of that rent.

The agreement was one for the purchase of an interest in land, which was not reduced into writing so that its terms can be ascertained (LORD CRANWORTH, C.).—CADDICK *v.* SKIDMORE (1857), 2 De G. & J. 52; 27 L. J. Ch. 153; 30 L. T. O. S. 205; 3 Jur. N. S. 1185; 6 W. R. 119; 44 E. R. 907, L. C.

Annotations:—**Reld.** Isaacs *v.* Evans (1899), 16 T. L. R. 113; *Re* De Nicols, De Nicols *v.* Curlier, [1900] 2 Ch. 410.

578. —— —— Agreement to pay for surface damage.]—J., the occupier of land, verbally agreed with G. to allow him to open a quarry & erect a limekiln & work same on such land, provided G. would pay him for any damages that might be done to the land by erecting & working same:—*Held:* this was an agreement to pay for surface damage, & not for an interest in land within Stat. Frauds.—GRIFFITHS *v.* JENKINS (1864), 3 New Rep. 489; 9 L. T. 732; 10 Jur. N. S. 207; 12 W. R. 533.

579. —— —— Agreement for indemnification of retiring colliery manager.]—C. (applt.) & J. & T. were partners in working a colliery, of which they

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PART VII. SECT. 1.

f. *Application of Statute of Frauds—Statute must be pleaded.]*—KENNEDY *v.* CURRIE (1896), 17 N. S. W. L. R. (Eq.) 28; 12 N. S. W. W. N. 105.—**AUS.**

g. —— ——.]—To maintain the defence of Stat. Frauds to an agreement for sale or transfer of a mineral claim, both that statute & Mineral Act, 1891, s. 34, must be pleaded.—STUSSI *v.* BROWN (1897), 5 B. C. R. 380; 1 M. M. Cas. 195.—**CAN.**

h. ——.]—The interest of a free miner in his mineral claim is an interest in land & an agreement not in writing respecting it cannot be enforced.—FERO *v.* HALL (1898), 6 B. C. R. 421; 1 M. M. Cas. 238.—**CAN.**

k. ——.] — M. transferred to C. a portion of an interest in mining areas which he claimed was held in trust for him by deft.:—*Held:* the subject of the alleged assignment was an interest in lands within Stat. Frauds & not merely an interest in the proceeds of the sale as distinguished from an interest in the areas themselves, & consequently, pltf. could not recover on account of failure to comply with that statute.—MCNEIL *v.* CORBETT (N. S.) (1907), 39 S. C. R. 608.—**CAN.**

l. ——.]—*Re* MCGUIRE & SHAW (1908), M. C. C. 156.—**CAN.**

m. ——.]—T. gave pltf. a memorandum whereby for $50, T. agreed

were the lessees, under an agreement for a lease from the freeholder, & of which P. (resp.) was the manager, at a salary of £1 a week. The concern being in want of money, J., T. & P. borrowed of a bank, on their joint note, £150 to pay the colliers' wages, on which note P. was afterwards sued, & judgment obtained against him, & he was also summoned by the colliers for wages, which he was adjudged by the magistrates to pay. At a meeting subsequently held to consider the best means of forming a limited liability co. of which C., applt., & P., resp. & also J. & T. were present, applt. refused to join the co. unless resp. retired from all connection with it, when it was agreed, by all present, that £60 should be paid to resp. "for any interest he might have, & for his services rendered in working the colliery." Resp. sued applt., together with J. & T. in the county ct. (abandoning the excess above £50) for breach of their promise to pay him the £60 :—*Held :* (1) the interest of resp. in the colliery was not an interest in or concerning land, within Stat. Frauds, s. 4, & therefore the agreement for breach of which the claim was brought need not be in writing ; (2) as manager, resp. might be liable to be sued by creditors & workmen, & in various ways, & so had an interest the giving up of which formed a good consideration for defts.' promise.

Two objections have been taken on the part of applt. First, that the agreement above-mentioned was a contract concerning land, or an interest in land, & so should have been in writing, under Stat. Frauds. No doubt, if it had appeared that pltf.'s interest had been an interest in land, the objection would have been formidable & ought to prevail. But it appears from the case that pltf. was the manager of the colliery (KELLY, C.B.).—CHEADLE *v.* PROCTOR (1868), 19 L. T. 289.

SECT. 2.—CONTRACTS FOR SALE OF LAND CONTAINING MINERALS.

SUB-SECT. 1.—EFFECT OF ABSENCE OF TITLE TO MINERALS.

See, generally, SALE OF LAND.

580. Whether contract enforceable.] — HAYFORD *v.* CRIDDLE, No. 626, *post.*

581. ——.]—Land was described in a contract for sale as freehold, but it was shown by the abstract that it was formerly copyhold, & had been enfranchised under Enfranchisement Acts. A decree was afterwards made at the suit of the vendor for specific performance, & a general inquiry directed as to title ; in the course of which the purchaser for the first time objected that the minerals were reserved to the lord of the manor under Enfranchisement Acts :—*Held :* (1) the objection was fatal to the title ; (2) but as the purchaser had taken the objection so late he was not allowed his costs.—UPPERTON *v.* NICKOLSON (1871), 6 Ch. App. 436 ; 40 L. J. Ch. 401 ; 25 L. T. 4 ; 35 J. P. 532 ; 19 W. R. 733, L. JJ.

Annotations :—As to (1) **Refd.** *Re* Lord & Fullerton's Contract (1895), 44 W. R. 195 ; *Re* Jackson & Haden's Contract, [1906] 1 Ch. 412. *Generally,* **Mentd.** McGrory *v.* Alderdale Estate Co., [1918] A. C. 503.

582. —— Failure to object within stipulated time.]—Advertisement of an estate for sale by auction described as containing "coal which was then in the course of working in the adjoining estate" : the vendor having no right to the coal & minerals under the surface : the conditions of sale (which did not allude to the vendor having such a right, & which at the sale was stated by the auctioneer to be in another party) stipulated that the vendor's title should be deemed accepted unless the purchaser declared within one month after the delivery of the abstract of title his dissatisfaction, & that if any error, misstatement, or omission should be discovered in the description of the property, same should not vitiate the sale but should be the subject for compensation. On the face of the abstract, which was duly delivered, the right to dig coals, etc., appeared not to be in the vendors. A purchaser made no objection to the vendors' title within the stipulated time. On a claim filed by the vendors for specific performance, & a cross claim by the purchaser for compensation, the Vice-Chancellor dismissed them both without costs. An appeal from that decree by the purchaser was dismissed, &, by consent, a decree was made for specific performance.—SMITHSON *v.* POWELL, POWELL *v.* SMITHSON (1852), 20 L. T. O. S. 105, L. C.

583. —— Vendor willing to compensate purchaser.]—*Re* HARGREAVES & THOMPSON'S CONTRACT (1886), 32 Ch. D. 454 ; 56 L. J. Ch. 199 ; 55 L. T. 239 ; 34 W. R. 708 ; 2 T. L. R. 681, C. A.

Annotations :—**Consd.** *Re* Davis & Cavey (1888), 40 Ch. D. 601 ; *Re* Wilsons & Stevens' Contract, [1894] 3 Ch. 546. **Refd.** King *v.* Chamberlayn, [1887] W. N. 158 ; *Re* Higgins & Percival (1888), 59 L. T. 213 ; *Re* Bryant & Cullingford to Barningham (1889), 62 L. T. 53 ; *Re* Boulton & Cullingford's Contract (No. 2) (1893), 37 Sol. Jo. 248 ; *Re* Lord & Fullerton's Contract, [1896] 1 Ch. 228 ; *Re* Marshall & Salt's Contract, [1900] 2 Ch. 202 ; *Re* Haedicke & Lipski's Contract, [1901] 2 Ch. 666 ; *Re* Furneaux & Aird's Contract, [1906] W. N. 215. **Mentd.** *Re* Jackson & Woodburn's Contract (1887), 37 Ch. D. 44 ; *Re* Arbib & Class's Contract, [1891] 1 Ch. 601.

584. Right of purchaser to rescind — Though time for completion of contract not expired.]—On Apr. 17, 1889, deft.'s agent wrote to pltf.'s agent offering £800 for a house of pltf. On Apr. 25 pltf.'s agent, by his authority, wrote, accepting the offer, & stating that possession would be given at mid-summer. Pltf.'s solrs. sent to deft.'s solr. a draft contract containing special conditions, which deft.'s solr. struck out. On May 14 pltf.'s solrs. wrote to deft.'s solr : "We cannot consent to all your alterations, which, in fact, make the contract almost an open one." On May 17 deft.'s solr. sent back the draft with a letter stating that he could not advise his client to go on with the negotiations. Pltf.'s solrs. sent back the draft with some variations & with the abstract of title, from which it appeared that the land was enfranchised copyhold, & that the vendor had not the mines. On May 20 deft.'s solr. wrote to pltf.'s solrs. that, as pltf. had not the mines, he could not advise his client to go on with the matter. Deft. according refused to proceed. Pltf. negotiated with the lord of the manor for the purchase of the mines, but did not obtain a conveyance of them till Sept. In the meantime,

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to transfer to pltf. a one-half interest in any mining claim he might acquire on his prospecting trip "in or around Cobalt district" :—*Held :* if Stat. Frauds had any application to right of pltf. to maintain the action, that application had been destroyed by Mining Act, 1908, s. 71.—CHEVRIER *v.* TRUSTS & GUARANTEE CO. (1909), 14 O. W. R. 101 ; 18 O. L. R. 547.—**CAN.**

PART VII. SECT. 2, SUB-SECT. 1.

580 i. *Whether contract enforceable.*]—In an action brought by the vendor for specific performance of a contract for sale of land containing minerals :—*Held :* the purchaser should be discharged from the said contract unless the vendor made a good title to the minerals.—LEE *v.* SHRER (Alta.) (1914), 30 W. L. R. 273 ; 7 W. W. R. 927 ; 19 D. L. R. 36.—**CAN.**

580 ii. ——.]—EWING *v.* MCGILL (1915), 30 W. L. R. 452 ; 7 W. W. R. 1147 ; 8 Alta. L. R. 104.—**CAN.**

580 iii. ——.]—BARTON *v.* DOWNES (1842), Fl. & K. 505.—**IR.**

580 iv. ——.]—MARTIN *v.* COTTER (1846), 3 Jo. & Lat. 496.—**IR.**

n. Right of purchaser to rescind—Not after entry into possession.]—Under an agreement for the sale of land the

Sect. 2.—Contracts for sale of land containing minerals: Sub-sects. 1, 2 & 3.]

on June 22, 1889, pltf. commenced this action for specific performance or damages. The judge held that the letters of Apr. constituted a contract, & that it was not affected by the subsequent correspondence; but that, as pltf. had occasioned the difficulty by insisting on stipulations to which he was not entitled, the action must be dismissed. Pltf. appealed:—*Held:* (1) as in May, 1889, the vendor had not power to convey the mines, nor power to compel a conveyance of them from any other person, the purchaser was entitled, upon discovering this, to rescind the contract, though the time to be allowed for completion had not expired, & specific performance could not be decreed; (2) pltf. could not sustain a claim for damages for breach of contract, since he was not, on June 24, which must be treated as the end of the time allowed for completion, in a position to give deft. such a conveyance as deft. was entitled to. *Qu.:* whether, if on June 24 pltf. had been able & willing to give deft. a proper conveyance, he would not have been entitled to damages for deft.'s breach of contract.

(3) It is said that the [deft.] knew this was enfranchised land. He probably did know that; but that would not acquaint him with the fact that the minerals had not been acquired by the vendor (LINDLEY, L.J.).—BELLAMY *v.* DEBENHAM, [1891] 1 Ch. 412; 60 L. J. Ch. 166; 64 L. T. 478; 39 W. R. 257; 7 T. L. R. 199, C. A.

Annotations:—As to (1) **Consd.** Brickles *v.* Snell, [1916] 2 A. C. 599. **Refd.** *Re* Cooke & Holland's Contract (1898), 78 L. T. 106. *As to* (2) **Consd.** Brickles *v.* Snell, [1916] 2 A. C. 599. *Generally,* **Mentd.** Mason *v.* Von Buch (1899), 15 T. L. R. 430; Halkett *v.* Dudley, [1907] 1 Ch. 590; Perry *v.* Suffields, [1916] 2 Ch. 187.

585. Right of purchaser to compensation—Failure to object to title within stipulated time.]—SMITHSON *v.* POWELL, POWELL *v.* SMITHSON, No. 582, *ante.*

586. ——.]—The vendor of an estate had granted to A. the right to work coals under the property, with a proviso, that when the working of the coal had finally ceased, the pits should be filled up, & the land restored to a proper state of cultivation. A. ceased to work the mines, & filled in the pits. Upon the sale of the estate A. claimed to be entitled to re-work the coal, & the purchaser therefore claimed compensation. The ct. considered that there had only been a temporary cessation to work the coals:—*Held:* the purchaser was entitled to compensation to be ascertained by an expert appointed by the judge.—RAMSDEN *v.* HURST (1858), 27 L. J. Ch. 482; 31 L. T. O. S. 325; 4 Jur. N. S. 200; 6 W. R. 349.

Annotation:—**Refd.** Rudd *v.* Lascelles, [1900] 1 Ch. 815.

587. ——.]—A condition giving the vendor the right to rescind in the event of his unwillingness to comply with an objection to the title, must not be considered as giving him an arbitrary power to annul the contract; some reasonable ground for his unwillingness must be shown. Before a vendor will be allowed to rescind, he must satisfy the ct. that he entered into the contract in ignorance of some material fact or document, or under some mistaken notion that he was entitled to sell & could make a title; there must be no failure of duty on his part, no element of shortcoming, & he must have omitted nothing which the ordinarily prudent man, having regard to his contractual relations with other persons, is bound to do.

J. & others contracted to sell to H. a villa residence by a description wide enough to include the mines & minerals under it. The contract provided (clause 13) that if the purchaser should "insist on any objection or requisition as to title" which the vendors should "be unable . . . or decline" to comply with, the vendors might rescind the contract; & (clause 14) that any error or misstatement should form the subject of compensation. The vendors believed that it was well known in the district that the minerals were reserved. The purchaser having insisted on a requisition that the vendors' title to the minerals should be furnished, the vendors gave a notice purporting to rescind the contract under clause 13:—*Held:* though the purchaser's objection was "an objection to the title" within the terms of clause 13, it was not an objection that the vendors could avail themselves of as a ground for rescinding the contract, having regard to the facts & their own conduct; & the purchaser was entitled, under clause 14, to a conveyance of the property with compensation in respect of the mines & minerals.—*Re* JACKSON & HADEN'S CONTRACT, [1906] 1 Ch. 412; 75 L. J. Ch. 226; 94 L. T. 418; 54 W. R. 434; 50 Sol. Jo. 256, C. A.

Annotations:—**Consd.** Merrett *v.* Schuster, [1920] 2 Ch. 240; Proctor *v.* Pugh, [1921] 2 Ch. 256; *Re* Des Reaux & Setchfield's Contract, [1926] Ch. 178. **Refd.** *Re* Milner & Organ's Contract (1920), 89 L. J. Ch. 315.

588. Right of vendor to rescind—Title to minerals doubtful.]—In a contract for sale of lands containing valuable quarries, there was a clause reserving to the vendors power to rescind if any objection should be persisted in, & another providing that compensation should be given for any error in the description of the property or the vendors' interest therein. The purchaser alleging that the right to the quarries was in a third party, under an exception of "mines & minerals" in one of the title deeds, asked for compensation, which the vendors, insisting that they could make a title to the quarries under a custom or by adverse user, refused to make, & upon petitioner persisting in his demand they exercised their power of rescinding. Upon bill filed by the purchaser:—*Held:* the question between the parties was one of title, & the rescission was therefore justifiable.—MAWSON *v.* FLETCHER (1870), 6 Ch. App. 91; 40 L. J. Ch. 131; 23 L. T. 545; 35 J. P. 391; 19 W. R. 141, L. JJ.

Annotations:—**Consd.** *Re* Jackson & Haden's Contract, [1905] 1 Ch. 603. **Refd.** Heppenstall *v.* Hose (1884),

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vendor covenanted to "convey the said land & premises to the purchaser by good & sufficient deed & transfer," & the purchaser accepted the title of the vendor, assumed an existing mtge., & went into & remained in possession for nearly six years, during which time he obtained an extension of the time for payment of the mtge. He then sued for rescission on the ground that the vendor had no title to the mines & minerals:—*Held:* pltf. was not entitled to rescission.—BERENIK *v.* SHELDON FARM CO., LTD., [1926] 2 D. L. R. 977; [1926] 2 W. W. R. 177; 20 Sask. L. R. 534; *affg.* [1925] 4 D. L. R. 752; [1925] 3 W. W. R. 465; 20 Sask. L. R. 86.—**CAN.**

588 i. *Right of purchaser to compensation.*]—Pltf. sued D. for purchase-money due under an agreement for the purchase by D. of land from pltf. At the trial, pltf. produced his certificates of title, one of which disclosed a reservation of all coal on or under a part of the land covered by the agreement:—*Held:* as there was no evidence that D. was aware of the deficiency when he agreed to purchase, he was entitled, upon payment of the amount due, to a conveyance of so much as pltf. was able to convey of what he had contracted to sell, with the right to compensation for the deficiency.—DAGENAIS *v.* DENIS (Alta.) (1913), 24 W. L. R. 441; 4 W. W. R. 839; 11 D. L. R. 676.—**CAN.**

c. —— *Except where amount of compensation cannot be ascertained.*]—If lands sold in the Landed Estates Ct. be subject to an exception of mines & minerals, & such exception has not been mentioned in the rental, the ct. will discharge the purchaser, if so required; but will not give compensation in the absence of means of ascertaining the value of the matters so excepted.—*Re* BUNBURY'S ESTATE (1867), 1 I. R. Eq. 458.—**IR.**

51 L. T. 589; *Re* Dames & Wood (1885), 29 Ch. D. 626; *Re* Terry & White's Contract (1886), 2 T. L. R. 327; Ashburner *v.* Sewell, [1891] 3 Ch. 405.

589. —— Knowledge by vendor of absence of title.]—*Re* JACKSON & HADEN'S CONTRACT, No. 587, *ante*.

590. Right of vendor to damages for breach—Acquisition of title after expiry of time for completion.]—BELLAMY *v.* DEBENHAM, No. 584, *ante*.

591. Whether purchaser entitled to costs—Delay in lodging objection to title.]—UPPERTON *v.* NICKOLSON, No. 581, *ante*.

Notice to purchaser of mining right.] — *See* Sub-sect. 2, *post*.

SUB-SECT. 2. —WHETHER PURCHASER AFFECTED WITH NOTICE OF MINING RIGHTS.

See, now, Law of Property Act, 1925 (c. 20), s. 44 (8); &, *generally*, SALE OF LAND.

592. Sale of copyhold land—Mines in possession of lord of manor.]—HAYFORD *v.* CRIDDLE, No. 626, *post*.

593. Mines in possession of third party.]—When a man is of right in possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, & persons so dealing cannot be heard to deny notice of the title under which the possession is held. Nor is it necessary that such possession should be continually visible or actively asserted.

Where therefore the purchasers of mines took possession under the agreement for purchase without any conveyance:—*Held:* a subsequent purchaser of the land without any exception of mines took with notice of the agreement, & was bound specifically to perform it.—HOLMES *v.* POWELL (1856), 8 De G. M. & G. 572; 44 E. R. 510, L. JJ.

Annotation:—**Refd.** Cavander *v.* Bulteel (1873), 29 L. T. 710.

594. Mines customarily separated from land.]—WRIGHT *v.* LEIGH (1890), cited in MacSwinney, Law of Mines, Quarries & Minerals, 4th ed. at p. 224.

595. Sale of enfranchised land — Notice of enfranchisement—Whether sufficient notice that vendor has no title to mines.] — BELLAMY *v.* DEBENHAM, No. 584, *ante*.

Effect of non-existence of minerals — In vein demised.]—*See* No. 666, *post*.

SUB-SECT. 3.—PURCHASER'S DUTY TO DISCLOSE.

See, generally, SALE OF LAND.

596. Whether purchaser bound to disclose — Existence of minerals.]—Suppose for instance that A. knowing there to be a mine in the estate of B. of which he knew B. was ignorant, should enter into a contract to purchase the estate of B. for the price of the estate, without considering the mine . . . A. as the buyer was not obliged, from the nature of the contract, to make the discovery (LORD THURLOW, C.).—FOX *v.* MACKRETH (1788), 2 Bro. C. C. 400; 2 Cox, Eq. Cas. 320; 29 E. R. 224. L. C.; *on appeal, sub nom.* MACKRETH *v.* FOX, 4 Bro. Parl. Cas. 258, H. L.

Annotations:—**Refd.** Walters *v.* Morgan (1861), 3 De G. F. & J. 718; Emma Silver Mining Co. *v.* Lewis (1879), 4 C. P. D. 396. **Mentd.** Hardwicke *v.* Vernon (1799), 4 Ves. 411; Gibson *v.* Joyes (1801), 6 Ves. 266; *Ex p.* Lacey (1802), 6 Ves. 625; Brown *v.* Higgs (1803), 8 Ves. 561; *Ex p.* James (1803), 8 Ves. 337; Coles *v.* Trecothick (1804), 9 Ves. 234; *Ex p.* Bennett (1805), 10 Ves. 381; Randall *v.* Errington (1805), 10 Ves. 423; A.-G. *v.* Dudley (1815), Coop. G. 146; Baker *v.* Peck (1860), 3 L. T. 656; Pell *v.* Midland Counties & South Wales Ry. (1869), 20 L. T. 288; *Re* Boles & British Land Co.'s Contract (1901), 71 L. J. Ch. 130.

597. —— ——.] — If an estate is offered for sale & I treat for it, knowing that there is a mine under it, & the other party makes no inquiry, I am not bound to give him any information of it (LORD ELDON, C.).—TURNER *v.* HARVEY (1821), Jac. 169; 37 E. R. 814, L. C.

Annotations:—**Refd.** Walters *v.* Morgan (1861), 3 De G. F. & J. 718; Thompson *v.* Lambert (1868), 17 W. R. 111. **Mentd.** Shrewsbury & Birmingham Ry. *v.* L. & N. W. Ry. (1853), 4 De G. M. & G. 115; Davies *v.* London & Provincial Marine Insce. (1878), 8 Ch. D. 469; Davis *v.* Ohrly (1898), 14 T. L. R. 260.

598. —— Value of minerals.] — WALTERS *v.* MORGAN, No. 601, *post*.

599. —— Wrongful working of minerals.]—PHILLIPS *v.* HOMFRAY, FOTHERGILL *v.* PHILLIPS, No. 548, *ante*.

600. Purchase by solvent partners from insolvent co-partner.]—The purchase by solvent partners of the share of a partner on an execution issued against him, in order to be valid must be made under circumstances beyond suspicion; therefore where the solvent partners in a coal mine before the sale by the sheriff removed the gear & prevented access to the coal mine through the shaft, & removed ironstone which had been newly raised, so as to prevent its being known that the seam of coal was almost reached, & then bid for & became the purchasers, & a few days afterwards, &, on one day's working, they discovered the seam of coal:—*Held:* the purchase must be set aside, & on repayment of the purchase money they were declared to be trustees of the share for the partner, although he had, without notice of the conduct of the purchasers, received the balance of the purchase money from the sheriff.—PERENS *v.* JOHNSON, JOHNSON *v.* PERENS (1857), 3 Sm. & G. 419; 65 E. R. 720; *sub nom.* PERRENS *v.* JOHNSON, JOHNSON *v.* PERRENS, 29 L. T. O. S. 383; 3 Jur. N. S. 975.

601. Purchaser hurrying vendor into agreement.]—There being no fiduciary relation between vendor & a purchaser, the purchaser is not bound to disclose any fact exclusively within his knowledge which might be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, but a word or gesture intended to induce the vendor to believe in the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a ct. of equity to refuse a decree of specific performance, & so, *a fortiori*, would any contrivance on the part of the purchaser, better informed than the vendor as to value, to hurry the vendor into an agreement without giving him an opportunity of being fully informed on that subject, or taking advice as to the terms of the bargain.

Where therefore an intended lessor & lessee of minerals were in the above position as to knowledge, & the intended lessee brought to the lessor a lease ready prepared, without previous negotiation as to the details of it, & induced the latter to sign it, saying he might trust to the proposed lessee for making a fair allowance if the minerals turned out more valuable than was supposed:—*Held:* a bill for specific performance filed by the intended lessee, offering to make a fair extra allowance, could not be sustained, & its dismissal was confirmed on appeal.

I cannot say that the omission in the agreement of a specific covenant for a sleeping rent is fatal (LORD CAMPBELL, C.).—WALTERS *v.* MORGAN (1861), 3 De G. F. & J. 718; 4 L. T. 758; 45 E. R. 1056, L. C.

Annotations:—**Refd.** Turner *v.* Green, [1895] 2 Ch. 205. **Mentd.** Seddon *v.* North Eastern Salt Co., [1905] 1 Ch. 326.

Sect. 2.—Contracts for sale of land containing minerals: Sub-sects. 3, 4 & 5. Sect. 3: Sub-sects. 1 & 2, A., B. & C.; sub-sect. 3.]

602. Purchaser misleading vendor into agreement.]—WALTERS *v.* MORGAN, No. 601, *ante.*

603. Tenant for life purchasing from trustees.]—*Qu.:* whether a tenant for life purchasing from the trustees is not in a different position from a stranger as regards obligations to communicate what he knows as to the value of the property.—DICCONSON *v.* TALBOT (1870), 6 Ch. App. 32; 24 L. T. 49; 19 W. R. 138, L. JJ.

Annotation:—**Mentd.** *Re* Laing's Settlmt., Laing *v.* Radcliffe, [1899] 1 Ch. 593.

604. Where fiduciary relation exists.]—The obligations on a solr. dealing with his client extend to the case of a dealing between a solr. & the trustee in bkpcy. of his client.

C. was, under the will of his mother, entitled to an interest in real estate, but whether for life or absolute was doubtful. He became bkpt., & a trustee in bkpcy. was appointed. J., the solr. of bkpt., had as solr., & having acted for some years as receiver, acquired an intimate knowledge of the nature & value of the estate. He had in negotiating mtges. for C. to consider the extent of his interest under the will; had obtained the opinion of counsel that it was for life only; but had himself formed an opinion that it was, probably, absolute, & not as he had described in his correspondence with the parties concerned merely for life; & he also formed an opinion that the estate was more valuable than the rental showed. He did not disclose his opinion to C., or to the trustee in bkpcy., or to his solr. He was employed by bkpt. to negotiate with the trustee for the purchase of his interest for the benefit of his wife & children. In the negotiation, as solr. & agent for bkpt., he found that the trustee could be induced to sell the interest for a very small sum (£77), & he availed himself of his knowledge, & contracted to purchase, secretly, for himself, but in the name of his brother, an interest which, as the ct. afterwards, in an action for administration, held, was absolute, & was worth some thousands of pounds. He never suggested to the trustee that he intended to purchase for himself, but gave him & his solr. to believe that the purchase was on behalf of bkpt.'s family. In an action by a subsequent trustee in bkpcy. to set aside the sale:—*Held:* the trustee in bkpcy. stood in the place of bkpt. for the purpose, that the solr. for bkpt. could not be allowed to hold as against the trustee an advantage obtained by him in the purchase from him by means of the knowledge which he had gained whilst acting as solr. for bkpt., & that J. & his brother were trustees for the trustee in bkpcy. & must give up to him every advantage of the purchase.

Taking the familiar illustration, if the agent becomes from his employment aware of the existence of a coal mine under his employer's land of which the employer is ignorant, though he could not purchase from the employer without disclosing that, it was said that he may do so from his trustee in bkpcy. I entirely dissent from that argument. The test is whether the purchase would be a benefit obtained to the prejudice or at the expense of the client (KAY, J.).—LUDDY'S TRUSTEE *v.* PEARD (1886), 33 Ch. D. 500; 55 L. J. Ch. 884; 55 L. T. 137; 35 W. R. 44; 2 T. L. R. 841.

SUB-SECT. 4.—SPECIFIC PERFORMANCE.

See, generally, SPECIFIC PERFORMANCE.

605. Whether remedy lies—Terms of contract ambiguous.]—WILLIAMSON *v.* WOOTTON, No. 625, *post.*

606. —— —— Effect of part performance.]—Where terms for letting farms provided that all materials required for buildings proposed to be built, or that might thereafter be built, should be led at the expense of the tenant; that the landlord should drain, the tenant leading tiles; that gates, buildings, "etc.," should be left in repair by the tenant, the landlord finding new gates when required; that the landlord reserved to himself all customary rights & reservations, such as liberty to cut & plant timber, search for & work mines, or minerals, "etc.," allowing the tenant for any reasonable damage:—*Held:* these stipulations did not render the agreement uncertain, so as to be incapable of being enforced specifically.

This agreement has been partly executed by possession having been taken under it: & there are many authorities to show that in such a case the ct. will strain its power to enforce a complete performance (LORD CHELMSFORD, C.).—PARKER *v.* TASWELL (1858), 2 De G. & J. 559; 27 L. J. Ch. 812; 31 L. T. O. S. 226; 22 J. P. 432; 4 Jur. N. S. 1006; 6 W. R. 608; 44 E. R. 1106, L. C.

Annotations:—**Mentd.** Stevens' Hospital *v.* Dyas (1864), 10 L. T. 882; Tidey *v.* Mollett (1864), 16 C. B. N. S. 298; Ball *v.* Bridges (1874), 30 L. T. 430; Martin *v.* Smith (1874), L. R. 9 Exch. 50; Willmott *v.* Barber (1880), 15 Ch. D. 96; Zimbler *v.* Abrahams, [1903] 1 K. B. 577; *Re* Fireproof Doors, Umney *v.* The Co., [1916] 2 Ch. 142.

Injunction—Where contract not specifically enforceable.]—*See* INJUNCTION, Vol. XXVIII., pp. 444–447.

SUB-SECT. 5.—RESCISSION.

See, generally, MISREPRESENTATION & FRAUD; MISTAKE.

SECT. 3.—CONTRACTS FOR SALE OF MINES AND MINING RIGHTS.

SUB-SECT. 1.—IN GENERAL.

607. Sale of mine partly worked—Misleading particulars of sale.]—A purchaser agreed to buy an estate, upon a statement in the particulars of sale that it lay upon a valuable vein of coal, which vein afterwards proved to have been mostly worked out. Subsequently the purchaser entered into an agreement with a third party to sell the colliery at a price implying the existence of a considerable quantity of coal, & afterwards discovered the fact of the exhaustion of the coal.

PART VII. SECT. 2, SUB-SECT. 4.

p. *Whether remedy lies—Terms of contract unambiguous.*]—HOBBS *v.* ESQUIMALT & NANAIMO RY. CO. (B. C.) (1899), 29 S. C. R. 450.—**CAN.**

PART VII. SECT. 3, SUB-SECT. 1.

q. *Contract to share proceeds of sale.*]—TUPPER *v.* ANNAND (N. S.) (1889), 16 S. C. R. 718.—**CAN.**

r. *Right to registration of transfer.*]—FIELDING *v.* CHURCH (1895), 28 N. S. R. (16 R. & G.) 136.—**CAN.**

t. *Champertous agreement.*]—GIEGERICH *v.* FLEUTOT (B. C.) (1904), 35 S. C. R. 327.—**CAN.**

s. *Non-fulfilment of condition precedent.*]—MYERS *v.* TYTLER (1908), 7 W. L. R. 416.—**CAN.**

b. —— *Subsequent restaking by purchaser—Purchaser trustee for owner.*]—STEWART & HAYES *v.* MOLYBDENUM MINING & REDUCTION CO., LTD., McGRATH, RIEL & TEETZEL, [1921] 2 W. W. R. 954.—**CAN.**

c. *Construction of agreement—Rights of vendor before completion.*]—CANADIAN COLLIERIES DUNSMUIR, LTD. *v.* DUNSMUIR, DUNSMUIR *v.* MACKENZIE (1913), 25 W. L. R. 130; 13 D. L. R. 793; 18 B. C. R. 583.—**CAN.**

d. —— *Sale to company.*]—CHASSEY *v.* MAY (1921), 68 D. L. R. 427; [1922] 2 W. W. R. 225; *affg.*

Where the particulars of sale are likely to mislead, it is incumbent on a vendor to show that the purchaser has not been misled; & where a misrepresentation has been made by a vendor, the ct. applies the rule of *caveat emptor* with great caution:—*Held:* (1) pltf. having failed to show that his misrepresentation did not influence deft. to enter into the agreement, the rule of *caveat emptor* did not apply, & pltf. must be left to his remedy, if any, at law; (2) the transaction between the purchaser & the third party did not invalidate the purchaser's defence of misrepresentation to a bill by the vendor for specific performance, though it might have been an answer to a claim by the purchaser for an abatement of the purchase-money.—COLBY *v.* GADSDEN (1867), 17 L. T. 97; 15 W. R. 1185, L. C.

SUB-SECT. 2.—TERMS WHICH MAY BE IMPLIED OR IMPOSED.

A. Right of Entry.

608. Sale of mines on varying royalty — Entry to discover quantity of minerals obtained.]—In a contract for sale of the minerals under a given quantity of surface at a certain price, payable by instalments, the times of payment to be accelerated if more than a certain quantity of minerals should be gotten from time to time, the vendor impliedly reserves the power of entering & inspecting the mines, to ascertain the quantity of mineral from time to time gotten therefrom; & the vendor is entitled to a specific performance of the contract, with a covenant reserving such power in the conveyance.

Where coal mines are either let or sold at a royalty, with stipulations as to the manner of working the mines, a right of entry to view the mines is reserved to the lessees, for the twofold purpose of seeing, first, in what manner the mines are worked; &, secondly, the quantity of minerals obtained. A covenant or proviso for this purpose is . . . incidental to the contract for such a lease or sale (WIGRAM, V.-C.).—BLAKESLEY *v* WHIELDON (1841), 1 Hare, 176; 6 Jur. 54; 66 E. R. 990.

Annotations:—**Refd.** Hodgkinson *v.* Crowe (1875), 10 Ch. App. 662; Pwllbach Colliery Co. *v.* Woodman, [1915] A. C. 634. **Mentd.** Jaques *v.* Mellar (1877), 6 Ch. D. 153.

609. Provision for special mode of working—Entry to inspect manner of working.]—BLAKESLEY *v.* WHIELDON, No. 608, *ante*.

B. Time of Essence of Contract.

610. General rule.] — The contract related to mining property, from the very nature of which time [is] of the essence (FRY, J.).—GREEN *v.* SEVIN (1879), 13 Ch. D. 589; 49 L. J. Ch. 166; 41 L. T. 724; 44 J. P. 282.

Annotations:—**Mentd.** Lee *v.* Soames (1888), 59 L. T. 366; Phillips *v.* Howell, [1901] 2 Ch. 773; Stickney *v.* Keeble, [1915] A. C. 386.

C. Possession and Payment.

611. Right to possession—From month or week of purchase—According to usual course of taking account.]—Purchase of a share in a colliery in trust for the agent & manager confirmed under particular circumstances, but with reluctance. The rule, that a purchaser shall have possession as from the quarter day preceding the sale, does not apply to a colliery; which is an article of trade, the profits accruing daily. The proper period is the month or week, in which the purchase takes place; according to the usual course of taking the account.

This application is made upon the common rule that a purchaser shall be let into possession from the quarter day preceding his purchase; paying his money before the following one. The difficulty is, that there is no such thing as a quarter day in this concern. They settle their profits monthly. He is therefore entitled to the profits only from the commencement of the month in which he purchased; paying his purchase-money in the course of that month (LORD ELDON, C.).—WREN *v.* KIRTON (1803), 8 Ves. 502; 32 E. R. 449, L. C.

Annotations:—**Consd.** Williams *v.* Attenborough (1823), Turn. & R. 70.

612. —— —— ——.]—The sale of a colliery is not like the sale of a landed estate, & a purchaser . . . is not entitled to call for an account of the profits of a colliery from any particular quarter day, as upon the sale of a landed estate he is entitled to do. Collieries & landed estates are quite different in the contemplation of this ct.: a colliery being always considered as a trade, the profits accruing from day to day as in all trading concerns (LORD ELDON, C.).—WILLIAMS *v.* ATTENBOROUGH (1823), Turn. & R. 70; 1 L. J. O. S. Ch. 138; 37 E. R. 1021, L. C.

Annotations:—**Refd.** Jeffreys *v.* Smith (1834), 1 Coop. *temp.* Cott. 381, n.; Rule *v.* Jewell (1881), 18 Ch. D. 662.

613. Time for payment—In course of month or week of purchase.]—WREN *v.* KIRTON, No. 611, *ante*.

614. Effect of entry & working before conveyance—Right of vendor—Order for payment of purchase-money & interest into court.]—Order on a purchaser, before conveyance, to pay into ct. instalments due, & interest according to the contract, the subject being a coal mine; & the purchaser in possession, & working it.—BUCK *v.* LODGE (1812), 18 Ves. 450; 34 E. R. 387.

SUB-SECT. 3.—EFFECT OF ABSENCE OF TITLE TO MINERALS.

See, generally, SALE OF LAND.

615. Whether contract enforceable.]—Reservation of salt works, mines, etc., in 1704, with a right of entry, though no instance of any claim, & the title had been transferred in 1761, without such reservation upon the usual covenants:—*Held:* an objection, giving a right to compensation: the purchaser not insisting upon it farther.—SEAMAN *v.* VAWDREY (1810), 16 Ves. 390; 33 E. R. 1032.

Annotations:—**Apld.** Ramsden *v.* Hirst (1858), 4 Jur. N. S. 200. **Refd.** Low Moor Co. *v.* Stanley Coal Co. (1875), 33 L. T. 436.

616. —— **Knowledge by purchaser of doubt as to title.**]—In an agreement for the sale of seventeen undivided shares of a coal mine there was an article stating two conveyances by which six undivided shares of the land beneath which the coal lay had been conveyed to the vendors'

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29 B. C. R. 83; [1921] 1 W. W. R. 69.—**CAN.**

e. —— *Sale of right to profits from gold mine.*]—AMALGAMATED PROPERTIES OF RHODESIA (1913), LTD. *v.* GLOBE & PHŒNIX GOLDMINING CO., LTD. (1919), 35 T. L. R. 415, P. C.—**S. AF.**

PART VII. SECT. 3, SUB-SECT. 2.—A.

f. Effect of absence of title to surface.]—VAN METER *v.* MATHESON (1888), 21 N. S. R. (9 R. & G.) 56.—**CAN.**

PART VII. SECT. 3, SUB-SECT. 2.—C.

g. Time for payment — Extension of time—No consideration.]—WEBB *v.* MONTGOMERY (1897), 5 B. C. R. 323; 1 M. M. Cas. 129.—**CAN.**

h. —— —— *Consideration.*]—CUNNINGHAM *v.* INSINGER, [1924] 2 D. L. R. 433; [1921] S. C. R. 8.—**CAN.**

Sect. 3.—*Contracts for sale of mines and mining rights: Sub-sects.* 3, 4 *&* 5. *Sects.* 4 *&* 5.]

predecessor in title, but stating that there was no express mention in the conveyances of the minerals under the land, & requiring that the purchasers should assume that six undivided shares of the minerals passed by the conveyances of the land, & thereby became absolutely vested in the vendors' predecessor in title. In the abstract of the vendors' title sent to the purchasers mention was made of a certain indenture, but nothing further was said about it. The purchasers' solr. inquired of the vendors' solr. what this deed was, & was told that it could not be found, & no abstract of it or information about it could be furnished, but that it was believed not to affect the property sold. The vendors' solr. also said, as he really believed to be the case, that though the title to the six undivided shares could not be strictly proved, yet the vendors had a good holding title to them. After these transactions the purchasers entered into the agreement, & paid the deposit money. Subsequently, the deed which was supposed to have been lost was found, when it was discovered that by virtue of it the six undivided shares of the mine belonged to some person quite different from the vendors, & that neither they, nor their predecessors in title, had ever had any title to those shares. The purchasers refused to proceed with the agreement, whereupon the vendors brought this action for specific performance of it. The purchasers contended that without these six shares the mine would be useless to them, & claimed to be entitled to be released from the agreement:—*Held:* as there had been no fraud in the matter, but the vendors had acted under a *bonâ fide* mistake, & the purchasers had had the fact that there was a doubt as to the title brought to their notice before entering into the agreement, & had thought fit to run the risk of taking the property without having the matter cleared up, specific performance of the agreement ought to be decreed, but that a deduction must be made from the purchase money as compensation to the purchasers for the loss of the six shares.—ENGLISH *v.* MURRAY (1883), 49 L. T. 35; 32 W. R. 84.

617. Right of purchaser to compensation.]—SEAMAN *v.* VAWDREY, No. 615, *ante*.

Contracts for sale of land containing minerals.]—*See* Sect. 2, sub-sect. 1, *ante*.

SUB-SECT. 4.—SPECIFIC PERFORMANCE.

See, generally, SPECIFIC PERFORMANCE.

618. Whether remedy lies — Covenant for unlimited option of purchase of mines.]—In a conveyance of a plot of land, reserving the mines under it to the vendor, there was a covenant by the vendor with the purchaser, that, in case the vendor, his heirs or assigns, should at any time thereafter sell, or agree to sell, to any person the mines under some adjoining lands belonging to him, he, his heirs or assigns, would at the same time offer to the purchaser of the plot of land, his heirs or assigns, the mines under that plot, & give him & them the refusal of same for one month from the time such offer should be made, at the same price per acre as the vendor, his heirs or assigns, should have agreed to sell the adjoining mines. If the purchaser, his heirs or assigns, should accept such offer, & within such month agree to purchase the mines so offered, at the price at which they should be offered, the vendor, his heirs or assigns, should convey same to the purchaser, his heirs or assigns:—*Held:* (1) this covenant was not obnoxious to the rule against perpetuities; (2) the performance of the covenant could be enforced by assigns of the purchaser against devisees of the vendor; (3) it was necessary that the offer should be made in writing, & consequently the non-acceptance within a month of a parol offer made by the devisees of the vendor did not deprive the assigns of the purchaser of their rights under the covenant; & specific performance of the covenant was decreed against the devisees of the vendor & a purchaser from them (with notice of the covenant) of the adjoining land & the mines under it, & also of the mines under the plot of land, to whom they had actually executed a conveyance.—BIRMINGHAM CANAL CO. *v.* CARTWRIGHT (1879), 11 Ch. D. 421; 48 L. J. Ch. 552; 40 L. T. 784; 27 W. R. 597.

Annotations:—Generally, **Mentd.** *Re* Blight, Blight *v.* Hartnoll (1881), 45 L. T. 524; L. & S. W. Ry. *v.* Gomm (1882), 20 Ch. D. 562.

619. When remedy barred — Laches.]—Delay, after the parties were at arm's length, of three calendar months & thirteen days, in filing a bill for specific performance of a contract for the sale & purchase of a colliery:—*Held:* a bar to relief.—GLASBROOK *v.* RICHARDSON (1874), 23 W. R. 51.

620. Compensation to purchaser—In respect of misrepresentation—Where specific performance decreed—Costs.]—In suits as to the specific performance of a contract to purchase large colliery works, the purchasers alleged as a defence misrepresentation by the vendors as to the value. As to several allegations the purchasers were held to have failed, & specific performance was decreed, but with compensation to the purchasers in respect of an alleged misrepresentation as to the amount of stores consumed in the collieries, & a consequent excess in the statement of income. An inquiry was directed as to such compensation, & it was found that there was a large excess in the statement of income beyond its true amount:—*Held:* (1) the purchasers were entitled to a deduction from their purchase-money bearing the same proportion to the whole purchase-money as the excess bore to the income stated; (2) as no direction as to costs was given by the original decree in the suits, & as the purchasers were held to be entitled to a considerable abatement, the vendors must pay the costs of the suits, & could not on the hearing on further consideration be relieved from payment of any part of the costs on account of the failure of the purchasers as to parts of their case on the original hearing.—POWELL *v.* ELLIOT (1875), 10 Ch. App. 424; 33 L. T. 110; 23 W. R. 777, L. C. & L. JJ.

Annotations:—Generally, **Mentd.** Ebbs *v.* Boulnois (1875), 44 L. J. Ch. 691; *Re* Fawcett's Trustees & Holmes (1889), 61 L. T. 105; Rudd *v.* Lascelles, [1900] 1 Ch. 815.

Injunction—Where contract not specifically enforceable.]—*See* INJUNCTION, Vol. XXVIII., pp. 444–447.

Specific performance of mining leases.]—*See* Part XI., Sect. 9, *post*.

PART VII. SECT. 3, SUB-SECT. 4.

k. *Whether remedy lies.*]—LEARMOUTH *v.* MORRIS (1869), 6 W. W. & A'B. 74.—**AUS.**

619 l. *When remedy barred—Laches.*]—Where a plff. seeks specific performance of an executory contract relating to mining property, a brief delay in asserting his rights will be fatal to his claim.—BUTLER *v.* SADDLE HILL GOLD-MINING CO. (1884), 2 N. Z. L. R. 296.—**N.Z.**

l. —— *Contract incomplete.*]—Action for specific performance of an agreement to sell an interest in the Mac Mining Co. dismissed, it being held that the agreement was indefinite & incomplete, the interest & sale price not being ascertained.—THOMSON *v.* MCPHERSON (1912), 21 O. W. R. 646; 3 O. W. N. 791; 3 D. L. R. 269.—**CAN.**

SUB-SECT. 5.—RESCISSION.

See, generally, MISREPRESENTATION & FRAUD; MISTAKE.

621. Appointment of receiver & manager pending hearing of action for rescission.]—In a suit by the purchaser of a coal mine to rescind the contract on the ground of fraudulent misrepresentations, it being essential that the mine should be kept in a going state, the ct., upon the application of the purchaser, who was in possession of the colliery, appointed a receiver & manager until the hearing.—GIBBS *v.* DAVID (1875), L. R. 20 Eq. 373; 44 L. J. Ch. 770; 33 L. T. 298; 23 W. R. 786.

SECT. 1.—CONTRACTS FOR SALE OF MINERALS.

622. Specific performance—Contract involving superintendence of court.]—In contracts relating to commodities fluctuating from day to day in market price, the ct. expects persons to be unusually vigilant & active in asserting their right to specific performance, which it is inequitable to grant after such an interval, & when the parties may be no longer in the same position. Such a contract is a positive contract, & does not give jurisdiction to restrain sale to other parties.

Bill by a co. for smelting & manufacturing iron, against proprietors of coal mines adjoining their works, for specific performance of an agreement to sell to the co., at a fixed price per ton, all of certain beds of coal, estimated to contain from 120,000 to 150,000 tons, to be raised & delivered by defts. at the rate of 500 tons per week, & the co. to drain the beds; & for an injunction to restrain defts. from selling any part to other persons. The bill averred, that the coal was very conveniently situate with reference to the co.'s iron works, which adjoined thereto; & that the co. had the power, by means of their engines & pits, to drain the beds, & had occasion for a large quantity of coal of that particular description. Demurrer allowed, mainly on ground of laches, the co. having neglected to file their bill until eleven months after they discovered that defts. had ceased to deliver the coal, & were referred by defts. to their solrs.

Leave to amend & account for laches, refused on the ground that the agreement, notwithstanding it was to be performed, not immediately, but by instalments, & at intervals extending over a long period; & notwithstanding the circumstances averred as to the vicinity of the coal, & its convenience with reference to the co.'s works, & the importance to them of coal of that particular description, was an agreement for works of which the ct. could not undertake the superintendence; for, the applications to the ct. would be incessant, to secure due industry & exertion on the part as well of pltfs. as defts. *Semble:* upon this ground alone the demurrer would have been allowed. *Semble:* the benefit to be derived from vicinity of deft.'s coal to co.'s iron works, is one which can be estimated by damages, &, taken alone, is not a ground for specific performance.—POLLARD *v.* CLAYTON (1855), 1 K. & J. 462; 25 L. T. O. S. 50; 1 Jur. N. S. 342; 3 W. R. 349; 69 E. R. 540.

Annotation:—**Refd.** Abinger *v.* Ashton (1873), L. R. 17 Eq. 358.

623. —— Contract being one for sale of chattels.]—The ct. will not interfere by injunction to restrain the breach of a contract for the sale & delivery of chattels which it could not specifically perform.

Accordingly, where the lessee of a colliery contracted to raise & deliver to pltfs. all the get of coals in the colliery at a fixed price for five years, & subsequently agreed for the sale of the colliery to other parties:—*Held:* the ct. had no jurisdiction to grant an injunction to restrain the breach of contract.—FOTHERGILL *v.* ROWLAND (1873), L. R. 17 Eq. 132; 43 L. J. Ch. 252; 29 L. T. 414; 38 J. P. 244; 22 W. R. 42.

Annotations:—**Consd.** Donnell *v.* Bennett (1883), 22 Ch. D. 835; Davis *v.* Foreman (1894), 8 R. 725; Keith, Prowse *v.* National Telephone Co., [1894] 2 Ch. 147. **Mentd.** Tailby *v.* Official Receiver (1888), 13 App. Cas. 523; Whitwood Chemical Co. *v.* Hardman (1891), 64 L. T. 716; Metropolitan Electric Supply Co. *v.* Ginder, [1901] 2 Ch. 799.

See, further, SPECIFIC PERFORMANCE.

Injunction—Where contract not specifically enforceable.] —*See* INJUNCTION, Vol. XXVIII., pp. 444-447.

Rescission.]—*See, generally,* MISREPRESENTATION & FRAUD; MISTAKE.

SECT. 5.—CONTRACTS FOR SALE OF SHARES IN MINING COMPANIES.

Shares in cost book mine—Application of Statute of Frauds.]—*See* COMPANIES, Vol. X., p. 1102, Nos. 7736-7738; &, *now,* Law of Property Act, 1925 (c. 20), s. 44.

Right of purchaser to investigate vendor's title to mines.]—*See* COMPANIES, Vol. X., p. 1103, No. 7739.

Rescission of contract—Misrepresentation.]—*See* COMPANIES, Vol. IX., pp. 112-139; MISREPRESENTATION & FRAUD.

—— **Mistake.**]—*See* MISTAKE.

PART VII. SECT. 3, SUB-SECT. 5.

m. *Sale of mine to company—Effect of fraud by promoter.*]—NORTHRUP MINING CO. *v.* DIMOCK (1894), 27 N. S. R. (15 R. & G.) 112.—**CAN.**

n. *Whether purchase-money recoverable.*]—The breach of an agreement for the sale of mining rights does not entitle the vendor to recover the purchase money, but only gives him a right of action for damages sustained in consequence of the breach.—WEATHERBE *v.* WHITNEY (1898), 30 N. S. R. (18 R. & G.) 447.—**CAN.**

o. *Contract induced by report of mine—Report prepared by co-owner.*]—LECKIE *v.* STUART (1900), 34 N. S. R. 140.—**CAN.**

Part VIII.—Absolute Dispositions.

SECT. 1.—CONVEYANCE OF LAND.

SUB-SECT. 1.—WHETHER MINES AND MINERALS PASS.

624. General rule.]—HARRIS *v.* RYDING, No. 945. *post.*

625. ——.]—A. agreed to sell to B. a house & land, with a clause that in the event of there being any coals or ironstone under the land, a royalty of so much per ton was to be paid thereon; & that any mines required to be left by a certain railway co. were to be paid for the same as if gotten, out of the money received for them from the railway co. The ct. refused to enforce specific performance of this agreement.

I am of opinion that I ought not to decree specific performance of this agreement. The terms of it are peculiar. . . . So far, there is no doubt that would be a contract by deft. to sell his house & land . . . & no doubt that contract would carry not only the surface, but the mines & minerals under it (KINDERSLEY, V.-C.).—WILLIAMSON *v.* WOOTTON (1855), 3 Drew. 210; 61 E. R. 883.

626. ——.]—(1) Where a contract is entered into to sell a freehold, & nothing is said about the minerals, if the purchaser finds that the minerals are reserved, the title is bad, & he cannot be compelled to take it (SIR JOHN ROMILLY, M.R.).

(2) But if, on a sale of copyh lds, nothing is said as to the minerals, can a purchaser object that the title is bad because he cannot touch the minerals except with the consent of the lord? Clearly not (SIR JOHN ROMILLY, M.R.).—HAYFORD *v.* CRIDDLE (1855), 22 Beav. 477; 52 E. R. 1192.

Annotation:—Generally, **Mentd.** *Re* Boyfus & Masters' Contract (1888), 39 Ch. D. 110.

627. ——.]—In the absence of a special provision in the agreement minerals held not to pass to the purchaser.

After the passing of 4 & 5 Vict. c. 35, & 15 & 16 Vict. c. 51, but before 21 & 22 Vict. c. 94, an agreement was entered into for the sale of a copyhold estate, together with the timber " & all appurtenances to the same hereditaments belonging," as soon as same should become freehold, under an agreement of the vendor to use his best endeavours to enfranchise. An enfranchisement was effected under the second Act, reserving the minerals to the lord:—*Held:* the contract had reference to the provisions in those Acts relative to minerals, etc., & the purchaser must complete, notwithstanding this reservation.

Primâ facie an agreement to convey lands in fee simple would include the minerals (ROMILLY, M.R.).—KERR *v.* PAWSON (1858), 25 Beav. 394; 27 L. J. Ch. 594; 31 L. T. O. S. 224; 22 J. P. 241; 4 Jur. N. S. 425; 6 W. R. 447; 53 E. R. 687.

*Annotation:—***Mentd.** Jenkins *v.* Green (1859), 27 Beav. 440.

628. ——.]—MARSHALL *v.* ULLESWATER STEAM NAVIGATION CO., No. 122, *ante.*

629. ——.]—SPOOR *v.* GREEN, No. 654, *post.*

630. ——.]—JERSEY (EARL) *v.* NEATH POOR LAW UNION GUARDIANS, No. 26, *ante.*

631. ——.]—The proprietor in *plenum dominium* of the lands of Campbell in 1796 disponed in fee to one Drysdale the lands of Hillfoot, reserving the coals & coalheughs. In 1808 one Tait acquired the Campbell Estate from the proprietor, including the lands of Hillfoot & the coals & coalheughs. Tait became bkpt., & his trustee in bkpcy., by a disposition dated July 28, 1837, which in its narrative part stated there was vested in him as trustee the lands of Campbell, comprehending the superiority & *feu* duty of the lands of Hillfoot, & that one Moir, who was the successor of Drysdale in the lands of Hillfoot, had become purchaser of the said superiority & *feu* duty, conveyed " all & whole the town & lands of Hillfoot all as at present possessed by Moir." In 1860 the predecessor of applt., Sir A. Orr, purchased from the same trustee " all & whole the lands of Campbell, including the lands of Hillfoot, with (*inter alia*) the coals & coalheughs." In an action of declarator by applt. seeking a declaration that he was the proprietor of the coal under the lands of Hillfoot:—*Held:* as the dispositive clause of the deed of July 28, 1837, might aptly describe either an estate of fee, in which case the minerals would have passed to the purchaser & so to resps., or an estate of superiority, which would not affect the ownership of the minerals, & being thus ambiguous, the rest of the deed might be looked at to see whether it qualified the words used in the dispositive clause, & the narrative part of that deed did in fact so qualify the dispositive, & showed that only the superiority & *feu* duty was intended to pass thereby to the purchaser & so to resps.—ORR *v.* MITCHELL, [1893] A. C. 238; 9 T. L. R. 356; 1 R. 147, H. L.

632. Exceptions to rule—Exception of mines in favour of grantor.]—HARRIS *v.* RYDING, No. 945, *post.*

As to exception generally, *see* Sub-sect. 2, *post.*

633. —— **Customary separate dealing with mines—Knowledge of purchaser.**]—WRIGHT *v.* LEIGH (1890), cited in MacSwinney, Law of Mines, Quarries & Minerals, 4th ed. at p. 224.

634. —— **Mines & minerals under canal—Conveyance of land intersected by canal.**]—It was argued that the conveyance of the two separate plots intersected by the canal would carry the mines under the canal. It was argued that this must be so by analogy to the presumption of law that where a piece of land is conveyed which is bounded by a public highway or a non-navigable river, the conveyance passes the moiety of the highway or of the river. . . . It is very difficult to see the analogy (LORD MACNAGHTEN).—CHAMBER COLLIERY CO., LTD. *v.* ROCHDALE CANAL CO., [1895]

PART VIII. SECT. 1, SUB-SECT. 1.

624 i. *General rule.*]—Certain Crown lands in Quebec had been granted to the suppliants, from which the Crown contended the coal thereon was reserved:—*Held:* there being no express or implied agreement to the contrary the suppliants were entitled to a grant conveying such mines & minerals as would pass without express words.—R. *v.* CANADIAN AGRICULTURAL COAL & COLONISATION CO. (1895), 24 S. C. R. 713.—**CAN.**

624 ii. ——.]—Where the precious metals have been passed out of the Crown to a grantee, a conveyance of the land by the latter to a third person in the ordinary form will pass the precious metals although not specially mentioned.—*Re* ST. EUGENE MINING CO. & LAND REGISTRY ACT (1900), 7 B. C. R. 288; 1 M. M. Cas. 406.—**CAN.**

632 i. *Exceptions to rule—Exception of mines in favour of grantor.*]—BARTON *v.* LEMPRIERE (1910), 79 L. J. P. C. 80.—**AUS.**

632 ii. —— ——.]—In this case, the reservation of gold & silver mines in favour of the Crown, contained in the grant, indicated that everything outside of the reservation was granted.—CITY OF HULL *v.* SCOTT (1903), Q. R. 24 S. C. 59.—**CAN.**

p. *Land granted as subsidy to railway.*]—Lands granted by the Crown as a subsidy towards the construction of a railway under 53 Vict.

A. C. 564; 64 L. J. Q. B. 645; 73 L. T. 258; 11 T. L. R. 544; 11 R. 264, H. L.

Annotations:—**Refd.** New Moss Colliery Co. *v.* M. S. & L. Ry., [1897] 1 Ch. 725; R. *v.* L. & N. W. Ry. (1899), 68 L. J. Q. B. 685. **Mentd.** Brinckman *v.* Matley (1904), 90 L. T. 199; Sharpness New Docks & Gloucester & Birmingham Navigation Co. *v.* A.-G. (1915), 112 L. T. 826.

635. —— Mines & minerals under railway—Grant of land & minerals on each side of & adjoining railway.]—THOMPSON *v.* HICKMAN, No. 156, *ante*.

Undiscovered minerals within manor—Effect of general words.]—*See* COPYHOLDS, Vol. XIII., p. 15, No. 68.

Sale of ecclesiastical land.]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 500, Nos. 3561, 3562.

Compulsory purchase.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 152, No. 346.

SUB-SECT. 2.—EXCEPTION OF MINES FROM CONVEYANCE.

Form of conveyance reserving minerals.]—*See* Law of Property Act, 1925 (c. 20), Sched. 5, Form No. 6.

636. Mines subject of exception not reservation.]—CARDIGAN (EARL) *v.* ARMITAGE, No. 992, *post*.

637. ——.]—Exceptions & reservations (so called), from the demise, of timber trees, mines, & quarries, are exceptions, not reservations. Nor would these necessarily be construed as coming within the word reservations in a power, though the power mentioned rent & reservations, & there appeared to be in fact no reservation besides, except rent; at any rate the construction would not be such where there were in fact reservations besides rent. *Qu.:* the ancient lease having excepted all mines & quarries of stone & slate, & all other mines, whether a lease is bad in which the exception is of all mines of tin, toll tin, tin works, copper, lead, & all other mines, minerals, & metals whatsoever.—DOE d. DOUGLAS *v.* LOCK (1835), 2 Ad. & El. 705; 4 Nev. & M. K. B. 807; 4 L. J. K. B. 113; 111 E. R. 271.

Annotations:—**Mentd.** Wickham *v.* Hawker (1840), 7 M. & W. 63; Durham & Sunderland Ry. *v.* Walker (1842), 2 Q. B. 940; Doe d. Egremont *v.* Stephens (1814), 6 Q. B. 208; Doe d. Biddulph *v.* Hole (1850), 15 Q. B. 848; Doe d. Croft *v.* Tidbury (1854), 2 C. L. R. 347; Williams *v.* Hayward (1859), 5 Jur. N. S. 1417; Proud *v.* Bates (1865), 6 New Rep. 92; Thellusson *v.* Liddard, [1900] 2 Ch. 635.

638. ——.]—PROUD *v.* BATES, No. 17, *ante*.

639. ——.]—HAMILTON (DUKE) *v.* GRAHAM, No. 134, *ante*.

640. ——.]—EARDLEY *v.* GRANVILLE, No. 497, *ante*.

641. ——.]—JONES *v.* CONSOLIDATED ANTHRACITE COLLIERIES, LTD. & DYNEVOR (LORD), No. 941, *post*.

642. Exception & reservation distinguished.]—PROUD *v.* BATES, No. 17, *ante*.

——.]—*See, further*, DEEDS, Vol. XVII., p. 380, Nos. 1886–1888.

643. Validity of exception—Must be to person conveying legal estate.]—CHETHAM *v.* WILLIAMSON, No. 889, *post*.

644. —— ——.]—An exception must be to the person or persons who convey the legal title & to him or them alone (POLLOCK, C.B.).—DENISON *v.* HOLLIDAY (1857), 1 H. & N. 631; 156 E. R. 1354; *sub nom.* DENNISON *v.* HALLIDAY, 28 L. T. O. S. 307; 5 W. R. 357; *on appeal* (1858), 3 H. & N. 670, Ex. Ch.

645. What amounts to exception—Previous severance of ownership of mines.]—S., being seised in fee, mortgaged four closes of land in D. to N. in fee. S. afterwards, in 1809, devised to her children all the seams of coal lying under her lands in D., which she had let to W. for a long term of years, at £105 rent; & devised all her other lands, except the seams of coal to A., B. & W. in fee in trust to sell. In 1812 S. demised to B. & W. all those two seams of coal under four closes in D. & other closes for fifty years, from Jan. 1, 1813, at a rent of £105. S. died in 1814, & B. & W. paid the £105 rent to the children of S. In 1815, A., B. & W. & the assignee of N., by a deed, which recited that the former had put up the real estate of S. to sale, & that K. was the highest bidder for certain lots (comprising the four closes in D.), except the seams of coal under the closes, granted, bargained & sold to K. in fee "all the four closes of land before mentioned, with all houses, edifices, buildings, gardens, yards, paths, watercourses, ditches, quarries, woods," etc., "other than & save & except & reserved to S. & W., during the term of thirty years to be computed from Jan. 1 then last, all the mines & beds of coal lying & being within & under those four closes thereinbefore described & therein intended to be granted & conveyed." Defts., who took under K., claimed all the coal under the four closes; except the two seams demised to B. & W.:—*Held:* none of the coal under the four closes passed to K. by the deed.—DENISON *v.* HOLIDAY (1858), 3 H. & N. 670; 28 L. J. Ex. 25; 157 E. R. 637; *sub nom.* HOLLIDAY *v.* DENISON, 31 L. T. O. S. 250; 4 Jur. N. S. 1002; 6 W. R. 719, Ex. Ch.

646. —— Reservation of liberty of working the coal.]—Where the owner conveys land to a singular successor or other person reserving the "liberty of working the coal" in those lands, he must be taken to have reserved the estate of coal, unless there are clear words in the deed qualifying that right of property, with which he stands vested by infeftment at the date of the conveyance.—HAMILTON (DUKE) *v.* DUNLOP (1885), 10 App. Cas. 813, H. L.

Annotation:—**Distd.** Sutherland *v.* Heathcote, [1892] 1 Ch. 475.

647. —— ——.]—SUTHERLAND (DUKE) *v.* HEATHCOTE, No. 871, *post*.

648. Effect of exception of minerals—Right of lessee to support of surface.]—HARRIS *v.* RYDING, No. 945, *post*.

649. —— Building lease—Right of lessee to dispose of minerals obtained while digging foundations.]—ROBINSON *v.* MILNE, No. 63, *ante*.

650. Interpretation of exception.]—A. conveyed to B. in fee a messuage, buildings, yard, gardens, & homestead, with the appurtenances, & certain closes of land excepting all mines of coal under the lands & hereditaments; with liberty

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c. 4, are not subject to the Dominion Lands Act & the Regulations of 1889, & where there is no express reservation of mines & minerals in the grant the mines & minerals, except gold & silver, pass under the grant.—CALGARY & EDMONTON RY. CO. *v.* R. (1904), 20 T. L. R. 770, P. C.—**CAN.**

PART VIII. SECT. 1, SUB-SECT. 2.

648 i. *Effect of exception of minerals—Right of lessee to support of surface.*]—In every conveyance of surface there is at common law an implied conveyance of a right to a subjacent & adjacent support adequate to the purpose for which the surface was conveyed, & a reservation can only be so far as the working can be carried on consistently with the grant.—CALEDONIAN RY. CO. *v.* SPROT (1856), 19 Dunl. (Ct. of Sess.) (H. L.) 3; 2 Macq. 449; 28 Sc. Jur. 486.—**SCOT.**

648 ii. —— ——.]—WHITE'S TRUSTEES *v.* HAMILTON (DUKE) (1887), 14 R. (Ct. of Sess.) 597; 24 Sc. L. R. 395.—**SCOT.**

q. ——.]—HAMILTON (DUKE) *v.* GRAHAM (1871), 9 Macph. (Ct. of Sess.) (H. L.) 98; 43 Sc. Jur. 491; L. R. 2 Sc. & Div. 166.—**SCOT.**

650 i. *Interpretation of exception.*]—FARQUHARSON *v.* BARNARD ARGUE ROTH STEARNS OIL & GAS CO. (1911),

Sect. 1.—*Conveyance of land: Sub-sects.* 2 & 3. *Sects.* 2, 3, 4 & 5. *Part IX.*]

to enter & sink pits for getting all such coal, & to erect engines & make drains, etc., necessary for working the coal; except as to such lands as lie within 150 yards of the messuage & buildings, & except any homestead:—*Held:* the seller thereby reserved to himself the right to dig coals under the messuage, buildings & homestead, & within 150 yards of same respectively; but was not entitled to sink pits, erect engines, or make drains within 150 yards of the messuage or buildings, or within the homestead.—BOWLER *v.* WOLLEY (1812), 15 East, 444; 104 E. R. 912.

651. —— Whether vendor entitled to substance worked by open quarry.]—BELL *v.* WILSON, No. 2, *ante*.

—— *See, generally,* DEEDS, Vol. XVII., pp. 380 *et seq.*

SUB-SECT. 3.—RESERVATION OF RENTCHARGE IN RESPECT OF MINERALS.

652. Whether void as perpetuity.] — Where in a deed of grant of land there was a clause that a rentcharge should be paid by the purchaser, his heirs or assigns, to the vendor, his heirs & assigns, if the purchaser, his heirs or assigns should at any time dig & work, etc., any mines, etc., on the property granted:— *Held:* the rentcharge was validly created, & the clause not void as violating the rule against perpetuities.—MORGAN *v.* DAVEY (1883), 1 Cab. & El. 114.

See, generally, PERPETUITIES.

SECT. 2.—**CONVEYANCE OF MINES AND MINERALS.**

See, generally, SALE OF LAND.

653. Covenant for payment "for every acre of coal found"—Whether finding of coal condition precedent to liability.]—Declaration in covenant stated, that pltf., by indenture, granted to deft. all the coals, & mines of coal, under certain land; that deft. covenanted to pay pltf., as the price of the coal so granted, £40 for every statute acre of the coal which should be found under the lands, &, until the price should be fully paid, to pay pltf. £40, part of the price, in each year, by two equal half-yearly instalments, whether the whole of an acre of coal should be gotten in every such year, or not. Averment, that, at the time of the making of the indenture, there were under the lands divers, to wit, 14 acres of coal; & that divers, to wit, 13 acres of the coal still remained under lands, & that £40 for two of the half-yearly instalments of the price for the coal aforesaid became due, & still was in arrear & unpaid, to pltf.:—*Held:* the finding of coal was not a condition precedent to pltf.'s recovering the annual sum of £40.—JOWETT *v.* SPENCER (1847), 1 Exch. 647; 17 L. J. Ex. 367; 12 L. T. O. S. 85; 154 E. R. 275, Ex. Ch.

654. Covenant for quiet enjoyment—Whether broken by subsidence—Due to earlier working.]—Deft. being seised in fee of land & coal beneath it, in 1844, let the coal, by a written agreement, to lessees for a term of twenty-five years, with power to enter & work & carry away the coal across the land, & all other powers fit & necessary for the working & carrying. The lessees entered & worked & carried away coal, & after they had ceased, deft., in 1845, conveyed by deed a portion of the land to J., a purchaser, who had previously been through the workings, but was not shown to have any knowledge of the agreement or its terms. By the deed deft. covenanted with J., his appointees, heirs & assigns for title, for quiet enjoyment, & against incumbrances. In 1846 J. appointed the portion of land to pltf., a purchaser, who afterwards built houses thereon, & who had no knowledge of the workings until the land & houses subsided, in 1865. The subsidence was caused by the workings which had been carried on before the conveyance to J. In 1848, the lessees entered the mine & took fireclay, which they had no right to take, & also fragments of coal of nominal value, but these acts did not contribute to cause the subsidence. In 1867, pltf., as appointee of J., sued deft. on the covenants, the declaration alleging as breaches of the covenants for title & quiet enjoyment, that, after pltf. became seised, the lessees entered & worked, whereby the damage was caused:—*Held:* as to the covenant for title, there was no breach since J. had bought with notice of the workings, & pltf. must be taken to have bought the land without the coal; but even if the agreement constituted a breach, the cause of action was complete in J., & pltf. could not sue upon it; the subsistence of the agreement during pltf.'s possession was not a breach of the covenant against incumbrances, because, although the agreement gave the lessees the privilege of doing certain things upon the surface of pltf.'s land necessary for the working the colliery yet it did not appear that any such thing was or could be necessary to be done; the covenant for quiet enjoyment was not broken by the acts of the lessees in 1848; & the action was not maintainable.

The declaration . . . alleges that pltf. became the purchaser of certain land, which would, of course, include any coal or other mineral underneath it (CLEASBY, B.).— SPOOR *v.* GREEN (1874), L. R. 9 Exch. 99; 43 L. J. Ex. 57; 30 L. T. 393; 22 W. R. 547.

Annotation:—**Mentd.** Turner *v.* Moon, [1901] 2 Ch. 825.

SECT. 3.—**ENFRANCHISEMENT.**

See, generally, COPYHOLDS, Vol. XIII., pp. 152 *et seq.*; & Law of Property Act, 1922 (c. 16), s. 128, Sched. 12 (5), & s. 138 (12).

SECT. 4.—**INCLOSURE.**

See Law of Property Act, 1925 (c. 20), s. 193 (5).

Rights of lord of manor—As to subsoil.]—*See* COMMONS, Vol. XI., p. 42, Nos. 574–581.

—— **Inclosure against common of turbary—Custom.**]—*See* COMMONS, Vol. XI., p. 44, Nos. 617–621.

—— **Inclosure against common of estovers—Custom.**]—*See* COMMONS, Vol. XI., p. 45, Nos. 624, 625.

—— **Inclosure against right to dig gravel.**]—*See* COMMONS, Vol. XI., p. 45, Nos. 622, 623.

Common in the soil—Rights of tenant of manor.]—*See* COMMONS, Vol. XI., p. 22, Nos. 250, 251.

Mining rights under Inclosure Acts.] — *See* COMMONS, Vol. XI., pp. 61–68.

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20 O. W. R. 351; 3 O. W. N. 239; 25 O. L. R. 93.—**CAN.**

650 ii. ——.]—A reservation of minerals implies therewith the right to dig & carry them away & such powers as are reasonably necessary for such purpose.—FULLER *v.* GARNEAU (Alta.), [1920] 1 W. W. R. 154; 50 D. L. R. 405.—**CAN.**

r. *Onus of proof.*]—BING KEE *v.* MACKENZIE (B. C.), [1919] 2 W. W. R. 172; 47 D. L. R. 43.—**CAN.**

Effect of award of inclosure—Mining rights & rights in the soil.]—*See* COMMONS, Vol. XI., p. 83.

655. Ownership of minerals — Express reservation to lord of manor.]—By an Inclosure Act, the comrs. were authorised to apportion to the lord of the manor, in satisfaction for his right & interest as such lord, a certain quantity of the waste in cattle gates. By a subsequent sect., reciting that the waste was of such small value as not to bear the expense of being allotted, the comrs. were empowered to set it out in one inclosure, & to regulate the stint among the owners of land entitled to rights of common, awarding them sheep gates in proportion to their several rights. The proprietors or persons entitled to the greater part of the sheep gates were then empowered, with the consent of the lord, to appoint comrs. to divide this stinted pasture into allotments "to & amongst the proprietors of the common or waste land, in proportion to their respective rights & interests therein." A further sect. reserved to the lord the right "to enjoy, search for, & work all mines, minerals, & other rights & privileges in the waste (except the right to the soil thereof, for which a compensation was thereinbefore directed to be made), in as full, ample, & beneficial a manner as if the Act had not been made":—*Held:* the effect of the Act was, to take from the lord his right to the soil of the waste, & with it the exclusive right of sporting thereon.—ROBINSON *v.* WRAY (1866), L. R. 1 C. P. 490; 14 L. T. 434.

Annotation:—**Refd.** Sowerby *v.* Smith (1873), L. R. 8 C. P. 514.

656. — — In tenant.]——Where certain waste land was, with the consent of the then lord of the manor, inclosed by a former owner of pltf.'s property, & pltf. had dug for minerals thereon; & where a subsequent lord asserted his right to the minerals, & sold them to defts., who thereupon entered upon the property & commenced digging for them; on a bill to restrain defts.:—*Held:* the lord of the manor had not succeeded in establishing his claim, & pltfs. were entitled to the minerals in question.—ACKROYD *v.* BRIGGS (1865), 13 L. T. 521; 14 W. R. 25.

Calculation of assets & dissents to inclosure—Interest of lord of manor in subsoil to be considered.]—*See* COMMONS, Vol. XI., p. 73, No. 953.

SECT. 5.—**WHERE TITLE IS REGISTERED.**

See Land Registration Act, 1925 (c. 21).

Part IX.—Mortgages.

See, generally, Law of Property Act, 1925 (c. 20), ss. 92, 100 & 101; MORTGAGE.

657. Rights of mortgagee — Appointment of receiver & manager.]—The ct. has jurisdiction, at the instance of mtgees. of collieries held under leases containing working covenants, to appoint a receiver & manager of the property & business, notwithstanding that the latter is not specifically referred to in the mtge. security.—CAMPBELL *v.* LLOYD'S, BARNETT'S & BOSANQUET'S BANK, LTD. (1889), [1891] 1 Ch. 136, n.; 58 L. J. Ch. 424.

Annotations:—**Consd.** Whitley *v.* Challis, [1892] 1 Ch. 64; County of Gloucester Bank *v.* Rudry Merthyr Steam & House Coal Colliery Co., [1895] 1 Ch. 629. **Refd.** Makins *v.* Ibotson (1890), 63 L. T. 515; Stamford, Spalding & Boston Banking Co. *v.* Keeble (1913), 82 L. J. Ch. 388.

658. —— ——.]—A colliery co. executed a mtge. to a banking co. by subdemise of their lands, mines, & seams of coal & other premises comprised in certain leases, & also their buildings & some of their fixed machinery. Default having been made of principal & interest, the bank took possession of the mines & appointed a receiver of the income, but did not work the mines. They afterwards brought a foreclosure action against the colliery co., & moved for a receiver & manager of the colliery:—*Held:* (1) although the business of the colliery was not expressly mentioned in the mtge. deed, it was intended to pass & did pass to the mtgees., & they were entitled to apply in the action for a receiver & manager of the colliery; (2) the ct. would, in the exercise of its discretion, appoint a receiver & manager, although the mtgees. had taken possession & appointed a receiver of the income.

(3) What is a colliery? What are the seams of coal? What is the motive power? What does all that mean but that industrial occupation which we compendiously call a colliery? What is the meaning of the conveyance but the transfer of those rights of taking away the coal & of working the coal which are involved in the leases? (LORD HALSBURY).—COUNTY OF GLOUCESTER BANK *v.* RUDRY MERTHYR STEAM & HOUSE COAL COLLIERY CO., [1895] 1 Ch. 629; 64 L. J. Ch. 451; 72 L. T. 375; 43 W. R. 486; 39 Sol. Jo. 331; 2 Mans. 223; 12 R. 183, C. A.

Annotations:—*As to* (1) **Refd.** Ruben *v.* Great Fingall Consolidated, [1904] 1 K. B. 650; Stamford, Spalding & Boston Banking Co. *v.* Keeble (1913), 82 L. J. Ch. 388. *As to* (2) **Refd.** Poole *v.* Downes (1897), 76 L. T. 110. *Generally,* **Mentd.** *Re* Bank of Syria, Owen & Ashworth's Claim (1900), 83 L. T. 547; Buck *v.* Tower Galvanizing Co., [1901] 2 K. B. 314; Premier Industrial Bank *v.* Carlton Manufacturing Co. & Crabtree, [1909] 1 K. B. 106; *Re* Fireproof Doors, Umney *v.* Fireproof Doors, [1916] 2 Ch. 142; Dey *v.* Pullinger Engineering Co., [1921] 1 K. B. 77; Underwood *v.* Bank of Liverpool & Martins, Underwood *v.* Barclays Bank, [1924] 1 K. B. 775.

659. —— ——.]—This was a motion by pltf., the mtgee. of certain collieries, for the appointment of a receiver. Defts. had a cross motion for an order preventing pltf., who was lessee of part of the colliery, from denying them access to the colliery for the purpose of inspecting it. There was a covenant in the lease that the lessor & his agents should be at liberty to inspect the colliery, but it was said that there was a personal objection to the persons nominated by the lessor to inspect the colliery, & that at the time the lease was signed the lessor verbally promised not to employ those particular persons to inspect. Defts. alleged that pltf. was making use of his position as mtgee. to prevent any one else taking a lease of the colliery. The judge thought that pltf. was entitled to the appointment of a receiver, & that defts. were entitled to inspect the colliery.—BARNETT *v.* WHITE, WHITE *v.* BARNETT (1897), 41 Sol. Jo. 607.

PART IX.

t. *Rights of mortgagee—Against tenant in possession—Under lease prior to mortgage.*]—CLAZY *v.* THORNBURN (Y. T.) (1905), 2 W. L. R. 534.—**CAN.**

660. —— Repayment with interest of working expenses.]—(1) An overstatement on the part of mtgees. in possession of a colliery as to the balance represented by them as remaining due on their mtge., & their refusal to furnish accounts to the mtgors., except on being paid the expenses of so doing:—*Held:* not such vexatious conduct as to deprive them of their costs of a redemption suit.

On their appealing from a decree disallowing such costs, they were held entitled to have their costs of appeal.

(2) A mtgee. in possession of mines expended large sums beyond the amount covered by his security in working the mines, paying agents, etc.; & also in keeping down the interest of prior incumbrances:—*Held:* the mtgees. were rightly allowed these sums with interest.—NORTON *v.* COOPER (1854), 5 De G. M. & G. 728; 25 L. J. Ch. 121; 2 W. R. 659; 43 E. R. 1053, L. JJ.

661. —— Mortgagee in possession—Refusal to furnish accounts at own expense—Effect on costs of redemption suit.]—NORTON *v.* COOPER, No. 660, *ante*.

662. —— Mortgagee of share in colliery—Right to account from owners of other shares.] —BENTLEY *v.* BATES, No. 206, *ante*.

663. —— Rents paid to mortgagor by his lessee—Subsequently to foreclosure—Necessity for further account.]—At the date limited for redemption in a foreclosure action money was in ct. & in the hands of a receiver paid under a mining lease since the issue of the chief clerk's certificate. The foreclosure judgment gave liberty to any persons redeeming, or, in the event of foreclosure, to pltfs., to apply for payment to themselves of funds in ct. or in the hands of the receiver:—*Held:* pltfs. were entitled to an immediate order for foreclosure absolute, & for payment of the money in ct. & in the hands of the receiver without any further account.—COLEMAN *v.* LLEWELLIN (1886), 34 Ch. D. 143; 55 L. T. 647; 35 W. R. 82; *sub nom.* COLMAN *v.* LLEWELLYN, 56 L. J. Ch. 1, C. A. *Annotations:*—**Refd.** Smith *v.* Pearman (1888), 58 L. T. 720; Cheston *v.* Wells, [1893] 2 Ch. 151.

Powers of mortgagee—Absolute disposition.]—*See* Part IV., Part V., Sect. 1, sub-sect. 4, *ante*.

—— **Leasing.**]—*See* Part V., Sect. 2, sub-sect. 4, *ante*.

Part X.—Agreements for Leases.

664. Distinguished from licence.] —JONES *v.* REYNOLDS, No. 711, *post*.

Mining licences, *see* Part XI., *post*.

665. Distinguished from lease.] —By a memorandum made on Feb. 2, A. agreed to let & grant a lease to B. of "the coal, iron-mine, stone & fire-clay," under certain lands, at certain specified royalties, for the term of seventy years; & it was provided that so much royalties as would amount to £50 a year should be worked or paid for during the term; the rent to commence in a year from the time a pit was sunk; with power to work the minerals, & to deposit rubbish, & make a wharf, as usually granted in leases of a similar nature, & as granted by C.; & to abandon & quit the same, if at any time during the term B. should think fit, on giving six months' notice; to commence sinking a pit before June 24, & A. engaged that he had not incumbered such estate; to contain the usual covenants, & as entered into by C., & A. engaged to sign a lease upon the said terms as soon as it could be prepared:—*Held:* this was not a lease, but an agreement for a demise *in futuro*.

I should say . . . that the tenants would not under this instrument be able to exercise the rights that would be indispensable to the proper working of the mines, without some deed under the seal of the grantor; & consequently I think we are justified in saying that, regard being had to the intention of the parties as manifested by the instrument, & to the subject-matter, it does not amount to an actual demise (TINDAL, C.J.).—DOE d. MORGAN *v.* POWELL (1844), 7 Man. & G. 980; 8 Scott, N. R. 687; 4 L. T. O. S. 134 A; 8 Jur. 1123; 135 E. R. 397; *sub nom.* DOE d. MORGAN *v.* MORGAN, 14 L. J. C. P. 5.

See, generally, LANDLORD & TENANT, Vol. XXX., pp. 366 *et seq.*; Mining leases, *see* Part X., *post*.

666. Do not import existence of minerals.]—A., on the application of B. & C., agreed to grant them a lease of a vein or seam of coal, called the S. vein, "about two feet thick, with the overlying & underlying beds of clay," on & under a farm called X., at £100 *per annum* as certain or dead rent, & royalties of 9*d.* per ton for the coal & 4*d.* per ton for the clay: the lessees to have any part of the farm at the rent of £10 per acre, & to expend not less than £500 in the erection of a manufactory & buildings for the purpose of working the coal & clay; way-leave of 1*d.* per ton for foreign coal & clay; lessees to have power to determine the lease at the end of three years on giving one year's notice. On action by A. for specific performance, B. & C. alleged that the S. vein did not exist under the farm, & it was proved that on search it had not been found, but counter-evidence was given to show that the searches were insufficient:—*Held:* under the agreement, B. & C. had, in consideration of the dead rent reserved, obtained licence to enter & search for the vein, but not a warranty that such vein was to be found; &, accordingly, A. was entitled to specific performance of the contract whether the S. vein existed or not.—JEFFERYS *v.* FAIRS (1876), 4 Ch. D. 448; 46 L. J. Ch. 113; 36 L. T. 10; 25 W. R. 227.

667. Imperfect description of minerals.]—PRICE *v.* GRIFFITH, No. 842, *post*.

668. Sufficiency of description of area—Area described by name—Boundaries "hereafter to be defined."]—HAYWOOD *v.* COPE, No. 845, *post*.

669. —— Boundaries not fixed.]—LANCASTER *v.* DE TRAFFORD, No. 843, *post*.

670. —— Boundaries fixed by supposed line of fault.]—DAVIS *v.* SHEPHERD, No. 844, *post*.

671. Omission of covenant for dead rent—Not fatal to agreement.]—WALTERS *v.* MORGAN, No. 601, *ante*.

672. Agreement entered into by receiver—Subject to approval of court—Lessee's remedy for non-completion.]—GRACE *v.* BAYNTON (1877), 21 Sol. Jo. 631, L. JJ.

Time of essence of contract.]—*See* LANDLORD & TENANT, Vol. XXX., p. 410, No. 728.

PART X.

a. *Construction of agreement—Agreement by two landowners—Whether for joint lease or separate leases.*]—WELLAND COUNTY LIME WORKS CO. *v.* SHURR (1912), 23 O. W. R. 397; 4 O. W. N. 336; 8 D. L. R. 720.—CAN.

b. *Condition precedent to grant of lease—Raising specified quantity of ore.*] —WAYNE *v.* HUGHAN (1890), 9 N. Z. L. R. 295.—N.Z.

Part XI.—Leases.

SECT. 1.—NATURE AND DEFINITION.

See, generally, LANDLORD & TENANT, Vol XXX., pp. 429 *et seq.*

673. Nature — Amounts to sale of minerals.]—(1) The lessee of a mine, although entitled to rely on the existence of the subject matter, takes all risk of its failure, either as to quantity or value, unless either is expressly warranted (LORD SELBORNE, L.C.).

(2) What we term a mineral lease is really a sale out & out of a portion of the land (LORD CAIRNS).—GOWAN *v.* CHRISTIE (1873), L. R. 2 Sc. & Div. 273, H. L.

Annotations :—As to (1) **Refd.** Grimsdick *v.* Sweetman, [1909] 2 K. B. 740. *As to* (2) **Consd.** Munro *v.* Didcott, [1911] A. C. 140. **Refd.** Coltness Iron Co. *v.* Black (1881), 6 App. Cas. 315; Campbell *v.* Wardlaw (1883), 8 App. Cas. 641; Leppington *v.* Freeman (1891), 66 L. T. 357; Greville-Nugent *v.* Mackenzie (1899), 81 L. T. 793. *Generally*, **Refd.** Strelley *v.* Pearson (1880), 15 Ch. D. 113.

674. —— ——.]—A mining lease, which [is] an anomalous document amounting, not to a demise, but to a sale of the minerals (CAVE, J.)—*Re* WILLIS, *Ex p.* KENNEDY (1888), 21 Q. B. D. 384; 57 L. J. Q. B. 634; 59 L. T. 749; 36 W. R. 793; 4 T. L. R. 637; *sub nom. Re* WILLIS, *Ex p.* WILLOUGHBY DE ERESBY (LADY), 5 MORT. 189, C. A.

Annotations :—**Mentd.** Mumford *v.* Collier (1890), 25 Q. B. D. 279; Stevens *v.* Marston (1890), 60 L. J. Q. B. 192; Green *v.* Marsh, [1892] 2 Q. B. 330; *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co., [1897] 1 Ch. 373.

675. —— ——.]—A lease of minerals being in fact a sale (CHITTY, J.).—FARRAR *v.* FARRARS, LTD. (1888), 40 Ch. D. 395; 58 L. J. Ch. 185; 59 L. T. 619; *on appeal*, 40 Ch. D. 406, C. A.

Annotations :—**Mentd.** Colson *v.* Williams (1889), 58 L. J. Ch. 539; Tomline *v.* Luce (1889), 59 L. J. Ch. 164; *Re* Hurst, Addison *v.* Topp (1890), 63 L. T. 665; Bailey *v.* Barnes, [1894] 1 Ch. 25; Field *v.* Debenture Corpn. (1896), 12 T. L. R. 469; Kennedy *v.* De Trafford, [1896] 1 Ch. 762; Nutt *v.* Easton, [1899] 1 Ch. 873; Hodson *v.* Deans, [1903] 2 Ch. 647; Bath *v.* Standard Land Co., [1911] 1 Ch. 618; Belton *v.* Bass, Ratcliffe & Gretton, [1922] 2 Ch. 449.

676. —— **Interest of lessee—Interest in land.**]—The interest of the lessee under a mining lease is an interest in land, & the rights created by the lease are not merely incorporeal.—MUNRO *v.* DIDCOTT, [1911] A. C. 140; 80 L. J. P. C. 65; 103 L. T. 682; 27 T. L. R. 176, P. C.

Definition.]—*See* Law of Property Act, 1925 (c. 20), s. 205 (1) xiv; Settled Land Act, 1925 (c. 18), s. 117 (1) xv; Universities & College Estates Act, 1925 (c. 24), s. 43 vii.

SECT. 2.—USUAL AND CUSTOMARY MINING CLAUSES.

677. Proviso for entry & inspection—Terms as to mode of working—& quantity of minerals obtained.]—BLAKESLEY *v.* WHIELDON, No. 608, *ante*.

678. Proviso for re-entry—On non-payment of rent—Not for breach of any covenants.]—Under an agreement for a lease to contain "all usual & customary mining clauses," the landlord is not entitled to have inserted in the lease a proviso for re-entry on breach of any of the covenants by the lessee, or otherwise than on non-payment of rent.—HODGKINSON *v.* CROWE (1875), 10 Ch. App. 622; 44 L. J. Ch. 680; 33 L. T. 388; 23 W. R. 885, L. JJ.

Annotations :—**Apld.** Hampshire *v.* Wickens (1878), 7 Ch. D. 555; *Re* Anderton & Milner's Contract (1890), 45 Ch. D. 476. **Refd.** *Re* Lander & Bagley's Contract, [1892] 3 Ch. 41; De Soysa *v.* De Pless Pol, [1912] A. C. 194.

679. Proviso for determination of lease—Mine incapable of profitable working—In absence of special custom.]—(1) Independently of a special custom, a provision that the lessee shall be entitled to determine the lease when the mine is incapable of being worked at a profit is not a usual clause in the lease of a colliery.

(2) Under R. S. C., 1875, Ord 52, r. 3, the ct. has power in a proper case to grant an interim injunction to restrain a deft. from ceasing to pump water out of a mine.—STRELLEY *v.* PEARSON (1880), 15 Ch. D. 113; 49 L. J. Ch. 406; 43 L. T. 155; 28 W. R. 752.

Annotation :—Generally, **Mentd.** New Orleans S.S. Co. *v.* London & Provincial Marine Insce. (1909), 14 Com. Cas. 111.

SECT. 3.—CONSTRUCTION OF LEASES.

SUB-SECT. 1.—IN GENERAL.

See, generally, DEEDS, Vol. XVII., pp. 212 *et seq.*; Part I., *ante*.

680. Meaning of words—"Level"—"Deeper than"—"Below."]—(1) Lessees of a coal mine covenanted with the lessors that they would, by a certain time, get all the demised coal in the township of B. "not deeper than or below the level of" the bottom of the A. mine under a certain point at the surface. In an action for breach of the covenant, a question arose whether "level" was used in the ordinary sense, of a horizontal plane, or in a peculiar sense, having reference to the drainage: —*Held:* evidence was admissible to show the understanding of the term "level," used as in the above lease, among coal miners.

(2) It was referred to an arbitrator to receive evidence as to the meaning of the covenant, according to the custom & understanding of miners, & to state a case for the opinion of the ct. He found that the mine was situate within an extensive coal mining district in the county of Lancaster; & that, "according to the custom & understanding of miners throughout that district," the terms "level," "deeper than," & "below," signified, etc.; stating the construction of the terms, which was in favour of deft. It did not appear, as to some of the parties to the lease, that they resided within the district, & they were named, in the lease as of other places :—*Held:* the existence of the custom stated, in the district wherein the mine lay, did not raise a conclusion of

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PART XI. SECT. 1.

c. *What amounts to a lease.*]—LYNCH *v.* SEYMOUR (Ont.) (1888), 15 S. C. R. 341.—**CAN.**

d. ——.]—HALPIN *v.* FOWLER (No. 2) (1907), 5 W. L. R. 226; 12 B. C. R. 447.—**CAN.**

PART XI. SECT. 3, SUB-SECT. 1.

e. *Meaning of words—"All rights."*]—A permanent lease including "all rights of various kinds, with the exception only of homestead," would include the minerals.—SHAMACHARAN NANDI *v.* ABHIRAM GOSWAMI (1906), I. L. R. 33 Calc. 511; 10 C. W. N. 738.—**IND.**

1. —— *Waste dumps.*]—UNITED RHODESIA GOLDFIELDS, LTD. *v.* PEARCE, [1912] S. R. 197.—**S. AF.**

g. *Whether grant amounts to lease or easement.*]—LE GAL *v.* DUFFY (1854), 3 All. 57.—**CAN.**

h. ——.]—LITTLE *v.* WESTERN TRANSFER & STORAGE CO., LTD. & EDMONTON COLLIERIES, LTD. (Alta.), [1922] 3 W. W. R. 356; 69 D. L. R. 364.—**CAN.**

k. *Condition precedent—Discovery of*

Sect. 3.—*Construction of leases: Sub-sects.* 1 & 2, *A. & B.*]

law that the covenanting parties used the terms according to such custom, but was only evidence from which a jury might draw that conclusion; & the ct. could not give judgment for deft. *Semble:* they might have done so, if the arbitrator had found the custom of miners without limitation as to a district.—CLAYTON *v.* GREGSON (1836), 5 Ad. & El. 302; 4 Nev. & M. K. B. 602; 6 Nev. & M. K. B. 694; 1 Har. & W. 159; 4 L. J. K. B. 161; 111 E. R. 1180.

Annotations:—*As to* (1) **Refd.** Shore *v.* Wilson (1842), 9 Cl. & Fin. 355. *As to* (2) **Refd.** Sweeting *v.* Pearce (1859), 7 C. B. N. S. 449.

See, also, No. 685, *post.*

681. —— Words qualifying estimated quantity of mines demised—"Or thereabouts."]—DAVIS *v.* SHEPHERD, No. 844, *post.*

682. —— "Win."]—LEWIS *v.* FOTHERGILL, No. 700, *post.*

683. —— ——.]—ELLIOT *v.* ROKEBY (LORD), No. 884, *post.*

684. — — "Open & get."]—To open & get, I think really refers to what miners often call winning the seams, that is to say, the lessees are to push on their work so as to open these seams (FLETCHER MOULTON, L.J.).—ECKERSLEY *v.* WIGAN COAL & IRON CO., LTD. (1910), 102 L. T. 264, C. A.; *on appeal, sub nom.* WIGAN COAL & IRON CO. *v.* ECKERSLEY, 103 L. T. 468, H. L.

—— Local custom—Knowledge of parties.]—*See* CUSTOM & USAGES, Vol. XVII., p. 29, No. 310.

—— Admission of extrinsic evidence.]—*See* DEEDS, Vol. XVII., pp. 325 *et seq.*

685. Discrepancy between parcels & plan.]—An award defined the southern boundaries of the P. F. Level Colliery thus: "commencing at the point where the said level struck the coal, & extending in an eastward direction as deep as the said level will drain." There was an old existing excavation, termed by miners a level, not horizontal, but running upward into the coal eastward from the point where it struck the coal bed. This excavation was described on the plan annexed to the award as the line of boundary:—*Held:* this existing old level was the boundary meant by the award & not an imaginary mathematical line drawn horizontally eastward from the point where the old excavation struck the coal.—BRAIN *v.* HARRIS (1855), 10 Exch. 908; 24 L. J. Ex. 177; 25 L. T. O. S. 219; 156 E. R. 710, Ex. Ch.

686. ——.]—Parcel or no parcel is a question of fact for the jury, but the judge is bound to tell the jury what is the proper construction of any documents necessary to be considered in the decision of that question. In a "sett" or lease of a mine, the boundary line was thus described, "a line drawn from J. V.'s house, to a boundstone"; & in the description of the parcels in the lease, it was said, "which said premises are particularly described by the map on the back of this sett." On this map the boundary line appeared to be drawn from the north-east corner of the house. The position of the house itself was incorrectly represented on the map:—*Held:* the judge was bound to look to the map as forming part of the deed, & to tell the jury that the line was to be drawn as marked on the map.—LYLE *v.* RICHARDS (1866), L. R. 1 H. L. 222; 35 L. J. Q. B. 214; 15 L. T. 1; 30 J. P. 659; 12 Jur. N. S. 947, H. L.

687. Minerals included in demise—Minerals not workable by lessees.]—DUGDALE *v.* ROBERTSON, No. 916, *post.*

688. —— Grant of all seams "workable as coal seams."]—CARR *v.* BENSON, No. 891, *post.*

689. Implication as to existence of subject matter—Absence of warranty.]—GOWAN *v.* CHRISTIE, No. 673, *ante.*

SUB-SECT. 2.—RIGHTS OF WORKING.

A. Incidental and Necessary Powers.

690. Whether implied.]—DARCY *v.* ASKWITH (1618), Hut. 19; Hob. 234; 123 E. R. 1070.

Annotations:—**Refd.** Phillipps *v.* Smith (1845), 14 M. & W. 589. **Mentd.** Manby *v.* Scot (1661), 1 Keb. 80; Elwes *v.* Maw (1802), 3 East, 38; Simmons *v.* Norton (1831), 9 L. J. O. S. C. P. 185; Jones *v.* Chappell (1875), L. R. 20 Eq. 539; West Ham Central Charity Board *v.* East London Waterworks Co., [1900] 1 Ch. 624.

691. Opening of new mines.]—DARCY *v.* ASKWITH (1618), Hut. 19; Hob. 234; 123 E. R. 1070.

Annotations:—**Refd.** Phillipps *v.* Smith (1845), 14 M. & W. 589. **Mentd.** Manby *v.* Scot (1661), 1 Keb. 80; Elwes *v.* Maw (1802), 3 East, 38; Simmons *v.* Norton (1831), 9 L. J. O. S. C. P. 185; Jones *v.* Chappell (1875), L. R. 20 Eq. 539; West Ham Central Charity Board *v.* East London Waterworks Co., [1900] 1 Ch. 624.

692. Cutting down trees — For use as pit poles.]—DARCY *v.* ASKWITH (1618), Hut. 19; Hob. 234; 123 E. R. 1070.

Annotations:—**Mentd.** Manby *v.* Scot (1661), 1 Keb. 80; Elwes *v.* Maw (1802), 3 East, 38; Simmons *v.* Norton (1831), 9 L. J. O. S. C. P. 185; Phillipps *v.* Smith (1845), 14 M. & W. 589; Jones *v.* Chappell (1875), L. R. 20 Eq. 539; West Ham Central Charity Board *v.* East London Waterworks Co., [1900] 1 Ch. 624.

693. —— For purpose of working quarry.]—A lease was granted of a farm & tenement, & the quarries of paving & tile-stone in & upon the premises, with liberty & power to open & work the quarries, subject to an annual rent for the premises, excepting the quarries, & to the payment of a royalty for the stone obtained. Out of this demise were reserved & excepted "all timber-trees, trees likely to become timber, saplings, & all other wood & underwood, which then were, or which should at any time thereafter be, standing, growing, & being on the premises, & all mines, minerals, etc., which should thereafter be opened & found," & the lease contained a covenant "not to commit any waste, spoil, or destruction, by cutting down, lopping, or topping any timber-trees, or trees likely to become timber, saplings, or any other wood or underwood"; & a power of re-entry, for non-payment of rent, or if the lessee, etc., should commit any waste, spoil, or destruction by any of the means or ways aforesaid, & should not perform & keep all & singular the covenants, etc., contained in the lease. The assignee of the term having cut down & grubbed up certain saplings, wood, & underwood, for the necessary purpose of working a quarry on the demised premises:—*Held:* the effect of the covenant was, that the tenant should not so cut any of the trees excepted, as that such

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mine.]—CALEDONIAN MINING CO. *v.* BLIGHT (1864), 6 All. 96.—**CAN.**

l. *Priorities.*]—*Re* GOLD MINING AREAS, WAVERLEY (N. S.) (1883), 4 R. & G. 280.—**CAN.**

m. *Whether lessee has right to exclusive possession—Quantity of stone to be obtained specified in lease.*]—HAVEN *v.* HUGHES (1900), 20 C. L. T. 55; 27 A. R. 1.—**CAN.**

n. *Compensation for improvements.*]—A.-G. FOR ONTARIO *v.* HARGRAVE (1906), 8 O. W. R. 127; 10 O. W. R. 319.—**CAN.**

o. ——.]—*Re* CANADIAN ANTHRACITE COAL CO. & MCNEILL CO. (1912), 21 W. L. R. 682; 2 W. W. R. 638; 4 D. L. R. 784; 4 Alta. L. R. 355.—**CAN.**

PART XI. SECT. 3, SUB-SECT. 2.—A.

690 i. *Whether implied.*]—Where a lessor in granting a lease of surface lands had excepted the minerals:—*Held:* in excepting the minerals the lessor impliedly reserved to himself as a necessary incident the right to dig for & win them.—RAMESWAR MALIA *v.* RAM NATH BHUTTACHARJEE (1905), I. L. R. 33 Calc. 462.—**IND.**

cutting should amount to an excess of the right which it was intended that he should exercise; & therefore that cutting trees in a manner necessary to a reasonable exercise of the power to get the stone, was no breach of the covenant.—DOE d. ROGERS *v.* PRICE (1849), 8 C. B. 894; 19 L. J. C. P. 121; 14 L. T. O. S. 329; 137 E. R. 760.

Annotation:—**Mentd.** Swindell *v.* Birmingham Canal Navigation Co. (1860), 9 C. B. N. S. 241.

694. Not limited by grant of express powers.]—HODGSON *v.* FIELD, No. 1003, *post*.

695. Must be exercised bonâ fide — & in usual & reasonable course of working.]—HONEYWELL COTTON SPINNING CO. *v.* MARLAND, [1875] W. N. 46.

B. Sinking of Shafts.

Particular covenants by lessee.]—*See* Sect. 4, *post*.

696. Whether lessee bound to sink shaft—Under covenant to sink shaft—Mine unworkable.]—Where lessees of land, & of coal mines found or to be found therein, covenanted forthwith to proceed to sink for coal as far as could & ought to be accomplished by persons acquainted with the nature of collieries, & as in such cases was usual & customary, & to erect fire engines for the purpose, by June 24, 1806; or in default thereof, to pay so much to the lessor as arbitrators should award: & after the day past, without any new pits sunk, etc., the parties named arbitrators to award concerning the damage, loss, & delay to the lessor, if any; & whether any rent or other satisfaction should be made to him on that account; & the lessees gave bond to the lessor conditioned to perform the award: & afterwards the arbitrators awarded that the lessees had not performed their covenant by not having proceeded to sink for the said coal as far as could & ought to be accomplished, etc., in the words of the covenant, on or before June 24, 1806, for which they awarded to the lessor £150 on account of all damages & losses then incurred on account of such breach: & further, that the lessees should sink coal mines, & erect fire engines for getting the coals demised on or before June 24, 1807; & in default thereof, & until the same should be done, they should pay a yearly rent of £200 to the lessor as a compensation for the lord's share reserved under the lease:—*Held*: to an action on the bond, it was a sufficient answer by the lessees to save the condition, that they had paid the £150 awarded for the breach of the covenant up to June 24, 1806; & as to the subsequent period from thence till June 24, 1807; that on divers days between, etc., they did well & truly sink for coal in the lands demised as far as could & ought to be accomplished, etc., in the words of the covenant, & were ready & willing to have sunk & completed the pits, & to have erected the necessary fire engines, etc., within the time limited by the award; but that at the time of making the lease, & from thenceforth, there were no mines of coal under the lands as could or ought to be worked by any person acquainted with the nature of collieries, or as in such cases it was usual or customary to work, or as would have defrayed the necessary expenses of working & getting the same: all which premises defts. ascertained & proved by due & sufficient experiments & trials then & there made.—HANSON *v.* BOOTHMAN (1810), 13 East, 22; 104 E. R. 274.

697. —— —— ——.]—A declaration stated, that by deed, pltf. let to defts. a certain mine of rock salt for twenty-one years from June 25, 1851: & defts. covenanted with pltf. that they would in every year during the term, get & raise from the mine 2,000 tons of rock salt, & in case of default would, at the expiration of the year, pay pltf. 6*d*. a ton for every ton by which the quantity was less than 2,000: & also that they would, with all reasonable diligence, sink a shaft to the salt rock in order to get at the salt: & would also during the continuance of the term, work the mine in a proper & workmanlike manner. First breach: that although defts. did not raise or get out of the mine the annual quantity of 2,000 tons of salt, yet they have not paid for the quantity short of 2,000 tons. Second breach: that defts. did not in every year of the term get & raise 2,000 tons, & did not pay for the quantity short of 2,000 tons, but on the contrary got & raised no salt whatever, & refused to pay pltf. any sum whatever. Third breach: that they did not use all reasonable diligence to sink a shaft to the salt rock in order to get at the salt; but wholly omitted & neglected so to do. Fourth breach: that defts. did not during the continuance of the term work the mine in a proper & workmanlike manner, but permitted the same to be unworked. Defts. pleaded, secondly: that the deed provided that in case the rock salt should, during the continuance of the term, fail by any inevitable accident, then, on payment of all rent due & performance of all covenants on the part of defts. the term should cease & determine to all intents & purposes whatsoever; that the salt during the continuance of the term failed by inevitable accident; that all rent due was paid & covenants performed; & thereupon the term ceased & determined. Thirdly to the third breach: that defts. did with all reasonable diligence sink a shaft to the salt rock. Fourthly to the fourth breach: that defts. did at all times during the continuance of the term work the mine in a proper & workmanlike manner. Upon which pleas issued were joined. At the trial it appeared that by an agreement in writing, dated Aug. 29, 1851, pltf. agreed, before March 25, then next, to demise to defts. the salt mine in question for twenty-one years from June 25, 1851. When the agreement was executed, defts. began to sink a shaft for the purpose of getting the salt. This sinking was, in Sept. 1851, discontinued in consequence of an influx of brine. Defts. thereupon began to sink another shaft which was in the same month discontinued from the like cause. On Nov. 16, 1852, a lease, pursuant to the agreement, was executed, being the deed declared on & which contained the proviso for cesser stated in the second plea. In consequence of the influx of brine before mentioned defts. never in any manner worked the mine, nor paid any of the rents. The jury found that defts. could not have worked the

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694 i. *Not limited by grant of express powers.*]—Where a lease of a particular mineral, existing in one & the same mine along with other minerals, gives the tenant a right of working it in the way & cost profitable & convenient for him he will not be restrained from working in the way he thinks most beneficial, by the circumstance that that way of working will prejudice the interests of a tenant of the other minerals, by lease made subsequently to his.—HURLET-ALUM CO. *v.* GLASGOW (EARL) (1850), 7 Bell, Sc. App. 100; 22 Sc. Jur. 487; *affg.* 12 Dunl. (Ct. of Scss.) 704; 22 Sc. Jur. 324.—**SCOT.**

p. *Right of entry—Conditions precedent.*]—*Held*: where a mining lease is obtained over private lands in Nova Scotia the lessees must obtain from the owners of the land permission to enter either by special agreement or in accordance with the provisions of the Mining Act.—FIELDING *v.* MOTT (N. S.) (1885), 14 S. C. R. 254.—**CAN.**

q. —— *Whether lost by surrender of lease.*]—*Semble*: the right to enter & mine obtained under any previous award or agreement, depending upon the original lease from the Crown, was lost when the lease was surrendered & a new lease granted & the shaft or tunnel opened by the holders of the previous lease became vested in the owners of the freehold.—PALGRAVE MINING CO. *v.* MCMILLAN (1892), 25 N. S. R. (13 R. & G.) 56.—**CAN.**

Sect. 3.—Construction of leases: Sub-sect. 2, B. & C.; sub-sect. 3, A. (a) & (b) i.]

mine by any reasonable application of labour, diligence, skill, money or other means, & that they were prevented from working it by the influx of brine:—*Held:* (1) as the term commenced in point of interest on Nov. 16, 1852, though its duration as to computation of time was to be reckoned from June 25, 1851, the proviso for cesser, which referred to a failure by inevitable accident during the continuance of the term, never came into operation; & as defts. had entered into an absolute unqualified covenant to get 2,000 tons of rock salt in each year, or pay for the deficiency, they were liable; for whether the salt could be got easily or with difficulty, or whether it existed at all, was immaterial; (2) pltf. was entitled to the verdict on the issue raised by the third plea, for defts. having, after their inability to reach the salt by reason of the influx of brine, covenanted with all reasonable diligence to sink the shafts down to the salt, they were bound to do so, although it might be an unreasonable application of time & labour; (3) pltf. was also entitled to the verdict on the issue raised by the last plea, since defts. must be taken to have covenanted to work the mine in some way, in as prudent & proper a manner as they could under the circumstances, & therefore had no right to abandon the works altogether.

Semble: if the lease had been executed before the interruption of the works by the influx of brine, that would have been "a failure by inevitable accident" within the proviso for cesser.—JERVIS *v.* TOMKINSON (1856), 1 H. & N. 195; 26 L. J. Ex. 41; 27 L. T. O. S. 205; 156 E. R. 1173; *sub nom.* JARVIS *v.* TOMLINSON, 4 W. R. 683.

Annotations:—As to (1) **Distd.** Simpson *v.* Ingleby (1872), 26 L. T. 543. *As to* (3) **Folld.** Watson *v.* Charlesworth, [1905] 1 K. B. 74. *Generally,* **Mentd.** Anglo-Egyptian Navigation Co. *v.* Rennie (1875), L. R. 10 C. P. 271.

698. —— Covenant to work mine — Mine only workable by shaft.]—A lease contained various clauses which spoke of pits or shafts to be sunk on demised premises, but did not contain any express covenant by which the lessees were either bound to sink a pit, or to work the mines; & it was also doubtful whether the lessees were empowered to work the demised mines by "outstroke":—*Held:* no covenant could be implied from the preceding covenant, which imposed upon the lessees, upon the mines being worked, & manure being made within them, the obligation of sinking a pit or shaft upon demised lands, although they might be liable for a breach of covenant in working the mines by outstroke.

If there were a positive covenant to work the mines, I own I feel strongly impressed with the opinion that there would be a covenant on the part of the lessees to make a pit for the purpose, because the mines can only be worked by means of a pit on the demised premises, or by means of outstroke pits (PARKE, B.).—JAMES *v.* COCHRANE (1852), 7 Exch. 170; 21 L. J. Ex. 229; 155 E. R. 903; *affd.* (1853), 8 Exch. 556, Ex. Ch.

*Annotations:—***Refd.** Wheatley *v.* Westminster Brymbo Coal Co. (1869), L. R. 9 Eq. 538. **Mentd.** Kelantan Government *v.* Duff Development Co., [1923] A. C. 395.

699. —— —— In best & most approved mode.] — WHEATLEY *v.* WESTMINSTER BRYMBO COAL CO., No. 707, *post.*

700. —— —— In "proper & workmanlike manner."]—The owner of a piece of land agreed to demise the seams of coal under the land to the owners of an adjoining colliery, at a royalty on each ton of coal worked, & at a dead rent of £500 if the royalties did not amount to so much; the dead rent not to be charged for the first three years if the necessary steps were *bonâ fide* taken with ordinary despatch to win & work the coal. The lease was to contain a covenant by the lessee for working the coal in a proper & workmanlike manner. The lessees proceeded to work the coal by instroke or headings from their adjoining colliery, which was situated to the rise of the seams agreed to be demised; the lessor alleged that the lessees ought to sink a pit & work the coal from the deep & filed a bill to restrain them from working from the adjoining colliery, & to compel payment of the dead rent, on the ground that they had not taken the necessary steps to win & work the coal:—*Held:* (1) under the circumstances, working the coal by instroke was working in a proper & workmanlike manner, & if the lessor had intended to compel the lessees to sink a pit, it should have been provided for in the agreement.

A proper & workmanlike manner may not mean the best possible mode of working for the lessor, but it means in such a manner as shall not be simply an attempt to get out of the earth as much mineral as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding (LORD HATHERLEY, C.).

(2) I conceive that the coal is won when it is put in a state in which continuous working can go forward in the ordinary way (LORD HATHERLEY, C.).—LEWIS *v.* FOTHERGILL (1869), 5 Ch. App. 103, L. C.

Annotations:—As to (2) **Consd.** Rokeby *v.* Elliot (1879), 13 Ch. D. 277; Kinsman *v.* Jackson (1880), 42 L. T. 80.

701. —— —— ——.]—A tenant for life, with certain powers of leasing, demised the seams & veins of coal under a piece of land for twenty-one years, & for sixty years if the tenant for life had power so to do; with liberty for the lessee to search for, dig, raise, & sell the coal, & to make any pits or works, & to take surface land, paying for the damage; & the lessee covenanted to work the mines in a proper & workmanlike manner, & to deliver up at the end of the term the works, seams, & veins of coal in good repair & condition, so that the said coal works might be continued. The lessees worked the demised coal by instroke from an adjoining colliery, situate to the rise of the coal in the demised land, & did not sink a pit so as to work the demised coal from the deep. They kept no barrier between the two collieries, so that water & air passed from their other colliery through the demised colliery into a lower colliery. They also continued to work the demised coal after the expiration of the lease for twenty-one years, claiming to be entitled for sixty years; which claim was, after much litigation, decided to be invalid as against the reversioner:—*Held:* (1) under the circumstances, working by instroke was working in a proper & workmanlike manner, & the lessees were not bound to sink a separate pit for the demised coal; (2) the value of the coal raised by the lessees after the expiration of the twenty-one years' lease was to be paid for by them at its fair market value, as if they were purchasers, all expenses of hewing & raising being allowed; (3) under the terms of the lease, the lessees were not liable to damages for not working the coal continuously; (4) the lessees were not bound to keep up a barrier so as to prevent air & water from flowing through the lessor's mine, & were not liable to pay for wayleave or air-leave; (5) the lessees were liable for any damage done beyond the removal of coal by working the mine since the determination of the twenty-one years' lease, & must also pay for wayleave, or for the passage of

coal through the lessor's mine since the determination of the lease.

(6) I think that the milder rule of law is certainly that which ought to guide this ct., subject to any case made of a special character which would induce the ct. to swerve from it: otherwise, on the one hand, a trespass might be committed with impunity if the rule *in poenam* were not insisted upon; so, on the other hand, persons might stand by & see their coal worked, being spared the expense of winning & getting it (LORD HATHERLEY, C.).

(7) It is said, that because the lessee covenants that he will do the work in a workmanlike manner, he has covenanted to be always working. But there are various approved modes of effecting such a purpose. One is to take so heavy a dead rent as to make the lessee find it to his own benefit to work, because the rent must be paid whether he works the mine or not. Another mode is to have an express covenant that he shall continuously work. Another mode is to say that so much coal shall be raised *per annum;* but to say that this is to be implied from a covenant to work in a workmanlike manner would be a very great stretch of the terms actually employed (LORD HATHERLEY, C.).

(8) Both sides most probably thought that pits would be sunk, but that does not amount in my mind to a covenant to make them (LORD HATHERLEY, C.).—JEGON *v.* VIVIAN (1871), 6 Ch. App. 742; 40 L. J. Ch. 389; 19 W. R. 365, L. C.

Annotations:—As to (2) **Apld.** Ashton *v.* Stock (1877), 6 Ch. D. 719; Ellas *v.* Griffith (1878), 8 Ch. D. 521; Trotter *v.* Maclean (1879), 13 Ch. D. 574. **Apprvd.** Livingstone *v.* Rawyards Coal Co. (1880), 5 App. Cas. 25. **Apld.** Whitwham *v.* Westminster Brymbo Coal & Coke Co., [1896] 2 Ch. 538. **Refd.** Brown *v.* Dibbs (1877), 37 L. T. 171; Taylor *v.* Mostyn (1886), 33 Ch. D. 226. *As to* (6) **Consd.** Trotter *v.* Maclean (1879), 13 Ch. D. 571. *Generally,* **Mentd.** Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n.

702. —— In absence of express covenant.]—In the absence of express contract, the lessee of a mine is entitled to work the minerals by "instroke."—WHALLEY *v.* RAMAGE (1862), 10 W. R. 315.

703. —— - —— Intention of parties apparent from lease.]—(1) *Semble:* suffering a seam of the mine, where workings had been formerly carried on but were discontinued, to be filled with water, whereby the air courses in that seam were interrupted, was not a breach of the covenant to keep the levels, drifts & necessary staples for air in good repair, order, & condition.

(2) We agree in the reasoning to be found in the judgments of the members of the ct. below; hardly perhaps, going so far as to say that the sinking of a pit was anticipated when the lease was framed. We should think it more correct to say, that it was considered a possible, perhaps a not unlikely event (COLERIDGE, J.).—JAMES *v.* COCHRANE (1853), 8 Exch. 556; 22 L. J. Ex. 201; 20 L. T. O. S. 310; 1 W. R. 232; 155 E. R. 1172, Ex. Ch.

Annotations:— **Refd.** Wheatley *v.* Westminster Brymbo Coal Co. (1869), L. R. 9 Eq. 538. **Mentd.** Kelantan Government *v.* Duff Development Co., [1923] A. C. 395.

704. —— —— —— .]—JEGON *v.* VIVIAN, No. 701, *ante.*

705. Breach of covenant to sink shaft—Measure of damages.]—Defts. covenanted with pltf. that if he would surrender to his lessor a certain lease, they would, within two years, or within such period as should be agreed in a new lease, which the lessor had agreed to grant to them, sink upon the demised premises a pit to the depth of 130 yards in search of coal, & in case a marketable vein of coal should be reached, pay to pltf. £2,500. Pltf. having sued defts. for a breach of this covenant, gave evidence to show that if defts. had sunk the pit, marketable coal might have been found:—*Held:* pltf. was entitled to more than nominal damages, & the true measure of damage was the amount which he had lost by being deprived of the opportunity of finding marketable coal.—PELL *v.* SHEARMAN (1855), 10 Exch. 766; 156 E. R. 650.

Annotations:— **Refd.** Wigsell *v.* School for Indigent Blind (1882), 8 Q. B. D. 357. **Mentd.** Joyner *v.* Weeks, [1891] 2 Q. B. 31.

706. Duty to fence shaft.]—WILLIAMS *v.* GROUCOTT, No. 1010, *ante.*

Loss of right to sink shaft—Right to compensation.]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 146, No. 300.

C. Right to Let Down Surface.

See Part XIII., Sect. 1, *post.*

SUB-SECT. 3.—CONSIDERATION.

A. Dead Rent.

(*a*) *In General.*

707. Object of dead rent—To insure working.]—JEGON *v.* VIVIAN, No. 701, *ante.*

708. —— ——.]—*Re* ALDAM'S SETTLED ESTATE, No. 397, *ante.*

709. Unusual mode of calculation — According to number of coal getters employed.]—The rent was a yearly small surface rent, if & when surface was taken, & the mineral rent was calculated in what may have been then the usual mode, but which, according to my experience, is certainly not now the usual mode. It was calculated according to the number of coal getters who were employed in the mine It was a mining lease for 200 years, reserving rents (COZENS-HARDY, M.R.). —MITCHELL *v.* MOSLEY, [1911] 1 Ch. 438; 83 L. J. Ch. 135; 109 L. T. 618; 30 T. L. R. 29; 58 Sol. Jo. 118, C. A.

(*b*) *Liability for Dead Rent.*

i. *In General.*

710. When liability arises—Rent to commence when certain quantity dug—Fraudulent delay by lessee.]—Rent for a colliery commencing the first quarter day after a certain quantity of coal had been dug, ordered to be paid from the quarter day prior to which that quantity would have been dug, but for the fraudulent delay of the lessee.—GREEN *v.* SPARROW (1725), 3 Swan. 408, n.; 36 E. R. 927, L. C.

Annotation:— **Consd.** Wheatley *v.* Westminster Brymbo Coal Co. (1839), L. R. 9 Eq. 538.

711. —— On taking possession.]—If a down be let by an instrument not under seal for the purpose of digging copper ore, an action for use & occupation may be maintained if deft. has ever taken possession; & if he has once taken possession he is liable to all subsequent rent until the determination of the tenancy, whether he has continued to work the minerals or not.

A. agreed with B. to take a lease of B.'s iron ore at N. for forty years, at a certain rent, engaging to work the several veins of ironstone, etc., in certain stipulated proportions, & B. agreed to grant such lease:—*Held:* by this agreement B. took, not a mere licence, but a right constituting an hereditament in respect of which A. might sue for use & occupation.—JONES *v.* REYNOLDS (1836), 4 Ad. &

Sect. 3.—Construction of leases: Sub-sect. 3, A. (b) i., ii. & iii., & B. (a) i. & ii.]

El. 805; 7 C. & P. 335; 6 Nev. & M. K. B. 441; 111 E. R. 986.

Annotations:—**Refd.** Jones v. Reynolds (1841), 1 Gal. & Dav. 62; Holmes v. Powell (1856), 8 De G. M. & G. 572; R. v. Fayle (1856), 20 J. P. 263.

712. Lessee ceasing to work mine.]—JONES *v.* REYNOLDS, No. 711, *ante*.

713. Minerals non-existent.] — JEFFERYS *v.* FAIRS, No. 666, *ante*.

ii. *Mine Exhausted.*

714. Liability of lessee.] —Where a coal mine becoming unproductive ceases to be worked, the lessee is no longer liable to be rated for it to the relief of the poor, although he be still bound by his covenant to pay the rent reserved to his landlord. *Aliter*, where the mine is itself productive, although it be worked to a loss by the lessee, after deducting the proportion of the gross value of the produce reserved to the owner.—R. *v.* BEDWORTH (INHABITANTS) (1807), 8 East, 387; 103 E. R. 391.

Annotations:—**Consd.** Farnham Flint, Gravel & Sand Co. *v.* Farnham Union, [1901] 1 K. B. 272; East Pool & Agar *v.* Redruth Assmt. Com. & Illogan Overseers, [1923] 2 K. B. 405. **Refd.** R. *v.* Westbrook, R. *v.* Everest (1847), 2 New Mag. Cas. 131; Staley *v.* Castleton Overseers (1864), 10 Jur. N. S. 1147. **Mentd.** Bristol *v.* Walt (1835), 5 L. J. M. C. 113; R. *v.* G. W. Ry., *Re* Tilehurst Poor-rate (1852), 16 Jur. 217.

715. ——.]—A., by deed, demised to B., for fifty years, all his right & interest in the coals & other minerals in a certain estate, in as ample a manner as the same were demised to him, A., by D.; yielding & paying yearly, for every ton of coal that should be worked, raised, or got by B., in each year not exceeding 13,000 tons in any year, 8*d.* per ton, or yielding & paying that amount of money, viz., £433 6*s.* 8*d.* each year, as fixed rent, whether the coal should be worked or not, & for every ton of coals that should be worked, raised, or got in each year, above 13,000 tons, 9*d.* per ton, & B. covenanted that he would raise & work 13,000 tons of coal in each year, & pay 8*d.* per ton royalty for the same, or would pay that amount of money viz. £433 6*s.* 8*d.* each year, as fixed rent, whether the coals were worked or not. There was a distinct *reddendum*, & covenant for payment of rent, in respect of other minerals. In covenant on this indenture, the breach assigned was, that B. did not raise or work 13,000 tons of coal in each year, & pay at the rate of 8*d.* per ton for the same, or pay that amount of money viz. £433 6*s.* 8*d.* each year, as fixed rent, whether the coals were worked or not, but on the contrary thereof, to wit, on etc., £216 13*s.* 4*d.* of the said rent for half a year became due & was unpaid:—*Held:* the whole rent claimed was payable, although the mine was so exhausted that the lessee could not raise 13,000 tons of coal in a year.—BUTE (MARQUIS) *v.* THOMPSON (1844), 13 M. & W. 487; 14 L. J. Ex. 95; 4 L. T. O. S. 174; 9 J. P. 457; 153 E. R. 202.

Annotations:—**Folld.** Milne *v.* Taylor (1850), 16 L. T. O. S. 172. **Consd.** Jervis *v.* Tomkinson (1856), 1 H. & N. 195; Cartwright *v.* Forman (1866), 7 B. & S. 243. **Expld. & Distd.** Clifford *v.* Watts (1870), L. R. 5 C. P. 577. **Refd.** Hills *v.* Sughrue (1846), 15 M. & W. 253; Herne Bay Steamboat Co. *v.* Hutton (1903), 88 L. T. 269. **Mentd.** R. *v.* L. & N. W. Ry. (1874), L. R. 9 Q. B. 134.

716. ——.]—A. granted to B. a lease of certain coal mines of a minimum rent of £20 *per annum*. The mine after some time became completely exhausted:—*Held:* the rent was still payable & the demise was of the land for the purpose of digging for coal & not for the ore merely.—MILNE *v.* TAYLOR (1850), 16 L. T. O. S. 172.

717. —— **Ancient mines.**] —RIDGWAY *v.* SNEYD, No. 721, *post*.

iii. *Profitable Working Impossible.*

718. Liability of lessee.] —HAYWOOD *v.* COPE, No. 845, *post*.

719. —— **"Accidents & defects."**] —Pltf. was lessee of a coal mine at the rent of £300 a year & subject to a royalty of 10*s.* for every wey of coals raised in each year, above 600, that being the quantity considered to be paid for by the £300 a year: & pltf. was authorised to determine the lease on the coal being worked out. Pltf. worked the mine for several years; & when it was nearly exhausted he was prevented, by accidents & defects in it, from continuing to work it, except at a ruinous expense. The ct. refused to restrain deft. from suing for the rent of £300 a year, although pltf. offered to pay him 10*s.* per wey for all the remaining coal.—PHILLIPS *v.* JONES (1839), 9 Sim. 519; 3 Jur. 242; 59 E. R. 458.

Annotations:—**Consd.** Ridgway *v.* Sneyd (1854), Kay, 627; Simpson *v.* Ingleby (1872), 26 L. T. 543.

720. —— **"Inevitable causes."**] —A. demised a coal mine to B. at £60 per acre for the coal gotten, & B. covenanted to work not less than two acres annually or pay the rent for that quantity, "whether the same should be got or not." There was a proviso for cesser if all the coal was exhausted. At the end of the term, the lessee, alleging that there was a deficiency in the coal, & that, from "inevitable causes," it was impossible to get two acres annually, & that during the term he had paid for more than he had got, sought to recover back the excess. A demurrer was allowed, on the ground that the covenant was absolute, & the lessee was bound to pay whether he got the quantity or not, & that there was no allegation of an actual exhaustion of the coal.—MELLERS *v.* DEVONSHIRE (DUKE) (1852), 16 Beav. 252; 22 L. J. Ch. 310; 20 L. T. O. S. 268; 1 W. R. 44; 51 E. R. 775.

721. —— **"Faults."**]—In applying the rule of *caveat emptor* to the case of leases of coal mines it must be remembered that everyone acquainted with that kind of property is aware that coal mines are liable to be interrupted by faults.

PART XI. SECT. 3, SUB-SECT. 3.—A. (b) ii.

714 i. *Liability of lessee.*]—A mineral lease contained a provision that the lease should take end "when the coals are worked out or found unworkable to profit on examination by competent persons or an overman if they differ in opinion":—*Held:* it was not a relevant defence to an action for arrears of rent to allege that the coal had been worked out or could not have been worked to profit, it being the plain duty of the tenant, if this state of matters arises to take the initiative & have the fact ascertained in the manner stipulated.—THOMSON *v.* GORDON (1869), 7 Macph. (Ct. of Sess.) 687; 41 Sc. Jur. 347.—**SCOT.**

714 ii. ——.]—GOWAN *v.* CHRISTIE (1873), L. R. 2 Sc. & Div. 273.—**SCOT.**

PART XI. SECT. 3, SUB-SECT. 3.—A. (b) iii.

718 i. *Liability of lessee.*]—PALMER *v.* WALLBRIDGE (Ont.) (1888), 15 S. C. R. 650.—**CAN.**

718 ii. ——.]—Note of suspension of a charge for rent of a coal-field on the ground that the coal was unworkable to a profit refused, the tenants having continued in possession till the end of the term for which the rent was payable, & there being no provision in the lease upon the subject.—BARGADDIE COAL CO. *v.* WARK (1860), 23 Dunl. (Ct. of Sess.) 44; 33 Sc. Jur. 19.—**SCOT.**

718 iii. ——.]—FLEEMING *v.* BAIRD & Co. (1871), 9 Macph. (Ct. of Sess.) 739; 43 Sc. Jur. 377.—**SCOT.**

718 iv. ——.]—*Held:* a tenant was not entitled to reduce a lease of minerals on the ground that they could not be worked to profit, even if no rent were to be paid.—GOWANS *v.* CHRISTIE (1873), 11 Macph. (Ct. of Sess.) (H. L.) 1.—**SCOT.**

718 v. ——.]—WADDELL'S TRUSTEES *v.* MONKLAND IRON CO. (1885), 13 R. (Ct. of Sess.) 237 23 Sc. L. R. 158.—**SCOT.**

If all the coal had been gotten by ancient workings that might be a case for equitable relief.—RIDGWAY *v.* SNEYD (1854), Kay, 627; 24 L. T. O. S. 58; 18 J. P. 759; 69 E. R. 266.

Annotation:—**Consd.** Simpson *v.* Ingleby (1872), 26 L. T. 543.

722. —— Mine "fairly wrought."]—GRIFFITHS *v.* RIGBY, No. 763, *post*.

B. Royalties.

(a) Royalties on Demised Minerals.

i. *In General.*

723. Reservation of annual sum.]—In covenant on an indenture of demise of a coal mine, made on July 8, 1805, reserving a quarter of the coal raised or the value in money at the election of the lessor; & if the quarter fell short of £400 *per annum*, then reserving such additional rent as would make up that annual sum, to be rendered monthly in equal portions:—*Held*: the lessor having elected to take the whole in money may declare for two years & three months' rent in arrear. But even if the money rent were reserved annually, pltf. may remit his claim as to the three months' rent, & enter up judgment for the two years' rent only.—BUCKLEY *v.* KENYON (1808), 10 East, 139; 103 E. R. 728.

724. Supply of burning lime—Obligation to burn lime.]—Where a lessee covenanted that he would at all times & seasons of burning lime supply the lessor & his tenants with lime at a stipulated price for the improvement of their lands & repair of their houses:—*Held*: this was an implied covenant also that he would burn lime at all such seasons, & it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied.—SHREWSBURY (EARL) *v.* GOULD (1819), 2 B. & Ald. 487; 106 E. R. 444.

Annotation:—**Refd.** Gwillim *v.* Daniell (1835), 2 Cr. M. & R. 61.

725. Supply of coal as royalty—Mine unworkable at profit.]—CARTWRIGHT *v.* FORMAN, No. 828, *post*.

726. Dressed or undressed ore.]—MORLEY *v.* YORKSHIRE LEAD MINES, [1890] W. N. 47.

727. Whether payable on coal consumed in working.]—Deft., lessee of mine S. took a lease of B. an adjoining mine, from pltf., by which he was entitled to get the coal from B. mine at a certain rent, & also to be at liberty to bring the coal got in the A. mine to the surface by way of "outstroke" through the B. mine, on payment of 1½*d.* per ton for outstrokes, watercourse rent, & shaft rent. No rent was to be paid for any coal got from the B. mine which should be used or consumed on or for any engine employed in working or carrying on the mines demised:—*Held*: no rent was payable for coal used in working the engine of B. mine when employed in bringing up the coal from the A. mine, such engine being at the same time used for keeping B. mine free from water.

The question has reference to the coal got from the Evanrigg mine & raised by outstroke through the Ellenborough colliery; it being contended on the part of deft. that he is entitled to convey the coal so raised, by the tramway in question, without payment of the 2½*d.* per ton. . . . Our judgment upon this point is adverse to deft. (COCKBURN, C.J.).—SENHOUSE *v.* HARRIS (1862), 5 L. T. 635.

728. Rate of royalty in dispute—Payment into court of lower rate ordered.]—Pltfs. commenced an action against deft. for specific performance of an agreement for a lease of a coal mine by pltfs. to deft. at a royalty, as pltfs. alleged, of 10*d.* per ton. Deft. counter claimed to have specific performance with a royalty of less amount. Deft. was in possession & raising & selling large quantities of coal, but he alleged that he had expended on the mine more than the value of the coal raised. He also brought an action against pltfs. in the Q. B. Div. to obtain damages for misrepresentations alleged to have been made to him for the purpose of inducing him to enter into the agreement, which action was still pending. Pltfs. moved for an interlocutory order that deft. might be ordered to pay into ct. the amount of royalties at 10*d.* per ton on the coal he had raised:—*Held*: although it would not be right, while the rate of royalty was in dispute, to order deft. to pay into ct. the amount of royalties at the rate claimed by pltfs. he ought to be ordered to pay in the amount of royalties at the rate which he himself alleged to be the one agreed upon, & that as his carrying away coal diminished the value of the property he would not have the usual option of giving up possession instead of paying money into ct.—LEWIS *v.* JAMES (1886), 32 Ch. D. 326; 56 L. J. Ch. 163; 54 L. T. 260; 50 J. P. 423; 34 W. R. 619, C. A.

Annotations:—**Mentd.** Greenwood *v.* Turner, [1891] 2 Ch. 144; Cook *v.* Andrews (1896), 66 L. J. Ch. 137.

ii. *Share of Proceeds of Sale.*

729. Royalties on coal sold at pit's mouth—Whether payable on coal sold elsewhere.]—The lessee of a coal mine, who covenants to pay a certain share of all such sums of money as the coal should sell for at the pit's mouth, is not liable under that covenant to pay to the lessor any part

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PART XI. SECT. 3, SUB-SECT. 3.—B. (a) i.

r. *Gold mining lease.*]—An appen. for a gold mining lease on private land may, under Mines Act, 1897, s. 75, agree with the owner of such land for the payment of any sum to be ascertained in any way mutually agreed upon for purchase money or compensation, & such payments may be estimated by way of a percentage of the value of the gold that may thereafter be won from the mine.—DUKE OF WELLINGTON G. M. Co. *v.* ARMSTRONG (1906), 3 C. L. R. 1028.—**AUS.**

t. *Option of lessor—Fixed sum or royalty.*]—A mining lease for ninety-nine years contained provisions enabling the lessor to demand, at his option, a royalty upon the proceeds of the mines, or $4,000 in lieu of such royalty; the lessor had not exercised such option:—*Held*: the lessee was a purchaser for value, & a prior voluntary conveyance was void as against him.—CONLIN *v.* ELMER (1869), 16 Gr. 541.—**CAN.**

a. —— *Fixed rent or royalty.*]—GUTHRIE *v.* COCHRANE (1846), 19 Sc. Jur. 69.—**SCOT.**

b. *Recovery of royalty—Paid under mistake of law.*]—CHAPELLE *v.* R. (1902), 7 Exch. C. R. 414.—**CAN.**

c. *Royalty from placer mining.*]—The Governor in Council has power under Dominion Lands Act to make regulations requiring a placer miner to pay a percentage on the proceeds realised from the grant. Such an imposition, called a royalty, is not a tax, but is a reservation which the owner in fee is entitled to make out of his grant.—CHAPPELLE *v.* R., CARMACK *v.* R., TWEED *v.* R., [1904] A. C. 123.—**CAN.**

d. *Royalty on current prices.*]—Where in a lease of rights to lime defts. agreed to pay a royalty upon current prices of lime & the agreement defined current prices as the price at which defts. sold or disposed of the same:—*Held*: royalties were properly chargeable upon the prices paid by buyers, even though such included the cost of delivery.—KRUGERSDORP LIME CO. *v.* NOLAN LIME WORKS, [1910] T. L. 205.—**S. AF.**

e. *Deductions from royalty.*]—Where a lessee of a mining lease, prior to the enactment of Act 6 of 1910, had agreed to pay & discharge all taxes, royalties & other charges now or hereafter levied by the Government:—*Held*: the lessee was not entitled to the benefit of sect. 8 of the Act which enables a lessee to deduct from the royalty payable by him a part of the tax levied by the Act.—ODENDAAL *v.* ELANDSLAAGTE COLLIERIES, LTD. (1914), 35 N. L. R. 424.—**S. AF.**

f. *Fixed minimum output.*]—WESTERN TRUST CO. *v.* CANADIAN COAL CO. (Alta.), [1926] 3 W. W. R. 330.—**CAN.**

Sect. 3.—*Construction of leases: Sub-sect.* 3, *B.* (*a*) *ii.*, *&* (*b*), *& C. Sect.* 4: *Sub-sect.* 1.]

of the money produced by sale of the coals elsewhere than at the pit's mouth, & evidence of the lessee's having accounted with the lessor, & paid him the share of money produced by the sale of coal elsewhere, is not admissible to explain the intention of the parties.—CLIFTON *v.* WALMESLEY (1794), 5 Term Rep. 564; 101 E. R. 316.

Annotations:—**Consd.** N. E. Ry. *v.* Hastings, [1900] A. C. 260. **Mentd.** Watcham *v.* East Africa Protectorate, [1919] A. C. 533.

730. —— ——.] —The lessee of a coal mine covenanted to pay a moiety of all such sums of money as the coals there raised should sell for at the pit's mouth:—*Held:* he was not liable to pay any part of the money produced by the sale of the coals elsewhere.—GERRARD *v.* CLIFTON (1798), 7 Term Rep. 676; 101 E. R. 1194; *revsg.* S. C. *sub nom.* CLIFTON *v.* GERRARD (1796), 1 Bos. & P. 524.

731. How calculated—On amount of coal sold—Not on amount of money actually received.]—A. demised a colliery to B., & B. covenanted to pay as rent "one third part of the money that should arise, be made, received, or produced from the sale of the coals"; & covenanted to keep "true accounts of all coal daily raised, & to make & deliver true copies thereof to A.":—*Held:* taking the two covenants together, the rent was to be calculated on the amount of coals sold, & not on the amount of money actually received.—EDWARDS *v.* REES (1836), 7 C. & P. 340.

732. Liability unless working prevented by "unavoidable accident"—Accident capable of being remedied.]—Covenant on a coal lease to pay a certain proportion of the value of nine hundredweight of the coals to be raised, unless prevented by unavoidable accident from working the pit. Plea, that deft. was prevented by unavoidable accident. It appeared in evidence that the accident might have been remedied at a greater expense than the value of the coals to be raised:—*Held:* pltf. was entitled to recover.—MORRIS *v.* SMITH (1783), 3 Doug. K. B. 279; 99 E. R. 654.

Annotations:—**Consd.** Simpson *v.* Ingleby (1872), 26 L. T. 543. **Mentd.** Jackson *v.* Union Marine Insce. (1873), L. R. 8 C. P. 572.

(b) Royalties on Way-Leaves.

733. Right of royalties — Minerals worked by outstroke—Carried through demised mine.]—SENHOUSE *v.* HARRIS, No. 727, *ante.*

734. —— **Minerals brought "through, over or under" demised land—Minerals temporarily shunted.**]—L., the owner of land with mines underneath the surface, granted a lease of part of his land known as A., & the mines under it, to a co. known as P., carrying on the manufacture of iron. The lease contained this covenant: "yielding & paying to the lessor, his heirs, etc., for every quantity of 2,520 lbs. of coal, ironstone, etc., the produce of any lands or mines not intended to be included in the present demise, but which shall be raised within the distance of twenty miles from any part of the premises hereinbefore expressed to be demised, & shall be brought through, over, or under the said lands, etc., the royalty or sum of one half-penny." P. afterwards granted an underlease of a part of the surface of the land A. to a railway co. which made sidings thereon, for the purpose of more conveniently & safely shunting trains for a time, before forwarding them to their destination. Trains containing minerals raised within the twenty miles, often mixed with minerals in no way coming within the words of the covenant, & sent by other cos. upon the line, were frequently, for safety & convenience, shunted for a time on the sidings formed on the land A., & afterwards taken out & conveyed to their destination:—*Held:* the minerals raised within the described distance did come within the words of the covenant, even though brought on the land only for the temporary purpose of being shunted there, & were therefore liable to the payment of the royalty.—GREAT WESTERN RY. CO. (DIRECTORS) *v.* ROUS (1870), L. R. 4 H. L. 650; 39 L. J. Ch. 553; 23 L. T. 360; 35 J. P. 516; 19 W. R. 169, H. L.

Annotations:—**Reld.** Wright *v.* Pitt (1870), L. R. 12 Eq. 408. **Mentd.** St. John's Corpn. *v.* Central Vermont Ry. (1889), 14 App. Cas. 590.

735. —— **Unauthorised user of wayleave.**]—JEGON *v.* VIVIAN, No. 701, *ante.*

736. —— **Wayleave through disused mine.**]—A.-G. *v.* TOMLINE, No. 150, *ante.*

C. Average Clause.

737. Royalties payable quarterly — No average over other quarters.]—The lessees under a lease of coal mines covenanted thereby, that they would deliver to the lessor two equal thirteenth parts of all coal which should be raised from the mines demised during the term, or would pay him quarterly the value thereof in money; & that, in case, at the end of the first quarter of any year, such quarterly deliveries should not have equalled in value, or such quarterly payments should not have equalled in amount, the sum of £38 10*s.* the lessees should also pay, at the end of every such first quarter, such additional rent or sum as should make up the sum of £38 10*s.*; & in case, at the end of the second quarter, such deliveries or payments for that & the preceding quarter should not have equalled in value or amount the sum of £75 then the lessees should also pay, at the end of the second quarter, such further sum as would make up £75; & in case, at the end of the third quarter, such deliveries or payments for that & the two preceding quarters should not have equalled in value or amount the sum of £111 10*s.* then the lessees should pay, at the end of the third quarter, such further sum as would make up £111 10*s.*; & in case, on June 24, in any year, the deliveries or payments for that & the three preceding quarters should not have equalled in value or amount the sum of £150 the lessees should pay, on June 24, such an additional sum as would make up £150; it being the intent & meaning of the parties, that the royalties thereby reserved should always amount to £150 per annum at the least:—*Held:* in calculating the amount of royalty due to the lessor at the end of each year, the lessees were not entitled to set off the excess of royalty accruing in any quarter against a deficiency in the previous quarter; but the lessees were entitled, at the end of each quarter, to the full sum of £38 10*s.*—BISHOP *v.* GOODWIN (1845), 14 M. & W. 260; 14 L. J. Ex. 290; 153 E. R. 473.

738. Deficiencies on dead rent—Recoupment out of royalties.]—CLAYTON *v.* PENSON, [1878] W. N. 158.

SECT. 4.—COVENANTS BY LESSEE.

SUB-SECT. 1.—PAYMENT OF RENT AND ROYALTIES.

See, generally, LANDLORD & TENANT, Vol. XXXI., pp. 230 *et seq.*

739. Against whom action lies—Equitable owner in possession.]—Lease of a coal mine to A., reserving a rent; A. the lessee, declares himself a trustee for five persons, to each a fifth; the five

partners enter upon, work, & take the profits of the mine, which afterwards becomes unprofitable, & the lessee insolvent; the *cestuis que trust* not liable, but for the time during which they took the profits.—CLAVERING *v.* WESTLEY (1735), 3 P. Wms. 402; 2 Eq. Cas. Abr. 224; 24 E. R. 1120.

Annotations:—**N.F.** Walters *v.* Northern Coal Mining Co. (1855), 5 De G. M. & G. 629. **Refd.** Cox *v.* Bishop (1856), 26 L. J. Ch. 389. **Mentd.** Coope *v.* Eyre (1788), 1 Hy. Bl. 37.

740. —— ——.]—In pursuance of an arrangement made on behalf of a joint stock co. with certain persons to purchase the beneficial interest in a colliery lease agreed to be granted to them for a term of forty years, a lease was granted in Mar. 1842 to three persons, as trustees for the co., for a period of forty years, at a fixed rent, together with a royalty. The lease contained a stipulation enabling the lessees, at the end of any period of three years from its commencement, to determine the lease by giving twelve months' notice. The co. entered into possession in Dec. 1841, & remained in such possession till Nov. 1842, when the working proving unprofitable was abandoned & never afterwards resumed. In Jan. 1850 the co. was dissolved, & its affairs ordered to be wound up under the provisions of Joint Stock Co.'s Winding-up Acts. The lessor became bkpt. in Aug. 1853. Some time prior to his bkpcy. his interest in the mine became vested in pltf. In May, 1852, the official manager of the co., under protest that the lease was not binding on the co., gave notice to terminate the lease on May 31, following, when one of the triennial periods expired. On Feb. 23, 1853, pltf. filed his bill against the official manager of the co., praying a declaration that the co. had accepted the lease & were bound thereby, & that the official manager might be ordered to pay the arrears of the stipulated rent since Mar. 1842, together with compensation for all breaches of covenant:—*Held:* no relief in the nature of specific performance, nor any equitable relief, could be granted either against the persons to whom the demise was made or against the co. in respect of their occupation, the rights of pltf., if any, being legal.—WALTERS *v.* NORTHERN COAL MINING CO. (1855), 5 De G. M. & G. 629; 25 L. J. Ch. 633; 26 L. T. O. S. 167; 2 Jur. N. S. 1; 4 W. R. 140; 43 E. R. 1015, L. C.

Annotations:—**Folld.** Cox *v.* Bishop (1857), 8 De G. M. & G. 815. **Consd.** Wright *v.* Pitt (1870), L. R. 12 Eq. 408. **Apld.** Ramage *v.* Womack, [1900] 1 Q. B. 116. **Mentd.** *Re* Royal British Bank, *Ex p.* Walton, *Ex p.* Hue (1857), 26 L. J. Ch. 545; De Brassac *v.* Martyn (1863), 2 New Rep. 512; Gilbert *v.* Cossey (1912), 56 Sol. Jo. 363.

741. —— ——.]—An agreement to take an assignment of a lease followed by possession on the part of the equitable assignee is not sufficient to give the lessor any right to sue the equitable assignee in equity on the covenants in the lease.—Cox *v.* BISHOP (1857), 8 De G. M. & G. 815; 26 L. J. Ch. 389; 29 L. T. O. S. 44; 3 Jur. N. S. 499; 5 W. R. 437; 44 E. R. 604, L. JJ.

Annotations:—**Consd.** Wright *v.* Pitt (1870), L. R. 12 Eq. 408; Bagot Pneumatic Tyre Co. *v.* Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146. **Refd.** Friary Holroyd & Healey's Breweries *v.* Singleton, [1899] 1 Ch. 86; Ramage *v.* Womack, [1900] 1 Q. B. 116; Hand *v.* Blow, [1901] 2 Ch. 721; *Re* Nisbet & Potts Contract, [1905] 1 Ch. 391. **Mentd.** Torrington *v.* Lowe (1868), L. R. 4 C. P. 26; Haywood *v.* Brunswick Bldg. Soc. (1881), 8 Q. B. D. 403.

742. —— ——.]—WRIGHT *v.* PITT, No. 895, *post*.

743. —— —— **Privity of contract.**] — The covenants of the trustee or assignor ordinarily bind the beneficiary or equitable assignee, so as to render him liable to an action on the covenants, only where there is a privity of contract between him & the original lessor (WRIGHT, J.).—RAMAGE *v.* WOMACK, [1900] 1 Q. B. 116; 69 L. J. Q. B. 40; 81 L. T. 526; 16 T. L. R. 63.

Annotation:—**Refd.** Hand *v.* Blow, [1901] 2 Ch. 721.

744. —— **Personal representatives of joint tenant.**]—A mineral lease for thirty-one years was granted to L. & M., " & the survivor of them, but expressly excluding assigns & sub-tenants, whether legal or conventional." By the lease L. & M. bound themselves & their respective heirs, exors. & successors, all conjointly & severally renouncing the benefit of discussion, to pay the rent. The lease also provided that if L. or M. became bkpt. it should, in the option of the lessor, become void. Shortly after the commencement of the lease L. became bkpt. & M. died, but the lessor never exercised his option to determine the lease:—*Held:* by the terms of the clause of obligation the lessees were conjointly & severally liable for rent irrespective of their interest, & after M.'s death, his representatives, though they had no interest as tenants, remained liable for rent during the currency of the lease.—BURNS *v.* BRYAN (OR MARTIN) (1887), 12 App. Cas. 184.

See, generally, LANDLORD & TENANT, Vol. XXXI., p. 420, Nos. 5658 *et seq.*

745. Effect of covenant for indemnity by assignee.]—A., the lessee of certain coal mines, for a term of years, by indenture assigned the same to B. for the unexpired residue of his term, B. covenanting that he, his exors., etc., would, at all times during so long as he or they should be in possession or receipt of the rents, produce, & profits of the premises, pay to the lessors the rents, galeages, & wayleaves reserved & made payable by the original lease, & observe & perform all other the covenants therein contained, & would at all times thereafter keep harmless & indemnified A., his heirs, etc., from & against the rents, covenants, etc., in the said lease, & from & against all actions, etc., for & in respect of the same covenants, or otherwise in relation thereto. In covenant by A. against B. upon this indenture, the declaration assigned two breaches, non-payment of the rents & galeages, etc., accruing whilst B. was in possession or receipt of the rents, produce, & profits of the premises, & that B. had neglected to keep A. indemnified. Plea, to the whole declaration, that, at the times when the said rents & galeages became due, B. was not in possession or receipt of the rents, produce, or profits by the indenture assigned, etc.:—*Held:* the issue raised by this plea was an immaterial issue, inasmuch as the restrictive words, " so long as B., his exors., etc., should be in possession or receipt of the rents, produce, & profits of the premises," did not extend to the covenant to indemnify; &, consequently, the jury having found for deft. on the issue joined on that plea, A. was entitled to judgment *non obstante veredicto*.—CROSSFIELD *v.* MORRISON (1849), 7 C. B. 286; 6 Dow. & L. 608; 18 L. J. C. P. 135; 13 L. T. O. S. 161; 13 Jur. 565; 137 E. R. 114.

Annotation:—**Mentd.** Rutland *v.* Bagshaw (1850), 14 Q. B. 869.

Assignor's right of indemnity against assignee, *see, generally*, LANDLORD & TENANT, Vol. XXXI., p. 412, Nos. 5587 *et seq.*

746. Recovery of arrears—By assignee of rent.] —J., lessee of certain mines of ironstone, coal & other minerals, for a term of thirty years, to be computed from Mar. 1839, demised the same, in Nov. 1846, to deft. for twenty-three years, reserving a royalty upon the ore & coal raised by deft. or an annual sum of £100, in lieu thereof, if the royalties in any year should not amount to that sum; with power to J. to distrain for the said

Sect. 4.—Covenants by lessee: Sub-sects. 1 & 2, A. & B. (a), (b) & (c).]

rents, reservations, etc.; & with liberty to deft., during the demise to use, jointly with J., a railway then on the land demised; deft. covenanting to repair the same, or to do so jointly with others who might use it; he having leave to divert it at his own expense if he thought fit.

J., during the demise, assigned to pltf. "the said rents, reservations & royalties, & all other the estate, right, title," etc., of J., "of, in, or in respect of the said demised premises; & the benefit of the said covenants in the said lease contained."

In an action by pltf. to recover arrears in lieu of royalties, accrued since the assignment:—*Held:* by the deed of J. in 1846, a rent was created, & not a mere covenant in gross; such rent was assignable, & pltf., as assignee of J., could sue deft. for such rent.—WILLIAMS *v.* HAYWARD (1859), 1 E. & E. 1040; 28 L. J. Q. B. 374; 33 L. T. O. S. 344; 5 Jur. N. S. 1417; 7 W. R. 563; 120 E. R. 1200.

Annotations:—**Mentd.** Evans *v.* Robins (1863), 11 L. T. 211; Chappell *v.* Mason (1894), 10 T. L. R. 404; Wedd *v.* Porter, [1916] 2 K. B. 91.

—— ——.]—*See, generally,* LANDLORD & TENANT, Vol. XXXI., p. 268, Nos. 4116 *et seq.*

——.] — *See* LIMITATION OF ACTION, Vol. XXXII., p. 418, Nos. 956, 959.

Covenant as to wayleaves & royalties.]—*See* No. 810, *post.*

SUB-SECT. 2.—COVENANTS TO WORK.

A. In General.

747. Mode of insuring continuous working—Express covenant.]—WHEATLEY *v.* WESTMINSTER BRYMBO COAL CO., No. 767, *post.*

748. —— ——.]—JEGON *v.* VIVIAN, No. 701, *ante.*

749. —— **Reservation of heavy dead rent.**]—JEGON *v.* VIVIAN, No. 701, *ante.*

750. —— **Provision for raising fixed quantity annually.**]—JEGON *v.* VIVIAN, No. 701, *ante.*

751. Covenant for limited working—With third party.]—Pursuers were the trustees & proprietors of part of the lands of A. Defenders were tenants of the coal seams under said lands, but the mineral field worked by defenders comprised also coal seams under lands belonging to several adjoining proprietors which were worked by pursuers on the said lands of A. The whole was to be worked as one general scheme. Pursuers sought to enforce as absolute against defenders the following prohibition contained in a minute of agreement of the same date of the leases: "The second parties, defenders, hereby undertake & bind themselves & their foresaids that from & after . . . they will work the coal in the adjoining properties only to such an extent as to enable them to pay the several proprietors thereof such sums of lordship as will amount to but not exceed the fixed rents agreed by their existing leases to be paid to such proprietors respectively. Declaring that if in any year during the currency of this lease the sums payable to such adjoining proprietors shall exceed the said fixed rents, which amount *in cumulo* to £550 sterling *per annum*, then & in that event the second parties shall be bound . . . to pay to the first party, pursuers' author, the sum of one penny per ton on every ton of coal worked from the lands of such adjoining proprietors in excess of the quantities necessary to make up . . . the said fixed rents. . . . In consideration whereof the first party . . . renounces from & after . . . the right to exact the wayleave of one penny per ton presently payable to him":—*Held:* the clause was an absolute prohibition & not one giving defenders a licence to work as much coal as they pleased from beneath the adjoining lands so long as they paid the stipulated one penny per ton.—FORREST *v.* MERRY & CUNINGHAME, LTD., [1909] A. C. 417; 79 L. J. P. C. 49; 101 L. T. 138, H. L.

B. Liability for Non-Working

(a) In General.

752. Covenant to work all mines to be discovered or opened—None actually discovered or opened.]—By an indenture of lease, pltf. demised to deft. all mines & beds of coal, etc., which then had been, or thereafter, during the demise should be discovered or opened under the lands belonging to Dyffryn House, at the yearly rent of £20, to be paid whether any coal should be worked or not, together with 7*d.* per ton for every ton of coal, etc., raised. & deft. covenanted that he would at all times during the demise work the said mines in a proper & workmanlike manner. Breach, that deft. did not work said mines in a proper & workmanlike manner, but, on the contrary, permitted the mines to lie & the same were wholly ungotten. Plea, that the said mines were never at any time before the said demise worked or gotten, nor did he, deft., at any time since or during the demise, work or get the mines:—*Held:* on demurrer, inasmuch as it appeared by the pleadings that the mines had not been worked at all, deft. was not liable on this covenant for not working them in a workmanlike manner, the subject matter of demise being, not all the mines under the lands specified, but only such as either had been or should be discovered or opened.—QUARRINGTON *v.* ARTHUR (1842), 10 M. & W. 335; 11 L. J. Ex. 418; 152 E. R. 498; *subsequent proceedings* (1843), 11 M. & W. 491.

Annotation:—**Refd.** Simpson *v.* Ingleby (1872), 26 L. T. 543.

753. Acquiescence by lessor in cessation of work—Receipt of dead rent.]—In 1816 B. leased three coal mines & an iron mine for 300 years at a minimum rent of £50, & also certain specified royalties at a particular rate. The lease contained special covenants, first, that the working should not be delayed beyond six years from the date of the lease; also, that as to three mines the lessees should be at liberty either to work or relinquish them, & that they should not assign the lease without the consent in writing of the lessors, except to responsible tenants. In 1835 the lessees gave up working the iron mine, as it was not remunerative, & in 1845 the working of the coal mines was also discontinued; but though the mines were not worked the rent was still paid & received. In the meantime considerable correspondence took place, but it was not until 1860 that any decidedly hostile step was taken by the lessors, who, on June 30, in that year, brought an

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PART XI. SECT. 4, SUB-SECT. 2.—A.

747 i. *Mode of insuring continuous working—Express covenant.*]—QUESNEL FORKS GOLD MINING CO., LTD. *v.* WARD, [1920] A. C. 222, P. C.—**CAN.**

g. *Strict construction.*]—The labour covenants in a gold-mining lease are the real consideration for the lease, & should be strictly construed.—BARWICK *v.* DUCHESS OF EDINBURGH CO. (1882), 8 V. L. R. (Eq.) 70.—**AUS.**

h. *Covenant to commence work within specified time.*]—FLOWER *v.* DUNCAN (1867), 13 Gr. 242.—**CAN.**

k. ——.]—LANG *v.* PROVINCIAL NATURAL GAS & FUEL CO. OF ONTARIO, UTZ *v.* LANG (1908), 12 O. W. R. 671; 17 O. L. R. 262.—**CAN.**

action of ejectment against the lessees, but there being a receiver it proceeded no further than the writ. Upon summons for liberty to prosecute the action:—*Held:* reasonable time must be given to the lessees for the restitution of the works, for, although the lessors had a right to insist on their mines being kept in full working order, still, by their acquiescence in the abandonment & their receipt of rent, they had lost their right to proceed at law immediately.—WHITEHEAD *v.* BENNETT (1861), 4 L. T. 818; 9 W. R. 626.

(*b*) *Where Working Impossible.*

754. "Drowning out" of mine.]—By release of Oct. 6, 1791, reciting that B. X. & Y., X. & Y. not being parties to the deed, had proposed as co-partners to accept a lease of the premises, for the purpose of getting the minerals thereunder, & making iron thereon; A., a mtgee. & B. the owner of the equity of redemption, conveyed the premises with the mines, etc., to C. upon trust to demise the same to B. X. & Y. for forty-two years, & upon further trust, at the request of the lessees, to execute a further lease for twenty-one years, & upon the execution of the lease to reconvey to A. & B. By a deed of Oct. 7, C. demised the premises to B. X. & Y. for forty-two years, reserving as the surface rent, £100 & certain royalties in respect of the minerals; & C. covenanted with the lessees to execute a further lease for twenty-one years; & the lessees covenanted among other things, "that the mines should be fairly got & regularly worked to as little disadvantage as possible to C. his exors. etc." By a deed of Oct. 8, C. conveyed to A. the premises & the accruing rents, subject to the lease, & reserving to C. a power to grant the further lease. In 1796, B. conveyed his reversion in fee in the mines to M. & T. as tenants in common. The mines were worked & royalties paid till 1815, at which time it was admitted the mines were "drowned out." The surface was occupied by pltfs. with iron works, & the rent of £100 regularly paid to the parties entitled up to the present time. On June 21, 1833, the lessees applied to M. & T. to concur in the grant of the further lease; & on July 3, M. & T. declined to comply, denying the right of the lessees. On June 27, 1836, the assignees of the lease filed their bill, stating the trust in C. & the covenant to renew, & praying a specific performance of the covenant as to the mines:—*Held:* the laches of pltfs. in filing their bill would, if the case depended on the covenant alone, have been a bar to the relief; the prayer of the bill being confined to specific performance of the covenant, would not preclude the ct., under the general prayer, from entertaining the question of the trust, as it was no surprise on defts.; under the covenant, "that the mines should be fairly got & regularly worked," etc., the lessees were bound to continue the working, if practicable; & an issue must be directed, as to whether the "drowning out" of the mines, on their continuance in that state, was by any default of the plaintiffs.—WALKER *v.* JEFFREYS (1842), 1 Hare, 341; 11 L. J. Ch. 209; 6 Jur. 336; 66 E. R. 1064.

Annotations:—**Apld.** Watson *v.* Charlesworth, [1905] 1 K. B. 74. **Reid.** Macbryde *v.* Weekes (1856), 22 Beav. 533. **Mentd.** Kimber *v.* Ensworth (1842), 1 Hare, 293; Southcomb *v.* Exeter (Bp.) (1847), 6 Hare, 213; Parkin *v.* Thorold (1852), 16 Beav. 59; Bastin *v.* Bidwell (1881), 44 L. T. 742.

755. ——.]—Deft. demised to pltfs. a coal mine for a term of twenty-one years, subject to the payment of a sleeping rent & of certain royalties according to the amount of coal worked. The lease contained a covenant by the lessees to work the mine in "a fair, honest & workmanlike manner, delays, or stoppages by accidents, or other unavoidable cause, only excepted"; & also a proviso for re-entry in case of any "material breach" of lessees' covenants. Pltfs. proceeded to work the mine under their lease, & continued working until stopped by water, which flowed into & drowned the mine, &, although they made every effort to pump out the water, they were at length forced to discontinue the workings. Notwithstanding the offer of pltfs. to continue paying the sleeping rent, deft. refused to accept it, & commenced an action of ejectment against pltfs. for an alleged breach of covenant in having ceased to work the mine:—*Held:* there was no obligation on pltfs. to work beyond the sleeping rent, & they were consequently entitled to suspend their works as long as they thought fit, provided they paid the rent.—SIMPSON *v.* INGLEBY (1872), 26 L. T. 513; 20 W. R. 587; *subsequent proceedings*, 27 L. T. 695, L. JJ.

756. Influx of brine.]—JERVIS *v.* TOMKINSON, No. 697, *ante*.

(*c*) *Where Working Unprofitable.*

757. Payment by lessee of value of minerals unworked.]—Pltf. lessee of a colliery at a rate of so much per wey, the colliery becoming not worth working, & pltf. offering to pay for all the coal that could be got, relieved against the future rent, & the covenant in the lease to work the colliery.—SMITH *v.* MORRIS (1788), 2 Bro. C. C. 311; 2 Dick. 697; 29 E. R. 171.

Annotations:—**Distd.** Phillips *v.* Jones (1839), 9 Sim. 519; Mellers *v.* Devonshire (1852), 16 Beav. 252; Ridgway *v.* Sneyd (1854), Kay, 627. **Consd.** Simpson *v.* Ingleby (1872), 26 L. T. 513.

758. Heavy pecuniary loss—Excuse for non-working.]—By a mining lease a seam of coal under land of lessors was demised for a term of years at an annual rent, & until the working began at a nominal dead rent, & lessees covenanted that they would at all times during the term fairly, duly & honestly win, work & get the whole of the seam in a proper & workmanlike manner. Owing to difficulties in working it was found to be impossible to work the coal without heavy pecuniary loss, & lessees therefore abandoned the undertaking:—*Held:* upon the true construction of this particular lease lessees had broken their covenant, & were liable in damages to lessors.—CHARLESWORTH *v.* WATSON, [1906] A. C. 14; 75 L. J. K. B. 137; 94 L. T. 6, H. L.; *affg.* S. C. *sub nom.* WATSON *v.* CHARLESWORTH, [1905] 1 K. B. 71, C. A.

Annotation:—**Mentd.** Palethorpe *v.* Home Brewery Co., [1906] 2 K. B. 5.

759. —— ——.]—By a mining lease made in 1889 lessees covenanted with lessor that they would "immediately or as soon as may be after this demise proceed to open & get the several mines thereby demised, & from time to time & at all times during the term thereby granted, fairly & orderly, & in regular workmanlike manner, & according to the custom & usual method of working mines of the same description in the neighbourhood wherein the thereby demised mines lay, work the same mines respectively with effect, & without any voluntary intermission or delay, & in accordance with the most approved method of working such mines." The mines in question were surrounded by mines belonging to other persons also leased to the same lessees, & worked by them from pits sunk on such adjoining lands, & it was the intention of the lessees to work the mines in question from such pits after they had

Sect. 4.—Covenants by lessee: Sub-sect. 2, B. (c) & (d), & C.; sub-sect. 3, A.]

worked through the intervening coal, & there was evidence that this was the proper & usual way of working. It would have been physically possible to sink pits on the land of lessor, & to work the mines in that way, but the expense of so doing would have been out of all proportion to the resulting profit. In fact the lessees did not work through the intervening coal during the term of the lease, & the demised mines were not worked at all:—*Held:* lessees had committed a breach of the covenant for which they were liable in damages to lessor.—WIGAN COAL & IRON CO. *v.* ECKERSLEY (1910), 103 L. T. 468, H. L.; *affg.* S. C. *sub nom.* ECKERSLEY *v.* WIGAN COAL & IRON CO., LTD., 102 L. T. 264, C. A.

760. Effect of qualification of covenant—As long as mine "fairly workable."]—Tenant agreed to work a coal mine so long as it was "fairly workable." There were coals in the mine, but of such a description that it would not pay to work it:—*Held:* in these circumstances the tenant was not bound to work the mine & under the words "fairly workable" a tenant was not bound to work at a dead loss.—JONES *v.* SHEARS (1836), 7 C. & P. 346, N. P.

Annotation:—**Consd.** Simpson *v.* Ingleby (1872), 26 L. T. 543.

761. —— "Consistent with means of sale."]—Where lessee of a brickfield, contrary to the covenants in his lease, caused the fall of one of the fences bounding the field, by excavating the clay from under it:—*Held:* a covenant in the lease binding lessee to "get the demised clay to the fullest practicable extent consistent with the means of sale of bricks & tiles to be made therefrom," did not bind lessee to go on working at a loss, even though a means of sale, at an unremunerative rate, might have been found for bricks made out of the demised clay.—NEWTON *v.* NOCK (1880), 43 L. T. 197.

762. —— Minerals insufficient in quantity or quality.]—(1) A lessee of furnaces, ironworks & ironstone mines covenanted to work the furnaces effectually, unless prevented by inevitable accident or want of materials, or unless the ironstone should be insufficient in quantity or quality, or would not, by itself, or with a proper mixture or process, make good common pig-iron:—*Held:* the mixture intended was not necessarily of ingredients procurable on the demised premises.

(2) The lease also contained a covenant to raise a certain quantity of ironstone in each quarter of a year, & pay certain royalties on it, or else to pay a certain fixed quarterly rent to the landlords:—*Held:* the landlords having declared in respect of breaches of both the above covenants, & money having been paid into ct. & accepted in satisfaction of the latter, were entitled to nominal damages only in respect of the former.

(3) The lease contained a covenant to repair & yield up in repair the furnaces, fire engine, iron works, dwelling-houses, & all other erections, buildings, improvements, & alterations to be thereafter erected, built or set up, except the ironwork castings, railways, wimseys, gins, machines, & the movable implements & materials used in or about the said furnaces, fire engine, iron works, stone pits, & premises; & there was a power given to lessors to purchase those articles, giving a certain notice before the expiration of the lease:—*Held:* defts. had a right to remove whatever was in the nature of a machine or part of a machine, but not what was in the nature of building or support of building, although made of iron; & in such removal the defts. might disturb such brickwork as was necessary, & were not bound to restore it to a perfect state, as if the article it was intended to support or cover were still there; but defts. were liable for any unnecessary disturbance of brickwork.—FOLEY *v.* ADDENBROOKE (1844), 13 M. & W. 174; 14 L. J. Ex. 169; 153 E. R. 72.

763. —— "Fairly wrought."]—A demise of coal mines for 30 years, yielding £400 for every acre of coal, etc., by annual payments of not less than £200: provided that in case the whole of the coals, so far as the same could be fairly wrought, should have been worked out & gotten at any time prior to the expiration of the term, & that the said coal so fairly wrought should have been wholly paid for, then that the annual payment of £200 should cease & be no longer payable:—*Held:* the question whether the coal could be fairly wrought did not depend upon whether it could be worked at a profit or not, or whether any such coal as that demised was worth working, but assuming that coal of the same description as that demised could be properly worked, whether, according to the usage of miners, the coal in question could be worked without extraordinary difficulty or expense.—GRIFFITHS *v.* RIGBY (1856), 1 H. & N. 237; 25 L. J. Ex. 284; 156 E. R. 1191.

(d) *Where Minerals Non-Existent.*

Impossibility of performance generally.]—*See* CONTRACT, Vol. XII., pp. 368 *et seq.*

764. Whether lessee liable.]—JERVIS *v.* TOMKINSON, No. 697, *ante.*

765. —— Covenant applicable only to minerals found.]—Pltf. in consideration of the rent, etc., demised by deed to deft. all the veins, pits, etc., of clay which were or might be found upon or under certain lands described, with liberty to enter & search for, dig, & carry away all such clay, making satisfaction to tenants for surface damage, & a covenant that deft. would dig & remove from the land an aggregate amount of not less than 1,000, nor more than 2,000 tons of pipe or potter's clay in each year of the term. There was no reservation of a minimum rent to be paid in the event of clay not being found or raised. In an action upon this deed, one of the breaches assigned was that deft. had not dug an aggregate amount of not less than 1,000 tons of pipe & potter's clay in each year of the demise that had elapsed. Plea, on equitable grounds, that deft. could not, at any time during the term, dig an aggregate amount of not less than 1,000 tons of pipe & potter's clay in each year, because there was not at the time of the demise, nor at any time since, so much clay under the land in question, & the performance of the covenant was impossible, & such impossibility was, at the time of making the covenant, unknown to deft. & he had no reasonable means of ascertaining it:—*Held:* on demurrer, the plea was an answer to the breach, as the ct. were of opinion, on the construction of the deed, that it was the intention of the parties that the covenant to dig not less than 1,000 tons of clay in each year should not take effect unless there was clay to that amount in the lands demised.—CLIFFORD

764 1. *Whether lessee liable.*]—Tenant of a coal-field, though never previously worked, entitled to be liberated, on the ground of sterility.—MURDOCK *v.* FULLERTON (1829), 7 Sh. (Ct. of Sess.) 404.—**SCOT.**

(LORD) *v.* WATTS (1870), L. R. 5 C. P. 577; 40 L. J. C. P. 36; 22 L. T. 717; 18 W. R. 925.

Annotations:—**Refd.** Howell *v.* Coupland (1874), 22 W. R. 691; Newby *v.* Sharpe (1878), 8 Ch. D. 39. **Mentd.** Nickoll & Knight *v.* Ashton, Edridge (1901), 70 L. J. K. B. 600; *Re* Shipton, Anderson *v.* Harrison's Arbitration, [1915] 3 K. B. 676; Leiston Gas Co. *v.* Leiston-cum-Sizewell U. C., [1916] 2 K. B. 428.

766. —— Onus of proof of non-existence.]—WATSON *v.* CHARLESWORTH, No. 773, *post.*

C. Remedies for Breach.

767. Specific performance not decreed.]—Pltfs. granted a lease of a coal mine to defts. reserving a minimum rent of £720, to be increased to £1,000 in case there should be pits sunk upon the estate, with a royalty upon all coal gotten beyond a certain quantity; & the lessees covenanted to work the mine uninterruptedly, efficiently, & regularly, according to the usual or most improved practice. The lessees paid the minimum rent, but only raised a small quantity of coal by working through an adjoining mine without sinking pits on pltfs.' property. Pltfs. being desirous of enforcing a larger amount of working, whereby an increased rental would be payable, filed a bill for specific performance of the covenant in the lease:—*Held:* there was no obligation upon defts. to sink pits, although that might be the most efficient mode of working; & so long as the minimum rent was paid, defts. could not be compelled to work the mine at all; the lessees had committed no breach of contract; but if they had done so, the remedy was at law & not in equity; & this ct. could not give effect to the covenant by directions as to the management of a coal mine.

In all cases of mining leases, if the lessors desire to secure the working of their mines beyond the amount of the sleeping rent, they must in the lease insert covenants which throw that obligation on the lessee (MALINS, V.-C.).—WHEATLEY *v.* WESTMINSTER BRYMBO COAL CO. (1869), L. R. 9 Eq. 538; 39 L. J. Ch. 175; 22 L. T. 7; 18 W. R. 162.

Annotations:—**Consd.** Simpson *v.* Ingleby (1872), 26 L. T. 543. **Distd. & Dbtd.** Kinsman *v.* Jackson (1880), 42 L. T. 80.

768. Forfeiture.]—A lease of china clay granted to lessees licence to "dig, work, & search for china clay" . . . & "to raise & . . . wash, cleanse, prepare, & make merchantable & fit for sale, & to dispose of same, & to exercise the powers" granted by the lease, subject to the rent & royalties thereby reserved, & lessees covenanted to work for china clay in the most proper & effective manner, & with a reasonable number of able bodied men, kept employed on the works at all reasonable & usual working times, so that the china clay might be raised & made merchantable as speedily as possible. There was a proviso for forfeiture & re-entry on failure in the performance of the covenants.

For some months no fresh clay was got, but only the old stock was worked. The ct. refused to restrain lessors from having possession on the ground of forfeiture for breach of covenant.—KINSMAN *v.* JACKSON (1880), 42 L. T. 558; 28 W. R. 601, C. A.

769. Damages.]—WIGAN COAL & IRON CO. *v.* ECKERSLEY, No. 759, *ante.*

770. —— Measure of damages.]—WATSON *v.* CHARLESWORTH, No. 773, *post.*

SUB-SECT. 3.—COVENANTS TO WORK IN PARTICULAR MANNER.

A. In General.

771. Effect of covenant—When added to covenant to work.]—WALKER *v.* JEFFREYS, No. 754, *ante.*

772. —— ——.]—JERVIS *v.* TOMKINSON, No. 697, *ante.*

773. —— ——.]—By a mining lease, lessors demised to lessees for a term of twenty-one years the whole of a mine of coal, lying under a certain area at a rent, as soon as the lessees should commence working the coal, of £100 for an acre of the coal, & until they should begin to work & get coal, the annual rent of £5. By the lease the lessees covenanted that they should & would at all times during the term thereby appointed "fairly, duly & honestly win work recover obtain & get the whole of the said mine vein or seam of coal demised in a proper & workmanlike manner." Operations with the object of proving the coal, extending over several years & involving a large expenditure, were unsuccessful, & lessees abandoned the working of the mine. The coal within the demised area could in the ordinary course of working have been won & gotten, but the operations would have entailed heavy pecuniary loss upon lessees, & in a commercial sense they acted prudently in abandoning the undertaking. On a claim by lessors to recover damages for breach of covenant:—*Held:* upon the true construction of the covenant lessees were under an absolute obligation to win & get the coal, & the words "fairly, duly & honestly" in the covenant must be construed as adding to & not limiting that obligation, & consequently there had been a breach of covenant by lessees, for which lessors were entitled to recover as damages the amount which would have been paid to them under the lease if the lessees had won & gotten the coal regardless of pecuniary loss to themselves.

It appears to me that *primâ facie* the *onus* rests on the lessees to prove that the coal which they have absolutely covenanted to win does not exist, in order to justify them in throwing up the lease, the covenants of which they have *primâ facie* broken (COLLINS, M.R.).—WATSON *v.* CHARLESWORTH, [1905] 1 K. B. 74; 74 L. J. K. B. 155; 92 L. T. 46, C. A.; *affd. sub nom.* CHARLESWORTH *v.* WATSON, [1906] A. C. 14, H. L.

Annotation:—**Mentd.** Palethorpe *v.* Home Brewery Co., [1906] 2 K. B. 5.

774. Nature of lessee's obligation—To work in specified manner—No positive obligation to work.]—WHEATLEY *v.* WESTMINSTER BRYMBO COAL CO., No. 767, *ante.*

775. —— —— ——.]—Certain pits or mines were, with other higher & intervening mines, demised to lessees, with power to work & get coal from same at a fixed rent, & with a covenant that they should work & carry on the mines with their utmost skill & ability, in the best & most effectual manner, to the best advantage, & according to the common mode & usual practice of carrying or coal works or collieries with effect. On a bill, by lessor, alleging that defts. after having for some time worked said three mines, had ceased working the T. mine, & also that they were working the C. mine in advance of the B. mine, & praying injunctions accordingly:—*Held:* under the terms of the covenant, defts. were entitled to work any

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PART XI. SECT. 4, SUB-SECT. 3.—A.

774 1. *Nature of lessee's obligation—To work in specified manner—No positive obligation to work.*]—JACKSON'S TRUSTEE *v.* DIXON, LTD. (1901), 3 F. (Ct. of Sess.) 782; 38 Sc. L. R. 587; 9 S. L. T. 257.—**SCOT.**

1. *Meaning of terms—"Best & most*

Sect. 4.—Covenants by lessee: Sub-sect. 3, A. & B.; sub-sects. 4, 5 & 6.]

of the mines without working all, or all that they had commenced to work; according to the evidence before the ct. it was the common practice in the district to work a lower seam of coal before working a higher; there was no ground for saying that defts. were committing a breach of the covenant, & the bill was dismissed with costs.

The word "mine" is clearly used in its primary sense of "vein" (JESSEL, M.R.).

The jurisdiction of this ct. does not extend to the performance of covenants of repair. It is clear I cannot grant an injunction that defts. shall not be at liberty to work the other mine till they put the Town Lane Mine in repair (JESSEL, M.R.).—ABINGER (LORD) *v.* ASHTON (1873), L. R. 17 Eq. 358; 22 W. R. 582.

Annotations:—**Expld.** Strelley *v.* Pearson (1880), 15 Ch. D. 113. **Consd.** Charlesworth *v.* Watson, [1906] A. C. 14. **Refd.** Newton *v.* Nock (1880), 43 L. T. 197.

776. Meaning of terms—"Proper & workmanlike manner."]—LEWIS *v.* FOTHERGILL, No. 700, *ante.*

777. —— ——.]—Leases of seven seams of coal for mining purposes contained covenants by lessees to work the coal "in a fair, proper, & workmanlike manner, & according to the best mode of working for the time being adopted in the neighbourhood," & to work the seams "so as not to injuriously affect or make it more difficult & expensive to work the seam or seams lying next beneath or next above," & not to injure or endanger buildings by undermining their foundations or by the working. In the neighbourhood of the mines the system of working usually adopted was the "long wall" or the "Barry" system, a modification of it, under which systems all the coal was worked & no pillars were left. In an area of forty-two acres, beneath a village in which there were many houses, the lessees worked the lower vein of the two into which the seam there lying was divided on the "pillar & stall" system, under which many large pillars of coal were left to support the surface & houses:—*Held:* (1) in arriving at the meaning of what was "fair, proper, & workmanlike" working, all the circumstances must be considered, including lessees' obligation to support the surface; (2) the "best mode of working" meant the best under all the circumstances, & even the system in general use, if meant, was only to be used where applicable; (3) the "pillar & stall" system was properly used under the area of forty-two acres; & (4) the covenant as to working seams without injury to others applied to the seven seams demised & not to the two veins of one seam.—BREWER *v.* RHYMNEY IRON CO., [1910] 1 Ch. 766; 79 L. J. Ch. 334; 102 L. T. 392.

778. —— **"Best mode of working."**]—BREWER *v.* RHYMNEY IRON CO., No. 777, *ante.*

B. How Enforced.

779. Injunction.]—Ct. with reluctance grants injunction to stay working a colliery.—ANON. (1754), Amb. 209; 27 E. R. 140, L. C.

Annotations:—**Consd.** Birmingham Canal Co. *v.* Lloyd (1812), 18 Ves. 515. **Apld.** Wheatley *v.* Westminster Brymbo Coal Co. (1869), L. R. 9 Eq. 538.

780. ——.]—A lease of iron ore mine granted in 1900 contained covenants by the lessees to work the mine properly, not to do any act which might occasion loss or damage to the mine, to keep correct maps & plans, & to allow inspection by the lessor & his agents of such maps & plans. It also contained a covenant by the lessees to permit the lessor & his agents at all reasonable times to inspect the mine & its workings, & a proviso that on default by the lessees in performing or observing any of the covenants, the lessor might re-enter, & thereupon the lease should be determined. The lessor died in Jan. 1907. On Apr. 26 his exors.' agent was refused inspection of the mine by the lessees. On Apr. 29 the exors. gave the lessees notice in writing that they had determined the lease, & on May 3 they, through their agents, demanded possession of the mine. On May 4 they issued a writ against the lessees, claiming (*a*) recovery of possession of the mine; (*b*) mesne profits; (*c*) an injunction to restrain the lessees from working the mine so as to occasion loss or damage to it; (*d*) an order on the lessees to allow inspection of the mine & its workings; (*e*) a receiver; & (*f*) damages:—*Held:* (1) having regard to the form of the proviso for re-entry in the lease, actual re-entry or its equivalent, the issue of a writ claiming possession *simpliciter* was necessary in order to determine the lease, & the notices of Apr. 29 & May 3 were ineffectual for that purpose; (2) the claim in the writ for possession was inconsistent with the claim for an injunction, & the writ was not therefore an unequivocal demand for possession so as to operate as a final election by the exors. to determine the lease.

(3) The ct. will not interfere by means of an injunction to enforce the specific performance of the working of a mine. But . . . where there is a covenant against any improper working sufficiently definite to be expressed in an order, an injunction may be granted (WARRINGTON, J.).—MOORE *v.* ULLCOATS MINING CO., LTD., [1908] 1 Ch. 575; 77 L. J. Ch. 282; 97 L. T. 845; 24 T. L. R. 54.

Annotation:—*Generally*, **Mentd.** Elliott *v.* Boynton, [1923] 1 Ch. 422.

781. Specific performance.]—MOORE *v.* ULLCOATS MINING CO., LTD., No. 780, *ante.*

SUB-SECT. 4.—COVENANTS TO LEAVE PILLARS AND BARRIERS.

782. Pillars—Want of—Liability for surface damage.]—By a mining lease, the lessees covenanted, amongst other things, that they would "from time to time & at all times during the said term work said pits, mines, & shafts in a workmanlike manner, & leave pillars of the said stone of sufficient strength to support the roofs of the said mines, & get & clear the said stone in the usual & best way in which the same is done in other works of a like character in Clayton." It also contained covenants to pay for surface damage, & at the expiration of the term to fill up the pits & shafts, & restore the surface to a state fit for agricultural purposes:—*Held:* lessees were liable to the reversioner for damage done to the surface of the land by its cracking & subsiding in consequence of the want of sufficient pillars of stone being left to support the roofs of the mines, notwithstanding they might have worked the mines in a usual & a workmanlike manner.—HODGSON *v.* MOULSON (1865), 18 C. B. N. S. 332; 144 E. R. 472.

—— —— ——.]—*See* No. 811, *post.*

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approved method."]—MEREWETHER *v.* SCOTTISH AUSTRALIAN MINING CO., LTD. (1907), 4 C. L. R. 953.—**AUS.**

m. *Deviation from covenant—With knowledge of landlord—Whether amounting to waiver of future breaches.*]—CARRON CO. *v.* HENDERSON'S TRUSTEES (1890), 23 R. (Ct. of Sess.) 1042; 33 Sc. L. R. 736; 4 S. L. T. 91.—**SCOT.**

783. —— Working of—Injunction to restrain.] —MOSTYN *v.* LANCASTER, TAYLOR *v.* MOSTYN, No. 380, *ante*.

784. —— Working & removal of—Liability of mortgagees authorising removal.] — TAYLOR *v.* MOSTYN, No. 462, *ante*.

785. Barriers—Removal of barriers—Remedies for.]—Case in the nature of waste will lie against lessee of a mine, for an injury to the reversion, by the removal of a barrier or boundary between it & an adjoining mine, although the act complained of might also be the subject of an action for a breach of an express covenant.—MARKER *v.* KENRICK (1853), 13 C. B. 188; 22 L. J. C. P. 129; 20 L. T. O. S. 223; 17 Jur. 44; 138 E. R. 1169.

Annotation:—**Refd.** Defries *v.* Milne, [1913] 1 Ch. 98.

786. —— Enforcement of covenant to leave barriers—Injunction.]—Tenant of a mine restrained, on motion, from permitting a communication with an adjoining mine to continue open, & water to flow through the same, the effect intended being to compel defts. to close the communication.—MEXBOROUGH (EARL) *v.* BOWER (1843), 7 Beav. 127; 49 E. R. 1011; *affd.*, 2 L. T. O. S. 205, L. C.

Annotation:—**Refd.** Bowser *v.* Maclean (1860), 2 De G. F. & J. 415.

Rights against persons wrongfully or improperly taking minerals.]—*See* Part VI., Sect. 2, *ante*.

SUB-SECT. 5.—COVENANTS TO REPAIR.

See, generally, LANDLORD & TENANT, Vol. XXXI., pp. 310 *et seq.*

787. Whether enforceable by specific performance or injunction.]—ABINGER (LORD) *v.* ASHTON, No. 775, *ante*.

788. Covenant to yield up in repair—Disturbance of brickwork—Extent of liability for restoration.]—FOLEY *v.* ADDENBROOKE, No. 762, *ante*.

789. —— "Erections, buildings & improvements"—Removal of furnace.]—The first [question] related to the damage claimed by pltfs. in respect of a furnace erected by defts. on certain demised premises, & removed by them. The lease contained a covenant to keep & leave in repair all & every the furnace, fire engine, dwelling-houses, & all other erections & buildings & improvements whatsoever, to be thereafter erected or set up & continued, & in two antecedent clauses of the lease, power was expressly given to set up, & afterwards from time to time remove all fire engines, cranks, whins & other machines; & by another clause power was given to set up furnaces, mills, houses for workshops, stables & other erections, but without any express power, in either case, to remove them. . . . The learned judge was of opinion that no damage ought to be assessed on this head & we think he is right. . . . There is no question here of any colourable removal of the furnaces, for the furnaces had been discontinued, as to the working, fifteen or twenty years, yet taken down long before, in the year 1839 (POLLOCK, C.B.).—ADDENBROOKE *v.* BOTFIELD (1848), 12 L. T. O. S. 220.

790. —— "Ways & roads"—Removal of tram plates fastened to sleepers.] — BEAUFORT (DUKE) *v.* BATES, No. 1021, *post*.

791. —— "Erections, fences & fixed machinery"—Removal of trade fixtures.] — In 1905 M. granted a mining lease to the predecessors in title of the co. whereby the lessees covenanted, clause 13, that "at the end or sooner determination of the term all erections, fences & fixed machinery in the demised seams or on the surface of the said premises shall be left in good repair & condition by lessees." The working of the coal proved unremunerative & certain holders of debentures issued by the co. brought an action to enforce their security, & obtained the appointment of a receiver. In pursuance of an order in the action, the receiver, during the existence of the term, sold the machinery & plant upon the premises, & paid the proceeds into ct. Upon a motion by M. for a declaration that certain articles of machinery sold by the receiver were fixed machinery or erections within clause 13:—*Held:* clause 13 operated to deprive the tenants of their right to remove trade fixtures, & as the articles in question had been severed & sold during the term M. was entitled to affirm the sale & to recover the proceeds immediately without waiting until the end of the term.—*Re* BRITISH RED ASH COLLIERIES, LTD., [1920] 1 Ch. 326; 88 L. J. Ch. 212; *sub nom. Re* BRITISH RED ASH COLLIERIES, LTD., EASTERN VALLEYS BLACK VEIN COLLIERIES, LTD. *v.* BRITISH RED ASH COLLIERIES, LTD., 120 L. T. 551, C. A.

792. Covenant to erect & repair smelting mill—Runs with reversion.]—(1) Where a lease of an undivided third part of certain mines contained a recital of an agreement made by lessee with lessor, & the owners of the other two thirds, for pulling down an old smelting mill, & building another of larger dimensions, upon a waste near the mines, & the lease contained a covenant to keep such new mill in repair, & so leave it at the expiration of the term, but did not contain a covenant to build it:—*Held:* such a covenant was to be implied, & lessor of the one third might sue upon it in respect of his interest. (2) The lease contained a demise of all mines & minerals then opened or discovered, or which might during the term be opened or discovered, in or under certain moors & waste lands; & also all smelting mills then standing upon the said lands, with full liberty to sink shafts there, & to build thereon any mills or other buildings requisite for working the mines, *habendum* said demised premises, with the appurtenances for twenty-one years. Lessor afterwards granted his reversion of & in the said demised premises, with the appurtenances, to G. B., who, by will demised the same to pltfs.:—*Held:* the covenant to build the new smelting mill tended to the support & maintenance of the thing demised, & the assignee of the reversion might therefore sue upon it.—EASTERBY *v.* SAMPSON (1830), 6 Bing. 644; 1 Cr. & J. 105; 4 Moo. & P. 601; 130 E. R. 1429, Ex. Ch.; *affg.* S. C. *sub nom.* SAMPSON *v.* EASTERBY (1829), 9 B. & C. 505.

Annotations:—*As to* (1) **Consd.** Aspdin *v.* Austin (1844), 5 Q. B. 671; Stephens *v.* Junior Army & Navy Stores, [1914] 2 Ch. 516. **Refd.** Dunn *v.* Sayles (1844), 5 Q. B. 685. *As to* (2) **Expld.** Keppell *v.* Bailey (1834), 2 My. & K. 517; Ricketts *v.* Enfield, [1909] 1 Ch. 544. **Refd.** Dewar *v.* Goodman, [1909] A. C. 72.

793. Covenant to keep "levels, drifts, & staples" in repair—Suffering disused seam to be filled with water.]—JAMES *v.* COCHRANE, No. 703, *ante*.

SUB-SECT. 6.—COVENANTS TO RESTORE SURFACE AND PAY FOR SURFACE DAMAGE.

794. Covenant to restore surface—Not enforceable by specific performance.]—Specific perform-

n. *Covenant to pay for surface damage—What included in "surface."*]—OSWALD *v.* GORDON (1853), 16 Dunl. (Ct. of Sess.) 70; 26 Sc. Jur. 45.—SCOT.

Sect. 4.—Covenants by lessee: Sub-sects. 6, 7, 8 & 9.]

ance of a covenant to make good a gravel pit refused.—FLINT *v.* BRANDON (1803), 8 Ves. 159; 32 E. R. 314; *subsequent proceedings* (1804), 1 Bos. & P. N. R. 73.

Annotations:—**Refd.** Storer *v.* G. W. Ry. (1842), 2 Y. & C. Ch. Cas. 48; South Wales Ry. *v.* Wythes (1854), 1 K. & J. 186; Rogers *v.* Challis (1859), 27 Beav. 175.

795. —— How construed — Restoration for all former practical purposes & uses.]—The meaning of a covenant on lessee's part in a mining lease to restore the surface to its original condition, is, that the ground shall be restored for all the practical purposes & uses to which it had been formerly applicable.—HARBY *v.* EAST & WEST INDIA DOCKS & BIRMINGHAM JUNCTION RY. CO. (1852), 1 De G. M. & G. 290; 20 L. T. O. S. 4; 42 E. R. 564, L. C.

796. —— For benefit of owner — Not third party.]—WILSON *v.* WADDELL, No. 1071, *post.*

797. —— Breach — Measure of damages.]—Lessee of a mining lease covenanted that from time to time during the lease, or at the expiration thereof, he would put the lands generally into such state & condition as they were in before, or as near thereto as possible, or if he did not that he would pay £100 for every acre not so restored. Damage was done to about 30 acres of land, but the lessee did not restore the same to its former condition:—*Held:* the lessor was entitled to the sum of £100 for every acre although such sum greatly exceeded the amount of actual damage, as it was evident the parties intended that to be paid in the event of a breach of covenant, & it was not in the nature of a penalty.—*Re* MEXBOROUGH (EARL) & WOOD (1882), 47 L. T. 516; 47 J. P. 151.

798. Covenant to pay for surface damage — Runs with land.]—A covenant to pay compensation for damage done to the surface by working the mines thereunder is a covenant that runs with the land.

In 1861 S., the owner of an estate in fee, granted a portion of it for the express purpose that certain buildings should be erected thereon by the grantee, but reserved to himself all mines & minerals thereunder, with liberty for himself & his lessees to get & work same for his or their benefit, "but without entering upon the surface of the said premises or any part thereof, so that compensation in money be made by him or them for all damages that shall be done to the said erections on the said plot by the exercise of any of the said excepted liberties or in consequence thereof." The buildings were duly erected on this land by the grantee, & were afterwards conveyed by him to pltfs. in fee. S. subsequently granted to defts. without any reservation, the lands adjacent to pltfs.' buildings & also the right to work the mines under pltfs.' buildings. Defts. who had notice of the compensation clause in the conveyance to pltfs.' predecessors in title, thereupon proceeded to get the minerals both under their own & pltfs.' land by means of mines that had been partially worked prior to 1861, & thereby caused the surface of pltfs.' land to subside, & so did considerable injury to the buildings erected thereon:—*Held:* (1) the right of the surface owner to compensation was a right of which the law takes notice, & it was therefore a burden which might be annexed to the mine owner's right to work his mines so as to let down the surface, & consequently pltfs. were entitled to recover damages in respect of the injury done to their buildings.

(2) I apprehend there may be a well known & perfectly legal custom that the lord of the manor may get all the minerals under the copyhold lands, paying compensation to a copyhold tenant for any damage he may do to the surface in getting them. Inclosure Acts constantly give the same right (MELLISH, L.J.).—ASPDEN *v.* SEDDON, PRESTON *v.* SEDDON (1876), 1 Ex. D. 496; 46 L. J. Q. B. 353; 36 L. T. 45; 41 J. P. 804; 25 W. R. 277, C. A.

Annotations:—*As to* (1) **Consd.** Westhoughton U. D. C. *v.* Wigan Coal & Iron Co., [1919] 1 Ch. 159. **Refd.** Haywood *v.* Brunswick Permanent Benefit Bldg. Soc. (1881), 8 Q. B. D. 403; Mundy *v.* Rutland (1883), 23 Ch. D. 81.

799. —— ——.]—In a mining lease granted by the owners of the minerals, who were not owners of the surface, lessee, which expression was to include his exors., administrators & assigns, unless such construction was excluded by the sense or the context, covenanted with lessors & "as separate covenants with other the owner or owners occupier or occupiers for the time being" of surface lands to pay to lessors & other the covenantees or covenantee compensation for all damage occasioned by the working of the coal demised. The lease was assigned to a colliery co. & damage was occasioned to the surface by the co.'s working:—*Held:* the covenant was not simply collateral, but affected the nature & value of the land & ran with the land, & although the surface owners were not parties to the lease, yet under Real Property Act, 1845 (c. 106), s. 5, & Conveyancing & Law of Property Act, 1881 (c. 41), s. 58 (1), the benefit of the covenant might be taken by the devisees of one who was a surface owner at the date of the lease & by the successors in title of others who were surface owners at that date, & they could sue the exors. of the lessee & the colliery co. for compensation for damage done to their surface lands.—DYSON *v.* FORSTER, DYSON *v.* SEED, QUINN, MORGAN, ETC., [1909] A. C. 98; 78 L. J. K. B. 246; 99 L. T. 942; 25 T. L. R. 166; *sub nom.* FORSTER *v.* DYSON, FORSTER *v.* SEED, FORSTER *v.* QUINN, FORSTER *v.* MORGAN, 53 Sol. Jo. 149, H. L.

Annotations:—**Consd.** Westhoughton U. D. C. *v.* Wigan Coal & Iron Co., [1919] 1 Ch. 159. **Refd.** Hubbard *v.* Weldon (1909), 25 T. L. R. 356.

800. —— ——.]—A landowner, whose predecessors in title had demised the minerals under certain lands to defts., subject to a covenant by defts. with them & their assigns not to let down the surface, & a condition for making compensation for any damage done, granted a lease of the surface of the same lands to pltfs., subject to defts.' lease, reserving liberty to mine without liability for subsidence caused thereby. Defts. having worked the mine so as to let down the surface, thereby causing damage to pltfs.' works, pltfs. brought an action in the County Palatine Ct. of Lancaster for damages & an injunction. The Vice-Chancellor refused the injunction, but granted an inquiry as to damages:—*Held:* (1) the benefit of defts.' covenant ran with the land & could be enforced by assigns, but pltfs., being merely subsequent lessees without any express assignment of the covenant, were not assigns for that purpose; but (2) pltfs. had under their lease the right of support to the surface so far as it was not taken away by defts.' lease, & defts. were not entitled by their lease to let down the surface without making compensation as required by their lease, therefore pltfs. were entitled to damages for the injury caused by defts.' workings.—WESTHOUGHTON URBAN COUNCIL *v.* WIGAN COAL & IRON CO., [1919] 1 Ch. 159; 88 L. J. Ch. 60; 120 L. T. 242, C. A.

Covenants running with the land.] — *See, generally,* LANDLORD & TENANT, Vol. XXXI., pp. 141 *et seq.*

SUB-SECT. 7.—COVENANTS TO DRAIN.

801. Obligation of lessees to continue pumping —Whether implied in absence of express covenant—Lessor with reserved right of passage through demised mine.]—PAYNE *v.* ROCHER COLLIERY CO. (1887), 3 T. L. R. 359.

802. —— Covenant against drowning out of mine—Removal of pumping machinery.]—Lessee of a mine covenanted by his lease, at the end of the term, if lessor should require it, to leave him all the engines, machinery, things & materials which should have been used in & about the working of the mine upon receiving twelve months' notice from lessor, & being paid for the same according to a valuation. In a subsequent part of the lease it was provided that it should be lawful for lessee at any time or times during the term, or within twelve months after its expiration, to remove all the machinery, engines, things & materials which should be erected or brought by him upon the premises, unless lessor should be minded to purchase same, which he should have liberty to do upon giving the notice thereinbefore mentioned & upon paying the price estimated. The deed also contained a covenant by lessee not to do any act which might occasion or tend to produce the drowning of the mine.

Fourteen years before the expiration of the term lessee became insolvent, & assigned everything he had brought upon the premises to trustees, who gave notice to lessor of their intention to remove same unless he should be minded to purchase. To a bill by lessor, averring that such removal would occasion or tend to produce the drowning of the mine, & praying for an injunction to restrain same until the end of the term, & until pltf. had the opportunity of exercising his option to purchase, a demurrer was allowed, the ct. being of opinion that, according to the true construction of the lease, lessee was to be at liberty to remove all the property in question, unless lessor gave notice of his intention to purchase, & paid for the same.—ROLLESTON *v.* NEW (1858), 4 K. & J. 640; 70 E. R. 266.

Annotation:—**Reld.** Strelley *v.* Pearson (1880), 43 L. T. 155.

803. —— —— ——.]—GOODRICH *v.* EVERGLYN COAL CO., [1889] W. N. 152.

804. —— Preservation of property pending action.]—STRELLEY *v.* PEARSON, No. 679, *ante.*

SUB-SECT. 8.—COVENANTS AGAINST ASSIGNMENT.

See, generally, LANDLORD & TENANT, Vol. XXXI., pp. 370 *et seq.*

805. Liability of equitable assignee in possession —Breaches of covenant.]—COX *v.* BISHOP, No. 741, *ante.*

—— For rent.]—*See* Part XI., Sect. 4, subsect. 1, *ante.*

806. Exception of assignment to responsible persons—Right of lessor to withhold consent—Acquiescence.]—WHITEHEAD *v.* BENNETT, No. 753, *ante.*

807. Licence to assign — Form of covenant in sub-lease.]—The lease of certain mines contained a covenant that the lessee should not, without the consent of the lessor, let or assign the mines. The lessor granted to the lessee a licence to sublet a part, but the licence provided that this should not authorise any further letting or assigning of the part of the mines, the subject of the licence, without such consent as was required by the lease. The lessee then agreed to sub-let to an underlessee the part of the mines the subject of the licence, the underlease to contain provisions in all respects like those in the original lease:—*Held:* according to the agreement the underlease ought to contain a covenant by the underlessee against letting or assigning without the consent of the lessee, & not a covenant against letting or assigning without the consent of the lessor.—WILLIAMSON *v.* WILLIAMSON (1874), 9 Ch. App. 729; 43 L. J. Ch. 738; 31 L. T. 291, L. JJ.

Annotations:—**Consd.** Haywood *v.* Silber (1885), 30 Ch. D. 404; Macksick *v.* Carmichael, [1917] 2 K. B. 581. **Reld.** *Re* Wedgwood Coal & Iron Co. (1882), 47 L. T. 612; *Re* Spark's Lease, Berger *v.* Jenkinson, [1905] 1 Ch. 456; Slough Picture Hall Co. *v.* Wade, Wilson *v.* Nevile, Reid (1916), 32 T. L. R. 542.

808. Remedy for breach — Interim injunction.]—Pltf. demised to deft. certain quarries of hard & soft limestone, with full power & authority to work the quarries; & deft. covenanted not to assign, demise, or part with the said mines, powers, authorities, & premises, or any part thereof, for the whole or any part of the term. There was a right of re-entry for breach of covenant. Deft. sold to certain purchasers marl to be gotten by them from the lands included in the demise, & the purchasers in pursuance thereof worked the marl & took it away:—*Held:* pltf. had made out a *primâ facie* case of breach of covenant, & he was *primâ facie* entitled to an *interim* injunction until the trial of the action to restrain the further working of the quarries.—MOSTYN (LORD) *v.* MANGER (1901), 17 T. L. R. 281, C. A.

SUB-SECT. 9.—OTHER COVENANTS.

809. Covenant to deliver up machinery — On exercise of lessor's option to purchase—"At any time."]—A lease of mines contained a covenant that, if the lessor should at any time before the expiration or determination of the lease give notice, in writing, to the lessee, of his desire to take all or any part of the machinery, stock-in-trade, implements, etc., in or about the mines, then the lessee would, at the expiration of the lease, deliver the articles specified in the notice to the lessor on his paying the value of them, such value to be ascertained in the manner therein mentioned:—*Held:* the covenant was so injurious & oppressive to the lessee, that the ct. ought not to enforce it, or to grant an injunction to prevent a breach of it.—TALBOT *v.* FORD (1842), 13 Sim. 173; 6 Jur. 843; 60 E. R. 66.

810. Covenant as to wayleaves & royalties thereon—Runs with land.]—A., an owner of lands in the township of S., entered into articles of agreement with B., the lessee of a neighbouring colliery, by which he agreed to grant to B. a lease of part of the land for the purpose of forming a railway for the conveyance of coal to certain wharfs; & B., for himself, his exors., administrators & assigns, agreed with A., his heirs & assigns, to

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PART XI. SECT. 4, SUB-SECT. 9.

o. Covenant not to employ more than specified number of men.]—NIMMONS *v.* GILBERT (N. W. P.) (1907), 6 W. L. R. 531.—**CAN.**

p. Covenant to furnish accounts.]—ADAM *v.* NAPIER (1813), 5 Dunl. (Ct. of Sess.) 736; 15 Sc. Jur. 333.—**SCOT.**

q. Covenant to cede possession on notice.]—HOULDSWORTH *v.* BRAND'S

Sect. 4.—Covenants by lessee: Sub-sect. 9. Sects. 5 & 6: Sub-sects. 1 & 2.]

convey, upon the railway, all the coal to be gotten from the colliery or from any other lands or grounds in the township, & to pay to A., his heirs & assigns, 2*d.* for every ton of coal so conveyed. B assigned his interest in the colliery & in the lands taken, under the articles of agreement, for forming the railway, together with the use of the railway to C.:—*Held:* the agreement to convey, upon the railway, all the coal, etc., & to pay 2*d.* per ton in respect of it, ran with the land, &, consequently, it was binding on C.—HEMINGWAY *v.* FERNANDES (1842), 13 Sim. 228; 7 Jur. 888; 60 E. R. 89; *sub nom.* HEMMINGWAY *v.* FERNANDEZ, 12 L. J. Ch. 130.

Covenants running with the land.]—*See, generally,* LANDLORD & TENANT, Vol. XXXI., pp. 141 *et seq.*

SECT. 5.—COVENANT BY LESSOR FOR QUIET ENJOYMENT.

See, generally, LANDLORD & TENANT, Vol. XXXI., pp. 122 *et seq.*

811. When implied—"Let."]—Deft., who was the tenant for life of a mansion house & grounds under the will of her husband, & also one of his exors. & trustees, agreed to "let" & pltf. agreed to take the mansion house & grounds for a year, & thereafter from year to year, he agreeing to keep the inside of the premises in good & tenantable repair & keep up the vineries & glasshouses. Deft. excepted the minerals, with power to work them, but without any power to let down the surface. Some years previously deft.'s husband had entered into an agreement with the adjoining landowners with a view of granting to a proposed co. a lease of the coal underneath their several properties, but the husband died before this arrangement was carried out, which was eventually carried into effect by his trustees, including deft., who, with the adjoining landowners, joined in demising the coal & the right to work it to trustees, called the demising trustees, who in turn demised the coal & the right to work it to the co. The former of these indentures gave liberty "so far as the owners have power to grant such liberty" to work the seam without leaving any supports, & the second contained a similar clause, but without the qualification. There was no express mention of such a clause in the agreement which deft.'s husband had entered into. By the second indenture the demising trustees reserved so much of the coal as should be necessary for the support of buildings as they should in writing require to be left, & in case serious damage by subsidence were reasonably anticipated the co. were to have power, after notice in writing to the trustees, to leave without paying for it sufficient coal as should be agreed upon for the support of buildings. In the course of working the co. desired to leave a sufficient pillar of coal for the support of the mansion house, but at the instance of deft. the demising trustees withheld their consent to the pillar being left, & as it was worked out, the result was that serious subsidences took place, & pltf. suffered serious damage in his tenancy:—*Held:* pltf. was entitled to recover, inasmuch as deft. had derogated from her grant, & although the tenancy agreement only contained the word "let" it nevertheless implied a contract for quiet enjoyment, of which there had been a breach by deft.—MARKHAM *v.* PAGET, [1908] 1 Ch. 697; 77 L. J. Ch. 451; 98 L. T. 605; 24 T. L. R. 426.

Annotation:—**Refd.** Jones *v.* Consolidated Anthracite Collieries & Dynevor, [1916] 1 K. B. 123.

812. —— —— "To hold demised premises."]—Pltf. sued for rent on a lease of mines; defts. pleaded that pltf. had no title to part, & knew it, but defts. did not, & that the Crown had claimed this part against defts. Defts. also, by way of counterclaim, asked for damages in respect of losses incurred in consequence of pltf.'s want of title:—*Held:* the words "let" & "to hold the demised premises" in the lease implied a covenant for title & quiet enjoyment for breach of which defts. were entitled to damages.—MOSTYN *v.* WEST MOSTYN COAL & IRON CO. (1876), 1 C. P. D. 145; 45 L. J. Q. B. 401; 34 L. T. 325; 40 J. P. 455; 24 W. R. 401.

Annotations:—**Consd.** Markham *v.* Paget, [1908] 1 Ch. 697. **Refd.** Baynes *v.* Lloyd, [1895] 2 Q. B. 610; Budd-Scott *v.* Daniell, [1902] 2 K. B. 351. **Mentd.** Breslauer *v.* Barwick (1876), 36 L. T. 52; Wheeler *v.* Le Marchant (1881), 17 Ch. D. 675; Carlish *v.* Scott, [1906] 1 Ch. 335.

813. What amounts to breach—Working of upper stratum—Causing floods & falls in demised mine.]—By indenture, deft. demised to pltfs. a coal mine for a term of years, with liberty to dig & sink pits, etc., for obtaining the coal; & deft. covenanted with pltfs. that they might peaceably & quietly have, hold, occupy, possess & enjoy the mine during the term, without any molestation, interruption or disturbance whatever of, from, or by deft. After the making of the indenture deft. excavated a quarry of ironstone, lying under some of the closes under which the demised mine was situate, but above that mine; & made holes from the strata of ironstone into the demised mine; & thereby caused quantities of water to percolate into the demised mine; & deft. also by excavating the quarry caused parts of the roof of the demised mine to fall in, & by reason of the premises the demised mine became flooded, & the working of the coal was rendered impracticable:—*Held:* though deft. had a right to excavate the quarry, yet as the excavation had caused an interruption of pltfs.' occupation of the demised mine, deft. was liable for a breach of his covenant for quiet enjoyment.—SHAW *v.* STENTON (1858), 2 H. & N. 858; 27 L. J. Ex. 253; 30 L. T. O. S. 352; 6 W. R. 327; 157 E. R. 353.

Annotations:—**Expld.** Jenkins *v.* Jackson (1888), 40 Ch. D. 71. **Consd.** Harrison, Ainslie *v.* Muncaster, [1891] 2 Q. B. 680. **Refd.** Anderson *v.* Oppenheimer (1880), 5 Q. B. D. 602; Davis *v.* Town Properties Investment Corpn., [1902] 2 Ch. 635. Williams *v.* Gabriel, [1906] 1 K. B. 155.

814. —— Working of adjoining mine—Inadvertent flooding of demised mine.]—Pltfs. were the lessees of a mine under a lease, granted to them by deft., which contained a covenant that they should peaceably & quietly hold & enjoy the premises thereby demised, without any interruption or eviction by deft. or any person or persons claiming under him. Prior to the granting of the lease to pltfs. deft. had demised to a co., a mine immediately adjacent to pltf.'s mine. The co., whilst lawfully & without any negligence

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TRUSTEES (1877), 4 R. (Ct. of Sess.) 369; 14 Sc. L. R. 255.—**SCOT.**

r. Covenant to leave no water in workings.]—PORTLAND (DUKE) *v.* WOOD'S TRUSTEES, [1926] S. C. 640.—**SCOT.**

PART XI. SECT. 5.

t. What amounts to breach—Subsequent grant to placer miner.]—A statement of claim which alleges that the Crown, after granting a lease of areas for subaqueous mining & while that lease was in force, in derogation of the rights of the lessee to peaceable enjoyment thereof, interfered with the rights vested in him by transferring the leased area to placer miners who were put in possession of them by the

working their mine, picked away some of the stratum, & in so doing accidentally tapped a natural reservoir or underground lake, the water from which overflowed into & flooded pltf.'s mine:—*Held:* the interruption of pltfs.' enjoyment of their mine was not caused by an act of the lessor or those claiming under him, but was immediately caused by the overflow of water into their mine, such overflow being a consequence of an act that could not have been foreseen at the time when the lease was granted to pltfs. by deft., &, therefore, there had been no breach of the covenant for quiet enjoyment.—HARRISON, AINSLIE & CO. *v.* MUNCASTER, [1891] 2 Q. B. 680; 61 L. J. Q. B. 102; 65 L. T. 481; 56 J. P. 69; 40 W. R. 102; 7 T. L. R. 688, C. A.

Annotations:—**Expld.** Kelly *v.* Rogers, [1892] 1 Q. B. 910. **Consd.** Williams *v.* Gabriel, [1906] 1 K. B. 155. **Refd.** Jaeger *v.* Mansions Consolidated (1902), 87 L. T. 690; Davis *v.* Town Properties Investment Corpn., [1903] 1 Ch. 797; Jones *v.* Consolidated Anthracite Collieries & Dynevor, [1916] 1 K. B. 123; Booth *v.* Thomas, [1926] Ch. 397.

815. —— Derogation from grant.]—MARKHAM *v.* PAGET, No. 811, *ante*.

816. Restraint of working—Working inconsistent with prior grant.]—A lease of alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached:—*Held:* the coal pillars could not be removed.—GLASGOW (EARL) *v.* HURLET ALUM CO. (1850), 3 H. L. Cas. 25; 10 E. R. 10, H. L.

SECT. 6.—LESSOR'S REMEDIES.

SUB-SECT. 1.—DISTRESS.

See, generally, DISTRESS, Vol. XVIII., pp. 260 *et seq.*

817. Royalties.]—The proprietor of a house & of a marl pit & brick mine demised the house, by unwritten agreement, to D. from a day named; & it was at the same time agreed between them, without writing, that D. should take the marl pit & the brick mine, & should pay quarterly, at the usual quarter days, 8*d.* per solid yard for all the marl that he got, & 1*s.* 8*d.* per thousand for all the bricks that he made. D. took the marl & made bricks accordingly, & paid the stipulated sums for a time; but they afterwards fell into arrear:—*Held:* the agreement for the marl pit & brick mine was a demise of the land from year to year, at a rent capable of being ascertained with certainty, & for which, therefore, the lessor might distrain.—DANIEL *v.* GRACIE (1844), 6 Q. B. 145; 13 L. J. Q. B. 309; 8 Jur. 708; 115 E. R. 56.

Annotations:—**Refd.** R. *v.* Westbrook, R. *v.* Everist (1847), 10 Q. B. 178; Edmonds *v.* Eastwood (1858), 2 H. & N. 811; Turnor *v.* Cameron (1870), 22 L. T. 525; *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co., [1897] 1 Ch. 373. **Mentd.** Pollett *v.* Forrest (1847), 8 L. T. O. S. 534; Holywell Iron Co. *v.* Mid. Ry., [1910] 1 K. B. 296.

818. Express power to distrain — Binding on assignees.]—Upon a demise of mines a power of distress for the rent reserved was granted to the lessor over "any lands in which there shall be, for the time being, any pits or openings by or through which the coal or culm by the said deed demised shall for the time being be in course of working by the lessees, their exors., administrators, & assigns." Pltfs., being assignees of the lease with notice, under a trust deed made by the lessees for the benefit of creditors, sued defts. for a distress made under the above-mentioned power after the assignment, at pits not included in the demise, but referred to in it, & then worked by the lessees:—*Held:* whether the power was or was not a valid power of distress against strangers, pltfs., taking as assignees with notice, were bound by it.—DANIEL *v.* STEPNEY (1874), L. R. 9 Exch. 185; 22 W. R. 662, Ex. Ch.

Annotations:—**Consd.** *Re* Roundwood Colliery Co., Lee *v.* Roundwood Colliery Co., [1897] 1 Ch. 373. **Mentd.** Cooke *v.* Chilcott (1876), 3 Ch. D. 694; Haywood *v.* Brunswick Bldg. Soc. (1881), 8 Q. B. D. 403.

819. —— On chattels not on demised premises—Does not constitute bill of sale.]—Mining co., now in liquidation, were lessees from separate lessors, at certain rents & royalties of two adjoining coal mines A. & B. There was no shaft on mine B. & the co. worked both mines by means of a shaft on mine A. In each of the leases the lessor reserved to himself express power to distrain for rent in arrear, not only upon chattels belonging to the lessees on the demised premises, but also upon chattels belonging to the lessees in or about "any adjoining or neighbouring collieries." In Oct. 1896, lessors of mine B. levied a distress upon chattels belonging to the lessees on mine A.:—*Held:* having regard to the nature of the demise & the manner in which the minerals were worked, the power to distrain upon chattels belonging to the lessees upon adjoining & neighbouring mines did not constitute the mining lease a bill of sale within Bills of Sale Act, 1878 (c. 31), so as to require registration under Bills of Sale Acts.—*Re* ROUNDWOOD COLLIERY CO., LEE *v.* ROUNDWOOD COLLIERY CO., [1897] 1 Ch. 373; 66 L. J. Ch. 186; 75 L. T. 641; 45 W. R. 324; 13 T. L. R. 175; 41 Sol. Jo. 240, C. A.

Annotation:—**Mentd.** Venner's Electrical Cooking & Heating Appliances *v.* Thorpe, [1915] 2 Ch. 104.

See, generally, BILLS OF SALE, Vol. VII., pp. 3 *et seq.*

SUB-SECT. 2. FORFEITURE.

See, generally, LANDLORD & TENANT, Vol. XXXI., pp. 460 *et seq.*

820. Demand for possession—Effect of delay in making demand.]—WHITEHEAD *v.* BENNETT, No. 753, *ante*.

821. —— Must be unequivocal.]—MOORE *v.* ULLCOATS MINING CO., LTD., No. 780, *ante*.

Compare Nos. 892, 893, *post*.

822. Proviso for forfeiture on cesser of work for two years—Lease voidable at option of lessor.]—A lease of coal mines reserved a royalty rent for every ton of coals raised, & contained a proviso that the lease should be void, to all intents & purposes, if the tenant should cease working at any time two years. After the working had ceased more than two years, the lessor received rent:—*Held:* a tenancy from year to year was not thereby created; for the lease was not absolutely

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Crown to his detriment, discloses a sufficient cause of action in support of a petition of right for the recovery of damages claimed in consequence of such subsequent grants.—MCLEAN *v.* R. (1907), 38 S. C. R. 542.—CAN.

PART XI. SECT. 6, SUB-SECT. 2.

a. Waiver of forfeiture—What amounts to.]—JUST IN TIME GOLD MINING SYNDICATE, NO LIABILITY *v.* MARSHALL, [1918] S. R. Q. 204.—AUS.

b. Relief against forfeiture.]—Though the interest of a free miner in his claim expires, unless renewed at the end of the year, his lessor, the Crown, may relieve against the forfeiture in cases where there is no one

Sect. 6.—Lessor's remedies: Sub-sect. 2. Sect. 7.]

void by the cesser to work, but voidable only at the option of the lessor, & he might avoid the lease upon any cesser to work commencing two years before the day of demise in the ejectment.—DOE d. BRYAN *v.* BANCKS (1821), 4 B. & Ald. 401; 106 E. R. 984.

Annotations:—**Apld.** Roberts *v.* Davey (1833), 4 B. & Ad. 664. **Refd.** Malins *v.* Freeman (1838), 4 Bing. N. C. 395; Bowser *v.* Colby (1841), 1 Hare, 109; Jones *v.* Carter (1846), 15 M. & W. 718; James *v.* Young (1884), 27 Ch. D. 652. **Mentd.** Arnsby *v.* Woodward (1827), 6 B. & C. 519; Dakin *v.* Cope (1827), 2 Russ. 170; Doe d. Hemmings *v.* Durnford (1832), 2 Cr. & J. 667; Doe d. Nash *v.* Birch (1836), 1 M. & W. 402; Selby *v.* Browne (1845), 14 L. J. Q. B. 307; Amott *v.* Holder (1852), 17 Jur. 318; Cockerell *v.* Van Diemen's Land Co. (1857), 5 W. R. 312; Hughes *v.* Palmer (1865), 19 C. B. N. S. 393; Toleman *v.* Portbury (1871), 40 L. J. Q. B. 125; Davenport *v.* R. (1877), 3 App. Cas. 115; New Zealand Shipping Co. *v.* Soc. des Ateliers et Chantiers de France, [1919] A. C. 1; Elliott *v.* Boynton, [1924] 1 Ch. 236.

823. Waiver of forfeiture — Acquiescence — Lessor allowing expenditure of money by lessee.]—I take it to be a settled principle, a principle more strictly applicable to mining property than any other, that a party who witnesses a breach of contract by another & lies by & permits the alleged wrongdoers to proceed in the acts complained of, incurring expenses & liabilities, instead of applying promptly to this ct. for relief, I say, I consider it a settled principle that a party so acting will be considered in this ct. as having waived its special interposition (WIGRAM, V.-C.).—BOWSER *v.* COLBY (1841), 1 Hare, 109; 11 L. J. Ch. 132; 5 Jur. 1178; 60 E. R. 969.

Annotations:—**Mentd.** Howard *v.* Fanshawe, [1895] 2 Ch. 581; Dendy *v.* Evans, [1910] 1 K. B. 263.

824. —— —— ——.]—Pltfs. being lessees of a mine under deft. admitted the forfeiture of the lease at law by reason of breaches on their part of covenants which it contained; but upon their alleging & establishing by evidence that, after the breaches, deft.'s agent had encouraged them to lay out money upon the premises, & upon their also making out that there was in other respects a presumption that at the hearing they might be entitled to equitable relief. Their lordships, considering that the inconvenience of allowing an action of ejectment to proceed would far exceed that of stopping the action until the hearing, granted an injunction upon interlocutory application.—NORTH STAFFORD STEEL, IRON & COAL CO. (BURSLEM), LTD. *v.* CAMOYS (LORD) (1865), 6 New Rep. 345; 12 L. T. 780; 29 J. P. 628; 11 Jur. N. S. 555, L. JJ.

——.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 497 *et seq.*

825. Effect of winding-up order—On landlord's right of re-entry.]—Mines were demised to a co. by a lease which contained a power of re-entry if the rents or royalties, or any part thereof, should be in arrear for thirty days, or if the co. "should be wound up voluntarily or by compulsion or otherwise under the provisions of any Act or Acts of Parliament." An action was brought against the co. by the debenture-holders, & a receiver was appointed. Rent being in arrear, the landlord took out a summons for leave to distrain or re-enter. After the summons had been returnable, but before it was heard, an order was made for winding up the co. The summons was then amended by intituling it in the winding-up as well as in the action:—*Held:* according to the true construction of the proviso for re-entry, a right to re-enter accrued on the making of a winding-up order, &, the title of the landlord to re-enter being clear, the ct. ought to order possession to be given to him, & ought not to put him to the useless expense of bringing an action to which there was no defence.—GENERAL SHARE & TRUST CO. *v.* WETLEY BRICK & POTTERY CO. (1882), 20 Ch. D. 260; *sub nom. Re* WETLEY BRICK & POTTERY CO., 30 W. R. 445, C. A.

Annotation:—**Mentd.** Horsey Estate *v.* Steiger, [1898] 2 Q. B. 259.

826. Relief against forfeiture—Refusal by lessee to perform conditions on which relief granted—Right of lessor to enforce condition.]—Pltfs. obtained a judgment for possession against defts. in respect of a breach of a covenant in a mining lease. Defts. appealed, but abandoned the appeal. Subsequently defts. applied for relief, under C. L. P. Act, 1860 (c. 126), against that judgment of forfeiture, & obtained the following order: "It is ordered that upon defts. (*a*) paying all rent in arrear with interest thereon . . . (*b*) paying costs of action & appeal, including this application & the several adjournments thereof as between solr. & client such costs to be taxed by the taxing master . . . & (*c*) entering forthwith into a personal covenant for payment of the machinery rent in terms similar to the lessee's covenant . . ." defts. "have relief against forfeiture of the lease. . . ."

Defts. remained in possession for some time working the mine & paying the rent. They subsequently refused to proceed on the order giving relief. On an application by pltf. for an order, in effect, to compel defts. to proceed on the order granting relief:—*Held:* the ct. had no jurisdiction to compel defts. to perform the conditions of the order, but defts. had to pay all the costs of & occasioned by & incidental to their application for relief.—TALBOT *v.* BLINDELL, [1908] 2 K. B. 114; 77 L. J. K. B. 540; 98 L. T. 859; 24 T. L. R. 477.

——.]—*See, generally,* LANDLORD & TENANT, Vol. XXXI., pp. 487 *et seq.*

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entitled to take advantage of such expiry.—WILLIAM CREEK CO. *v.* SYNON, 1 M. M. Cas. 1.—**CAN.**

c. ——.]—PINELLE *v.* MOORE, [1925] 1 D. L. R. 569; *affg.*, 24 O. W. N. 342.—**CAN.**

d. ——.]—Though the aim of law generally is in favour of giving relief against forfeiture in the case of leases, in the case of mining leases a proviso for the entry should be strictly construed & forfeiture cannot ordinarily be relieved against.—SYED AHMAD *v.* MAGNESITE SYNDICATE, LTD. (1915), 1. L. R. 39 Mad. 1049.—**IND.**

e. *Crown lease—Rights of lessor.*]—Where mining ground is held from the Crown under a lease, which is subject to forfeiture for non-compliance with terms & conditions, the Crown alone can declare a forfeiture & re-enter for breach, or waive it.—CANADIAN CO. *v.* GROUSE CREEK FLUME CO., LTD., 1 M. M. Cas. 3.—**CAN.**

f. —— ——.]—QUESNEL FORKS GOLD MINING CO., LTD. *v.* WARD (B. C.), [1919] 3 W. W. R. 946.—**CAN.**

g. —— *Grounds for forfeiture.*]—R. *v.* SNOW, MCDONALD & HOWARD (1873), 9 N. S. R. 373.—**CAN.**

h. ——.]—A.-G. *v.* SHERATON (1896), 28 N. S. R. (16 R. & G.) 492.—**CAN.**

k. —— *Cancellation by Minister of the Interior—Right of lessee to judicial enquiry.*]—Under a condition for defeasance in a lease of a mining location, made by the Crown in virtue of the hydraulic mining regulations of Dec. 3, 1898, a provision that the Minister of the Interior is to be the "sole & final judge" of the fact of default by the lessee does not entitle the Crown to cancel the lease & re-enter until the fact of such default has been determined by the Minister in the exercise of the functions vested in him after an enquiry of a judicial nature in which an opportunity has been afforded to all parties interested of knowing & being heard in respect to the matters alleged against them in such investigation.—BONANZA CREEK HYDRAULIC CONCESSION *v.* R. (1908), 40 S. C. R. 281.—**CAN.**

l. —— —— ——.]—KLONDYKE GOVERNMENT CONCESSION *v.* R. (Y. T.) (1908), 40 S. C. R. 294.—**CAN.**

m. —— —— *Necessity for notice.*]—PAULSON *v.* R. (Alta.) (1915), 52 S. C. R. 317.—**CAN.**

n. *Placer miner—Failure to carry on mining operations.*]—CLAZY *v.* MEYERS (Y. T.) (1905), 2 W. L. R. 289.—**CAN.**

SECT. 7.—DETERMINATION.

827. By lessee—Right to determine—Condition precedent—Performance of all covenants.]—Pltf. demised to deft. a coal mine for forty-two years, at a certain yearly rent. The lease contained numerous covenants on the part of the lessee for payment of rent, & in respect of the working of the mine, etc., with a proviso for re-entry on breach of any of them; & also a proviso, that if the lessees should be desirous to quit the premises at the end of the first eight years of the term, & of such their desire should give the lessor notice in writing eighteen calendar months before the expiration of such eighth year, then, all arrears of rent being paid, & all & singular the covenants & agreements on the part of the lessee having been observed & performed, the lease should, at the expiration of the eighth year, be utterly void; but, nevertheless, without prejudice to any claim or remedy which any of the parties might then be entitled to for breach of any of the covenants:—*Held:* the performance of all the covenants by the lessee was a condition precedent to his right to determine the lease.—FRIAR *v.* GREY (1851), 5 Exch. 584; 20 L. J. Ex. 365; 17 L. T. O. S. 233; 15 Jur. 814; 155 E. R. 256, Ex. Ch.; *affd. sub nom.* GREY *v.* FRIAR (1854), 4 H. L. Cas. 565, H. L.

Annotations:—**Reld.** Jervis *v.* Tomkinson (1856), 26 L. J. Ex. 41. **Mentd.** Newson *v.* Smythies (1858), 3 H. & N. 840; Finch *v.* Underwood (1875), 33 L. T. 634; Bastin *v.* Bidwell (1881), 18 Ch. D. 238; Seaward *v.* Drew (1898), 67 L. J. Q. B. 322; Stait *v.* Fenner, [1912] 2 Ch. 504; Burch *v.* Farrows Bank, [1917] 1 Ch. 606.

See, generally, LANDLORD & TENANT, Vol. XXXI., pp. 538, 539, Nos. 6835–6838.

828. —— —— Proviso for determination on minerals being "fully & fairly gotten"—Residue of coal not worth working.]—Declaration on a covenant in a lease of a colliery, by which the owners for the time being were entitled to as many coals at the pit's mouth as should be consumed in any one dwelling-house, to be agreed upon by the majority of them. Plea, that the whole of the coals comprised in the demise were worked out in the fair & proper course of working the mines. The lease was for the term of twenty-eight years from Sept. 30, 1847, at the royalty of one-eighth of the minerals produced, & contained a proviso that if the minerals should be fully & fairly gotten before the expiration of the term the lessees might determine it on giving twelve months' notice. It appeared that some coal remained in the pit, but it could not be practically worked without costing more than it was worth:—*Held:* the covenant was absolute, & therefore the plea was no answer.

The lessee of a coal mine is not excused from working out a stratum because by reason of its growing thinner it cannot be worked at a profit (MELLOR, J.).—CARTWRIGHT *v.* FORMAN (1866), 7 B. & S. 243.

829. —— Power to determine "at any time"—Notice given during current year.]—By an agreement for the lease of certain ironworks & mines between pltf. & defts., pltf was to grant a lease of the works & mines for twenty-one years, with the usual & customary clauses. The lessees were to be at liberty "at any time" to determine the agreement, or the lease thereby agreed to be granted, "on giving to lessor six months' notice in writing of their intention so to do." Defts. entered into possession of the mines & works on Aug. 19, 1861, under the agreement. No lease was ever granted. The rent of £125 for the second quarter was paid by the lessees, & subsequently a further sum of £250 for the six months ending Aug. 19, 1862. On Aug. 10, 1863, defts. gave notice of their intention to determine the agreement & the tenancy on Feb. 10, 1864. On Nov. 21, 1863, defts. paid to pltf. the sum of £500 in respect of rent for the year ending Aug. 19, 1863:—*Held:* looking to all the provisions of the lease, defts. had a right to give this notice at any time, & were not bound to give such a notice as tenants from year to year are generally bound to give, namely, a notice expiring at a date corresponding with the commencement of the tenancy.—BRIDGES *v.* POTTS (1864), 17 C. B. N. S. 314; 33 L. J. C. P. 338; 11 L. T. 373; 10 Jur. N. S. 1049; 144 E. R. 127.

Annotation:—**Mentd.** Soames *v.* Nicholson, [1902] 1 K. B. 157.

830. Continuance in possession after expiry of notices—Whether amounting to waiver—Question of fact.]—(1) To a declaration for rent of a coal mine, deft. pleaded a determination of the tenancy by notice, & pltf. replied a waiver of such notice, which was denied:—*Held:* it was properly left to

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PART XI. SECT. 7.

827 i. *By lessee—Right to determine—Condition precedent—Performance of all covenants.*]—SIVA PRASHAD SINGH *v.* TATE IRON & STEEL CO., 23 C. W. N. 466.—**IND.**

o. *Forfeiture for breach of bye-law.*]—At the time of the repeal of a mining bye-law, a claim held under it was liable to forfeiture for breach of that bye-law theretofore committed. The repealing bye-law only expressly saved "the rights of all persons obtained previous to, & held at the time of, this bye-law coming into force":—*Held:* proceedings for forfeiture for the breach in question would lie, notwithstanding the repeal of the bye-law.—UNITED EXTENDED BAND OF HOPE CO. *v.* DOYLE (1868), 5 W. W. & A'B. 39.—**AUS.**

p. *Distinction between forfeiture & abandonment.*]—Where a claim is actually forfeited, it is open to the first legal claimant; but unless it be actually abandoned, the persons alleged to have forfeited should be summoned before a warden to dispossess them.—COLLINS *v.* O'DWYER (1868), 5 W. W. & A'B. 30.—**AUS.**

q. *Who may object to determination.*]—Where a gold mining lease is declared forfeited, it is not competent for anyone other than the lessee to take the objection that the lease is not determined until re-entry by the Crown.—WEDDELL *v.* HOWSE (1882), 8 V. L. R. (L.) 44.—**AUS.**

r. *Statutory forfeiture.*]—SILVER PEAK MINES, LTD. *v.* WILLIAMS (1916), 17 S. R. N. S. W. 1; 33 N. S. W. W. N. 31.—**AUS.**

t. ——.]—The decision of the Governor in Council, under Regulations of 1892, clauses 69, 70, to forfeit a lease granted under Goldfields Act of 1886 must be unequivocally expressed by some overt act:—*Held:* its transmission to the Warden's office was not such an act & the decision did not take effect till the day on which it was notified to the lessee.—MINISTER OF MINES *v.* HARNEY, [1901] A. C. 347, P. C.—**AUS.**

a. *By mining commissioner—Necessity for notice.*]—*Re* SWORD'S LEASE (1873), 9 N. S. R. 389.—**CAN.**

b. —— ——.]—Proceedings were taken to forfeit certain gold mining areas, & the notice pursuant to Statute was addressed to deft., who was mtgee. & not the owner of the areas:—*Held:* the Comr. of Mines had no jurisdiction for want of notice to the owner.—R. *v.* ELZE (1883), 4 R. & G. 130.—**CAN.**

c. —— ——.]—*Held:* the allegation that "no person could be found upon whom to make service of the notice" of process to forfeit was sufficient without alleging that no person could be found in the gold district within which the areas were situated, & that a plea setting out the proceedings taken in substantially the terms of the Act was sufficient.—WALLACE *v.* CREELMAN (1884), 6 R. & G. 546.—**CAN.**

d. —— *Grounds for—Irregularity.*]—The Comr. of Mines refused an application for a right to search on the ground that the areas applied for were covered by prior leases. Applts. admitted that they were so covered, but claimed that the leases were irregular & should be cancelled:—*Held:* the refusal was right; the Comr. had no power to cancel the leases alleged to be irregular or to inquire into their validity.—*Re* MCCOLL (1889), 22 N. S. R. (10 R. & G.) 17.—**CAN.**

e. —— —— *Rent paid by cheque—Cheque subsequently dishonoured.*]—*Re* HANBRIGHT & LAKEVIEW MINING CO. (1905), 37 N. S. R. 278.—**CAN.**

f. —— —— *Non-payment of taxes.*]—MCLEAN GOLD MINES, LTD.

Sect. 7.—Determination. Sects. 8 & 9: Sub-sects. 1, 2, 3 & 4, A.]

the jury to say whether a continuance to work the mine for a short time after the expiration of the notice, was intended by defts. as a waiver of the notice.—JONES *v.* SHEARS (1836), 4 Ad. & El. 832; 2 Har. & W. 43; 6 Nev. & M. K. B. 428; 5 L. J. K. B. 153; 111 E. R. 997.

Annotation:—**Mentd.** Finlay *v.* Bristol & Exeter Ry. (1852), 7 Exch. 409.

831. —— Lessee alleging existence of local custom.]—A tenant from year to year of a stone quarry in Yorkshire received from his landlord six months' notice to quit. The tenant claimed the right, under an alleged custom of the district, to be allowed to continue in possession a reasonable time after the expiration of the notice, to enable him to "get" the stone he had "bared." At the expiration of the notice, the landlord brought an action of ejectment against the tenant, who thereupon filed a bill to restrain the action, & setting up the custom as against the landlord:—*Held:* the evidence failed to prove the existence of the custom as alleged; & even if it had existed, the proper remedy of the tenant would have been at law.—VINT *v.* CONSTABLE (1871), 25 L. T. 324.

SECT. 8.—ARBITRATION.

See, generally, ARBITRATION, Vol. II., pp. 312 *et seq.*

832. Construction of clause.]—The lease of a mine contained an agreement to refer disputes between the lessors & three lessees to arbitrators or their umpire, pursuant to the provisions of C. L. P. Act, 1854 (c. 125). The lessees sank a shaft, & through the shaft drew minerals from an adjoining mine. The lessors filed a bill to restrain the lessees from so doing. Two of the three lessees applied for an order to stay proceedings in the suit, & that the matter might be referred to arbitration:—*Held:* on the construction of the lease, the ct. would not decide, but would leave it to the arbitrators to decide whether the matters in dispute between the parties were within the agreement to refer.—WILLESFORD *v.* WATSON (1873), 8 Ch. App. 473; 42 L. J. Ch. 447; 28 L. T. 428; 37 J. P. 548; 21 W. R. 350, L. C. & L. JJ.

Annotations:—**Reld.** Wade-Gery *v.* Morrison (1877), 37 L. T. 270; Piercy *v.* Young (1879), 14 Ch. D. 200; Minifie *v.* Railway Passengers Assce. (1881), 44 L. T. 552; Rowe *v.* Crossley (No. 1) (1912), 57 Sol. Jo. 144. **Mentd.** Plews *v.* Baker (1873), L. R. 16 Eq. 564; Gillett *v.* Thornton (1875), L. R. 19 Eq. 599; Law *v.* Garrett (1878), 8 Ch. D. 26; Russell *v.* Russell (1880), 14 Ch. D. 471; Compagnie du Senegal *v.* Woods (1883), 53 L. J. Ch. 166; Lyon *v.* Johnson (1889), 40 Ch. D. 579; De Ricci *v.* De Ricci, [1891] P. 378; Brighton Marine Palace & Pier Co. *v.* Woodhouse (1893), 62 L. J. Ch. 697; Hickman *v.* Kent or Romney Marsh Sheep Breeders' Assocn., [1915] 1 Ch. 881; Metropolitan Tunnel & Public Works *v.* L. Elec. Ry., [1926] Ch. 371.

833. Effect of clause.]—A colliery lease, which empowered the lessees to carry foreign coal over the surface, provided that all disputes relating to the lease should be referred to arbn. Shortly before the expiration of the term the lessees by letters requested the lessors to grant an extension of the lease on the existing terms for six months, & the lessors wrote in reply that the lessees might consider themselves tenants at will of both mine & wayleave pending further arrangements. The lessors having brought an action against the lessees in respect of their exercise of the wayleave during the tenancy at will, the lessees applied for a stay of proceedings under Arbitration Act, 1889 (c. 49):—*Held:* upon the construction of the letters, the terms of the lease, including the arbn. clause, applied to the tenancy at will, so far as applicable to such a tenancy, & the proceedings ought to be stayed.—MORGAN *v.* HARRISON (WILLIAM), LTD., [1907] 2 Ch. 137; 76 L. J. Ch. 548; 97 L. T. 445, C. A.

Annotations:—**Reld.** A.-G. *v.* Cory, Kennard *v.* Cory (1918), 34 T. L. R. 621; Cole *v.* Kelly, [1920] 2 K. B. 106. **Mentd.** Croft *v.* Blay, [1919] 2 Ch. 343; Bradbury *v.* Grimble (1920), 124 L. T. 189; *Re* Leeds & Batley Breweries & Bradbury's Lease, Bradbury *v.* Grimble, [1920] 2 Ch. 548; Lowther *v.* Clifford (1926), 95 L. J. K. B. 576.

SECT. 9.—SPECIFIC PERFORMANCE.

SUB-SECT. 1.—IN GENERAL.

See, generally, LANDLORD & TENANT, Vol. XXX., pp. 398 *et seq.*; SPECIFIC PERFORMANCE.

834. Agreement for lease of wayleave—Grant having become useless.]—Specific performance of an agreement [for lease of wayleave] become useless to deft., refused.—— —— *v.* WHITE (*circa* 1709), 3 Swan. 108, n.; 36 E. R. 792.

835. Agreement to let workings of quarries.]—Specific performance of an agreement to let the workings of quarries, & account of moneys due for working the quarries in a particular manner refused, the party's remedy being at law.—BOOTH *v.* POLLARD (1840), 4 Y. & C. Ex. 61; 160 E. R. 920.

836. Mine worthless.]—HAYWOOD *v.* COPE, No. 815, *post.*

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v. A.-G., [1924] 1 D. L. R. 10; 54 O. L. R. 573.—**CAN.**

g. By warden—Grounds for—Holding excess of ground.]—Where holders under miners' rights, & a warden's certificate for an extended claim, hold ground in excess of the area authorised by the certificate, a warden has jurisdiction under Goldfields Act, 1866, s. 62, on a complaint for that purpose, to decree forfeiture of such excess.—CHING TONG FONG *v.* LEE CHUNG, 1 J. R. 139.—**N.Z.**

h. —— —— Non-payment of rent.]—BANK OF NEW ZEALAND & EWING *v.* SCANDINAVIAN WATER-RACE CO. (NO. 2) (1906), 26 N. Z. L. R. 1351.—**N.Z.**

PART XI. SECT. 8.

833 i. *Construction of clause.*]—MERRY & CUNNINGHAME *v.* BROWN (1860), 2 Sc. Jur. 528.—**SCOT.**

833 ii. ——.]—In a missive of lease of minerals the parties bound themselves that, "should the minerals become exhausted, or workable only at an evident loss, the tenants shall be entitled to give up the lease on the same being ascertained by arbiters mutually chosen," & that they should enter into a lease containing the usual clauses. The tenants proposed to renounce before any formal lease was drawn up:—*Held:* there was a valid obligation to refer to two arbiters, mutually chosen, the question whether the minerals were workable only at evident loss, but there was no obligation to execute a submission containing a devolution on an oversman.—MERRY & CUNNINGHAME *v.* BROWN (1863), 1 Macph. (Ct. of Sess.) (H. L.) 14.—**SCOT.**

833 i. *Effect of clause.*]—A mineral lease of the whole minerals in a certain field containing a variety of provisions in regard to the working of the field, concluded with a clause of reference to a mining engineer of all disputes "as to the meaning or execution of these presents":—*Held:* this clause was meant to be executorial of the lease, & to provide for carrying out of the stipulations according to their true meanings.—PEARSON *v.* OSWALD (1859), 21 Dunl. (Ct. of Sess.) 419; 31 Sc. Jur. 229.—**SCOT.**

833 ii. ——.]—MUNGLE *v.* YOUNG (1872), 10 Macph. (Ct. of Sess.) 901; 44 Sc. Jur. 499.—**SCOT.**

k. Necessity for notice.]—Where the warden of the municipality had appointed an arbitrator on behalf of resp. to estimate damages to be paid him by appits., & it appeared that resp. had received & neglected a notice to appoint:—*Held:* such appointment was not a judicial act, & a fresh notice to resp. in relation thereto was not a condition precedent to its validity.—PALGRAVE GOLD MINING CO. *v.* MCMILLAN, [1892] A. C. 460.—**CAN.**

PART XI. SECT. 9, SUB-SECT. 1.

l. Covenant to sink oil well—Option to purchase land after test made.]—HUNT *v.* SPENCER (1867), 13 Gr. 225.—**CAN.**

837. Vein non-existent.]—JEFFERYS *v.* FAIRS, No. 666, *ante*.

838. At whose instance decreed—Reversioner—Ultra vires agreement by tenant for life.]—RICKETTS *v.* BELL, No. 376, *ante*.

SUB-SECT. 2.—AGREEMENTS BY ONE OF TWO TENANTS IN COMMON.

839. Lease of whole property.]—PRICE *v.* GRIFFITH, No. 842, *post*.

840. ——.]—One of two tenants in common of an estate agreed to grant a lease of the mines under it:—*Held:* the lessee was entitled to a decree for specific performance & for a partition of the estate.—HEATON *v.* DEARDEN (1852), 16 Beav. 147; 51 E. R. 733.

841. Lease of undivided moiety.]—HEXTER *v.* PEARCE, No. 846, *post*.

SUB-SECT. 3.—WHERE TERMS AMBIGUOUS.

842. Insufficiency of description of subject-matter—"Coals, etc."]—One of two tenants in common in fee of lands containing mines of coal & iron entered into a negotiation for a lease of minerals, & wrote a letter stating his willingness to grant a lease on the terms of a paper referred to in the letter. There were two papers, each of which in some respects answered the description in the letter. One of these purported to be terms for letting & taking coals, "etc.," under the lands in question, but contained no more definite description of the minerals which were the subject of it. In a suit by the proposed lessee for specific performance as to the moiety belonging to the tenant in common who had written the letter:—*Held:* (1) the paper to which the letter referred was not sufficiently identified; (2) even if, as pltf. contended, it was shown to be the above paper, its terms were too indefinite to be capable of being enforced specifically; (3) the contract being for a lease of the entirety, & deft. not having been shown to have made any misrepresentation as to his title or otherwise, it could not be enforced against him as to one moiety only.—PRICE *v.* GRIFFITH (1851), 1 De G. M. & G. 80; 21 L. J. Ch. 78; 18 L. T. O. S. 190; 15 Jur. 1093; 42 E. R. 482, L. JJ.

Annotations:—*As to* (2) **Refd.** Naylor *v.* Goodall (1877), 47 L. J. Ch. 53; Burrow *v.* Scammell (1881), 19 Ch. D. 175. *As to* (3) **Expld. & Distd.** Hexter *v.* Pearce, [1900] 1 Ch. 341. **Refd.** Lumley *v.* Ravenscroft, [1895] 1 Q. B. 683. *Generally*, **Mentd.** Dawson *v.* Newsome (1860), 6 Jur. N. S. 625.

843. Insufficiency of description of mineral area.]—Where the agreement for a lease of mineral property did not clearly define the mineral area to be comprised in the lease, the ct. refused, at the instance of the proposed lessee, to decree specific performance of the agreement.—LANCASTER *v.* DE TRAFFORD (1862), 31 L. J. Ch. 554; 7 L. T. 40; 8 Jur. N. S. 873; 10 W. R. 474.

844. ——.]—In construing the words "or thereabouts" when used to qualify the statement of the estimated quantity of mines agreed to be demised, the same principles ought to be acted upon as would guide the ct. in construing the same words in an agreement for sale or demise of the surface.

In the case of a demise of unworked minerals, there can hardly be said to be actual possession of any part of them except of what the intended lessee is actually working; but I think that when the lessor allows his intended lessee to take possession & the lessee does take possession & commences working accordingly, he must be considered as constructively in possession of all which the lessor has bound himself to demise. I cannot however think that the lessee can be treated by this ct. as constructively in possession of any thing of which the lessor did not intend to put him in possession, & of which this ct. shall say the lessor is not bound to grant a lease (LORD CRANWORTH, C.).

I do not go the length of saying that this is a case in which this ct. would set the agreement aside & order it to be cancelled, as founded in mistake; although I am by no means prepared to say that the ct. would not do so, as the agreement seems to me to have proceeded on both sides upon the footing that the fault was supposed to run in the direction laid down upon the plan, & it has subsequently appeared that it does not in fact run in that direction (TURNER, L.J.).—DAVIS *v.* SHEPHERD (1866), 1 Ch. App. 410; 35 L. J. Ch. 581; 15 L. T. 122, L. C. & L. JJ.

Annotation:—**Apld.** Low Moor Co. *v.* Stanley Coal Co. (1875), 33 L. T. 436.

845. —— **Lands described by name—Boundaries to be subsequently defined.**]—(1) A., by contract in writing, agreed with B. to take a lease of "those two seams of coal known as 'the two-feet coal' & the 'three-feet coal' lying under lands hereafter to be defined in the Bank End estate," & B. agreed to let to A. "the before-mentioned seams of coal": *Held:* the contract was sufficiently definite to enforce, & the true construction of it was, that the boundaries of the estate, which consisted of about twenty-seven acres, were to be thereafter defined.

(2) Pltf. had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterwards deft. cleared the pit & examined the coal in the shaft with other persons, & subsequently contracted for a lease. The colliery turned out to be worthless:—*Held:* deft. could not resist a specific performance, on the ground of pltf. not having communicated the fact of his having worked the mine & found it unprofitable.

A person contracting for the lease of a mine cannot resist its performance, on the ground of his ignorance of mining matters, & of the mine turning out worthless.

(3) In order to have entitled deft. to make time an element in this matter he ought to have given pltf. a formal notice that he repudiated the agreement, that he had abandoned the mine, & would have nothing more to do with the transaction (ROMILLY, M.R.).—HAYWOOD *v.* COPE (1858), 25 Beav. 140; 27 L. J. Ch. 468; 31 L. T. O. S. 48; 4 Jur. N. S. 227; 6 W. R. 304; 53 E. R. 589.

SUB-SECT. 4.—BAR TO RELIEF.

A. In General.

846. Comparative convenience or inconvenience—Apart from misconduct or hardship.]—(1) Where a tenant in common of an undivided moiety of freehold lands has agreed to grant a lease to work the minerals in or upon such moiety, the ct. will in a proper case specifically enforce such contract.

(2) The comparative convenience or inconvenience of the parties concerned, apart from any considerations of misconduct or hardship, is not by itself a sufficient ground for refusing specific performance of such a contract.—HEXTER *v.* PEARCE, [1900] 1 Ch. 341; 69 L. J. Ch. 146; 82

Sect. 9.—Specific performance: Sub-sect. 4, A., B. & C. Part XII. Sect. 1: Sub-sect. 1.]

L. T. 109; 48 W. R. 330; 16 T. L. R. 94; 44 Sol. Jo. 133.

Annotation:—As to (1) **Consd.** Rudd *v.* Lascelles, [1900] 1 Ch. 815.

B. Delay.

847. Delay in making out title & giving possession.]—Bill for the specific performance of an agreement to take a lease, for forty-two years, of iron & coal mines & machinery, for the purpose of trade, dismissed on account of delay on the part of the lessor to make out his title, & to give possession at the time stipulated in the agreement.—PARKER *v.* FRITH (1819), 1 Sim. & St. 199, n.; 57 E. R. 80.

Annotations:—**Expld. & Distd.** Macbryde *v.* Weekes (1856), 22 Beav. 533. **Mentd.** Withers *v.* Parker (1859), 4 H. & N. 524.

848. Delay in bringing action.]—WALKER *v.* JEFFREYS, No. 754, *ante*.

849. ——.]—Specific performance is relief which this ct. will not give, unless in cases where the parties seeking it came promptly & as soon as the nature of the case will permit (LORD CRANWORTH, L.C.).—EADS *v.* WILLIAMS (1854), 4 De G. M. & G. 674; 3 Eq. Rep. 244; 24 L. J. Ch. 531; 24 L. T. O. S. 162; 1 Jur. N. S. 193; 3 W. R. 98; 43 E. R. 671, L. C.

Annotations:—**Refd.** Barclay *v.* Messenger (1874), 43 L. J. Ch. 449; Levy *v.* Stogdon, [1898] 1 Ch. 478. **Mentd.** Whitmore *v.* Smith (1860), 5 H. & N. 824; Bottomley *v.* Ambler (1877), 38 L. T. 545.

850. ——.]—Deft. agreed to grant pltf. a coal lease for twenty-one years, the only rent reserved was dependent on the quantity raised, & was made payable quarterly. The ct. held, on the construction of the contract, that pltf. was bound to commence working immediately & to proceed continuously.

In Mar. 1850, deft. agreed to grant pltf. a lease of a coal mine. Three months after, deft. gave notice to pltf. that, unless he commenced working in a month, he should consider the agreement abandoned. Two years after, pltf. entered & commenced working, but was resisted by deft.; the working however proceeded, but was abandoned in Feb. 1853. Five years afterwards pltf. attempted to resume the work, & filed a bill for specific performance. It was dismissed with costs on the ground of delay.—SHARP *v.* WRIGHT (1859), 28 Beav. 150; 54 E. R. 323.

851. —— **Necessity for formal repudiation by lessee.**]—HAYWOOD *v.* COPE, No. 845, *ante*.

852. —— **Parties at arm's length.**]—Pltf. filed a bill for specific performance of an agreement to grant a lease of certain coal mines, entered into on Feb. 28, 1872. Some dispute arose as to the terms of the agreement, & on Sept. 26, 1872, deft. gave pltf. notice that, unless he acquiesced in his views he should rescind the contract, & on Oct. 29 following, deft. stated his intention of abiding by that notice. On Nov. 4, 1872, pltf.'s solr. wrote to deft.'s solr. that he was instructed to file a bill for specific performance of the contract. The bill was not filed until Apr. 2, 1873:—*Held:* the effect of the notice of Sept. 1872, was to put the parties at arm's length, & pltf., if he intended to insist on his rights, ought to have proceeded at once; the delay in filing the bill was fatal to pltf.'s application for specific performance; the demurrer must be allowed.—HUXHAM *v.* LLEWELLYN (1873), 28 L. T. 577; 21 W. R. 570; *subsequent proceedings*, 21 W. R. 766.

Annotation:—**Refd.** Glasbrook *v.* Richardson (1874), 23 W. R. 51.

C. Misrepresentation.

See, generally, MISREPRESENTATION & FRAUD.

853. Concealment by lessor—Of knowledge that mine worthless.]—HAYWOOD *v.* COPE, No. 845, *ante*.

854. Concealment by lessee—Of facts influencing price.]—WALTERS *v.* MORGAN, No. 601, *ante*.

855. Misrepresentation by lessor—Notice by lessee to complete—After knowledge respecting misrepresentation.]—A purchaser, offering to perform his part of the contract, required, by notice, the vendor to complete within a month:—*Held:* the purchaser could not afterwards set up, as a defence to a suit for specific performance, misrepresentation of the vendor, of which he was aware at the time of giving the notice.—MACBRYDE *v.* WEEKES (1856), 22 Beav. 533; 28 L. T. O. S. 135; 2 Jur. N. S. 918; 52 E. R. 1214.

Annotations:—**Mentd.** Green *v.* Sevin (1879), 41 L. T. 724; Stickney *v.* Keeble, [1915] A. C. 386.

856. —— **As to quality of minerals—Cursory inspection by lessee.**]—In the course of the treaty pltf. had represented that the limestone was of a certain quality, the fact being that a quarry in the immediate neighbourhood had been worked, & the stone ascertained not to be of the specified quality. The result of this trial was not known to either party, but might have been ascertained on inquiry; & it further appeared that pltf. had no knowledge of the quality of the limestone. Deft. afterwards, & before signing the agreement, made a cursory inspection of the old quarry, & satisfied himself that the stone was limestone, but ascertained nothing as to its quality:—*Held:* the misrepresentation was a bar to a decree for specific performance.—HIGGINS *v.* SAMELS (1862), 2 John. & H. 460; 7 L. T. 240; 70 E. R. 1139.

Annotations:—**Consd.** Colby *v.* Gadsden (1867), 17 L. T. 97. **Mentd.** Mullens *v.* Miller (1882), 31 W. R. 559.

848 i. *Delay in bringing action.*]—PECK *v.* R. (1884), 1 B. C. R. pt. 2, 11.—CAN.

Part XII.—Licences.

SECT. 1.—NATURE OF LICENCEE'S INTEREST.

SUB-SECT. 1.—LICENCE COUPLED WITH GRANT.

See, generally, LANDLORD & TENANT, Vol. XXX., pp. 514 *et seq.*

857. Confers no estate in land.] — CHETHAM *v.* WILLIAMSON, No. 889, *post.*

858. ——.]—NORWAY *v.* ROWE, No. 226, *ante.*

859. ——.]—ROBERTS *v.* DAVEY, No. 876, *post.*

860. —— Right to get minerals only.]—The owner of land, granting to a railway co. the right to make & maintain a tunnel through his land, is in the same position, with respect to his right to work mines under Railways Clauses Consolidation Act, 1845 (c. 20), ss. 77, 78, as if co. had actually purchased the land; & the rule that a grantor cannot derogate from his own grant does not apply.

A licence to work a mine is only a licence to get the minerals, & when you have got them, you have done all you have a right to do, & you have no interest in the land (WOOD, V.-C.).—LONDON & NORTH WESTERN RY. CO. *v.* ACKROYD (1862), 31 L. J. Ch. 588; 6 L. T. 124; 8 Jur. N. S. 911; 10 W. R. 367.

Annotation:—**Refd.** L. & N. W. Ry. *v.* Howley Park Coal & Cannel Co., [1911] 2 Ch. 97.

861. —— Or in minerals ungot.] — DOE d. HANLEY *v.* WOOD, No. 448, *ante.*

862. Licence irrevocable.]—DOE d. HANLEY *v.* WOOD, No. 448, *ante.*

863. ——.] — SUTHERLAND (DUKE) *v.* HEATHCOTE, No. 871, *post.*

864. Assignable.] — (1) A licence to search for & raise metals, & also to carry them away & convert them to the licencee's own use, passes an interest which is capable of being assigned.

(2) A licence to mine was granted, with a proviso that if the grantee, after notice to work according to his covenant, failed to keep six miners at work, & the grantor fixed notice on the premises that he intended to avoid the licence, it should be lawful for the grantor to re-enter within a month after fixing the notice, & then the licence should be void:—*Held:* notice to the grantee that unless he kept six miners at work, the grantor would re-enter at the expiration of a month, did not avoid the licence or render the grantor's re-entry lawful; for such re-entry & extrusion the grantee might sue in case.

We think . . . the notice was insufficient (TINDAL, C.J.).—MUSKETT *v.* HILL (1839), 5 Bing. N. C. 694; 7 Scott, 855; 9 L. J. C. P. 201; 132 E. R. 1267.

Annotations:—*As to* (1) **Refd.** Martyn *v.* Williams (1857), 1 H. & N. 817; Newby *v.* Harrison (1861), 1 John. & H. 393; Bailey *v.* Stephens (1862), 12 C. B. N. S. 91; Heap *v.* Hartley (1889), 42 Ch. D. 461; Smelting Co. of Australia *v.* I. R. Comrs., [1896] 2 Q. B. 179; British Actors Film Co. *v.* Glover, [1918] 1 K. B. 299. *As to* (2) **Refd.** Ahearn *v.* Bellman, Sedgwick *v.* Ahearn (1879), 48 L. J. Q. B. 681. *Generally,* **Mentd.** Weeton *v.* Woodcock (1839), 5 M. & W. 587; Marker *v.* Kenrick (1853), 13 C. B. 188; Watson *v.* Spratley (1854), 10 Exch. 222; M'Mahon *v.* Lennard (1858), 6 H. L. Cas. 970.

865. —— But not divisible.] — MOUNTJOY (LORD) & HUNTINGTON'S (EARL) CASE (1583), as reported in Godb. 17; 78 E. R. 11; *sub nom.* HUNTINGTON (EARL) & MOUNTJOYES (LORD) CASE, 4 Leon. 147.

Annotations:—**Mentd.** Harvy *v.* Thomas (1591), Cro. Eliz. 216; Townshend *v.* Windham (1750), 2 Ves. Sen. 1; Chetham *v.* Williamson (1804), 4 East, 469; Goodright d. Fowler *v.* Forester (1807), 8 East, 552; Doe d. Hanley *v.* Wood (1819), 2 B. & Ald. 724; R. *v.* Trent & Mersey Canal Co. (1825), 3 L. J. O. S. K. B. 140; Low Moor Co. *v.* Stanley Coal Co. (1875), 33 L. T. 436; Sutherland *v.* Heathcote, [1892] 1 Ch. 475.

866. Inheritable.]—HAIGH *v.* JAGGAR, No. 881, *post.*

867. ——.] — MARTYN *v.* WILLIAMS, No. 869, *post.*

868. Incorporeal hereditament.] — The legal right to the minerals, or the right to search for & get them within some given limit . . . [is] an incorporeal hereditament, which could only be created or transferred by deed (MARTIN, B.).—WATSON *v.* SPRATLEY (1854), 10 Exch. 222; 2 C. L. R. 1434; 24 L. J. Ex. 53; 24 L. T. O. S. 79; 2 W. R. 627; 156 E. R. 424.

Annotations:—**Folld.** Powell *v.* Jessopp (1856), 18 C. B. 336. **Apld.** Hayter *v.* Tucker (1858), 4 K. & J. 243. **Consd.** *Re* Hollon, Forbes *v.* Hardcastle (1893), 68 L. T. 160. **Refd.** Toppin *v.* Lomas (1855), 16 C. B. 145; Walker *v.* Bartlett (1856), 18 C. B. 845; Morris *v.* Glynn (1859), 27 Beav. 218; Bulmer *v.* Norris (1860), 9 C. B. N. S. 19; Bennett *v.* Blain (1863), 15 C. B. N. S. 518; Entwistle *v.* Davis (1867), L. R. 4 Eq. 272; Webber *v.* Lee (1882), 9 Q. B. D. 315; Watson *v.* Black (1885), 16 Q. B. D. 270.

869. ——.] — The declaration alleged that F., being seised in fee of an estate by indenture, granted to deft. licence to dig, work, & search for china clay, & to raise, get, & dispose of same to his own use, to hold & exercise the said liberties for the term of twenty-one years; & deft. covenanted with F. & his assigns that he would pay compensation to F. & his assigns, & his lessees & tenants, for all inclosed lands which he might injure; the amount of such compensation to be ascertained, in case of difference, by two arbitrators, one to be appointed by deft. & the other by F. & his assigns; & also that deft. or his assigns would deliver up the works in repair at the expiration of the term; that after the making of the indenture F. conveyed all his estate to pltf.; & alleged as breaches: (*a*) That though, after the assignment to pltf., deft. injured certain inclosed lands; & that, though pltf. appointed an arbitrator, yet deft. refused to do so. (*b*) That deft. at the expiration of the time did not deliver up the works in repair. At the trial it was proved that the injury to the

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PART XII. SECT. 1, SUB-SECT. 1.

m. *Confers no estate in land—Capable of registration.*]—The grant from the Crown of the surface rights of a mineral claim, being given in conjunction with the right to win the minerals thereunder, does not confer an interest which can be separately transferred by the grantee so as to secure registration under Land Registry Act.—*Re* RELIANCE GOLD MINING & MILLING CO. (1908), 13 B. C. R. 482.—**CAN.**

857 i. ——.]—The holder of a claim in an alluvial digging has a right to dig for & win diamonds in such claim but has no *jus in re.* Upon finding a diamond he becomes the owner thereof & as the lawful occupier of the land he may prevent trespasses thereon, & recover damages for such trespasses, but if some one else has found a diamond in such claim & has sold it to an innocent purchaser, he is not entitled to follow it into the hands of such purchaser.—WHITE *v.* ADAMS (1897), 14 S. C. 152; 7 C. T. R. 161.—**S. AF.**

862 i. *Licence irrevocable.*]—A licence to mine for gold is not rendered irrevocable by the fact that the licencee has done work or expended money in exercise of his rights.—HETHERINGTON *v.* SAMSON (1878), 4 N. Z. Jur. N. S. 84.—**N.Z.**

n. *Parol licence — No estate conferred.*]—A parol licence from the owner of the land in which the mines are excepted, to the grantee of the mines to enter & dig them, vests no estate in the licencee, & is revoked by a conveyance of the land to a third person.—GESNER *v.* CAIRNS (1853), 2 All. 595.—**CAN.**

o. *Crown grant of licence with consent of owner—Effect of revocation of consent by owner on title of licencee.*]—The Crown may grant a valid title to minerals of lands to a licencee without

Sect. 1.—*Nature of licencee's interest: Sub-sects.* 1 & 2. *Sect.* 2: *Sub-sects.* 1, 2 & 3. *Sect.* 3.]

inclosed lands was before the assignment to pltf. Pltf. then applied for leave to amend the declaration, by alleging that injury was before the assignment to him:—*Held:* (1) such amendment would have made the first breach bad; (2) if this were otherwise it could not be allowed, because no amendment ought to be allowed which would make the pleading so amended open to a demurrer; (3) the covenant to deliver up the works in repair ran with the interest of the owner of the fee expectant upon the determination of the term in the incorporeal right to enter & take the clay, & therefore pltf., the alienee of the land, could sue upon it.—MARTYN *v.* WILLIAMS (1857), 1 H. & N. 817; 26 L. J. Ex. 117; 28 L. T. O. S. 321; 5 W. R. 351; 156 E. R. 1430.

Annotations:—*As to* (3) **Apld.** Norval *v.* Pascoe (1864), 4 New Rep. 390; Hooper *v.* Clark (1867), L. R. 2 Q. B. 200; Hastings *v.* N. E. Ry., [1898] 2 Ch. 674. *Generally,* **Mentd.** Indermaur *v.* Dames (1867), 36 L. J. C. P. 181.

870. ——.]—LOW MOOR CO. *v.* STANLEY COAL CO., LTD., No. 171, *ante.*

871. —— **Profit à prendre.**]—(1) G. & T., pltf.'s predecessors in title, having a general power of revocation & new appointment over lands of which they were respectively tenant for life in possession & tenant for life in remainder, by a deed of exchange in 1783 appointed & granted the lands to deft.'s predecessor in title in fee, saving & reserving nevertheless to G. & T., their heirs & assigns, full & free liberty to get the coal & minerals which should be found within the lands. The minerals were never worked under this reservation by pltf. or his predecessors in title. In 1865 the then owner of the lands demised the coal under part of them to persons whose interest became vested in defts. B. & B.; & in 1877 deft. H., who had succeeded to the ownership of the lands, demised the coal under another part to pltf. Some years after this pltf. first became aware of the reservation in the deed of 1783, & brought his action to establish his right to the minerals, to restrain defts. from working them, & to have the lease of 1877 rectified or set aside:—*Held:* the reservation in the deed of 1783 did not operate as an exception of the minerals, but only as a grant by defts.' predecessor in title of a right to work them; there was nothing to show this right was to be exclusive; & therefore it did not prevent the landowner from working them, provided he did not disturb the grantee in any working which the grantee was carrying on; & defts., therefore, had not infringed pltf.'s rights; the provision operated as a regrant of a licence.

(2) An exclusive licence to take the whole of a *profit à prendre* of a particular kind can be granted; but such a grant cannot be inferred from language which is not clear & explicit.

(3) A right to work mines is something more than a mere licence; it is a *profit à prendre,* an incorporeal hereditament lying in grant (LINDLEY, L.J.).

(4) What was reserved . . . was full & free liberty to work the mines under the lands conveyed by them. They reserved a *profit à prendre,* an incorporeal hereditament, not a mere personal revocable licence (LINDLEY, L.J.).—SUTHERLAND (DUKE) *v.* HEATHCOTE, [1892] 1 Ch. 475; 61 L. J. Ch. 248; 66 L. T. 210; 8 T. L. R. 272; 36 Sol. Jo. 231, C. A.

Annotation:—*As to* (3) **Reld.** Fitzhardinge *v.* Purcell, [1908] 2 Ch. 139.

SUB-SECT. 2.—BARE LICENCE.

See, generally, LANDLORD & TENANT, Vol. XXX., pp. 500 *et seq.*

872. Licence to explore merely—Confers no property in minerals found.]—It is only what we call an exploring licence; it is only a right to sink shafts for & tunnel for gold. There is no gift of the gold itself (JESSEL, M.R.).—*Re* HAVEN GOLD MINING CO. (1882), 20 Ch. D. 151; 51 L. J. Ch. 242; 46 L. T. 322; 30 W. R. 389, C. A.

Annotations:—**Mentd.** *Re* German Date Coffee (1882), 20 Ch. D. 169; *Re* Bristol Joint Stock Bank (1890), 44 Ch. D. 703; *Re* Bidwell, [1893] 1 Ch. 603; *Re* General Phosphate Corpn. (1893), 37 Sol. Jo. 683; *Re* Brinsmead, [1897] 1 Ch. 406; *Re* Coolgardie Consolidated Gold Mines (1897), 76 L. T. 269; Stephens *v.* Mysore Reefs (Kangundy) Mining Co., [1902] 1 Ch. 745.

Remedies for interference with possession.]—*See* Nos. 903, 904, *post.*

SECT. 2.—**FORM OF LICENCE.**

SUB-SECT. 1.—IN GENERAL.

See, generally, DEEDS, Vol. XVII., pp. 192 *et seq.*; EASEMENTS, Vol. XIX., pp. 199 *et seq.*

873. Necessity for deed—Licence coupled with grant.]—DOE d. MORGAN *v.* POWELL, No. 665, *ante.*

874. —— ——.]—WATSON *v.* SPRATLEY, No. 868, *ante.*

SUB-SECT. 2.—COVENANTS AND PROVISOS.

Covenants in mining leases.]—*See* Part XI., Sect. 4, *ante.*

875. Proviso for re-entry.]—DOE d. HANLEY *v.* WOOD, No. 448, *ante.*

876. Proviso for avoidance on breach of covenants.]—A. grants to B. a licence to enter upon his lands to search & dig for ores for a term of 21 years, with a proviso that if B. cease to work the mines for six months, or break any other of the covenants contained in the licence, then the "supposed indenture, & the liberties, licences, powers, & authorities thereby granted shall cease, determine, & be utterly void & of no effect:—*Held:*

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the owner's consent. The fact that the owner may have consented to the grant of licences, & has subsequently revoked such consent does not affect the licencees' title.—NATAL CAMBRIAN COLLIERIES & DURBAN NAVIGATION COLLIERIES, LTD. & MINISTER OF MINES (1925), 46 N. L. R. 27.—**S. AF.**

PART XII. SECT. 1, SUB-SECT. 2.

p. *Prospecting licence—Application for—Necessity for certainty of description.*]—*Re* MALEGA BARRENS (1889), 21 N. S. R. (9 R. & G.) 391.—**CAN.**

q. —— —— ——.]—*Re* OVENS (1891), 23 N. S. R. (11 R. & G.) 376.—**CAN.**

r. —— —— *Lands already covered by licence.*]—MCCOLL *v.* ROSS (1895), 28 N. S. R. (16 R. & G.) 1.—**CAN.**

t. —— —— *Licence subsequent to first right—When licence begins to run.*]—*Re* CALDWELL'S APPLICATION (1896), 28 N. S. R. (16 R. & G.) 240.—**CAN.**

a. —— —— *After expiry & before attempt to renew prior licence of other party.*]—*Re* COAL & PETROLEUM ACT & JOHNSON (1919), 25 B. C. R. 19.—**CAN.**

b. —— *Restriction of number of licences according to area.*]—A.-G. *v.* FRASER (1878), 3 R. & G. 351.—**CAN.**

c. —— *Discovery after expiry of licence.*]—The holder of a miner's licence can acquire no rights by a discovery & a staking after the expiry of the term covered by the licence & before its renewal.—*Re* SANDERSON *v.* SAVILLE (1912), 22 O. W. R. 672; 3 O. W. N. 1560; 26 O. L. R. 616.—**CAN.**

d. —— *Abandonment.*]—*Re* BAKER, 2 M. M. Cas. 530.—**CAN.**

PART XII. SECT. 2, SUB-SECT. 1.

e. *Contents—What may be included in one licence.*]—Islands & land covered by sea may be included in one licence.—MCNEILY *v.* BLANDFORD (1911), 9 Nfld. L. R. 517.—**NFLD.**

the word "void" was to be construed to mean "voidable," & some act of A. to show his election to enforce the forfeiture is necessary to put an end to the licence.

This instrument is a mere license to dig & did not pass the land (LITTLEDALE, J.).—ROBERTS *v.* DAVEY (1833), 4 B. & Ad. 664; 1 Nev. & M. K. B. 443; 2 L. J. K. B. 141; 110 E. R. 606.

Annotations:—**Consd.** James *v.* Young (1884), 27 Ch. D. 652. **Reld.** Doe d. Griffith *v.* Pritchard (1833), 2 Nev. & M. K. B. 489; Hughes *v.* Palmer (1865), 19 C. B. N. S. 393; Davenport *v.* R. (1877), 3 App. Cas. 115; Elliott *v.* Boynton, [1924] 1 Ch. 236.

877. Covenant running with the land — Covenant to repair.]—MARTYN *v.* WILLIAMS, No. 869, *ante*.

—— ——.]—*See* LANDLORD & TENANT, Vol. XXXI., pp. 310-314, Nos. 4535-4560.

878. —— Covenant to pay for surface damage—Liability of assignees of licencee.]—A licence to dig for & carry away minerals is such an interest in land that a covenant to pay compensation for the permanent injury done to the surface, will bind the assignee of the licencee.

Three such licencees jointly & severally covenanted to pay such compensation. Two of them afterwards assigned their rights the third being alive:—*Held:* the assignee was liable under the covenant for the whole amount of the compensation.—NORVAL *v.* PASCOE (1864), 4 New Rep. 390; 34 L. J. Ch. 82; 10 L. T. 809; 28 J. P. 548; 10 Jur. N. S. 792; 12 W. R. 973.

Annotations:—**Apld.** United Dairies *v.* Public Trustee, [1923] 1 K. B. 469. **Reld.** Hastings *v.* N. E. Ry., [1898] 2 Ch. 674; Hubbard *v.* Weldon (1909), 25 T. L. R. 356.

SUB-SECT. 3.—PAYMENTS RESERVED.

879. In nature of rent—& recoverable by mortgagee.]—Payments agreed to be made by an occupier of the soil under a parol licence to dig earth & make bricks, are in the nature of rent, & as such a mtgee. of the premises is entitled, after notice in the usual manner, to all sums in arrear from such occupier at the time of the notice, or which may become due afterwards.—*Re* BRINDLEY, *Ex p.* HANKEY (1829), Mont. & M. 247.

880. —— But not distrainable.]—WARD *v.* DAY, No. 896, *post*.

SECT. 3.—**CONSTRUCTION OF LICENCES.**

Construction of leases.]—*See* Part XI., Sect. 3, *ante*.

881. Instrument operating both as demise & licence.]—(1) *Semble*, under a grant to A., B., & C., their exors., etc., of liberty to get the coal under particular closes till all the coal shall be gotten, an interest passes to the exors. of the survivor, provided the deed operates under Statute of Uses.

(2) This deed is most inartificially drawn. It appears to us, however, to operate as a lease of the mines. . . . Whether the deed, as to the subsequent right to get coals, is more than a covenant to grant for a subsequent term, is a question; but we think it operates as a grant of an easement, after the expiration of that lease, to win the remainder of the six acres paid for by the sum of £420; & whenever that quantity should be got, to win the remainder, paying £70 an acre. The lease for 12 years is good at common law; the limitation for the indefinite term afterwards, of the incorporeal hereditament only, which is to continue for an uncertain period, viz. till all the coals are got, would in a common law conveyance be either an estate for life . . . or an estate for years, & if so, it would be void for want of the certainty of years (PARKE, B.).—HAIGH *v.* JAGGAR (1847), 16 M. & W. 525; 17 L. J. Ex. 110; 153 E. R. 1298; *subsequent proceedings* (1848), 3 Exch. 54.

Annotations:—*As to* (2) **Apld.** Low Moor Co. *v.* Stanley Coal Co. (1875), 33 L. T. 436. *Generally*, **Mentd.** Doe d. Agar *v.* Brown (1853), 1 C. L. R. 1048.

882. Agreement to let land for making bricks—Payment of royalties.]—A. agreed to let, & B. agreed to hire, a piece of land containing about 15 acres, at an annual surface rent, B. to use the land for the purpose of making bricks, & to pay to A., his exors., etc., 3*s.* per 1,000 on the quantity made, the quantity made to be not less than 4,000,000 annually; the ground not to be excavated beyond the depth of 8 feet, without the special permission of A. in writing. A portion of the land being required by a railway co., B.'s claim for compensation in respect of his estate & interest in the land so required, & for deterioration to the residue, was referred to arbn. under the provisions of Lands Clauses Consolidation Act, 1845 (c. 18). The umpire found the interest of B. under the above agreement was that of merely a tenant from year to year; & he assessed the compensation upon that basis:—*Held:* the construction put by the umpire upon the agreement was correct; & evidence tending to show that by the custom of the brickmaking trade, brick land is never hired from year to year, was properly rejected.—*Re* STROUD (1849), 8 C. B. 502; 19 L. J. C. P. 117; 137 E. R. 604; *sub nom.* STROUD *v.* EAST & WEST INDIA DOCK & BIRMINGHAM JUNCTION RY. CO., 14 L. T. O. S. 291.

883. Unenrolled bargain & sale of mines—Followed by possession.]—LOW MOOR CO. *v.* STANLEY COAL CO., LTD., No. 171, *ante*.

884. Licence to work several seams—Deduction of expenses of winning.]—By a deed of grant & licence the licencee was empowered to win & work all & every or any of the coal mines, seam & seams of coal under certain lands, & to reimburse himself all expenses incurred in the winning out of the profits from the sale of the coal; & it was provided that after payment to the licencee of all expenses in winning the said colliery, coal mines, or coal mine seams or seams of coal, he should pay the grantor such royalty for the coals yearly wrought out of the said coal mines, seam or seams as should from time to time be awarded by two arbitrators once in every five years whilst the said coal mines, seam, or seams of coal should continue to be wrought. More than one seam of coal lay under the lands. The licencee after winning one seam went on to win another:—*Held:* the whole colliery was not won when the first seam was won, but the deed was to be read *separatim* as to the winning of each seam, & the licencee was entitled to reimburse himself the expenses of winning the second seam before any royalty was payable as to that seam.—ELLIOT *v.* ROKEBY (LORD) (1881), 7 App. Cas 43; 51 L. J. Ch. 249; 45 L. T. 709; 30 W. R. 249, H. L.; *varying* S. C. *sub nom.* ROKEBY (LORD) *v.* ELLIOT (1879), 13 Ch. D. 277, C. A.

Annotation:—**Reld.** Kinsman *v.* Jackson (1880), 42 L. T. 558.

PART XII. SECT. 2, SUB-SECT. 3.

t. In nature of rent—Payable half-yearly in advance.]—CUFF *v.* JORDAN (1897), 16 N. Z. L. R. 117.—**N.Z.**

PART XII. SECT. 3.

g. Instrument operating both as demise & licence—Demise for term & licence for subsequent term.]—STANLEY *v.* RIKY (1893), 31 L. R. Ir. 196.—**IR.**

h. Lease or licence.]—*Re* BENFIELD & STEVENS (1897), 17 P. R. 339.—**CAN.**

Sect. 3.—*Construction of licences. Sects.* 4 *&* 5: *Sub-sects.* 1 *&* 2. *Sect.* 6.]

885. Exception of liberty to get minerals — Operates as re-grant.]—SUTHERLAND (DUKE) *v.* HEATHCOTE, No. 871, *ante.*

886. Concession in form of demise.] — In 1906 resps. obtained a concession over territory in the Gold Coast Colony; this concession was in the form of a demise & expressly conferred the right (*inter alia*) to mine & to cut timber for any purposes. In 1909 applts. obtained a concession over lands which included part of the above-mentioned territory; this concession also was in the form of a demise & conferred on applts. "exclusive liberty" to mine & to cut timber for mining purposes. Applts. in 1910 obtained a certificate of validity under Gold Coast Concessions Ordinance, 1900, No. 14, & subsequently opposed an application made by resps. for a certificate in respect of their concession:—*Held:* although applts.' certificated concession was in the form of a demise, & was expressed to give them an exclusive right, it did not preclude the issue of a certificate of validity to resps., but applts. were entitled to remain parties to the application until the terms of a certificate with such modifications or conditions as would preserve their rights had been settled by the ct. under the Ordinance, ss. 13, 16.—WASSAW EXPLORING SYNDICATE, LTD. *v.* AFRICAN RUBBER CO., LTD., [1914] A. C. 626; 83 L. J. P. C. 316; 111 L. T. 54, P. C.

SECT. 4.—EXCLUSIVE LICENCES.

887. Work requiring constant & exclusive occupation.]—It was agreed between A. & B. that A. should "forthwith enter upon" B.'s land, & there dig for coprolites in a specified manner, & should effectually fence the excavations & complete them by a given time, & should reinstate the land, & then "yield & deliver up" the land to B. There were no express words giving a right to the exclusive occupation of the land; but the excavations & works contemplated by the agreement required a constant occupation of the land by A. until the coprolites were raised, & the land could not be used for any other purpose from the commencement of the excavations until it had been reinstated, which could not be done for a year or more after the coprolites were raised. B. reserved to himself the right of going upon the land where the excavations were for the purpose of inspecting the works, but he was not required by the agreement to do anything upon the lands:—*Held:* upon the construction of the whole agreement, A. had the right of exclusive occupation of the land.—ROADS *v.* TRUMPINGTON OVERSEERS (1870), L. R. 6 Q. B. 56; 40 L. J. M. C. 35; 23 L. T. 821; 35 J. P. 72.

Annotations:—**Refd.** R. *v.* St. George's Union (1871), L. R. 7 Q. B. 90; Smith *v.* Lambeth Assmt. Com. (1882), 9 Q. B. D. 585; Back *v.* Daniels, [1925] 1 K. B. 526. **Mentd.** Cory *v.* Bristow (1875), 1 C. P. D. 54; R. *v.* Whaddon (1875), L. R. 10 Q. B. 230.

888. Necessity for express grant.] — SUTHERLAND (DUKE) *v.* HEATHCOTE, No. 871, *ante.*

SECT. 5.—RIGHTS AND REMEDIES OF LICENCOR.

SUB-SECT. 1.—RIGHTS.

See, generally, LANDLORD & TENANT, Vol. XXX., pp. 511, 512.

889. Where licence not expressed to be exclusive—Right to work minerals.]—A. being mtgee. in fee of certain lands & B., the mtgor. entitled to the equity of redemption, by lease & release A. conveys & B. releases the lands to C., in fee who by the same instrument covenants with & grants to B., that it shall be lawful for B., his heirs & assigns at all times to enter upon the lands to search & dig for coal & to take & carry away same to his & their own use. This is only a licence & conveys no interest in the soil so as to exclude C. & those claiming under him from getting coal there; nor could it operate as an exception or reservation out of the grant in respect to B., who had not the legal title in him at the time.—CHETHAM *v.* WILLIAMSON (1804), 4 East, 469; 102 E. R. 910; *sub nom.* CHEETHAM *v.* WILLIAMSON, 1 Smith, K. B. 278.

Annotations:—**Apprvd.** Sutherland *v.* Heathcote, [1892] 1 Ch. 475. **Refd.** Doe d. Hanley *v.* Wood (1819), 2 B. & Ald. 724; R. *v.* Trent & Mersey Canal (1825), 6 Dow. & Ry. K. B. 47; Denison *v.* Holliday (1857), 1 H. & N. 631; Lee *v.* Stevenson (1858), E. B. & E. 512. **Mentd.** Gilbertson *v.* Richards (1859), 4 H. & N. 277.

890. —— —— Providing working by licencee not defeated.]—SUTHERLAND (DUKE) *v.* HEATHCOTE, No. 871, *ante.*

891. —— Right to grant further licences—Providing first licencee not adversely affected.]—By a deed dated Sept. 29, 1854, R. demised to C. a certain firebrick manufactory, & by the same deed he granted to C. power to dig fire-clay from under certain lands therein described, the terms of the demise & licence being twenty-one years from Apr. 6, 1854. By a deed dated Aug. 31, 1862, R. demised to B. all the coal mines & seams of coal, "& also all the mines, seams, veins, or beds of ironstone & fire-clay found in connection with such coal seams as are workable as coal seams," under the same lands as those to which C.'s licence applied, for the term of forty-two years from Nov. 22, 1858:—*Held:* (1) the words "coal seams workable as coal seams," must be construed, regard being had to all & every the powers conferred by the lease in which those words were found, & looking at those powers & at the evidence which, in the opinion of the ct. showed that the S. seam was workable at a profit when both the coal & the fire-clay were taken into account, that seam must be considered to be comprised in B.'s lease; (2) as C.'s licence was not an exclusive licence, the licencor had still a right to deal with the property comprised in that licence in any matter not inconsistent therewith.—CARR *v.* BENSON (1868), 3 Ch. App. 524; 18 L. T. 696; 16 W. R. 744, C. A.

Annotation:—*As to* (2) **Refd.** Sutherland *v.* Heathcote, [1892] 1 Ch. 475.

SUB-SECT. 2.—REMEDIES.

892. Notice to determine—Sufficiency of notice.] —MUSKETT *v.* HILL, No. 864, *ante.*

893. —— —— Licence granted to another party.]—A parol mining licence is not determined by a licence given to another party without notice to the licencee.—LLOYD *v.* BELLIS (1850), 27 L. T. O. S. 203.

894. Account.] — Where a party has had permission to work certain mines not included in the lease, granting him certain other mines, it is his duty to keep a correct account of the profits made by those mines that are not included in the lease. Therefore, although in taking an account of the value of the coal worked in those mines, the

master may not have been clear as to the manner in which he arrived at his conclusion, the lessee himself having created the obscurity cannot be allowed to except in the master's report.—BALCARRIS (EARL) *v.* JOHNSON (1848), 11 L. T. O. S. 391.

895. ——.]—By a lease dated in 1855, pltf. demised to two persons the right to drive a sough under his lands in Derbyshire, & to work the mines thereunder subject to the payment of certain royalties. The lessees were trustees for a mining co. The work was not begun till 1866 when the co. commenced mining under pltf.'s land, not, as they alleged, under the powers of the lease, but under the Derbyshire mining custom, which was that any man might search for & dig out lead ore in the land of any other man without making him any compensation. Pltf. demanded an account of the royalties due to him under the lease, alleging that his lands were exempt from this custom. The co. relied on their rights under the custom, & alleged that the lease had been executed without any authority from the then managing committee, & was therefore not binding on them:—*Held:* (1) pltf.'s lands were, according to the evidence, exempt from the custom; (2) the co. were bound by the lease; (3) pltf. was entitled to an account.

(4) Nothing is more clearly settled than that a tenant is estopped from denying the title of his landlord (MALINS, V.-C.).

(5) Injunction granted to restrain defts. from using any wayleave or passage in or under pltf.'s land otherwise than under & by virtue of the lease.—WRIGHT *v.* PITT (1870), L. R. 12 Eq. 408; 40 L. J. Ch. 558; 25 L. T. 13; 20 W. R. 27.

Annotation:—As to (3) **Refd.** Ramage *v.* Womack, [1900] 1 Q. B. 116.

896. Distress—Not available.]—By deed made Sept. 4, 1843, B. granted to A. licence to get all the copperas stone which might be found in a certain part of the manor of M. for twenty-one years, at the yearly rent of £25 payable half yearly on June 24 & Dec. 25, with a proviso that if any part of the rent should be in arrear for twenty-one days, it should be lawful for B., his heirs & assigns, by notice in writing delivered to A., his exors., administrators or assigns, to determine the grant. On Jan. 31, 1856, J., who had become assignee of the licence, assigned the licence to defts. by way of mtge., & on Aug. 5, 1857, it was absolutely assigned to defts. by arrangement under 12 & 13 Vict. c. 106, who, by oral agreement granted to J. the enjoyment of all the rights under it on his paying the rent thereby reserved. On Mar. 27, 1858, pltf., who had purchased the manor in Aug. 1854, distrained goods of J., & H., his son, lying on the part of the manor mentioned in the licence, for arrears of rent due at Christmas, 1857. J. & H. thereupon brought actions against pltf. for the illegal distress, in which he suffered judgment by default; & in 1858, negotiations for a settlement of the actions & for granting a new licence to H. for a further term of twenty-one years, commencing on June 24, 1864, the day on which the grant of Sept. 4, 1843, would expire, were carried on between the attorneys of J. & of pltf., & it was verbally arranged between pltf.'s attorney & the attorney for J. & H. that the actions should be settled on certain terms, one of which was, that such a licence should be granted to H. These terms pltf. refused to carry out. On July 3, 1858, pltf. gave a written notice to defts. & J., pursuant to the proviso, to determine the licence. On Jan. 11, 1859, defts. tendered to pltf. £50 for two years rent due at Christmas, 1858, which pltf. refused to accept. In trespass for breaking & entering pltf.'s close & taking away copperas stone, the ct. having power on a special case to draw inferences of fact:—*Held:* (1) pltf., after the cause of forfeiture had occurred, sufficiently expressed & communicated to defts. his determination to treat the licence as existing, & was bound by that election, & therefore the subsequent notice was inoperative; (2) the tender of a sum which included rent accrued subsequently as well as prior to the cause of forfeiture, would not by itself amount to a waiver of the forfeiture. *Qu.:* whether, the distress being within six months after the cause of forfeiture, the period within which, by 8 Ann. c. 14, ss. 6, 7, a lessor may distrain after the determination of a lease, would by itself amount to an election to treat the licence as existing.

(3) He was wrong in thinking that he could distrain, for the deed was not a lease (BLACKBURN, J.).—WARD *v.* DAY (1863), 4 B. & S. 337; 2 New Rep. 444; 33 L. J. Q. B. 3; 28 J. P. 197; 11 W. R. 948; 122 E. R. 486; *affd.* (1864), 5 B. & S. 359, Ex. Ch.

Annotation:—Generally, **Refd.** Walrond *v.* Hawkins (1875), 44 L. J. C. P. 116.

897. —— **Attempt to levy—Waiver of forfeiture.**]—WARD *v.* DAY, No. 896, *ante.*

——.]—*See, generally,* DISTRESS, Vol. XVIII., pp. 260 *et seq.*

SECT. 6.—**REMEDIES OF LICENCEE.**

898. Injunction.] — A.-G. *v.* DONNITHORNE (1762), 3 Man. & Ry. K. B. App. II. 499.

899. Trespass.] — HARKER *v.* BIRKBECK, No. 494, *ante.*

900. Action for recovery of possession.]—DOE d. HANLEY *v.* WOOD, No. 448, *ante.*

901. Specific performance.] — It is immaterial whether an agreement to dig stone be a licence to do so or a lease in its construction in this ct. The ct. will decree specific performance of a licence to dig stone.—NELSON *v.* BRIDGES (1837), 1 Jur. 753, L. C.; *subsequent proceedings* (1839), 2 Beav. 239.

902. Action for damages—For disturbance—Founded on possession.] — Declaration in case stated, that T. was possessed, of one undivided moiety of certain waste land, as tenant in common with A. & that said T., being so possessed, on, etc., by a certain indenture made between him & pltf., granted to pltf. liberty, power, & authority, to dig, work, & search for clay in all said undivided moiety of the grantor in a certain parcel of the waste land, & to raise, etc., & make merchantable such clay, & to convert same to pltf.'s use, & to make pits & leats within said undivided moiety, as pltf. should think necessary for the more effectual exercise of the liberties, etc., thereby granted; to hold said liberties, etc., for a term of twenty-one years from Sept. 1833. The declaration then contained an averment, that, at the time of the grant, & thence continually there were within the parcel of waste land so described in the grant, divers clay pits, etc., & certain leats necessary for washing & making merchantable said clay; that whilst said grant was in full force, & after

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PART XII. SECT. 6.

1. *Specific performance—Licence not under seal.*] — A licence in writing not under seal, to mine upon land, indefinite as to time, & not purporting to be exclusive, will not, upon the principle of part performance, be enforced in equity, where the licencee has entered upon the land & expended

Sect. 6.—Remedies of licencee. Part XIII. Sect. 1: Sub-sects. 1 & 2, A. & B.]

pltf. had so become entitled to use, exercise & enjoy the liberties, in said indenture specified, & had in fact begun to use, exercise, & enjoy, & was actually using, etc., same, by & under the grant, by & with the assent of A., the co-tenant in common, deft. wrongfully disturbed pltf. in the use, etc., of said liberties, by destroying certain dams lawfully & necessarily erected on said parcel of waste land, for the enjoyment & working by pltf. of said clay pits, & diverted said leats lawfully & necessarily made by pltf. in & about his clay pits, & in & about the washing & making merchantable said clay:—*Held:* on special demurrer, that the declaration was good; as the action was possessory merely, there was no necessity for an allegation of seisin in fee; although pltf. had declared upon a grant by deed, profert was not necessary, his title being merely inducement; the breach was sufficient.

The deed is not the foundation of pltf.'s title to maintain the action, but his possession (ROLFE, B.). —THRISCUTT *v.* MARTIN (1849), 3 Exch. 454; 6 Dow. & L. 489; 18 L. J. Ex. 291; 12 L. T. O. S. 476; 154 E. R. 923.

903. —— For breach of contract.]—In the case of a parol lease, he who lets land agrees to give possession &, if he fails to do so the lessee may recover damages against him & is not driven to bring an ejectment (WILLIAMS, J.).—SMART (ASSIGNEE OF LEWIS) *v.* JONES (EXECUTOR OF HILL) (1864), 15 C. B. N. S. 717; 3 New Rep. 648; 33 L. J. C. P. 154; 10 L. T. 271; 10 Jur. N. S. 678; 12 W. R. 430; 143 E. R. 966.

904. Trover—Against third party.]—Pltf. under the licence of the owner of the soil to search for tin ore, had, in searching for that mineral, made certain excavations in the soil. Deft. carted away some of the soil which pltf. had so thrown out, pltf. not having abandoned his right to search the soil thrown out for ore. In an action of trover for the removal of the soil:—*Held:* pltf. had, as against deft., a mere wrongdoer, a sufficient possessory title to the mass thrown out to enable him to maintain the action.—NORTHAM *v.* BOWDEN (1855), 11 Exch. 70; 24 L. J. Ex. 237; 25 L. T. O. S. 100; 156 E. R. 749.

Annotation:—**Mentd.** Whaley *v.* Laing (1857), 2 H. & N. 476.

Part XIII.—Easements and Rights affecting Mines.

SECT. 1.—RIGHT OF SUPPORT.

SUB-SECT. 1.—IN GENERAL.

905. Acquisition by payment of compensation—Under private Act—Unworked minerals.]—By a local Act a co. were empowered to take lands for the purpose of their navigation, with provision for a jury to ascertain the sums to be paid as purchase-money & for damage in carrying the Act into effect. By sect. 170, it was provided that no mine owner should work any mine in or under any lands within 40 yards of certain tunnels, by which the canal passed under a hill, without the leave of the co.; & by sect. 171, if the co., instead of insisting upon having the full 40 yards left unworked, should require less than 30 yards to be left, then the mine owner might insist on having a greater quantity, not exceeding 30 yards, left unworked for his security; & the question in dispute as to such last mentioned quantity was to be tried, settled, & determined by an issue at law. Sect. 172 provided, that whenever any mine in due course should become workable within 40 yards of the tunnels, the mine owner should give notice to the co., who thereupon should pay him, as the case might be, for so much of the 40 yards as they should require to be left unworked for their security, or as might be ascertained by the issue to be necessary to be left unworked for his. Provided that no mines should in any case be worked under the tunnels; but whenever such last mentioned mines should become workable, satisfaction should be made by the co. for the same, such satisfaction to be settled by an issue at law. Sect. 178, gave the mode of trying any feigned issue, & enacted that, after trial & verdict, the ct. should give judgment for the sum of money awarded by the jury:—*Held:* where a mine had become workable within 40 yards of the tunnels, & the co. had required the whole 40 yards to be left unworked for their security the owner of the mine was entitled, under sect. 172, to compensation for the 40 yards, but the only remedy to enforce it was by a feigned issue, & not by an action on the case.—FENTON *v.* TRENT & MERSEY NAVIGATION CO. (1841), 9 M. & W. 203; 2 Ry. & Can. Cas. 837; 152 E. R. 86.

Annotation:—**Mentd.** Coe *v.* Wise (1866), L. R. 1 Q. B. 711.

Natural right of support.]—*See* EASEMENTS, Vol. XIX., pp. 163–172, Nos. 1139–1198.

SUB-SECT. 2.—SUPPORT OF BUILDINGS.

A. In General.

See, generally, EASEMENTS, Vol. XIX., pp. 168–170, 172, 173.

906. No natural right.]—In an action on the case by pltfs. as reversioners, the declaration alleged, amongst other things, that deft. wrongfully, carelessly, negligently, & improperly, & without leaving any proper or sufficient support in that behalf, worked the mines, & dug & got the minerals out of the mines, near to the said messuage, the reversion of which was pltfs.' whereby the said messuages, etc., were greatly injured, & the ground on which the building stood swagged:—*Held:* this part of the declaration was good, notwithstanding that there was no allegation that pltfs. had any right to have the messuage supported by the soil under which deft. got the mines. If it had appeared in the declaration in this case that the soil in which the mines were was deft.'s, or that deft. had all the right to get the mines which the owners of the adjoining soil had, the objection would have been fatal.

Where it is alleged & proved that deft. so negligently, unskilfully, carelessly, & improperly, dug his own soil, that pltfs.' house was thereby

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money on the faith of the licence.—MILLER *v.* CRAWFORD (1868), 5 W. W. & A'B. 199.—AUS.

m. —— ——.]—A licence not under seal for mining on private property is revocable in law; but in equity, where for valuable consideration & partly executed, the licencee is entitled to specific performance by a grant of a license under seal.—AH WYE *v.* LOCK (1872), 3 V. R. (Eq.) 112.—AUS.

injured, an action lies.—JEFFRIES *v.* WILLIAMS (1850), 5 Exch. 792; 20 L. J. Ex. 14; 16 L. T. O. S. 196; 155 E. R. 347.

Annotations:—**Apld.** Richards *v.* Jenkins (1868), 18 L. T. 437. **Refd.** Rogers *v.* Taylor (1858), 2 H. & N. 828; Bibby *v.* Carter (1859), 4 H. & N. 153. **Mentd.** Laing *v.* Whaley (1858), 3 H. & N. 675.

Negligent removal—Liability.]—*See* No. 906, *ante.*

907. Distinguished from right to support of land.]—The right to support of land & the right to support of buildings stand upon different footings as to the mode of acquiring them. . . . the latter must be founded upon prescription or grant, express or implied; but the character of the rights, when acquired, is in each case the same (WILLES, J.).—BONOMI *v.* BACKHOUSE (1859), E. B. & E. 646; 28 L. J. Q. B. 378; 33 L. T. O. S. 331; 5 Jur. N. S. 1345; 7 W. R. 667; 120 E. R. 652, Ex. Ch.; *on appeal, sub nom.* BACKHOUSE *v.* BONOMI (1861), 9 H. L. Cas. 503, H. L.

Annotations:—**Consd.** Greenwell *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165. **Refd.** Hunt *v.* Peake (1860), John. 705; Rowbotham *v.* Wilson (1860), 8 H. L. Cas. 348; Whitehouse *v.* Fellowes (1861), 10 C. B. N. S. 765; Metropolitan Board of Works *v.* Met. Ry. (1868), L. R. 3 C. P. 612; Eadon *v.* Jeffcock (1872), L. R. 7 Exch. 379; Spoor *v.* Green (1874), L. R. 9 Exch. 99; Birmingham Corpn. *v.* Allen (1877), 6 Ch. D. 284; Eccl. Comrs. for England *v.* N. E. Ry. (1877), 4 Ch. D. 845; Lamb *v.* Walker (1878), 3 Q. B. D. 389; Dalton *v.* Angus (1881), 6 App. Cas. 740; Bell *v.* Love (1883), 10 Q. B. D. 547; Darley Main Colliery Co. *v.* Mitchell (1886), 11 App. Cas. 127; A.-G. *v.* Conduit Colliery Co., [1895] 1 Q. B. 301; Hall *v.* Norfolk, [1900] 2 Ch. 493; Edinburgh & District Water Trustees *v.* Clippens Oil Co. (1902), 87 L. T. 275; West Leigh Colliery Co. *v.* Tunnicliffe & Hampson, [1908] A. C. 27; Aynsley *v.* Bedlington Coal Co. (1918), 87 L. J. K. B. 1031; Davies *v.* Powell Duffryn Steam Coal Co. (1920), 36 T. L. R. 358. **Mentd.** Todd *v.* Flight (1860), 9 C. B. N. S. 377; Croft *v.* L. & N. W. Ry. (1863), 3 B. & S. 436; Fletcher *v.* Rylands (1865), 3 H. & C. 774; Smith *v.* Thackerah (1866), L. R. 1 C. P. 564; Mason *v.* Shrewsbury & Hereford Ry. (1871), 25 L. T. 239; Bower *v.* Peate (1876), 1 Q. B. D. 321; Colley *v.* L. & N. W. Ry. (1880), 49 L. J. Q. B. 575; Bean *v.* Wade (1885), Cab. & El. 519; Crumbie *v.* Wallsend L. B. (1891), 60 L. J. Q. B. 392; Harrington *v.* Derby Corpn., [1905] 1 Ch. 205; Hague *v.* Doncaster R. D. C. (1908), 73 J. P. 69; Nash *v.* Rochford R. C., [1917] 1 K. B. 384.

908. How acquired—Prescription or grant, express or implied.]—BONOMI *v.* BACKHOUSE, No. 907, *ante.*

—— **Prescription.**]—*See* EASEMENTS, Vol. XIX., p. 68, Nos. 393–395.

—— **Express grant.**]—*See* EASEMENTS, Vol. XIX., pp. 23, 25, Nos. 94, 103.

—— **Implication of law.**]—*See* EASEMENTS, Vol. XIX., pp. 41, 42, 44, 46, 48, 49, Nos. 220, 222–225, 240–243, 256–259, 269, 270.

—— **Statute.**]—*See* EASEMENTS, Vol. XIX., pp. 75, 76, Nos. 451–454.

—— —— **Buildings on common land.**]—*See* COMMONS, Vol. XI., pp. 65, 66, Nos. 908–912.

—— —— **Buildings on land purchased compulsorily.**]—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 152–154, Nos. 317–359.

B. Extent of Easement.

See, generally, EASEMENTS, Vol. XIX., pp. 172, 173, Nos. 1205–1229.

909. Easement implied from grant—Derogation from grant.]—LONSDALE'S (EARL) CASE (*circa* 1800), cited in 7 East, p. 371; 103 E. R. 144.

Annotations:—**Distd.** Wyrley Canal Co. *v.* Bradley (1806), 7 East, 368. **Refd.** Hilton *v.* Granville (1844), Dav. & Mer. 614.

910. —— **Whether extends to buildings erected since grant.**]—By a deed of 1857, A., who was tenant for life under the will of one S., conveyed, under a power, land to B. in fee, with a reservation out of the grant of "all & every the seam or seams of coal & other minerals under the said hereditaments hereby granted, with power to win, work & carry away the same under or over any part of the said hereditaments & premises, the said A., or the person or persons for the time being entitled thereto, & his or their assigns, paying to the said B., his heirs & assigns, compensation for any damage which he or they may sustain thereby," & a covenant by A. that he had not done or permitted any act or thing whereby the premises or title thereto should or might be incumbered or prejudicially affected. B. covenanted, for himself, his heirs & assigns, "that the said hereditaments & premises hereby conveyed, or any buildings now or hereafter to be erected thereon, shall not at any time hereafter be used for the manufacture, sale, or storing of any combustible matter, or for the purpose of any offensive trade or business, the side walls not to be less than 18 feet high, & to be in uniformity with the street." In 1844, S., A.'s testator, had demised to C. & D. "a colliery & coal mines & seams of coal, as well opened as not opened, including & comprising all seams of coal under the land conveyed by the deed of 1857, with full power to the lessees, their exors. & administrators & assigns, to win, work & carry away the said seams of coal for a term of years not yet expired. Pltf. became possessed of the land comprised in the deed of 1857, & built four houses thereon; &, whilst he was so possessed, the houses were injured by the working & carrying away by the assignees under the lease of 1844 of the seams of coal thereunder. He thereupon brought an action against A., claiming compensation under the reservation contained in the deed of 1857. Deft., A., pleaded, seventhly, as to so much of the count as related to the damage & injury done to the part of the said piece of ground on which the said houses were built, & to the said houses, & to the compensation claimed by pltf. in respect thereof, that such damage & injury were occasioned by reason of the said houses having been erected thereon:—*Held:* the compensation clause in the deed of 1857 extended to houses thereafter built upon the land, & consequently the seventh plea was no answer to the declaration.—BERKLEY *v.* SHAFTO (1863), 15 C. B. N. S. 79; 143 E. R. 713.

911. —— —— **Intention to build known to grantor.**]—The general principle that a vendor who sells land for a particular purpose cannot derogate from his own grant by doing anything to prevent the land sold from being used for that purpose, applies to sales to railway cos. under compulsory powers. But this principle will not unnecessarily extend to compel a vendor, in the absence of any stipulation for the purpose, to perpetuate an accidental state of circumstances in his own land, though existing & of long standing at the date of the sale, & calculated to further the purpose for which the purchase was made.

A railway co. was empowered by its special Act to take lands, but the minerals were to be reserved to the vendors, who were to be at liberty to work them, causing no damage or obstructions to the Railway. By another clause it was provided that, on working up to within 20 yards of any masonry or building of the co., the owner of the minerals might require the co. to purchase the minerals within that range, or, on their neglect to do so, might work them in the usual & ordinary way, doing no avoidable damage. The co. purchased land from deft. under their compulsory powers.

910 1. *Easement implied from grant—Whether extends to buildings erected since grant.*]—CORONATION COLLIERIES *v.* MALAN, [1911] T. P. D. 577.—S. AF.

Sect. 1.—Right of support: Sub-sect. 2, B.; sub-sect. 3, A. & B.]

At the time of the purchase there was, beneath the land purchased & a large tract of the adjoining land of the vendor, an old mine which had been drowned for more than forty years. The water stood 80 fathoms deep in the shaft, which was at a considerable distance from the purchased land, & vertical support was given to the surface of the purchased land chiefly by pillars left in the mine & partly by the hydrostatic pressure of the water in the shaft. The removal of the water from the levels of the mine was said to be likely to weaken the pillars. The co. took the land for the purpose of erecting a bridge of great weight, which was accordingly built. More than twenty years after the completion of the bridge, deft. a subsequent lessee of the vendor, threatened to drain the shaft & renew the working of the mine:—*Held:* (1) deft. would be liable for damage to the railway, although caused by proper & workmanlike operations, except as to workings carried on within 20 yards of buildings, after satisfying the conditions of the Act; (2) deft. was entitled to drain the shaft, & was not liable for any damage to the bridge which might be caused by the withdrawal of the hydrostatic pressure; (3) notwithstanding any right of property in the water under the land acquired by the co., the right to take the minerals carried with it the right to remove the water for that purpose; but deft., except so far as he might be saved within the 20 yards aforesaid by the provisions of the Act, was answerable for any damage caused by such withdrawal, or otherwise by his workings in any other way than by the withdrawal of the hydrostatic pressure of the water.—NORTH EASTERN RY. CO. *v.* ELLIOTT (1860), 1 John. & H. 145; 29 L. J. Ch. 808; 3 L. T. 82; 24 J. P. 804; 6 Jur. N. S. 817; 8 W. R. 603; 70 E. R. 697; *affd.*, 2 De G. F. & J. 423, L. C.; *sub nom.* ELLIOT *v.* NORTH EASTERN RY. CO. (1863), 10 H. L. Cas. 333, H. L.

Annotations:—As to (1) **Consd.** Stourbridge Navigation Co. *v.* Dudley (1860), 3 E. & E. 409. **Distd.** G. W. Ry. *v.* Bennett (1867), L. R. 2 H. L. 27; Mid. Ry. *v.* Checkley (1867), L. R. 4 Eq. 19. **Consd.** Manchester Corpn. *v.* New Moss Colliery, [1906] 1 Ch. 278. **Refd.** Goold *v.* Great Western Deep Coal Co., Great Western Deep Coal Co. *v.* Goold (1865), 6 New Rep. 86; Richards *v.* Jenkins (1868), 18 L. T. 437; Colebeck *v.* Girdlers' Co. (1876), 45 L. J. Q. B. 225; Poutney *v.* Clayton (1882), 47 L. T. 731; L. & N. W. Ry. *v.* Evans, [1893] 1 Ch. 16; Aldin *v.* Latimer Clark, Muirhead & Co., [1894] 2 Ch. 437; Glamorganshire Canal Navigation *v.* Nixon's Navigation Co. (1901), 85 L. T. 53; L. & N. W. Ry. *v.* Howley Park Coal & Cannel Co., [1911] 2 Ch. 97. *As to* (2) **Refd.** Popplewell *v.* Hodkinson (1869), L. R. 4 Exch. 248. *Generally*, **Refd.** N. E. Ry. *v.* Crosland (1862), 32 L. J. Ch. 353; Mid. Ry. *v.* Haunchwood Brick & Tile Co. (1882), 20 Ch. D. 552; R. *v.* L. & N. W. Ry., [1899] 1 Q. B. 921; L. & N. W. Ry. *v.* Walker, [1903] A. C. 289. **Mentd.** Bradford Corpn. *v.* Pickles (1894), 64 L. J. Ch. 101; Grosvenor Hotel Co. *v.* Hamilton, [1894] 2 Q. B. 836.

912. —— —— ——.] — The vendor of land adjoining other land of his own under which are mines & minerals, & who knows at the time of the sale that the vendee is about to erect upon the land so purchased substantial buildings, impliedly covenants that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant. A. sold land to B. for the purpose of an iron foundry. Adjoining the land so sold to B., A. had other land under which was coal. A. afterwards leased the minerals to C. who commenced working the coal within such a distance from the land of B. as to be reasonably calculated to endanger its stability:—*Held:* ground for an injunction against A. & C. although no actual damage had been sustained by B.

Such an injunction will be granted although the minerals have not actually begun to be worked, if an intention has been expressed of working them, & preparations for so doing commenced.

It is said that there is no allegation that the damage apprehended is not of such a nature as to be capable of being satisfied by damages. I do not take that to be any ground for refusing an injunction (GROVE, J.).—SIDDONS *v.* SHORT (1877), 2 C. P. D. 572; 46 L. J. C. P. 795; 37 L. T. 230.

913. —— —— ——.] — The authorities are clear that if land is granted for the express purpose of some particular work, that carries the implied right of such support as is necessary for maintaining the work. . . . If a grant is given to construct on land works which require support, is not the right of support given by implication; & where an express right is given by statute to construct works which require support, is not such a right of support given as is necessary for the maintenance of the works, unless the context shows the contrary (BOWEN, L.J.).—LONDON & NORTH WESTERN RY. CO. *v.* EVANS, [1893] 1 Ch. 16; 62 L. J. Ch. 1; 67 L. T. 630; 41 W. R. 149; 9 T. L. R. 50; 2 R. 120, C. A.

Annotations:—**Refd.** G. W. Ry. *v.* Cefn Cribbwr Brick Co., [1894] 2 Ch. 157; Glamorganshire Canal Navigation *v.* Nixon's Navigation Co. (1901), 85 L. T. 53; Bishop Auckland Industrial Co-op. Flour & Provision Soc. *v.* Butterknowle Colliery Co. (1904), 73 L. J. Ch. 635; Clippens Oil Co. *v.* Edinburgh & District Water Trustees, [1904] A. C. 64. **Mentd.** Bradford Corpn. *v.* Pickles, [1894] 3 Ch. 53; Jordeson *v.* Sutton, Southcoates & Dryport Gas Co., [1898] 2 Ch. 614; Musselburgh Real Estate Co. *v.* Musselburgh, [1905] A. C. 491; Woolcombers *v.* Bradford Corpn. (1906), 70 J. P. 434; Cannon Brewery Co. *v.* Central Control Board (Liquor Traffic), [1918] 2 Ch. 101; A.-G. *v.* De Keyser's Royal Hotel, [1920] A. C. 508; *Re* Ellis & Ruislip-Northwood U. C., [1920] 1 K. B. 343; Newcastle Breweries *v.* R., [1920] 1 K. B. 854.

914. —— —— ——.] — A railway, which was subject to the provisions of the Railways Clauses Consolidation Act, 1845 (c. 20), passed over a bed of valuable clay, the manner of working which in the district was by open quarrying. The owner, who had sold the land to the co. reserving mines, gave notice to the railway co. of his intention to work the clay, & the co. did not purchase it:—*Held:* the owner was entitled to work the clay from the surface, & for that purpose to enter upon the land conveyed by him to the co., & to remove the ballast & surface soil lying above such clay.

According to the ordinary theories of law, a person who grants to an individual or to a corporate body land for the purpose of making upon the land some work like a railway, a canal, or other buildings, impliedly is taken, unless there is any provision to the contrary contained in the document which describes the rights, to grant also that necessary support which both parties must be supposed to have known would be required, & without which his grant would become ineffectual & futile (BOWEN, L.J.).—RUABON BRICK & TERRA COTTA CO. *v.* GREAT WESTERN RY. CO., [1893] 1 Ch. 427; 62 L. J. Ch. 483; 68 L. T. 110; 41 W. R. 418; 9 T. L. R. 121; 2 R. 237, C. A.

Annotations:—**Consd.** R. *v.* G. W. Ry. (1893), 62 L. J. Q. B. 572. **Apld.** *Re* Gerard & L. & N. W. Ry., [1895] 1 Q. B. 459. **Refd.** G. W. Ry. *v.* Blades, [1901] 2 Ch. 624; *Re* Todd, Bircston & N. E. Ry., [1903] 1 K. B. 603.

915. —— —— **After minerals worked out.**]— In 1864, comrs. conveyed to the pltf.'s predecessors in title two farms, in fee simple, subject to the reservation of minerals, with the following proviso, for compensation: "Provided always that the said Ecclesiastical Comrs. their successors assigns, & lessees . . . shall pay to the said William Watson his heirs & assigns reasonable compensation for the use & occupation of any part of the said land or for the severance of same or for the spoil of

ground or damage to the buildings on or to the surface of the land or ground the reversion of which is intended to be hereby conveyed which shall be taken done or occasioned by the exercise of the powers hereby excepted, & reserved." In 1899, the comrs. granted to defts. a lease of the mines underneath lands which included the two farms the subject of the conveyance of 1864 :—*Held :* on the construction of the proviso for compensation, the word "buildings" was not limited to buildings in existence at the date of the conveyance, & pltf. was entitled to recover from defts. compensation for injury caused by the subsidence of the surface to buildings erected after the underlying coal had been worked out, but in ignorance of that fact.—AYNSLEY *v.* BEDLINGTON COAL CO., LTD. (1918), 87 L. J. K. B. 1031 ; 119 L. T. 557, C. A.

SUB-SECT. 3.—EXCLUSION OF RIGHT.

A. In General.

916. Express words or necessary implication essential.]—(1) A lessor demised for sixty years, at certain rents & royalties, the following parcels, viz., firstly & secondly, certain cottages, engine house, etc. : thirdly, all the mines, etc., which then were or thereafter during the said term might be discovered within all the lands, about 514 acres, described in the map : & also full liberty, etc. for the lessees, etc., to dig, etc., & carry & sell, etc., all iron coal, etc., in, from, over, upon, or under the said lands, & to open, dig, etc., any pits, levels, etc., into, upon, about, or under the said mines & lands, except in, or upon the demesne lands coloured red in the plan, being a piece of 4 acres on which a capital mansion house & buildings were erected :—*Held :* this was a demise of the whole mines under the whole 514 acres, but with a restricted right of enjoyment in the lessees, so that the lessor could not demise the red part to any other persons, but the lessees had no right to work the mines under the red.

Upon the terms of the indenture it is clear that the mines & minerals under the lands coloured red were included in & did pass by the lease ; but that defts. were not authorised by that indenture to work them (PAGE WOOD, V.-C.).

(2) By the common law, where A. has two interests in the same hereditament, as houses or minerals, or a water course & also a mill, or two stories in a house, & demises one part, *e.g.* the lower portion of a house, reserving to himself the upper part, the grantee either for years or in fee will not, except by express stipulation or very direct implication, be permitted to use the portion held by him so as to interfere with the enjoyment by the grantor of the portion which he has retained possession of.—DUGDALE *v.* ROBERTSON (1857), 3 K. & J. 695 ; 30 L. T. O. S. 52 ; 3 Jur. N. S. 687 ; 69 E. R. 1289.

Annotations :—As to (1) **Expld. & Distd.** Shafto *v.* Johnson (1863), 8 B. & S. 252, n. *As to* (2) **Reid.** Eadon *v.* Jeffcock (1872), L. R. 7 Exch. 379 ; Westmoreland *v.* New Sharlston Colliery Co. (1898), 79 L. T. 716. *Generally,* **Mentd.** Proud *v.* Bates (1865), 6 New Rep. 92 ; Wakefield *v.* Buccleuch (1867), L. R. 4 Eq. 613 ; Aspden *v.* Seddon (1875), 44 L. J. Ch. 359 ; Love *v.* Bell (1884), 9 App. Cas. 286 ; Union Lighterage Co. *v.* London Graving Dock Co., [1902] 2 Ch. 557.

917. ——.]—DIXON *v.* WHITE, No. 946, *post.*

918. ——.]—TWYEROULD *v.* CHAMBER COLLIERY CO., [1892] W. N. 27, C. A. ; *on appeal, sub nom.* CHAMBER COLLIERY CO., LTD. *v.* TWYEROULD (1893), [1915] 1 Ch. 268, n., H. L.

*Annotations :—***Consd.** Beard *v.* Moira Colliery Co., [1915] 1 Ch. 257 ; Davies *v.* Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488. **Reid.** New Sharlston Collieries *v.* Westmoreland (1900), 73 L. J. Ch. 338, n. **Mentd.** N. E. Ry. *v.* Hastings, [1900] A. C. 260 ; Consett Industrial & Provident Soc. *v.* Consett Iron Co., [1922] 2 Ch. 135.

——.]—*See* EASEMENTS, Vol. XIX., p. 166, 167, 171, 172, Nos. 1155–1157, 1197, 1198 ; LANDLORD & TENANT, Vol. XXXI., p. 34, No. 1807 ; COMMONS, Vol. XI., p. 65, No. 909.

919. Onus of proof — On party claiming right to let down surface.] — LOVE *v.* BELL, No. 947, *post.*

920. —— ——.]—Pltfs. were owners of certain lands granted in 1840 to their predecessors by the Crown upon the terms that all rights to the mines & minerals should be reserved. Defts. subsequently became possessed of & worked the mines, but it did not appear that after 1840 any grant had been made to them by the Crown of the minerals. In an action by pltfs. for damages to their land & houses from the mining operations :—*Held :* they were entitled to judgment, as defts. gave no evidence of their being entitled to the benefit of the reservation by the Crown.—PRICE *v.* PLASKYNASTON COLLIERY CO. (1885), 2 T. L. R. 90, N. P.

*Annotation :—***Reid.** Beard *v.* Moira Colliery Co., [1915] 1 Ch. 257.

921. —— ——.]—It is plain that pltf. can claim no greater rights than his lessors. The principle of law applicable to such cases has been settled by decisions in the House of Lords. The effect of these decisions is that it is not incumbent upon the lessee of the surface to make out his right to support, but it is incumbent upon the colliery lessees to make out their right to let down the surface. I think that the lease does not support the contention of defts. (LINDLEY, L.J.).—MARQUISS *v.* PEASE & PARTNERS (1888), 4 T. L. R. 696, C. A.

*Annotation :—***Reid.** Westmoreland *v.* New Sharlston Colliery Co. (1898), 79 L. T. 716.

922. —— ——.]—NEW SHARLSTON COLLIERIES CO., LTD. *v.* WESTMORLAND (EARL), No. 933, *post.*

B. By Express Contract.

923. Validity of express covenant.]—Even if the grant could be produced *in specie*, reserving a right in the land to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant & void (LORD DENMAN, C.J.).—HILTON *v.* GRANVILLE (LORD) (1844), 5 Q. B. 701 ; 1 Dav. & Mer. 614 ; 13 L. J. Q. B. 193 ; 2 L. T. O. S. 419 ; 8 Jur. 311 ; 114 E. R. 1414 ; *subsequent proceedings* (1848), 12 Q. B. 737, n.

*Annotations :—***Consd.** Carlyon *v.* Lovering (1857), 1 H. & N. 784 ; Rowbotham *v.* Wilson (1857), 8 E. & B. 123 ; Blackett *v.* Bradley (1862), 1 B. & S. 940. **Dbtd.** Buccleuch *v.* Wakefield (1870), L. R. 4 H. L. 377. **Consd.** Bell *v.* Love (1883), 10 Q. B. D. 547. **Reid.** Humphries *v.* Brogden (1850), 12 Q. B. 739 ; Smart *v.* Morton (1855), 5 E. & B. 30 ; Salisbury *v.* Gladstone (1861), 9 H. L. Cas. 692 ; Williams *v.* Bagnall (1866), 15 W. R. 272 ; Hall *v.* Byron (1877), 4 Ch. D. 667 ; Consett Industrial & Provident Soc. *v.* Consett Iron Co., [1922] 2 Ch. 135. **Mentd.** Hilton *v.* Whitehead (1848), 12 Q. B. 734 ; Rogers *v.* Taylor (1858), 6 W. R. 249 ; Taylor *v.* Shafto (1867), 8 B. & S. 228 ; Liddy *v.* Kennedy (1871), L. T. 5 H. L. 134 ; Hext *v.* Gill (1872), 7 Ch. App. 699 ; Buchanan *v.* Andrew (1873), L. R. 2 Sc. & Div. 286 ; Gill *v.* Dickinson (1880), 5 Q. B. D. 159

924. ——.]—ROWBOTHAM *v.* WILSON, No. 121, *ante.*

925. ——.]—The conveyances of an estate in a mining district, sold in lots, contained an exception of all mines & minerals under the land included in the lot conveyed, with full power for the grantor to work, get, & dispose of them, without entering upon the land sold, & without being answerable for any injury to the land, or any buildings on it, by reason of working or getting the excepted

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mines or minerals, & without being liable to any action or suit for any such injury:—*Held:* a purchaser of two of the lots was not entitled against the grantor to either vertical or lateral support for the surface of his land.—WILLIAMS *v.* BAGNALL (1866), 12 Jur. N. S. 987; 15 W. R. 272.

Annotations:—**Consd.** Wakefield *v.* Buccleuch (1867), 36 L. J. Ch. 763; Buchanan *v.* Andrew (1873), L. R. 2 Sc. & Div. 286; Butterknowle Colliery Co. *v.* Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305.

926. ——.]—A feu of land was granted reserving the subjacent minerals, & stipulating that the feuar should have no claim against the superior or his tenants in respect of any damage that might arise from the working of the minerals. Damage having arisen, the feuar obtained from the ct. of session an interdict prohibiting the mineral workings complained of; but the House of Lords revoked the interdict, holding that the feuar had made a contract which bound him to submit to its consequences. This interdict imposes on the Superior an obligation which it was the express object of the contract to relieve him from. The fact that the contract was improvident cannot alter the construction of a special stipulation.—BUCHANAN *v.* ANDREW (1873), L. R. 2 Sc. & Div. 286; *sub nom.* HENDERSON *v.* ANDREW, 37 J. P. 436, H. L.

Annotations:—**Consd.** Bell *v.* Love (1883), 10 Q. B. D. 547. **Expld.** Dixon *v.* White (1883), 8 App. Cas. 833. **Consd.** Butterknowle Colliery Co. *v.* Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305; N. B. Ry. *v.* Budhill Coal & Sandstone Co., [1910] A. C. 116; Davies *v.* Powell Duffryn Steam Coal Co. (No. 2) (1921), 91 L. J. Ch. 40. **Reld.** Bell *v.* Dudley, [1895] 1 Ch. 182; Howley Park Coal & Cannel Co. *v.* L. & N. W. Ry., [1913] A. C. 11; Welldon *v.* Butterley Co., [1920] 1 Ch. 130.

927. —— **Terms included in local inclosure Act.**]—W. purchased lands, formerly part of the waste of a manor, which were sold under the provisions of a local inclusure Act to defray the expenses of the Act. The lord of the manor leased the mines under the lands so sold to K. who commenced working by sinking shafts, etc. W. filed a bill against the lord of the manor & K. to restrain the working of the mines, or at least such a working as to cause a subsidence of the surface. On a construction of 41 Geo. 3, c. 109 & of the local inclosure Act. It having been proved that the mines could not effectually be worked without causing a subsidence of the surface:—*Held:* the lord of the manor, or his tenant had a right to work the mines, to an extent which might cause the utter destruction of the land above, making compensation to the owner of the surface for the damage done.—BUCCLEUCH (DUKE) *v.* WAKEFIELD (1870), L. R. 4 H. L. 377; *sub nom.* WAKEFIELD *v.* BUCCLEUCH (DUKE), BUCCLEUCH (DUKE) *v.* WAKEFIELD, 39 L. J. Ch. 441; 23 L. T. 102; 34 J. P. 724, H. L.

Annotations:—**Expld.** Hext *v.* Gill (1872), 7 Ch. App. 699. **Distd.** Love *v.* Bell (1884), 9 App. Cas. 286. **Consd.** Consett Waterworks *v.* Ritson (1889), 64 L. J. Ch. 293, n.; Butterknowle Colliery Co. *v.* Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305; Thomson *v.* St. Catharine's College, Cambridge, etc., [1919] A. C. 468. **Followed.** Welldon *v.* Butterley Co., [1920] 1 Ch. 130. **Reld.** Mordue *v.* Durham (Dean & Chapter) (1873), 42 L. J. C. P. 114; Hall *v.* Byron (1877), 4 Ch. D. 667; Dalton *v.* Angus (1881), 6 App. Cas. 740; A.-G. *v.* Welsh Granite Co. (1887), 35 W. R. 617; Thompson *v.* Mein, [1893] W. N. 202; Bell *v.* Dudley, [1895] 1 Ch. 182; Westmoreland *v.* New Sharlston Colliery Co. (1898), 79 L. T. 716; St. Catharine's College, Cambridge *v.* Rossé, [1916] 1 Ch. 73; Consett Industrial & Provident Soc. *v.* Consett Iron Co., [1922] 2 Ch. 135. **Mentd.** Aspden *v.* Seddon (1874), 10 Ch. App. 396, n.; Benfieldside L. B. *v.* Consett Iron Co. (1877), 47 L. J. Q. B. 491; Shafto *v.* Bolckow, Vaughan & Eccl. Comrs. (1888), 4 T. L. R. 527; St. Catharine's College Cambridge *v.* Greensmith, [1912] 2 Ch. 280.

928. Covenant excepting liability in respect of newly built houses—Application to mine owners holding under antecedent lease.]—In 1840, a bed of coal, called the High Hazle Bed, was demised, with working powers, to persons from whom defts. took by assignment. The lessees were to pay a minimum rent of £200 as for 2 acres 1 rood 16 poles, & a further yearly rent at the rate of £85 per acre for coal actually got beyond the 2 acres 1 rood 16 poles, "including all ribs & pillars left in working the said coal except the pillars for the support of the shafts, the pillars between the deep & counter level, the pillars all round the estate, & the pillars under the homestead & farm buildings." These pillars of specified dimensions, the lessees bound themselves to leave "during the whole of the term," & they also covenanted to work the mines "according to the best of their judgment, skill, & discretion, in a good & workmanlike manner." In 1857 the assignee of the lessor conveyed part of the land within which the mine lay to persons from whom pltfs. took with notice, reserving to the grantor the High Hazle Bed, except a small portion specified, & "the mines, veins, & bed of coal, fire-clay, & other clay, stone & other minerals lying under the said bed called the High Hazle Bed," with powers to the grantor, his heirs & assigns, & his & their tenants & lessees, to be exercised "from & after the expiration of the term" for "carrying on the works of the mine, & getting & carrying away the said fire-clay, etc." so reserved; & also reserving to the grantor the coal rent under the lease of 1840, with the necessary powers. Provision was made for rent for land used or occupied by the grantor for the purposes of the mine, & for compensation for buildings required or removed for that purpose, & for surface damage to the land; but it was specially provided that the grantor, his heirs or assigns, tenants, or lessees, should not be liable for any damage caused to buildings which should thereafter be erected on the land conveyed, by the sinking of the land through mining operations in getting the "coal, clay, stone, & other minerals hereby excepted & removed." The pillars specified in the lease of 1840 were left; & defts. worked according to the usual course of mining in the district; but their workings caused a subsidence which injured the land of pltfs. & buildings erected since 1857. The land would have subsided without the buildings:—*Held:* it appearing by the lease of 1840 to be the intention of the parties that all the coal should be removed, except the specified pillars, & defts. having worked the mine in a proper manner, they were not liable for the injury.—EADON *v.* JEFFCOCK (1872), L. R. 7 Exch. 379; 42 L. J. Ex. 36; 28 L. T. 273; 20 W. R. 1033.

Annotations:—**Consd.** Aspden *v.* Seddon (1874), 10 Ch. App. 396, n.; Davis *v.* Treharne (1881), 6 App. Cas. 460; Chapman *v.* Day (1883), 47 L. T. 703. **Reld.** Dalton *v.* Angus (1881), 6 App. Cas. 740; Mundy *v.* Rutland (1883), 31 W. R. 510; Westhoughton U. C. *v.* Wigan Coal & Iron Co., [1919] 1 Ch. 159.

929. Covenant excepting liability in respect of subjacent mines—Application to rights in respect of adjacent land.]—B. gave a lease of lands to W., except the mines, etc., reserving liberty to B. to get, take, & carry away same without being responsible for damage to any building thereafter to be erected on the land, but not to sink any shafts on such land. B. had land adjoining to W., & began to work his own mines in such a manner as he would have done if intending to carry the workings below W.'s lands, & by reason of such working on B.'s own lands the buildings on W.'s land cracked & suffered injury:—*Held:* the reservation did not protect B. from liability, for it referred only to damage caused by working mines

under W.'s land, & not working mines under B.'s own land adjacent.—WHITEHOUSE *v.* BAYLEY (1875), 34 L. T. 93; 40 J. P. 405.

Copyhold lands.]—*See* COPYHOLDS, Vol. XIII., p. 80, No. 1019.

C. By Implication.

(a) In General.

930. When right to let down surface implied—Not from general power to work mines.]—PROUD *v.* BATES, No. 17, *ante*.

931. —— ——.]—The owner of land under which there were several strata of coal, demised one of the upper strata to pltf., reserving to himself & his lessees the right of working any coal not included in that demise, & same powers & privileges with respect to such last-mentioned coal as if that demise had not been made: provided always, that in exercising such powers & privileges the working of the coal then demised should not be prevented or unnecessarily interfered with, & that compensation should be made to pltf. for any necessary interference with the workings. The landowner afterwards demised some of the strata of coal underlying the coal demised to pltf., to the M. co. Pltf. brought an action for an injunction against the landowner & the co.:—*Held:* the proviso in the lease was unintelligible & could not determine the rights of the parties: if a lessor wished to reserve rights in derogation of his grant, he must do so in plain terms: & on that ground pltf. was entitled to an injunction if he could prove that the works threatened by defts. would in all probability affect the security of his mine. Further evidence was directed on this point & the ct. ultimately granted the injunction. —MUNDY *v.* RUTLAND (DUKE) (1883), 23 Ch. D. 81; 31 W. R. 510, C. A.

932. —— ——.]—TWYEROULD *v.* CHAMBER COLLIERY CO., [1892] W. N. 27, C. A.; *on appeal, sub nom.* CHAMBER COLLIERY CO., LTD. *v.* TWYEROULD (1893), [1915] 1 Ch. 268, n., H. L.

Annotations:—**Consd.** New Sharlston Collieries Co. *v.* Westmoreland (1900), [1904] 2 Ch. 443, n.; Beard *v.* Moira Colliery Co., [1915] 1 Ch. 257; Davies *v.* Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488. **Refd.** Consett Industrial & Provident Soc. *v.* Consett Iron Co., [1922] 2 Ch. 135. **Mentd.** N. E. Ry. *v.* Hastings, [1900] A. C. 260.

933. —— ——.]—The state of the law is now perfectly clear. The mere fact of giving a right to sink pits, & to work or get out coal, does not of itself establish a right to get rid of that which is a common law right of the surface owner, to have his surface undisturbed. . . . It appears to me that the law upon the question must now be regarded as settled, &, there being no express permission, the onus lies on the person who says he has a right to do it to show something in the instrument which gives him that right (LORD HALSBURY, C.).

Speaking for myself, I cannot see why a covenant providing a particular measure or mode of obtaining compensation is in any way inconsistent with the existence of an obligation not to let down the surface, even though that covenant extends beyond the surface, & is applicable also, or even exclusively, I should say, to underground operations (LORD DAVEY).—NEW SHARLSTON COLLIERIES CO., LTD. *v.* WESTMORLAND (EARL) (1900), [1904] 2 Ch. 443, n.; 73 L. J. Ch. 338, n.; 82 L. T. 725, H. L.; *affg.* S. C. *sub nom.* WESTMORELAND (EARL) *v.* NEW SHARLSTON COLLIERY CO., LTD. (1899), 80 L. T. 846, C. A.

Annotations:—**Apld.** Butterknowle Colliery Co. *v.* Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305. **Consd.** Beard *v.* Moira Colliery Co., [1915] 1 Ch. 257; Thomson *v.* St. Catharine's College, Cambridge, etc. (1918), 118 L. T. 758. **Distd.** Weldon *v.* Butterley Co., [1920] 1 Ch. 130. **Consd.** Consett Industrial & Provident Soc. *v.* Consett Iron Co., [1922] 2 Ch. 135. **Refd.** Davies *v.* Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488.

934. —— —— **Though in widest terms.**]—Before 1757 the lord of a manor had the right to work mines & minerals under the waste lands of the manor so as to let down the surface, provided enough pasturage was left to satisfy the rights of the commoners. By an inclosure Act of 1757 the waste lands were enclosed & allotted, & the lord of the manor was empowered to work the mines & minerals under the allotments as fully & freely as he might have done if the Act had not passed, & that without making or paying any satisfaction for so doing. A compensation clause in the Act provided that any damage done to an allottee by the exercise of the powers reserved to the lord should be paid for by an assessment upon the occupiers of the other allotments:—*Held:* upon the true construction of the Act, the common law right of the surface owners to the support of the surface was not taken away by express words or necessary implication.

The surface owner is entitled of common right to support for his property in its natural position & in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorised by the instrument of severance either in express terms or by necessary implication (LORD MACNAGHTEN).

If the compensation clause is capable of being satisfied by reference to acts done on the surface, then, though it may be wide enough to cover also damage done to the surface by taking away the support, still it must be confined to damage done on the surface, & the inference that support may be taken away on payment of compensation will not be drawn (LORD LOREBURN).

To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable, or that powers & privileges usually found in mining grants are conferred without stint, or that compensation is provided in measure adequate or more than adequate to cover any damage likely to be occasioned by the exercise of those powers & privileges. Nor is it enough, in the case of a lease, that the lessee is bound to work out the minerals or to work the minerals in a prescribed manner, or, in the case of an inclosure Act or award, that the lord in whose favour the mines are reserved or regranted may be authorised to work the minerals & enjoy the property as fully & freely as if the inclosure Act had not been passed (LORD MACNAGHTEN).

The absence of any provision for compensation is some indication that the ordinary rights of the surface owner were intended to be left untouched. On the other hand, the presence of a provision for compensation, which is obviously inadequate or plainly inappropriate if applied to damage by subsidence, is cogent evidence to prove that subsidence was not contemplated (LORD MACNAGHTEN).

If there is no provision for giving compensation for the injury done to the surface, it is almost conclusive that the common law rule was intended to apply. But it is not so clear that if there be a provision giving such compensation it is sufficient to exclude the common law rule (LORD DAVEY).—BUTTERKNOWLE COLLIERY CO. *v.* BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE CO., [1906] A. C. 305; 75 L. J. Ch. 541; 94 L. T. 795; 70 J. P. 361; 22 T. L. R. 516, H. L.; *affg.* S. C. *sub nom.* BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE

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& every part thereof, & to sell & dispose of, take, & convey away the same, at their free will & pleasure; & also to sink shafts, etc., for the raising up works, carrying away & disposing of the same or any part thereof, making a fair compensation to P. for the damage to be done to the surface of the premises, & the pasture & crops growing thereon:—*Held:* under this reservation, A. was not entitled to take all the mines, but only so much as he could get leaving a reasonable support to the surface.

(2) It appears that J. was entitled both to the mines & the land above, & that he granted away the land above, excepting out of the grant the mines, which would otherwise have passed under the conveyance of the land (ALDERSON, B.).

(3) It becomes unnecessary to inquire whether or not he was bound to leave support for an additional superincumbent weight upon the surface; probably he would not be (LORD ABINGER, C.B.).

(4) As to the compensation clause: it seems to me, upon the true construction of the covenant, that the provision applies only to the exercise of rights upon the surface; but supposing that it were otherwise, & it applied to any injury of this sort done by getting the minerals below in an improper manner, not authorised by the power, all that can be said to it is, that it only gives an action of covenant by the covenantee against the covenantor, as well as any other remedy he might have for the acting in that respect without being authorised so to do by the power. It is a cumulative remedy (LORD ABINGER, C.B.).

(5) The mines being under pltf.'s soil are only his property *primâ facie* (PARKE, B.).

(6) What is then the meaning & intention of the parties here? It is clearly the meaning & intention of the grantor, that the surface shall be fully & beneficially held & enjoyed by the grantee, he reserving to himself all the mines & veins of coal & iron ore below (PARKE, B.).—HARRIS *v.* RYDING (1839), 5 M. & W. 60; 8 L. J. Ex. 181; 151 E. R. 27.

Annotations:—As to (1) **Consd.** Humphries *v.* Brogden (1850), 12 Q. B. 739; Smart *v.* Morton (1855), 5 E. & B. 30. **Apld.** Allaway *v.* Wagstaff (1859), 4 H. & N. 681. **Consd.** Richards *v.* Jenkins (1868), 18 L. T. 437. **Reld.** Rowbotham *v.* Wilson (1857), 8 E. & B. 123; Rogers *v.* Taylor (1858), 30 L. T. O. S. 321; Shafto *v.* Johnson (1863), 8 B. & S. 252, n.; Williams *v.* Bagnall (1866), 12 Jur. N. S. 987; Taylor *v.* Shafto (1867), 8 B. & S. 228; Hext *v.* Gill (1872), 7 Ch. App. 699; Mundy *v.* Rutland (1883), 23 Ch. D. 81; Love *v.* Bell (1884), 9 App. Cas. 286; Welldon *v.* Butterley Co., [1920] 1 Ch. 130. *As to* (4) **Reld.** Berkley *v.* Shafto (1863), 15 C. B. N. S. 79. *As to* (5) **Reld.** Dugdale *v.* Robertson (1857), 3 K. & J. 695. *As to* (6) **Consd.** Wakefield *v.* Buccleuch (1867), L. R. 4 Eq. 613. *Generally*, **Reld.** Caledonian Ry. *v.* Sprot (1856), 27 L. T. O. S. 264; Eadon *v.* Jeffcock (1872), L. R. 7 Exch. 379; Smith *v.* Darby (1872), 26 L. T. 762; Aspden *v.* Seddon (1874), 10 Ch. App. 394; Westmoreland *v.* New Sharlston Colliery Co. (1898), 79 L. T. 716. **Mentd.** Angus *v.* Dalton (1877), 3 Q. B. D. 85.

946. —— ——.]—If the owner of a piece of land sells the surface & reserves the minerals below it, with power to get them, he must, if he intends to have the power of destroying or letting down the surface by subsidence in getting them, frame his power by such language that the Court may be able to say from the titles that such was clearly the intention of the parties. A. was the owner of 500 acres of land. He, in 1800, feued the whole coal, etc., therein to B. with full power to work & win same, & for that purpose to set down pits, etc., but expressly providing that B. should not be at liberty to sink pits, or break the surface of the land lying on the north of a certain line: with full power, however, to work the coal there, provided it was done from pits situate on the south of the line, without breaking the surface of the land on the north; but for the "whole damage & injury occasioned by the foresaid operations" A. & his successors "shall be completely paid & indemnified by" B. In 1801 A., by disposition & sale, conveyed to C.'s predecessor all his right & title in a parcel of land situate on the north of the line, reserving to himself & his feuars the liberty to take the coal, substantially in the terms given above, & providing that the persons carrying on these operations were to be liable to C.'s predecessor "for the whole damage thereby occasioned:" declaring that the rules contained in the above feu right should be the rule of settlement between C.'s predecessor & B. In 1799 A. had feued to another predecessor of C. a parcel of land contiguous to the above & also to the north of the line, under reservation of the minerals, & with liberty to work same "so as not to break the surface of the said lands or injure the springs therein upon payment to" C.'s predecessors "any damage that may be occasioned to the said lands by the working of the minerals." B. claimed an absolute right to work out the whole of the coal, under the obligation to pay C. a money compensation for any damage done to the surface:—*Held:* (1) there was nothing in the titles of the parties which had the effect of taking away or derogating from the common law right of the owner of the surface to insist that the owner of the minerals shall leave sufficient supports to sustain the surface uninjured; & (2) the provision as to payment of compensation for damage done by accident or negligence.—DIXON *v.* WHITE (1883), 8 App. Cas. 833, H. L.

Annotations:—As to (1) **Apld.** Marquiss *v.* Pease (1888), 4 T. L. R. 696; Twycrould *v.* Chamber Colliery Co., [1892] W. N. 27. **Consd.** Westmoreland *v.* New Sharlston Colliery Co. (1898), 79 L. T. 716; Butterley Co. *v.* New Hucknall Colliery Co., [1910] A. C. 381; Davies *v.* Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488. **Reld.** Butterknowle Colliery Co. *v.* Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305.

947. —— ——.]—An inclosure Act enacted that allotments should be made to the persons having a right of common upon the waste of the manor, that is, to the owners of every separate ancient dwelling-house within the manor; that all right of common should be extinguished; & that the allotments should be held & enjoyed by the allottees by the same tenure & estates as the respective dwelling-houses; provided that nothing should prejudice, lessen, or defeat the title & interest of the lords of the manor to & in the royalties, but that the lords & their successors as owners of the royalties should for ever hold & enjoy all "rents, courts, perquisites, profits, mines, power of using or granting wayleave, waifs, estrays, & all other royalties & jurisdictions whatsoever" to the owners of the manor appertaining "in as full, ample, & beneficial manner to all intents & purposes as they could or might have held & enjoyed same in case this Act had not been made." Provided further, that in case the lords or any persons claiming under them should work any mines lying under any allotment, or should lay, make, or use any way or ways over any allotment, such persons so working the mines, or laying, making, or using such way or ways should make "satisfaction for the damages & spoil of ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil"; such satisfaction to be settled by arbn. & "not to exceed the sum of £5 yearly during the time of working such mines or continuing or using such way or

ways for every acre of ground so damaged or spoiled."

At the time of passing the Act there were no customs which enlarged or cut down the common law rights of the lords to work the minerals under the wastes of the manor. Under the Act an allotment was made in 1772 to a commoner in respect of an ancient freehold dwelling-house. At that time no house had been built upon the allotment. More than twenty years after a house had been built upon it, the minerals underlying it were worked by lessees of the lords of the manor so as to cause the surface of the land to subside, whereby the house was damaged to an amount exceeding the sum recoverable under the proviso. The land would have subsided if there had been no house. An action for damages having been brought against the lessees by the allottee's successor in title & by his tenant in possession :—*Held :* upon the true construction of the Act, the proviso for satisfaction did not apply to damage from subsidence ; there was nothing in the Act giving the lords the right to let down the surface ; pltfs. were entitled to have the house & land supported by the minerals, & to recover damages for the subsidence.

It appears to me that here the principles already mentioned throw, at all events as strongly as before, upon applts., the duty of showing that there are words which dispense, in their favour, with the general rule of law, & give them a right to let down the surface & deprive the surface owner of his ordinary right of support (LORD SELBORNE).

I think it must always be presumed that a clause providing compensation was intended to cover the damage resulting to the landowner from the exercise of the powers previously reserved or granted to the owner of the mines. It is not the proper office, nor is it presumable the intention of such a clause, to define or extend the powers given to the mine owner ; & it is frequently *ob majorem cautelam*, & in the interest of the landowner, expressed in comprehensive terms, so as to include every species of damage which may result from operations which are consistent with giving support to the surface. The clause may, nevertheless, be so expressed as to explain the character & extent of these powers, as was the case in *Aspden* v. *Seddon*, No. 798, *ante*, where the power reserved to the mine owner was to work the subjacent minerals without entering upon the surface of the lands. That power would not, of itself, have warranted letting down the surface ; but it was made subject to the condition that the person working the mines should pay for all damages to erections on the surface occasioned by the exercise of the reserved power. Entry on the land being prohibited, it was a reasonable, if not a necessary, inference in that case, that the kind of underground working, contemplated & sanctioned, was such as would cause subsidence & injure buildings erected on the surface. But any such inference derived from the terms in which compensation is provided, must, in my opinion, be plain & unequivocal : otherwise general words, which were only meant to include every possible injury that could be caused by working without disturbance of the surface, might be construed as a power to let it down (LORD WATSON).—LOVE *v.* BELL (1884), 9 App. Cas. 286 ; 53 L. J. Q. B. 257 ; 51 L. T. 1 ; 48 J. P. 516 ; 32 W. R. 725, H. L. ; *affg.* S. C. *sub nom.* BELL *v.* LOVE (1883), 10 Q. B. D. 547, C. A.

Annotations :—**Distd.** Mayhew *v.* Bromilow, Foster (1886), 2 T. L. R. 400. **Apld.** Marquiss *v.* Pease & Partners (1888), 4 T. L. R. 696 ; Consett Waterworks Co. *v.* Ritson (1889), [1922] 2 Ch. 187, n. **Consd.** Hayles *v.* Pease & Partners, [1899] 1 Ch. 567. **Folld.** Butterknowle Colliery Co. *v.* Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305. **Consd.** Thomson *v.* St. Catherine's College, Cambridge, etc., [1919] A. C. 468. **Distd.** Welldon *v.* Butterley Co., [1920] 1 Ch. 130. **Apld.** Consett Industrial & Provident Soc. *v.* Consett Iron Co., [1922] 2 Ch. 135. **Reld.** A.-G. *v.* Welsh Granite Co. (1887), 35 W. R. 617 ; Shafto *v.* Bolckow, Vaughan & Eccl. Comrs. (1888), 4 T. L. R. 527 ; Twyerould *v.* Chamber Colliery Co., [1892] W. N. 27 ; L. & N. W. Ry. *v.* Evans, [1893] 1 Ch. 16 ; Thompson *v.* Mein, [1893] W. N. 202 ; Bell *v.* Dudley, [1895] 1 Ch. 182 ; New Sharlston Collieries Co. *v.* Westmoreland (1900), [1904] 2 Ch. 443, n. ; Bishop Auckland Industrial Co-op. Soc. *v.* Butterknowle Colliery Co., [1904] 2 Ch. 419 ; Butterley Co. *v.* New Hucknall Colliery Co., [1910] A. C. 381 ; Beard *v.* Moira Colliery Co., [1915] 1 Ch. 257.

948. —— ——.]—GREENWELL *v.* LOW BEECH BURN COAL CO., No. 972, *post.*

949. —— —— **When not inconsistent with right.**]—SMART *v.* MORTON, No. 953, *post.*

950. —— —— —— **Referable to surface injury.**]—In a conveyance of the surface of certain land the minerals underneath were reserved by the grantor, the reservation clause giving the grantor power to enter upon the land to search & sink for, dig, work, get, & carry away the minerals, & to erect machinery and works, & to do all necessary acts, the grantor giving the grantee of the surface compensation for all trespass or damage done to surface, but it was provided that no compensation for any injury to any buildings erected on the land after the date of the conveyance should exceed £200 :—*Held :* in an action for damages for letting down the surface by working the mines & for an injunction to restrain future workings that the clause only applied to surface operations, & did not give defts. the right of working the mines so as to let down the surface of the land, & pltf. was entitled to an injunction. —MAYHEW *v.* BROMILOW, FOSTER & CO. (1886), 2 T. L. R. 400, C. A.

951. —— —— —— ——.]—BUTTERKNOWLE COLLIERY CO. *v.* BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE CO., No. 934, *ante.*

952. —— —— —— **Though applicable solely to underground operations.**]—NEW SHARLSTON COLLIERIES CO., LTD. *v.* WESTMORLAND (EARL), No. 933, *ante.*

953. —— —— **Approved practice of mining.**]—When the surface & the minerals belong to separate owners, the owner of the surface is *primâ facie* entitled to the support of the subjacent strata ; & the owner of the minerals is bound so to work the mines as to leave sufficient support for the surface ; but these rights may be varied by express stipulation.

Where, however, the deed which granted the surface reserving the minerals, contained only the provision that the grantor should have the collieries & coal mines, veins & seams of coal, together with free & full power & liberty at all times to work, sink, dig for or win the same, & to drive drift or drifts, make watercourses, or do any other act necessary, needful or convenient for the working, winning, obtaining or getting the same, paying to the grantee treble damages for loss or damage sustained by reason of the working of the mines :—*Held :* (1) the terms of this reservation did not authorise the grantor to work the mines in such manner as to leave the surface without support ; (2) the entire removal of all the coal, so as to deprive the surface of support, was not an act necessary for the working & winning of the mines ; (3) upon the evidence, it was contrary to the approved practice of mining in the county of Durham at the date of the reservation, 1671, to leave the surface without support ; & a plea which alleged that defts. had done the

Sect. 1.—Right of support: Sub-sect 3, C. (b), D. & E.; sub-sect. 4, A. & B. (a).]

acts complained of in accordance with the approved practice of mining, must be taken to refer to the practice at the date of the reservation.

It may be contended that the powers here reserved of working & winning the coals are not confined to such as are to be exercised on the surface; but, wherever exercised, they are perfectly consistent with the exercise of them being subject to the implied right of the owner of the surface to support from the minerals. . . . The right to compensation may well be contemplated as extending only to injuries which may arise from mining, the mining being carried on in such a manner as that the surface is still left to enjoy a sufficient support (LORD CAMPBELL, C.J.). —SMART *v.* MORTON (1855), 5 E. & B. 30; 3 C. L. R. 1004; 24 L. J. Q. B. 260; 25 L. T. O. S. 97; 1 Jur. N. S. 825; 119 E. R. 393.

Annotations:—As to (1) **Consd.** Aspden *v.* Seddon (1874), 10 Ch. App. 396. **Reld.** Rowbotham *v.* Wilson (1856), 6 E. & B. 593; Rogers *v.* Taylor (1858), 2 H. & N. 828; Shafto *v.* Johnson (1863), 8 B. & S. 252, n.; Wakefield *v.* Buccleuch (1867), L. R. 4 Eq. 613; Hext *v.* Gill (1872), 7 Ch. App. 699; Westmoreland *v.* New Sharlston Colliery Co. (1898), 79 L. T. 716. *As to* (3) **Consd.** Dugdale *v.* Robertson (1857), 3 K. & J. 695; Allaway *v.* Wagstaff (1859), 4 H. & N. 681. **Reld.** Consett Industrial & Provident Soc. *v.* Consett Iron Co., [1922] 2 Ch. 135. *Generally*, **Reld.** Carlyon *v.* Lovering (1857), 1 H. & N. 784; Brown *v.* Robins (1859), 4 H. & N. 186; Eadon *v.* Jeffcock (1872), L. R. 7 Exch. 379; Smith *v.* Darby (1872), L. R. 7 Q. B. 716.

954. —— —— ——.]—A clause in a mining lease that the lessee may work the mines "in the usual & most approved way in which same is performed in other works of the like kind in the county," refers simply to the mode of carrying on the underground works for mining purposes; but does not suppose a custom to work the mines so as to injure or interfere with the rights of other people. Nor did the words that the mining lessee should have liberty to enter upon the land & carry away the minerals, & to erect buildings, & "do and execute all such other acts, works, & things upon, in, or under, or above, the said premises, as shall be necessary or convenient for working & carrying away same, making compensation," etc., enlarge the power so to deal with the mines as to let down the surface.

It is quite true that where parties have agreed in this way, you shall make compensation for whatever injury you do in respect of these rights, & amongst other things you shall make compensation for what you do in letting down the surface, the conclusion is very strong from that, that the lessor says, You may let down the surface. I do not say that it is conclusive, but it is a very strong argument, if you find that clause, to say that he did mean that the lessee might let down the surface (LORD BLACKBURN).

It is impossible that those words "the usual & most approved way of working in the county of Glamorgan" can have been intended to absolve the lessee from a legal obligation. . . . They relate simply to the manner of working the mine for mining purposes; they have no reference to the rights of other persons, which there could not possibly be any local custom in such a district as a county to disregard, & which must be respected in carrying on those works (LORD SELBORNE, C.). —DAVIS *v.* TREHARNE (1881), 6 App. Cas. 460; 50 L. J. Q. B. 665; 29 W. R. 869, H. L.

Annotations:—**Consd.** Chapman *v.* Day (1883), 47 L. T. 705. **Apld.** Love *v.* Bell (1884), 9 App. Cas. 286; Marquiss *v.* Pease & Partners (1888), 4 T. L. R. 696. **Folld.** Greenwell *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165. **Apld.** New Sharlston Collieries Co. *v.* Westmoreland (1900), [1904] 2 Ch. 443, n. **Reld.** Mundy *v.* Rutland (1883), 23 Ch. D. 81; Pountney *v.* Clayton (1883), 11 Q. B. D. 820; Consett Waterworks *v.* Ritson (1889), 22 Q. B. D. 318; Twyeroald *v.* Chamber Colliery Co., [1892] W. N. 27; L. & N. W. Ry. *v.* Evans, [1893] 1 Ch. 16; Sitwell *v.* Londesborough, [1905] 1 Ch. 460; Butterknowle Colliery Co. *v.* Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305; Thomson *v.* St. Catharine's College, Cambridge, etc., [1919] A. C. 468; Westhoughton U. D. C. *v.* Wigan Coal & Iron Co., [1919] 1 Ch. 159.

955. —— —— ——.] — JONES *v.* CONSOLIDATED ANTHRACITE COLLIERIES, LTD. & DYNEVOR (LORD), No. 941, *ante*.

956. —— —— **Not referable to surface injury—Provision against entry on to surface.**]—As by the express words of the reservation the mine owner in working the mines is not to enter upon the plot of land conveyed by the deed, the damage to the buildings for which compensation is to be given must be damage to the buildngs caused by the removal of the minerals reserved (MELLISH, L.J.).—ASPDEN *v.* SEDDON (1875), 10 Ch. App. 394; 44 L. J. Ch. 359; 32 L. T. 415; 39 J. P. 597; 23 W. R. 580, L. JJ.; *subsequent proceedings, sub nom.* ASPDEN *v.* SEDDON, PRESTON *v.* SEDDON (1876), 1 Ex. D. 496.

Annotations:—**Reld.** Gill *v.* Dickinson (1880), 5 Q. B. D. 159; Dalton *v.* Angus (1881), 6 App. Cas. 740; Dixon *v.* White (1883), 8 App. Cas. 833; Mundy *v.* Rutland (1883), 23 Ch. D. 81; Love *v.* Bell (1884), 9 App. Cas. 286; Hayles *v.* Pease, [1899] 1 Ch. 567; *Re* Whiting, Ormond *v.* De Launay (1913), 82 L. J. Ch. 309. **Mentd.** Haywood *v.* Brunswick Bldg. Soc. (1881), 8 Q. B. D. 403.

957. —— **Compensation adequate—Damage to building & crops.**]—Pltf. declared for injury caused to his land by defts. wrongfully & negligently excavating & working certain mines under & adjacent to the said land, & thereby the land gave way & sank, & a certain mill, cottage, & other buildings became prostrate & ruinous, & a stream of water was diverted from pltf.'s land. The pleas demurred to were based upon an indenture of lease made before pltf. became possessed of the land as alleged, by which the owners in fee demised & leased unto certain lessees, whose interest afterwards vested in defts., for thirty-eight years from Mar. 25, 1839, & all manner of veins & seams of coal, ironstone, & other stone & minerals of any manner or sort whatsoever that should or might be found or discovered in or under the said land, with full power, liberty, & authority to get the coal, ironstone, & other stone, & other minerals out of all pits already sunk or open, & the like liberty & authority to bore, dig, delve, & sink as many other pits as the lessees might think necessary. The lessees were to make reasonable satisfaction to the said owners in fee, their heirs & assigns, & their tenants, for the damage done to them respectively by the surface of their land being covered with rubbish or otherwise injured, or as they might sustain as well by the injury done to the lands of the said owners in fee in sinking & getting the said mines & minerals, & converting coal into charcoal, as for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the said owners by so doing. The lessees covenanted at their own costs & charges in case of damage or injury to such buildings to rebuild or repair same; & also over & besides the immediate damage to stock or crops so damaged to pay a satisfaction for all damages & trespasses sustained by the owners in fee after the rate of 40*s. per annum* for five years from the commencement of the damage, & after that time to pay such a price for the land so damaged as should be settled by arbitration. Upon the payment by the lessees of the price so settled, they were to have the free use & possession of the damaged land for the residue of the term demised. Defts. averred that the damage alleged

in the declaration was done by them in working their mines in pursuance of their lease, & they were always willing to settle the compensation in accordance with the covenants thereof. Besides demurring to these pleas on the ground that the said indenture of lease did not expressly or impliedly deprive pltf. of the right to have his land supported, & that the covenants set out merely gave a cumulative remedy; pltf. also replied that the buildings damaged had been erected since the making of the said lease:—*Held:* (1) by this indenture of lease the owners in fee granted the absolute right to the minerals; & (2) pltf.'s remedy for the loss of the support of his land & buildings was restricted to that provided by the covenants in the lease.—SMITH *v.* DARBY (1872), L. R. 7 Q. B. 716; 42 L. J. Q. B. 140; 26 L. T. 762; 37 J. P. 4; 20 W. R. 982.

Annotations:—*As to* (1) **Refd.** Dalton *v.* Angus, Works & Public Buildings Comrs. *v.* Angus (1881), 6 App. Cas. 740; Butterley Co. *v.* New Hucknall Colliery Co. (1908), 78 L. J. Ch. 63. *As to* (2) **Refd.** Aspden *v.* Seddon (1875), 10 Ch. App. 394; Bell *v.* Love (1883), 10 Q. B. D. 547; Mundy *v.* Rutland (1883), 31 W. R. 510; Pountney *v.* Clayton (1883), 11 Q. B. D. 820; Consett Waterworks Co. *v.* Ritson (1889), [1922] 2 Ch. 187, n.; Butterknowle Colliery Co. *v.* Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305.

958. —— —— Damage to surface soil & herbage.]—CHAMBER COLLIERY CO., LTD. *v.* TWYEROULD (1893), [1915] 1 Ch. 268, n., H. L.; *affg.* S. C. *sub nom.* TWYEROULD *v.* CHAMBER COLLIERY CO., [1892] W. N. 27, C. A.

Annotations:—**Consd.** New Sharlston Collieries Co. *v.* Westmorland (1900), [1904] 2 Ch. 443, n. **Apld.** N. E. Ry. *v.* Hastings, [1900] A. C. 260. **Refd.** Beard *v.* Moira Colliery Co., [1915] 1 Ch. 257; Davies *v.* Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488; Consett Industrial & Provident Soc. *v.* Consett Iron Co., [1922] 2 Ch. 135.

959. —— Compensation inadequate.]—BUTTERKNOWLE COLLIERY CO. *v.* BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE CO., No. 934, *ante*.

—— Mines under commons.]—*See* COMMONS, Vol. XI., pp. 65, 66, Nos. 907–910.

960. Effect of absence of compensation clause—Whether conclusive of right to support.]—BUTTERKNOWLE COLLIERY CO. *v.* BISHOP AUCKLAND INDUSTRIAL CO-OPERATIVE CO., No. 934, *ante*.

—— Mines under commons.]—*See* COMMONS, Vol. XI., p. 66, No. 911.

Compensation in case of compulsory purchase of lands.]—*See, generally,* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 152–163.

D. By Custom.

See, generally, CUSTOM & USAGES, Vol. XVII., p. 18, Nos. 187, 188.

961. Where custom applies—Custom at time of reservation.]—SMART *v.* MORTON, No. 953, *ante*.

962. —— Not custom of county.]—DAVIS *v.* TREHARNE, No. 954, *ante*.

963. Waste lands—Custom to let down surface without compensation — Bad.]—A custom of a manor for the lord to dig mines under the waste lands without leaving any support to the surface, or making any satisfaction for the injury caused by such surface, is bad.—BLACKETT *v.* BRADLEY (1862), 1 B. & S. 940; 31 L. J. Q. B. 65; 5 L. T. 832; 26 J. P. 358; 8 Jur. N. S. 588; 121 E. R. 963.

Annotations:—**N.F.** Gill *v.* Dickinson (1880), 5 Q. B. D. 159. **Consd.** Bell *v.* Love (1883), 10 Q. B. D. 547. **Distd.** Butterknowle Colliery Co. *v.* Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305. **Refd.** Wakefield *v.* Buccleuch (1867), L. R. 4 Eq. 613; Consett Industrial & Provident Soc. *v.* Consett Iron Co., [1922] 2 Ch. 135.

—— —— Effect of inclosure Acts.]—*See* COMMONS, Vol. XI., pp. 63–66, Nos. 898–912.

964. Copyhold lands—Custom to let down surface paying compensation—Good.]—ASPDEN *v.* SEDDON, PRESTON *v.* SAME, No. 798, *ante*.

——.]—*See* COPYHOLDS, Vol. XIII., pp. 80, 81, Nos. 1020–1027.

E. By Statute

965. Lands compulsorily conveyed—Under local Act.]—MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. *v.* JOHNSON (1883), 36 Ch. D. 629, n.; cited in 57 L. J. Ch. p. 156, D. C.

Annotation:—**Consd.** Evans *v.* M. S. & L. Ry. (1887), 36 Ch. D. 626.

966. —— —— Effect of subsequent incorporation of Railways Clauses Consolidation Act, 1845 (c. 20).]—A local Act in 1829 provided that a landowner in conveying his land to the co. might reserve the mines, but he should not be able to work those under the railway without finding security for any damage that might result. B., on conveying his lands reserved the mines. Afterwards the W. ry. co. obtained an Act converting their line which was originally intended to be a tramroad into a line for locomotives, & it was afterwards amalgamated with the C. line the Act for which incorporated above Act:—*Held:* B. could not, under above Act, insist on working the mines so as to endanger the railway until the co. purchased them, for his conveyance impliedly covenanted that the surface should have sufficient subjacent & adjacent support, & the general Act did not apply to cases where the land had been regulated by a prior contract.—CALEDONIAN RY. CO. *v.* BELHAVEN (LORD) (1857), 29 L. T. O. S. 286; 3 Jur. N. S. 573; 3 Macq. 56, H. L.

——.]—*See, generally,* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 152–156, 158–161.

Inclosure Acts.]—*See* COMMONS, Vol. XI., pp. 63–68, Nos. 898–919.

Subsidence caused by brine pumping.]—*See* Brine Pumping (Compensation for Subsidence) Act, 1891 (c. 40).

SUB-SECT. 4.—DISTURBANCE OF SUPPORT.

A. What amounts to Disturbance.

See EASEMENTS, Vol. XIX., pp. 173, 174, Nos. 1230–1233.

B. Remedies.

(*a*) *When Cause of Action Arises.*

967. General rule—Not until damage suffered.]—The owner of the mines might have removed every atom of the minerals without being liable to an action if the soil above had not fallen. So, if the superincumbent strata rested on the minerals he might have abstracted them, & substituted stone, or brick or any other substance, & would not have incurred any liability if the surface had not sunk (CRESSWELL, J.).—ROWBOTHAM *v.* WILSON (1857), 8 E. & B. 123; 27 L. J. Q. B. 61; 29 L. T. O. S. 357; 3 Jur. N. S. 1297; 5 W. R. 820; 120 E. R. 45, Ex. Ch.; *affd.* (1860), 8 H. L. Cas. 348, H. L.

Annotations:—**Consd.** Darley Main Colliery Co. *v.* Mitchell (1886), 11 App. Cas. 127. **Refd.** Dugdale *v.* Robertson (1857), 3 K. & J. 695; Bonomi *v.* Backhouse (1859), E. B. & E. 646; Brown *v.* Robins (1859), 4 H. & N. 186; Scots Mines Co. *v.* Loadhills Mines Co. (1859), 34 L. T. O. S. 34; Blackett *v.* Bradley (1862), 1 B. & S. 940; Shafto *v.* Johnson (1863), 8 B. & S. 252, n.; Proud *v.* Bates (1865), 6 New Rep. 92; Richards *v.* Harper (1866), 4 H. & C. 55; Williams *v.* Bagnall (1866), 15 W. R. 272; Woodall *v.* Hingley (1866), 14 L. T. 167; Richards *v.* Jenkins (1868), 18 L. T. 437; Buccleuch *v.* Wakefield (1870), L. R. 4 H. L. 377; Eadon *v.* Jeffcock (1872), L. R. 7 Exch. 379; Hext *v.* Gill (1872), 7 Ch. App. 699; Smith *v.* Darby (1872), L. R. 7 Q. B. 716; Aspden *v.*

Sect. 1.—Right of support: Sub-sect. 4, B. (a), (b), (c) & (d) i.]

Seddon (1875), 10 Ch. App. 394; Ramsay *v.* Blair (1876), 1 App. Cas. 701; Bell *v.* Love (1883), 10 Q. B. D. 547; Dixon *v.* White (1883), 8 App. Cas. 833; Pountney *v.* Clayton (1883), 11 Q. B. D. 820; Consett Waterworks Co. *v.* Ritson (1889), [1922] 2 Ch. 187, n.; G. N. Ry. *v.* I. R. Comrs., [1901] 1 K. B. 416; Sitwell *v.* Londesborough, [1905] 1 Ch. 460; Butterknowle Colliery Co. *v.* Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305; Butterley Co. *v.* New Hucknall Colliery Co., [1910] A. C. 381; Davies *v.* Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488; Thomson *v.* St. Catharine's College, Cambridge, etc. (1918), 118 L. T. 758; Westhoughton U. C. *v.* Wigan Coal & Iron Co., [1919] 1 Ch. 159; Davies *v.* Powel Duffryn Steam Coal Co. (No. 2) (1921), 91 L. J. Ch. 40; Consett Industrial & Provident Soc. *v.* Consett Iron Co., [1922] 2 Ch. 135. **Mentd.** Solomon *v.* Vintners' Co. (1859), 4 H. & N. 585; Jones *v.* Tapling (1862), 8 Jur. N. S. 333; Murchie *v.* Black (1865), 19 C. B. N. S. 190; Hammersmith, etc. Ry. *v.* Brand (1869), L. R. 4 H. L. 171; Hall *v.* Byron (1876), 4 Ch. D. 667; Dalton *v.* Angus (1881), 6 App. Cas. 740; N. B. Ity. *v.* Park Yard Co., [1898] A. C. 643.

See, further, LIMITATION OF ACTIONS, Vol. XXXII., pp. 340, 341, Nos. 237–240; EASEMENTS, Vol. XIX., p. 174, Nos. 1234–1237; DAMAGES, Vol. XVII., pp. 90, 91, Nos. 77–82.

(b) Who may Sue and be Sued.

968. Who may sue—Local authority.]—A local authority may act as relators in an action brought by the A.-G. for the purpose of abating a public nuisance, & may themselves maintain an action for damages for a nuisance affecting property of which they are the actual owners.

The proposition contended for is that because a local board is a corpn. existing for statutory purposes it has not the ordinary proprietary rights in respect of property which belongs to it. That is a very novel proposition & it has been candidly admitted that, if it is well founded, to put an extreme case, the corpn. of Liverpool, who are the owners of St. George's Hall, would have no right of action against a private person who, in working his coal mine, undermined the hall & let it down & destroyed it. But in such a case the corpn. have, as it seems to me, the ordinary common law rights attached to the possession of real property (WILLS, J.).—A.-G. *v.* LOGAN, [1891] 2 Q. B. 100; 65 L. T. 162; 55 J. P. 615; 7 T. L. R. 279, D. C.

Annotations:—**Consd.** Wednesbury Corpn. *v.* Lodge Holes Colliery Co., [1907] 1 K. B. 78. **Reid.** A.-G. & Spalding R. C. *v.* Garner, [1907] 2 K. B. 480.

——.]—*See* HIGHWAYS, Vol. XXVI., pp. 331, 455, 456, Nos. 628–631, 1715, 1716.

——.]—*See, generally,* EASEMENTS, Vol. XIX., pp. 184–186, Nos. 1340–1371.

969. Who may be sued—Personal representatives.]—*Re* DONEGAL (MARQUIS), DIMOND *v.* PENNINGTON, [1888] W. N. 112.

——.]—*See* EXECUTORS, Vol. XXIV., p. 648, Nos. 6741, 6742.

—— **Trustee.**]—*See* EXECUTORS, Vol. XXIV., p. 658, No. 6850.

——.]—*See, generally,* EASEMENTS, Vol. XIX., pp. 186, 187, Nos. 1372–1378.

(c) Damages.

See, generally, EASEMENTS, Vol. XIX., pp. 192–195, Nos. 1443–1472; DAMAGES, Vol. XVII., p. 78 *et seq.*

970. Right to damages.]—JEFFRIES *v.* WILLIAMS, No. 906, *ante.*

971. ——.]—PRICE *v.* PLASKYNASTON COLLIERY CO., No. 920, *ante.*

972. ——.]—(1) Mines were granted by deed, with power to the grantee & his assigns to work, making reasonable compensation for all damage occasioned to the surface of the lands, or to buildings thereon, by the exercise of the powers by the indenture granted:—*Held:* damage by subsidence was not covered by the compensation clause, & therefore the assigns of the grantee were liable to an action to recover damages for injury done to the surface of the land by subsidence caused by working the mines.

(2) A lessee of underground strata is not liable in damages to the owner of buildings on the surface, who has acquired a right to have the buildings uninjured by underground workings, for injury occasioned to the buildings by reason of subsidence happening during the currency of the lease, caused, not by any act of commission on the part of the lessee, but resulting from an excavation made in the underground strata by the lessee's predecessor in title prior to the date of the lease. Therefore, where pltfs.' buildings, erected more than twenty years before action, on land, the mines under which were worked by defts. under a lease, were injured, during the currency of the lease, & within six years before action, by subsidence caused, not by the acts of defts., but by the acts of their predecessor in title, done prior to the date of the lease:—*Held:* defts. were not liable.—GREENWELL *v.* LOW BEECHBURN COAL CO., [1897] 2 Q. B. 165; 66 L. J. Q. B. 643; 76 L. T. 759; 13 T. L. R. 471.

Annotations:—*As to* (2) **Consd.** Hall *v.* Norfolk, [1900] 2 Ch. 493. *Generally,* **Reid.** Westmoreland *v.* New Sharlston Colliery Co. (1898), 79 L. T. 716; A.-G. *v.* Roe, [1915] 1 Ch. 235.

973. ——.]—WESTHOUGHTON URBAN COUNCIL *v.* WIGAN COAL & IRON CO., No. 800, *ante.*

974. Action on covenant for compensation—Cumulative remedy.]—HARRIS *v.* RYDING, No. 945, *ante.*

975. What damages recoverable—Ordinary use of land to be considered.]—A conveyance of land in fee was made subject to a reservation to the grantors of mines & minerals, & extensive powers of occupying & using the surface for the purpose of working same. It was provided thereby that it should not be lawful for the grantee to do or suffer anything to be done whereby the grantors should be prevented, hindered, or obstructed in the exercise of the powers reserved, & also that the grantors should make to the grantee annually reasonable compensation for damage or spoil of ground to be occasioned by the exercise of the reserved powers. Previously to the date of the deed of conveyance the premises were leased to the grantee, subject to similar reservations to those in the conveyance, & workings already existed which had taken place under such reservations:—*Held:* (1) no restriction was placed by the words of the conveyance on the use by the grantee of the land for any purpose to which it was applicable so long as he did not touch or interfere with the minerals, & the compensation for damage or spoil of ground occasioned by the exercise of the powers reserved must be estimated with reference to the value of the land for any purpose to which an ordinary owner might put it; & (2) compensation was due in respect of

PART XIII. SECT. 1, SUB-SECT. 4.—B. (b).

n. *Grantor of irrevocable licence—Not liable for subsidence caused by licencee.*]—ATKINSON *v.* KING (1878), 2 L. R. Ir. 320.—**IR.**

PART XIII. SECT. 1, SUB-SECT. 4.—B. (c).

975 i. *What damages recoverable—Ordinary use of land to be considered.*]—The obligation to pay for damages to vacant ground includes the extra cost necessary for the foundations of new buildings thereon.—BAIRD & CO., LTD. *v.* BARR (1904), 6 F. (Ct. of Sess.) 524; 41 Sc. L. R. 385; 11 S. L. T. 710.—**SCOT.**

damage arising from the use subsequently to the conveyance of land included therein that had been previously occupied & used for mining purposes, but not in respect of the mere existence of workings in being at the time of the deed, or their subsequent user without any fresh damage. —MORDUE *v.* DURHAM (DEAN & CHAPTER) (1873), L. R. 8 C. P. 336; 42 L. J. C. P. 114; 28 L. T. 593.

976. —— Not in respect of old workings.]—MORDUE *v.* DURHAM (DEAN & CHAPTER), No. 975, *ante*.

—— ——.]—*See* EASEMENTS, Vol. XIX, p. 187, Nos. 1377, 1378.

See, further, DAMAGES, Vol. XVII., pp. 90, 91, Nos. 77–85.

977. Costs of inquiry as to damages—Whether included in costs of action—Compromise.]—Pltfs. brought two actions against defts. to recover damages caused by the subsidence of land of which they were owners in fee by reason of the working by defts. of their mines lateral & vertical to pltfs.' lands. By consent, an order was made in both actions directing an inquiry before an official referee as to damages in each action, the costs of such inquiries to be in the discretion of the official referee. A large sum in costs was incurred by pltfs. in respect to the inquiries under two orders by the official referee, but subsequently a compromise was arranged, & an agreement was executed by the parties in 1914 under which all proceedings in the two actions were stayed & defts. agreed to pay pltfs.' costs of the actions:—*Held:* under the circumstances pltfs.' costs of the actions included their costs of the inquiries so far as they had proceeded.—STOKE-UPON-TRENT CORPN. *v.* STAFFORDSHIRE COAL & IRON CO. (1916), 85 L. J. Ch. 812; 115 L. T. 621; 80 J. P. 273.

Damage to highways.]—*See* HIGHWAYS, Vol. XXVI., pp. 331, 439, 455, 456, Nos. 629–631, 1564, 1565, 1715, 1716.

(*d*) *Injunction.*

i. *In General.*

See, generally, INJUNCTION, Vol. XXVIII., pp. 361 *et seq.*

978. When granted—Whether granted quia timet.]—MUNDY *v.* RUTLAND (DUKE), No. 931, *ante*.

979. —— —— When damage irreparable.]—I have no doubt this ct. would interfere by injunction on the ground it always interferes upon—namely, to prevent irreparable damage when the damage is only threatened (JESSEL, M.R.).—BIRMINGHAM CORPN. *v.* ALLEN (1877), 6 Ch. D. 284; 46 L. J. Ch. 673; 37 L. T. 207; 42 J. P. 184; 25 W. R. 810, C. A.

Annotations:—**Refd.** Darley Main Colliery Co. *v.* Mitchell (1886), 11 App. Cas. 127; Manchester Corpn. *v.* New Moss Colliery, [1906] 1 Ch. 278; Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822; L. & N. W. Ry. *v.* Howley Park Coal & Cannel Co. (1910), 103 L. T. 26; Manley *v.* Burn, [1916] 2 K. B. 121. **Mentd.** Dalton *v.* Angus (1881), 6 App. Cas. 740.

980. —— —— When intention of working expressed.]—SIDDONS *v.* SHORT, No. 912, *ante*.

981. —— —— When damage imminent & certain.]—No injunction [against excavation, whereby an adjoining owner's soil is let down] could be obtained unless injury was imminent & certain (LORD BRAMWELL).—DARLEY MAIN COLLIERY CO. *v.* MITCHELL (1886), 11 App. Cas. 127; 55 L. J. Q. B. 529; 54 L. T. 882; 51 J. P. 148; 2 T. L. R. 301, H. L.; *affg.* S. C. *sub nom.* MITCHELL *v.* DARLEY MAIN COLLIERY CO. (1884), 14 Q. B. D. 125, C. A.

Annotations:—**Refd.** Hall *v.* Norfolk, [1900] 2 Ch. 493; Kennard *v.* Cory, [1922] 1 Ch. 265. **Mentd.** Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141; Serrao *v.* Noel (1885), 15 Q. B. D. 549; Crumble *v.* Wallsend L. B., [1891] 1 Q. B. 503; A.-G. *v.* Conduit Colliery Co., [1895] 1 Q. B. 301; Greenwell *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165; Jordeson *v.* Sutton, Southcoates & Drypool Gas Co. (1898), 67 L. J. Ch. 666; Markey *v.* Tolworth Joint Hospital District Board (1900), 69 L. J. Q. B. 738; Carey *v.* Bermondsey B. C. (1903), 2 L. G. R. 219; Harrington *v.* Derby Corpn., [1905] 1 Ch. 205; West Leigh Colliery Co. *v.* Tunnicliffe & Hampson, [1908] A. C. 27; Manley *v.* Burn, [1916] 2 K. B. 121; Nash *v.* Rochford R. D. C., [1917] 1 K. B. 384; Boynton *v.* Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213; Huyton & Roby Gas Co. *v.* Liverpool Corpn., [1926] 1 K. B. 146.

—— ——.]—*See, generally*, INJUNCTION, Vol. XXVIII., pp. 404–411, Nos. 311–365; EASEMENTS, Vol. XIX., pp. 188, 189, Nos. 1391–1400.

982. —— When subsidence caused—Though no substantial damage proved.]—In the year 1865 Lady W., pltf.'s predecessor in title, sold & conveyed to J. C. & Sons, Ltd., at the price of £26,500, all the mines, veins, & seams of coal, iron, & other ores under certain hereditaments known as the S. estate, containing 1,178 acres or thereabouts, together with full power to make, sink, & work all such pits, shafts, drifts, levels, & do all such other acts as might be deemed necessary or convenient for working, searching for, getting & raising the same & to do all other works & things which might be necessary or convenient for the purposes aforesaid, or any of them, doing as little damage as might be consistent with the due & proper carrying out of the said works. The deed contained a covenant by the co. not to sink any shaft or drive any level which should or might weaken or damage any building on the vendor's lands, & to make satisfaction to be assessed as therein mentioned for the spoil, or damage, or injury done to, in, & upon the said lands by the machinery for getting & raising the said coal, or by the sinking or working of any pit or shaft, or otherwise by virtue of or under the powers aforesaid. Defts. in this action were lessees of J. C. & Sons, Ltd. They were working on the long-wall system some of the deeper seams of coal under the S. estate, & had caused some subsidence of the surface in places, but no substantial damage was proved. Pltf. brought this action for an injunction to restrain defts. from working the coal so as to cause subsidence of the surface. Defts. claimed a right to cause subsidence as long as they worked in a proper method. There was a conflict of evidence whether it was possible to work the coal at all without causing subsidence, but it was in effect admitted that it was not possible to do so at a profit:—*Held:* the grant of the minerals did not expressly or by necessary implication give power to let down the surface, & pltf. was entitled to the injunction.—NEW SHARLSTON COLLIERIES CO., LTD. *v.* WESTMORLAND (EARL) (1900), [1904] 2 Ch. 443, n.; 73 L. J. Ch. 338, n.; 82 L. T. 725, H. L.; *affg.* S. C. *sub nom.* WESTMORELAND (EARL) *v.* NEW SHARLSTON COLLIERY CO., LTD. (1899), 80 L. T. 846, C. A.

Annotations:—**Refd.** Butterknowle Colliery Co. *v.* Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305; Beard *v.* Moira Colliery Co., [1915] 1 Ch. 257; Davies *v.* Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488; Thomson *v.* St. Catharine's College, Cambridge, etc. (1918), 118 L. T. 758; Welldon *v.* Butterley Co., [1920] 1 Ch. 130; Consett Industrial & Provident Soc. *v.* Consett Iron Co., [1922] 2 Ch. 135.

983. —— ——.]—A local authority were the owners of the surface of land & of the schools erected thereon. The minerals underlying their land & the adjoining lands had been for many

Sect. 1.—Right of support: Sub-sect. 4, B. (d) i. & ii., & (e). Sect. 2.]

years worked by defts. The surface of pltf.'s land subsided with consequent injury to the schools & pltfs. sued defts. claiming an injunction & damages for the injury caused by their workings. Defts. alleged that the subsidence & injury had been occasioned by old workings, &, alternatively, that pltfs. were only entitled to relief in respect of damage, if any, caused since 1909, *i.e.* within six years before the issue of the writ:—*Held:* on the evidence, subsidence & damage had been occasioned by defts. workings since 1909, & pltfs. were entitled to an injunction & an inquiry as to damage on that footing.—DURHAM COUNTY COUNCIL *v.* SOUTH MEDOMSLEY COLLIERY, LTD. (OWNERS) (1916), 80 J. P. 343.

984. —— Not where provision for indemnity.]—BUTTERLEY CO., LTD. *v.* NEW HUCKNALL COLLIERY CO., LTD., No. 940, *ante*.

—— When damages not adequate remedy.]—*See* INJUNCTION, Vol. XXVIII., p. 405, Nos. 320, 321; EASEMENTS, Vol. XIX., p. 187, No. 1379.

985. Ground for refusal — Not failure to allege damages not adequate remedy.] — SIDDONS *v.* SHORT, No. 912, *ante*.

986. Form of injunction.] — PROUD *v.* BATES, No. 17, *ante*.

ii. *Interim Injunction.*

See, generally, INJUNCTION, Vol. XXVIII., pp. 371 *et seq.*

987. When interim injunction will be granted—Not when merely risk of irreparable damage.]—An injunction to restrain the working of valuable mines refused, under the circumstances, on condition of deft.'s making certain admissions for the purpose of enabling pltf. to bring an action, although there was reason to apprehend that if the working was continued, pltf.'s houses upon the surface would be totally destroyed or irreparably damaged before the legal right could be decided.

By granting the injunction I shall be stopping the working of the mine, a thing which, of all others, this ct. is most averse to do, though it may under certain circumstances be compelled to do it (LORD COTTENHAM, C.).—HILTON *v.* GRANVILLE (LORD) (1841), 4 Beav. 130; Cr. & Ph. 283; 10 L. J. Ch. 398; 49 E. R. 288.

Annotations:—**Mentd.** Ridgway *v.* Roberts (1844), 4 Hare, 106; Albert (Prince) *v.* Strange (1849), 1 H. & Tw. 1.

988. —— By consent.]—BAYNTON *v.* LEONARD (1853), Seton's Judgments & Orders, 6th ed. 576.

989. —— ——.] — WALL *v.* DUNN (1876), Seton's Judgments & Orders, 6th ed. 574.

(c) *Inspection.*

990. Power of court to order — Inspection of workings.]—The ct. will order the lessees of a colliery, who have worked the coal pits demised to them by means of a shaft made on their own adjoining land, to permit inspection & access to the colliery demised by having access to it through & over the lessees' own land, to ascertain the extent, condition, & state of such colliery.

In cases where orders of this kind have been made, they have been made on the ground of "necessity"; that, without some such inspection pltf. was wholly unable to prove his case. There was an allegation in the present case also as to the working for coal under the buildings, which had caused them to crack & sink, & that, therefore, there was now no adequate support; now the moment inadequate support commenced, irreparable damage forthwith followed, which rendered this also a case of irreparable damage; this was to some extent admitted by the answer, & against which damage pltf. had a right to be protected by an injunction, when such irreparable damage was made to appear. In similar cases the ct. had allowed inspection to be made before the hearing of the cause (WIGRAM, V.-C.).—LEWIS *v.* MARSH (1849), 8 Hare, 97; 13 L. T. O. S. 89; 68 E. R. 288.

991. —— ——.] — BAYNTON *v.* LEONARD (1853), Seton's Judgments & Orders, 6th ed. 576.

——.] — *See, generally*, INJUNCTION, Vol. XXVIII., pp. 509, 510, Nos. 1141–1148; R. S. C., Ord. 50, r. 3.

SECT. 2.—RIGHTS AFFECTING ENJOYMENT OF SURFACE.

Implied rights of working—On severance of minerals.]—*See* Part IV., Sect. 1, *ante*.

992. Extent of implied rights — Acts necessary for convenient working.]—A. being seised in fee of the manor of F. & the demesne lands thereof, & of all the coal mines lying under the manor, enfeoffed C. of & in certain closes, except & always reserved to the feoffor, his heirs, & assigns, all tithes of corn & grain, & also except & always reserved out of the said feoffment unto the feoffor & his heirs, all the coals in all or any of the said lands & premises, together with free liberty for them, the feoffor & his heirs, & his & their assigns & servants, at all times thereafter, during the time that he, the feoffor, & his heirs should continue owners & proprietors of the demesne lands of F., to sink & dig pits, or otherwise to sough & get coals in all & every the lands & premises, & to sell & carry away the same with carts & carriages, or otherwise to dispose of the same coals at his & their free will & pleasure; he, the feoffor, & his heirs, paying to the feoffee, his heirs, & assigns, such satisfaction for the damages as two neighbours, indifferently chosen by the feoffee & feoffor, their heirs, & assigns, should from time to time award. The heirs of the feoffor having for a valuable consideration conveyed to a purchaser in fee the manor of F. & its demesne lands, with its appurtenances, & all the coal mines under, amongst others, the lands in question, etc.:—*Held:* the coals were, by the exception, reserved to the feoffor in fee, & therefore they passed to the purchaser; &, also, the latter was entitled, under the express liberty reserved, to enter upon the land, to dig pits, & get the coals, so long as he remained owner of the demesne lands:—*Semble:* the express liberty is not restrictive of that which would be implied by law to get the coals, & the purchaser would be entitled to an incidental right to get them co-extensive with his estate.

The incidental power would warrant nothing beyond what was strictly necessary for the convenient working of the coals; it would allow no use of the surface, no deposit upon it to a greater extent or for a longer duration than should be

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PART XIII. SECT. 2.

992 i. *Extent of implied rights—Acts necessary for convenient working.]*—CONIAGAS MINES *v.* COBALT & JAMIESON MEAT CO., CONIAGAS MINES, LTD. *v.* JACOBSON & BLAIS (1910), 15 O. W. R. 761; 20 O. L. R. 622.—**CAN.**

992 ii. —— ——.]—BANK OF SCOTLAND *v.* STEWART (1891), 18 R. (Ct. of Sess.) 957; 28 Sc. L. R. 735.—**SCOT.**

992 iii. —— ——.]—ANDERSON *v.* M'CRACKEN BROTHERS (1900), 2 F. (Ct. of Sess.) 780; 37 Sc. L. R. 587; 7 S. L. T. 427.—**SCOT.**

necessary, no attendance upon the land of unnecessary persons. It would be questionable at least, whether it would authorise a deposit upon the land for the purposes of sale, & whether it would justify the introduction of purchasers to view the coals. The express power gives great latitude in these respects. . . . It has therefore its necessary use . . . though it work nothing in restraint of the incidental right which A. & his heirs would otherwise have had (BAYLEY, J.).—CARDIGAN (EARL) *v.* ARMITAGE (1823), 2 B. & C. 197; 3 Dow. & Ry. K. B. 414; 107 E. R. 356.

Annotations:—**Apld.** Rogers *v.* Taylor (1857), 1 H. & N. 706. **Distd.** Clegg *v.* Clegg (1861), 3 Giff. 322; Goold *v.* Great Western Deep Coal Co. (1865), 2 De G. J. & Sm. 600. **Consd.** Hamilton *v.* Graham (1871), L. R. 2 Sc. & Div. 166. **Refd.** Bullen *v.* Denning (1826), 5 B. & C. 842; Doe d. Douglas *v.* Lock (1835), 2 Ad. & El. 705; Eastern Archipelago Co. *v.* R. (1853), 2 E. & B. 856; Proud *v.* Bates (1865), 6 New Rep. 92; Savill *v.* Bethell, [1902] 2 Ch. 523; Thomson *v.* St. Catharine's College, Cambridge & Mappin's Masbro' Old Brewery, etc. (1918), 118 L. T. 758. **Mentd.** Scratton *v.* Brown (1825), 4 B. & C. 485; Blackett *v.* Royal Exchange Assce. (1832), 1 L. J. Ex. 101; Wickham *v.* Hawker (1840), 7 M. & W. 63; Morris *v.* Rhydydefed Colliery Co. Glamorganshire (1858), 5 Jur. N. S. 339.

993. —— ——.] — DURHAM & SUNDERLAND RY. CO. *v.* WALKER, No. 1027, *post*.

994. —— —— **Boring through upper stratum.**] —(1) The upper veins or seams of coal of a tract in the forest of Dean were awarded or "galed" by the Crown, under 1 & 2 Vict. c. 43, to A., with the reservation that the underlying veins might be awarded or "galed" to the other parties, but to be so worked as not to impede or injure the working of tracts already allotted; & the veins underlying A.'s allotment were afterwards awarded or "galed" to B.:—*Held:* the restriction in the reservation only applied to the mode of working the lower seams when they were reached by the galee thereof, & did not limit the right of granting liberty to sink shafts through the upper seams; also B. could not be restrained by injunction from sinking such a shaft.

(2) The galee, who is the grantor in the reservation, has no other estate or interest under his gale than the right of getting the seams of coal which are granted to him; & after he has gotten the coal has interest ceases, & the space occupied by the coal that has been won is vested in the Crown who remains owner of all that is not granted (LORD WESTBURY, C.).

(3) Where there is a general reservation or exception the right or powers complied in such reservation or exception shall not be restrained or abridged by affirmative words expressive of part of that which is implied, because a general power which is incident or implied shall not be restrained by a particular power given by the grantor in the affirmative, which the grantee had before. In such a case the maxim "*expressum facit cessare tacitum*" does not apply, & the words giving the special power shall not restrain the general power, because they are in the affirmative only (LORD WESTBURY, C.).—GOOLD *v.* GREAT WESTERN DEEP COAL CO., GREAT WESTERN DEEP COAL CO. *v.* GOOLD (1865), 2 De G. J. & Sm. 600; 6 New Rep. 357; 13 L. T. 109; 29 J. P. 820; 11 Jur. N. S. 865; 13 W. R. 1111; 46 E. R. 508, L. C.

Annotations:—*Generally*, **Mentd.** Proud *v.* Bates (1865), 13 L. T. 61; Hayles *v.* Pease & Partners, [1899] 1 Ch. 567.

995. —— —— ——.] — Where a railway co. purchase under their statutory powers some of the underlying minerals as well as the surface of land, the rights & obligations which arise from the purchase as between the co. & the owner of the remaining minerals, are determined by Railway Clauses Consolidation Act, 1845 (c. 33), ss. 77–85, not by the common law.

At common law, where, by agreement, the upper portion of land is sold, the mines being reserved, without any express stipulation, I think a necessary implication arises in favour of the mine owner, that, if he cannot get the coal otherwise, he may, working in a reasonable way, bore through the upper land which is sold to get at the mine. Under the statute, where the upper portion of the land is taken compulsorily, leaving the mine, I think the implication must be the same (LORD ESHER, M.R.).—*Re* GERARD (LORD) & LONDON & NORTH WESTERN RY. CO.'S ARBITRATION, [1895] 1 Q. B. 459; 64 L. J. Q. B. 260; 72 L. T. 142; 43 W. R. 374; 11 T. L. R. 170; *sub nom. Re* LONDON & NORTH WESTERN RY. CO. & GERARD (LORD), 14 R. 201, C. A.

Annotations:—**Refd.** Glamorganshire Canal Navigation Co. *v.* Nixon's Navigation Co. (1901), 85 L. T. 53; Manchester Corpn. *v.* New Moss Colliery, [1906] 1 Ch. 278. **Mentd.** *Re* Carlisle & Northumberland County Council (1911), 10 L. G. R. 50; L. & N. W. Ry. *v.* Howley Park Coal & Cannel Co., [1911] 2 Ch. 97.

996. —— —— **Permanent destruction of surface.**]—39 Geo. 3, c. 21, which enabled ecclesiastical corpns. to sell lands for the redemption of the land tax, provided in sect. 12 that no minerals belonging to any lands sold by such corpn. should pass in any conveyance of such lands either by express or general words, but should be always absolutely excepted & reserved as fully as if expressly excepted in the conveyance. Land Tax Redemption Act, 1817 (c. 100), contained enactments confirming invalid sales under the first Act. In the interval between the two Acts a prebendary sold lands, reserving in the conveyance the pipe & potter's clay thereunder to the prebendary for the time being, except within 20 perches from the houses & inclosures forming part of the lands sold:—*Held:* the subsequent confirming enactments of Land Tax Redemption Act, 1817 (c. 100), s. 25, did not so ratify the conveyance as to give validity to the exception from the reservations, but all the clay under the lands conveyed was reserved to the prebendary & his successors in title, & they had the powers of working the same incident to the reservation thereof under the first-mentioned Act.

There will be a declaration that defts. are not entitled to work or get the clay so as to destroy, injure or let down the surface of the lands comprised in the indenture (HALL, V.-C.).—WHIDBORNE *v.* ECCLESIASTICAL COMRS. FOR ENGLAND (1877), 7 Ch. D. 375; 47 L. J. Ch. 129; 37 L. T. 346.

997. —— —— ——.]—MARSHALL *v.* BORROWDALE PLUMBAGO MINES & MANUFACTURING CO., LTD. (1892), 8 T. L. R. 275.

998. —— —— —— **Quarrying.**] — BELL *v.* WILSON, No. 2, *ante*.

999. —— —— —— **Necessity for express reservation.**]—HEXT *v.* GILL, No. 41, *ante*.

1000. —— —— —— **Compensation.**]—Case in which compensation for damage done to an

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999 i. —— —— *Permanent destruction of surface—Necessity for express reservation.*]—When the owner of land grants a lease of the minerals he retains a right to support of the surface, unless an intention that he is not to have that right is made plain by the lease.—BLACKBALL COAL CO., LTD. *v.* SHRIVES (1904), 23 N. Z. L. R. 872.—**N.Z.**

999 ii. ——————.]—DIXON *v.* WHITE (1883), 8 App. Cas. 833; 10 R. (Ct. of Sess.) (H. L.) 45; 20 Sc. L. R. 541.—**SCOT.**

o. Ancillary rights—Deposit of soil from quarry on surface.]—The lessee in working the quarry, cast the soil & refuse upon a portion of the land in the possession of the lessor & immediately adjoining the quarry:—*Held:* the lessee had a right to do so as

Sect. 2.—*Rights affecting enjoyment of surface. Sect.* 3: *Sub-sects.* 1 *&* 2, *A. & B.*]

estate was awarded once for all, so as to take away any right of action for subsequent damage against defts., who were held to be not wrongdoers, but persons exercising their rights of mining operations over the land of pltf., subject to paying compensation for the permanent injury thereby occasioned to the said estate.—GREAT LAXEY MINING CO. *v.* CLAGUE (1878), 4 App. Cas. 115; 27 W. R. 417, P. C.

1001. —— —— Temporary disturbance of surface.]—WHIDBORNE *v.* ECCLESIASTICAL COMRS. FOR ENGLAND, No. 996, *ante.*

1002. —— —— ——.]—MARSHALL *v.* BORROWDALE PLUMBAGO MINES & MANUFACTURING CO., LTD. (1892), 8 T. L. R. 275.

1003. Ancillary rights—Provision of repair pits for sough.]—A. & B. being severally seised of parcels of woody ground, & B. having other lands adjoining to his woody ground, & intending to make a colliery under his ground, A. grants to B. his heirs & assigns, liberty for him, his heirs & assigns, to carry up a sough or drain through A.'s woody ground into B.'s woody ground, & also liberty for B. his heirs & assigns, to make two little sough pits in A.'s woody ground, for the more easy & safe carrying up the tail of the sough, one of which was to be covered in as soon as conveniently might be after making the sough, & the other to be kept open for examining the sough so long as was necessary for that purpose, & no longer: & B. covenanted that he, his heirs & assigns, would not damage the trees growing on A.'s woody ground, nor get any of the coals under it, except what should arise in the drift of the intended sough, & that A., his heirs & assigns, from time to time & at all times after might go down into any pit or pits of B., his heirs or assigns, to discover whether any coals of A., his heirs or assigns, should be gotten; & that B., his heirs & assigns, should repair any injury to A.'s fence, etc.:—*Held:* by the grant to B., his heirs, etc., of the liberty of making the sough in A.'s land the liberty of making sought pits at any time afterwards, while the object of the grant remained, being necessary for the purpose of repairing the sough, passed as incident thereto: & the use of such sough, for the carrying up of which into B.'s woody ground liberty was granted, was not confined to the getting of coals under B.'s woody ground, but extended also to the adjoining lands of B.: & the liberty of making new sough pits for necessary repairs of the sough, after the two original sough pits had been covered in by mutual consent, was not controlled by the special liberty given for making such original sough pits, the uses of which were limited by the grant; it appearing upon the face of it that the grant of the sough was intended to have continuing operation while any coals in B.'s woody ground & adjoining lands remained to be gotten.

It would be very illogical to deduce a conclusion from the terms of a deed comprehending covenants, without which one of the parties could not have certain rights, & from their not expressly granting matters which would pass as incidents without being mentioned at all, that such matters in the nature of incidents were intended not to be granted (LORD ELLENBOROUGH, C.J.).—HODGSON *v.* FIELD (1806), 7 East, 613; 3 Smith, K. B. 538; 103 E. R. 238.

Annotation:—**Refd.** Cardigan *v.* Armitage (1823), 2 B. & C. 197.

1004. —— Deposit of mineral on surface.]—CARDIGAN (EARL) *v.* ARMITAGE, No. 992, *ante.*

1005. —— ——.]—MARSHALL *v.* BORROWDALE PLUMBAGO MINES & MANUFACTURING CO., LTD. (1892), 8 T. L. R. 275.

1006. —— Introduction of strangers on to surface—Prospective purchasers of minerals.]—CARDIGAN (EARL) *v.* ARMITAGE, No. 992, *ante.*

1007. —— Erection of machinery—Engine house & pond for supply of engine.]—By a deed dated in 1630, the grantor conveyed in fee, farm land in the manor of A., in the county of Northumberland, "excepting & reserved out of the grant all mines of coal within the fields & territories of A. aforesaid, together with sufficient wayleave & stayleave to & from the said mines, with liberty of sinking & digging pit & pits," with a covenant by the grantees that they, their heirs & assigns, "should give such accustomed recompense for digging & breaking the ground within A. aforesaid, in which any pits should thereafter happen to be sunk & wrought, as formerly had been usually given & allowed there in like cases." By another deed of the same date, same parties conveyed in fee farm, to other persons, lands in the manor of H., adjoining A., with a like exception, reservation, & covenant. *Qu.:* whether under this reservation of a "sufficient wayleave" the coal owner had now a right to make a railway, for the purpose of carrying the coals from the mines for shipment with cuttings & embankments, & fenced in so as to exclude the owner of the soil:—*Held:* (1) the right was not confined to such ways as were used at the time of the grant; (2) under the reservation of liberty of sinking pits, the right of erecting a steam engine, & other machinery necessary for draining them, with all proper accessories passed as incident thereto; (3) under the reservation in the former deed, the coal owner could not carry over A. coals got in H., although forming part of the same mineral field.

(4) To an action of trespass for breaking pltf.'s close, & laying a railroad thereon, deft. justified under the reservation in the above deeds. Pltf. new assigned to the plea, that the trespasses were committed on other & different occasions, & to a greater extent than was necessary, & for other & different purposes, & on other parts of the close; to which there was judgment by default:—*Held:* on these pleadings, pltf. could not dispute that some species of railroad was within the reservation, but the question was whether the railroad was constructed in a direction or in a manner unauthorised by the reservation.

As the coals in all the seams are excepted, & a right to dig pits for getting those coals reserved,

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incidental to his liberty of quarrying.—MIDDLETON *v.* CLARENCE (1877), I. R. 11 C. L. 499.—**IR.**

p. —— *Right to lay down rails.*]—ANTRIM (EARL) *v.* DOBBS (No. 1) (1891), 30 L. R. Ir. 424.—**IR.**

q. —— ——.]—Mineral tenants acquired right from a proprietor to use a road which was the only access to his mansion house:—*Held:* the mineral tenants were not entitled to use the road in a manner inconsistent with its use as the access to the mansion house, & were not entitled to lay down iron plates or rails along the road.—GALBRAITH'S TRUSTEE *v.* EGLINTON IRON CO. (1868), 7 Macph. (Ct. of Sess.) 167; 41 Sc. Jur. 93.—**SCOT.**

r. *Subsidence through excavation by previous occupier—Liability of present occupier.*]—A coal mining co. is not liable for damages caused by a subsidence of the surface occurring during its occupation, but resulting from an excavation made by a previous occupier.—STELLARTON TOWN *v.* ACADIA COAL CO. (1898), 31 N. S. R. (19 R. & G.) 261.—**CAN.**

t. —— ——.]—WHITE'S TRUSTEES *v.* HAMILTON (DUKE) (1887), 14 R. (Ct. of Sess.) 597; 24 Sc. L. R. 395.—**SCOT.**

a. *Whether mine proprietor has control over surface proprietor.*]—Where the property of the soil has been separated from that of coal below it, the proprietor of the coal cannot control the proprietor of the soil in

all things that are "depending on that right & necessary for the obtaining it," are reserved also. . . . Consequently, the coal owner had, as incident to the liberty to dig pits, the right to fix such machinery as would be necessary to drain the mines, & draw the coals from the pits. The case finds that the steam engine which was erected, was necessary for the winning & working the lower seams, which are the principal seams in that coalfield; & therefore deft. had a right to erect it. The pond for the supply of the engine, & the engine house, seem to have been necessary accessories to such an engine, & were therefore lawfully made (PARKE, B.).

Deft. has by his conduct shown that a railway in that direction was unnecessary & pltf. is entitled to recover for the damage occasioned by it (PARKE, B.).—DAND *v.* KINGSCOTE (1840), 6 M. & W. 174; 2 Ry. & Can. Cas. 27; 9 L. J. Ex. 279; 151 E. R. 370.

Annotations:—As to (1) **Apld.** Rogers *v.* Taylor (1857), 1 H. & N. 706; Newcomen *v.* Coulson (1877), 5 Ch. D. 133. **Consd.** Finch *v.* G. W. Ry. (1879), 5 Ex. D. 254. **Refd.** Bishop *v.* North (1843), 11 M. & W. 418; Bostock *v.* Sidebottom, Sidebottom *v.* Bostock (1852), 16 Jur. 1013; A.-G. *v.* Cambridge Consumers Gas Co. (1868), L. R. 6 Eq. 282; Welldon *v.* Butterley Co., [1920] 1 Ch. 130. *As to* (4) **Distd.** Bidder *v.* North Staffordshire Ry. (1878), 4 Q. B. D. 412. **Refd.** Hamilton *v.* Graham (1871), L. R. 2 Sc. & Div. 166. *Generally*, **Mentd.** Pheysey *v.* Vicary (1847), 16 M. & W. 484.

1008. — — Appropriation of minerals in overlying strata.]—GOOLD *v.* GREAT WESTERN DEEP COAL CO., GREAT WESTERN DEEP COAL CO. *v.* GOOLD, No. 994, *ante*.

1009. —— Removal of overlying strata.]—ROBINSON *v.* MILNE, No. 63, *ante*.

1010. Liability to fence shafts & workings.]—A person entitled to the minerals under the land of another, with licence to make a mine shaft opening into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft so as to prevent its being a source of danger to his cattle which may be upon it; & is liable to an action for injury accruing to those cattle for want of such fencing.—WILLIAMS *v.* GROUCOTT (1863), 4 B. & S. 149; 2 New Rep. 419; 8 L. T. 458; 27 J. P. 693; 9 Jur. N. S. 1237; 11 W. R. 886; 122 E. R. 416; *sub nom.* GROUCOTT *v.* WILLIAMS, 32 L. J. Q. B. 237.

*Annotations:—***Distd.** Great Laxey Mining Co. *v.* Claque (1878), 4 App. Cas. 115. **Apld.** Hawken *v.* Shearer (1887), 56 L. J. Q. B. 284.

1011. Remedy for wrongful deposit of spoil—Measure of damage.]—Defts. having trespassed on pltfs.' land by tipping spoil thereon from their colliery:—*Held:* the amount of damages was not to be assessed by ascertaining merely the diminution in value of pltfs.' land, but the principle of the wayleave cases, *Martin* v. *Porter*, No. 567, *ante*; *Jeyon* v. *Vivian*, No. 701, *ante*; & *Phillips* v. *Homfray*, *Fothergill* v. *Phillips*, No. 548, *ante*, applied; namely, that if one person without leave of another uses the other's land for his own purposes he ought to pay for such user; therefore, as to so much of the land as was covered with spoil, the value of the land for the purpose for which it was used by the wrongdoers ought to be taken into account; as to the rest of the land the measure of damages was the diminution of the value thereof to pltfs. by reason of the wrongful acts of defts.—WHITWHAM *v.* WESTMINSTER BRYMBO COAL & COKE CO., [1896] 2 Ch. 538; 65 L. J. Ch. 741; 74 L. T. 804; 44 W. R. 698; 12 T. L. R. 496; 40 Sol. Jo. 620, C. A.

*Annotation:—***Distd.** Walker *v.* Murphy, [1915] 1 Ch. 71.

SECT. 3.—RIGHTS OF WAY.

SUB-SECT. 1.—IN GENERAL.

See, generally, EASEMENTS, Vol. XIX., pp. 93 *et seq.*

SUB-SECT. 2.—MINING WAYS AND WAYLEAVES.

A. In General.

1012. Whether dominant owner entitled to exclusive user.]—Deft. has only the liberty of passing over this land for the purpose of carrying his coals, & cannot prevent any other person from using it (BULLER, J.).—R. *v.* JOLLIFFE (1787), 2 Term Rep. 90; 1 Bott. 6th ed. 162; 100 E. R. 50.

*Annotations:—***Refd.** R. *v.* Bell (1798), 7 Term Rep. 598. **Mentd.** R. *v.* London Corpn. (1790), 4 Term Rep. 21; R. *v.* Ellis (1813), 1 M. & S. 652; Roberts *v.* Aylesbury (1853), 1 E. & B. 423; Pimlico Tram. Co. *v.* Greenwich (1873), L. R. 9 Q. B. 9.

1013. Nature of interest—Incorporeal hereditament—Grant of wayleave reserving royalty.]—The owner in fee of land demised to a railway co. for a term of years a wayleave over his land, with the right to make & use a railway thereover, reserving to himself, his heirs & assigns, a periodical payment on coals, etc., carried over any part of the railways comprehended in the co.'s special Act to Port B. These railways included the one in respect of which the wayleave was granted; but subsequently coal was carried to Port B. over a part of one of the railways comprehended in the Act which was not on the land of the lessor:—*Held:* the amount was payable in respect of the hereditaments demised, & on the lessor's death was payable to the reversioner.

The interest conferred upon the railway co., namely, a wayleave over land of the grantor, with the right to make a railway thereover, & with the other powers given to them, is, in my judgment, an "incorporeal hereditament, a property, & an estate capable of being inherited by the heir," if granted to an individual, "& of being assigned to a purchaser." If is a "tenement" within the definition of LORD COKE (1 Inst. 20 a), being an inheritance concerning or annexed to or exercisable within a corporate inheritance (BYRNE, J.).—NORTH EASTERN RY. CO. *v.* HASTINGS (LORD), [1900] A. C. 260; 69 L. J. Ch. 516; 82 L. T. 429; 16 T. L. R. 325, H. L.; *affg.* S. C. *sub nom.* HASTINGS (LORD) *v.* NORTH EASTERN RY. CO., [1899] 1 Ch. 656, C. A.

*Annotations:—***Mentd.** Brown *v.* Peto, [1900] 2 Q. B. 653; A.-G. *v.* Tamworth R. D. C. (1901), 85 L. T. 190; Van Diemen's Land Co. *v.* Table Cape Marine Board, [1906] A. C. 92; Eckersley *v.* Wigan Coal & Iron Co. (1910), 102 L. T. 264; Hong-Kong & China Gas Co. *v.* Glen (1914), 110 L. T. 859; Watcham *v.* East Africa Protectorate, [1919] A. C. 533.

B. General Wayleave.

See, generally, EASEMENTS, Vol. XIX., pp. 7 *et seq.*

1014. Whether waggon way included.]—PIT *v.* CLAVERINTH (LADY) (1729), 1 Barn. K. B. 318; 94 E. R. 215, L. C.

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his use of it.—DUNLOP'S TRUSTEES *v.* CORBET & M'NAIR (1809), 15 Fac. Coll. 333.—**SCOT.**

b. *Surface damages—What amounts to.*]—NEILL'S TRUSTEES *v.* DIXON, LTD. (1880), 7 R. (Ct. of Sess.) 741; 17 Sc. L. R. 496.—**SCOT.**

c. —— ——.]—It depends on the construction of each particular contract whether the expression "surface damages" includes damages arising from subsidence of the ground caused by underground mineral workings, or is limited to damages arising from operations on the surface.—HALLPENNY *v.* DEWAR (1898), 25 R. (Ct. of Sess.) 889; 35 Sc. L. R. 696; 6 S. L. T. 30.—**SCOT.**

Sect. 3.—Rights of way: Sub-sect. 2, B., C. & D.]

1015. ——.]—Under the grant of a free & convenient way for the purpose of carrying coals, among other articles, the grantee has a right to lay a framed waggon way. Under a grant of a way from A. to B. in, through, & along a particular way, the grantee is not justified in making a transverse road across the same.—SENHOUSE *v.* CHRISTIAN (1787), 1 Term Rep. 560; 99 E. R. 1251.

Annotations:—**Distd.** *Re* Bidder & North Staffordshire Ry. (1878), 4 Q. B. D. 412. **Consd.** Pwllbach Colliery Co. *v.* Woodman, [1915] A. C. 634. **Reld.** Blakesley *v.* Whieldon (1841), 1 Hare, 176. **Mentd.** Taff Vale Ry. *v.* Cardiff Ry., [1917] 1 Ch. 299.

1016. Whether construction of railway authorised—Reservation of "sufficient wayleave."]—DAND *v.* KINGSCOTE, No. 1007, *ante*.

1017. Nature of user authorised—User for purpose apart from working of mine.]—PROUD *v.* BATES, No. 17, *ante*.

1018. —— User for carriage of foreign minerals.]—EARDLEY *v.* GRANVILLE, No. 497, *ante*.

1019. —— ——.]—(1) The predecessors in title of defts. were owners in fee simple of land, including both the surface & the strata below the surface. They conveyed the land to pltfs.' predecessors by a deed which contained an exception & reservation of "all mines & veins of coal in or under" the land. Defts. & their predecessors worked the coal mines under the land & made an underground road which was not confined to the seams of coal, but was cut also through the adjacent strata. Along this road they carried coal obtained from mines beyond the limits of the land conveyed to pltfs.' predecessors:—*Held:* by virtue of the exception, the property in the strata below the surface remained in defts. sufficiently to entitle them to construct roads therein & use them in any way they pleased.

(2) Coals & coal mines mean, I apprehend, when unopened mines are spoken of, nothing more nor less than the veins or seams of coal underlying the surface (WARRINGTON, J.).

(3) "Mines" unquestionably include not merely the bed of coal, but the workings of the coal, & the cavity after the coal has been removed (WARRINGTON, J.).—BATTEN POOLL *v.* KENNEDY, [1907] 1 Ch. 256; 76 L. J. Ch. 162.

——.]—*See, also*, EASEMENTS, Vol. XIX., p. 111, Nos. 710–713.

Ways & wayleaves reserved under inclosure Acts.]—*See* COMMONS, Vol. XI., pp. 66, 67, Nos. 913–916.

C. Wayleave of Definite Kind.

1020. Reservation of waggon ways—Construction of railway.]—Pltf. was a lessee for a term of twenty-one years of prebendal lands, there being reserved to the lessors the woods, underwoods, mines, quarries, seams of clay, with full & free authority & power to enter & cut down, & to dig, win, work, get, & carry away same, with free ingress, egress, wayleave, & passage to & from the same, or to or from any other mines, quarries, & seams of clay, on foot & on horseback, & with carts & all manner of carriages; & also all necessary & convenient ways, passages, conveniences, privileges, & powers whatsoever, for the purposes aforesaid, & particularly of laying, making, & granting waggon ways in & over the demised premises, paying reasonable damages. The Vice-Chancellor, inclining to the opinion that the reservation did not enable the lessors to grant to a public co. a licence to make a railway for the purpose of conveying passengers & general merchandise, but was only intended to enable the lessors or their grantees to convey mineral produce & wood from the demised lands to or from adjacent lands, granted an injunction, restraining the lessors & their licencees from proceeding to make a railway for the former purpose, previous to the precise extent of the reservation being ascertained by the decision of a ct. of law. Upon affidavits filed by the licencees, stating, that the proposed railway was intended to be used for purposes & objects which should be held to be within the terms of the reservation; that the primary purpose of the railway was to convey mineral produce, & the scheme of general traffic a secondary object; & showing, that there was a considerable quantity of coal in the neighbourhood of the demised land, the injunction was dissolved:—*Held:* this being a question for a ct. of law, upon the construction of the reservation, the property ought to be protected, pending the necessary trial at law; & it was made a condition of granting the injunction, pltf. should proceed to a trial of the question at the earliest possible opportunity.—FARROW *v.* VANSITTART (1839), 1 Ry. & Can. Cas. 602, L. C.

Annotation:—**Reld.** Bowser *v.* Maclean (1860), 2 De G. F. & J. 415.

1021. Grant of right to make roads & ways—Construction of railways & tramways.]—Coals & iron-works were demised, together with lands, & mines under other lands not included in the demise, with liberty to the lessees to make & use "roads and ways" over any of the lands, & to do all such other acts upon the lands as should be necessary for the purposes of the works, & the lessees covenanted to uphold & keep in good repair the furnaces & other works, houses & other buildings then standing & which during the term should be erected & built on the demised land & all other the demised premises, & at the expiration of the term to deliver up the property & "all ways & roads in, upon or under same lands" in such good order that the works might be continued by the lessor:—*Held:* (1) this covenant did not extend to trams fastened to sleepers not affixed to the freehold, which the tenant had placed upon roads for the purpose of using them as tramways, & the landlord therefore was not entitled to an injunction to restrain the tenant from disposing of them during the term.

(2) It is quite clear, as it seems to me, that "roads & ways" would not in all cases extend to railroads or tramways, & I apprehend, therefore, it must depend upon the nature & purposes of the instrument, taken in connection with such evidence as may be receivable upon the subject, whether, upon its true construction, the words "roads & ways" as there used were or were not intended to include & extend to railroads or tramways (TURNER, L.J.).—BEAUFORT (DUKE) *v.* BATES (1862), 3 De G. F. & J. 381; 31 L. J. Ch. 481; 6 L. T. 82; 10 W. R. 200; 45 E. R. 926; *sub nom.* BATES *v.* BEAUFORT (DUKE), 8 Jur. N. S. 270, L. JJ.

Annotations:—*As to* (1) **Reld.** Turner *v.* Cameron (1870), L. R. 5 Q. B. 306. *Generally*, **Mentd.** *Re* Richards, *Ex p.* Astbury, *Ex p.* Lloyds Banking Co. (1869), 4 Ch. App. 630; *Re* Armytage, *Ex p.* Moore & Robinson's Banking Co. (1880), 28 W. R. 924.

1022. Right of passage over accommodation bridge—Laying tramway on bridge.]—An estate was intersected by a canal under the powers of its Act, & an accommodation bridge was built by the co., over which a private road, leading across the property to a high road, was carried. Coal pits were opened upon the estate, which, when the canal was made, had been used as a farm. For some time the coals were carried down to the canal

by a tramway which did not cross the bridge. The coal owners subsequently carried the tramway across the bridge, excavating the soil of the roadway on the bridge & approaches, in order to carry their coals to a line of railway on the other side of the property. An action for trespass having been commenced, & a writ of injunction applied for by the canal co., the coal owners submitted to judgment in the action for £1 damages & costs, & gave an undertaking not to repeat the trespass complained of. The coal owners having a few months afterwards again laid down the tramway, but without breaking the soil on the bridge :—*Held :* the undertaking given by defts. formed a good ground for the interference of the ct., without going into the question of the right of defts. to make the tramway.—NEATH CANAL CO. *v.* YNISARWED RESOLVEN COLLIERY CO. (1875), 10 Ch. App. 450, L. JJ.

1023. Grant of " waggon or cart road "—Laying railroad or tramway.]—H., being the owner of certain land & the mines thereunder, by indenture conveyed the surface to C. but he excepted & reserved a " waggon or cart road " of the width of 18 feet, to be at all times thereafter kept in repair at his own costs & charges :—*Held :* these words would not enable H. to lay down a railroad or tramway for the carriage of coals raised from neighbouring collieries belonging to him.—*Re* BIDDER & NORTH STAFFORDSHIRE RY. CO. (1878), 4 Q. B. D. 412 ; 48 L. J. Q. B. 248 ; 27 W. R. 540 ; *sub nom.* BIDDER *v.* NORTH STAFFORDSHIRE RY. CO., 40 L. T. 801, C. A.

Annotations :—**Consd.** Rugby Portland Cement Co. *v.* L. & N. W. Ry., [1908] 1 K. B. 925. **Refd.** Joicey *v.* N. E. Ry., [1907] 1 K. B. 402.

D. Wayleave for Defined Purpose.

1024. User for other purposes not permitted—Grant for all purposes except carriage of coals—Carriage of coals not authorised.]—Where a landowner suffered the public to use, for several years, a road through his estate for all purposes, except that of carrying coals :—*Held :* this was either a limited dedication of the road to the public or no dedication at all, but only a licence revocable ; & a person carrying coals along the road after notice not to do so, was a trespasser. *Semble :* there may be a limited dedication of a highway to the public. —STAFFORD (MARQUIS) *v.* COYNEY (1827), 7 B. & C. 257 ; 5 L. J. O. S. K. B. 285 ; 108 E. R. 719.

Annotations :—**Mentd.** Le Neve *v.* Mile-End Old Town, Vestry (1858), 4 Jur. N. S. 660 ; Dawes *v.* Hawkins (1860), 7 Jur. N. S. 262 ; Hildreth *v.* Adamson (1860), 8 C. B. N. S. 587 ; A.-G. *v.* Horner (No. 2), [1913] 2 Ch. 140.

1025. ——— Grant for agricultural purposes—Carriage of minerals not authorised.]—User for twenty years of a way to a field used only for agricultural purposes does not give a right of way for mineral purposes. The owner of a field, with a right of way to it through an occupation road, agreed to sell the surface of the field reserving the minerals. The field had never been used for mining, & the vendor did not appear to have any present intention of working the minerals :—*Held :* (1) the vendor, having had a right to use the road for agricultural purposes only, could not prevent the purchaser from so altering the road as to make it unfit for the use of the vendor in working the minerals under the land agreed to be sold ; (2) even if the vendor had a right to use the road for minerals, inasmuch as he had no present intention of working the minerals, the ct. would not interfere.

We cannot grant a mandatory injunction unless he has clearly made out his right & I think also unless he made out that he had a present want of using the road (MELLISH, L.J.).—BRADBURN *v.* MORRIS, MORRIS *v.* BRADBURN (1876), 3 Ch. D. 812, C. A.

1026. —— Wayleave for mineral railway—User of railway for general traffic not authorised.]—FARROW *v.* VANSITTART, No. 1020, *ante*.

1027. ——— ——— ———.]—Case by a reversioner against a railway co. for entering & making a railway on his land. Plea, that, before the reversion of pltf., the Dean & Chapter of Durham were seised in fee, & by indenture between them & pltf. demised to pltf. the lands in question for a term " excepting & reserving the mines under the same, with power to dig, win & carry away the mines, with free ingress, egress & regress, wayleave & passage to & from the same, or to or from any other mines, lands & grounds, on foot & on horseback, & with carts & all manner of carriages, & also all necessary & convenient passages, conveniences, privileges & powers whatsoever, for the purposes aforesaid, & particularly of laying & making & granting waggon ways in & over the last-mentioned premises or any part thereof." Defts. then justified the making the railway as the servants of the Dean & Chapter, & by their authority. Replication, admitting the seisin in fee of the Dean & Chapter, & the demise to pltf., & that he had no other title except under such demise, *de injuria*, etc. On the trial it appeared that the railway co. had made a double line of railway on pltf.'s land, under a deed executed by the Dean & Chapter, & authorising the co. to make such a railway for the conveyance of passengers, goods, coals, wares & merchandise. The railway was constructed for the purpose of conveying general goods & passengers as well as coals, but had not been actually so used, & the railway was not more than was necessary for the carriage of the coals likely to be sent along it from the county with which it communicated. The judge directed the jury that, if they thought the railway was made for other purposes as well as for the carriage of coals, pltf. was entitled to their verdict :—*Held :* (1) if the railway was such a railway as the co., at the time when it was made, might lawfully make for the purposes of which, when made, they might lawfully use it, pltf., as reversioner, had no ground of complaint by reason of the intention of the co. also to use the railway for other purposes for which they had no right to use it & the direction of the judge was wrong ; (2) the proper construction of the exception clause in the indenture of demise by the Dean & Chapter to pltf. was, that the clause gave the Dean & Chapter, not a general power of making ways & granting wayleaves for all purposes, but for the limited purpose only of getting the excepted minerals ; (3) the proper question for the jury was, not whether the railway was made for other purposes as well as for the carriage of coals & minerals, but whether at the time when the road was made it had become necessary or expedient for the co. to make a road for the purpose of getting the excepted minerals, & if so, whether the road actually made was a proper road for that purpose, assuming it would be used for no other purpose.

We are clearly of opinion that the ways referred to in the exception in this case are confined to ways necessary or proper for enabling the lessors to get the matter excepted (TINDAL, C.J.).—DURHAM & SUNDERLAND RY. CO. *v.* WALKER (1842), 2 Q. B. 940 ; 2 Gal. & Dav. 326 ; 3 Ry. & Can. Cas. 36 ; 114 E. R. 364 ; *sub nom.* WALLIS *v.*

Sect. 3.—*Rights of way: Sub-sect.* 2, *D. & E.; sub-sect.* 3, *A., B. & C. Sect.* 4: *Sub-sect.* 1.]

HARRISON, DURHAM & SUNDERLAND RY. CO. *v.* WALKER, 11 L. J. Ex. 440, Ex. Ch.

Annotations:—*As to* (1) **Reld.** Hamilton *v.* Graham (1871), L. R. 2 Sc. & Div. 166. *As to* (2) **Distd.** Midgley *v.* Richardson (1845), 14 M. & W. 595. **Reld.** Bowes *v.* Ravensworth (1855), 15 C. B. 512.

1028. —— —— ——.]—A landowner offered a wayleave for a railway over his land to an Iron Mining co. for sixty years, upon the payment of triple damages only. The co., pending a suit by them for specific performance, sold its line to a railway co. for public traffic, who procured an Act authorising them compulsorily to purchase the land in fee over which the wayleave had been granted:—*Held:* there had been a variation as to the parties & the subject-matter of the contract, & there was no right to specific performance.—MEYNELL *v.* SURTEES (1855), 3 Sm. & G. 101; 25 L. J. Ch. 257; 25 L. T. O. S. 227; 1 Jur. N. S. 737; 3 W. R. 535; 65 E. R. 581, L. C.

Annotation:—**Consd.** Bonecke *v.* Chadwicke (1856), 4 W. R. 687.

1029. —— **Grant for carriage of minerals from particular mines—Carriage of foreign minerals not authorised.**]—DAND *v.* KINGSCOTE, No. 1007, *ante.*

1030. —— —— ——.]—An Act of Parliament for inclosing the moors & commons within the manor of Lanchester, in the county of Durham, contained a saving of all the seignoral rights of the Bishop of Durham as lord of the manor, & also provided, that the bishop & his successors, & their lessees & assigns, should at all times thereafter work & enjoy all mines & quarries lying under the said moors, & commons, together with all convenient & necessary ways & wayleaves over same, & full & free liberty of making & using any new roads or wagon ways over same, & for that purpose to remove obstructions, etc., & of winning & working the said mines & quarries belonging to the see & bishopric of Durham, wheresoever same should be, & of leading & carrying away all the coals, minerals, etc., to be gotten thereout, or out of any other lands & grounds whatsoever, etc.:—*Held:* this clause entitled the bishop to carry over the lands inclosed under the Act, not only coals & minerals got within or under those lands, but also those got out of any other mines belonging to the see of Durham; but not to carry coals, etc., got out of other mines worked by the bishop but not belonging to the see.

It is unreasonable to suppose that the legislature meant to give powers whereby damage might accrue to the occupier, for which he was not to receive any compensation, either from the bishop or from the fund provided by the Act (ROLFE, B.).—MIDGLEY *v.* RICHARDSON (1845), 14 M. & W. 595; 15 L. J. Ex. 257; 153 E. R. 613.

Annotation:—**Apprvd.** Hedley *v.* Fenwick (1864), 3 H. & C. 349.

See, further, EASEMENTS, Vol. XIX., p. 112, Nos. 715–718.

E. Direction of Way.

See, generally, EASEMENTS, Vol. XIX., p. 117.

1031. Effect of absence of defined route—Whether shortest practicable route must be followed.]—The power given by a local Act, enabling the proprietor of a mineral district to make roads & railways over lands of other persons from his mines to the canal, does not restrict him to the shortest practicable route, but enables him to adopt any more circuitous route which, in the *bonâ fide* exercise of his judgment, he may find expedient, provided the point at which he joins the canal is within four miles of the boundary of his estate.

Saving time by avoiding a lock:—*Held:* a sufficient reason for preferring a more circuitous route for this purpose.—RICHARDS *v.* RICHARDS (1859), John. 255; 23 J. P. 726; 70 E. R. 419.

1032. Deviation from defined route—Effect of acquiescence.]—MOLD *v.* WHEATCROFT, No. 1033, *post.*

SUB-SECT. 3.—REMEDIES.

A. For Obstruction.

See, generally, EASEMENTS, Vol. XIX., pp. 120 *et seq.*

1033. Damages.]—Where an Act of Parliament authorises the construction of a railway over the land of another, upon making compensation, & the railway is made without authority from the owner of the land, but is afterwards used for fifteen years with his knowledge, he will not be permitted to interfere with the possession. All he is entitled to is to have the compensation assessed & paid.

If the tramroad had been originally made without the authority of the owner of the land, & the owner having full notice of its existence had allowed pltf. to remain in possession of it without interference for 15 years, all that he could now do would be to require compensation for the damage occasioned to the land (ROMILLY, M.R.).

It makes no difference, in this view of the case, that the railroad was substituted for the tramroad, & that the railroad takes a different direction over these lands from that which the tramroad took (ROMILLY, M.R.).—MOLD *v.* WHEATCROFT (1859), 27 Beav. 510; 29 L. J. Ch. 11; 1 L. T. 226; 6 Jur. N. S. 2; 54 E. R. 202; *subsequent proceedings* (1860), 30 L. J. Ch. 598.

1034. Injunction.]—The lessees of a colliery having agreed to grant to the lessees of a neighbouring colliery licence to use a right of way enjoyed by the former, & the owner of the first colliery, having granted to the second lessees the same right of way during a term of years, & afterwards by assignment from the first lessees become possessed of the first colliery, & the right of way, an injunction was granted to restrain him from removing the materials, & destroying the way.—NEWMARCH *v.* BRANDLING (1818), 3 Swan. 99; 36 E. R. 789, L. C.

1035. ——.]—MOLD *v.* WHEATCROFT, No. 1033, *ante.*

B. In Case of Wrongful User.

See EASEMENTS, Vol. XIX., pp. 120 *et seq.*

1036. Injunction—Right of way wrongly claimed.]—POWELL *v.* AIKEN, No. 461, *ante.*

1037. —— ——.]—WRIGHT *v.* PITT, No. 895, *ante.*

1038. —— ——.]—PHILLIPS *v.* HOMFRAY, FOTHERGILL *v.* PHILLIPS, No. 548, *ante.*

1039. —— ——.]—EARDLEY *v.* GRANVILLE, No. 497, *ante.*

1040. —— **Mandatory injunction—Aperture made in adjoining land.**]—POWELL *v.* AIKEN, No. 461, *ante.*

1041. —— —— **Rails wrongfully laid.**]—NEATH CANAL CO. *v.* YNISARWED RESOLVEN COLLIERY CO., No. 1022, *ante.*

C. For Trespass.

See, generally, EASEMENTS, Vol. XIX., pp. 122 *et seq.*; TRESPASS.

1042. Damages.]—MONMOUTH CANAL CO. *v.*

HARFORD (1834), 1 Cr. M. & R. 614; 5 Tyr. 68; 4 L. J. Ex. 43; 149 E. R. 1226.

Annotations:—**Mentd.** Beasley *v.* Clarke (1836), 2 Bing. N. C. 705; Tickle *v.* Brown (1836), 4 Ad. & El. 369; Onley *v.* Gardiner (1838), 4 M. & W. 496; Hollins *v.* Verney (1884), 13 Q. B. D. 304; Gardner *v.* Hodgson's Kingston Breweries Co., [1900] 1 Ch. 592.

1043. —— User of way in unauthorised direction.]—SENHOUSE *v.* CHRISTIAN, No. 1015, *ante*.

1044. —— ——.]—A private Act of Parliament for inclosing the waste land of a manor reserved to the lord & his assigns all mines, etc., together with all convenient & necessary ways, etc., then already made, or thereafter to be made, & liberty of laying waggon-ways, etc., at his & their free will & pleasure, & to do all such other works, acts, & things as might be necessary or convenient for the full & complete enjoyment thereof, in as full, ample, & beneficial a manner as if that Act had not been made. An action of trespass having been brought against the lord's assignee for laying a waggon-way over one of the allotments in an improper direction & manner:—*Held:* the real question to be decided by the jury was, whether the waggon-way had been laid in such a direction as a person of reasonable skill would have selected; & whether the mode adopted was such as a prudent person would have adopted if he had been making the road over his own land, & not over the land of another.—ABSON *v.* FENTON (1823), 1 B. & C. 195; 1 L. J. O. S. K. B. 91: 107 E. R. 73.

Annotation:—**Mentd.** Taylor *v.* British Legal Life Assce. (1925), 94 L. J. Ch. 284.

1045. —— ——.]—DAND *v.* KINGSCOTE, No. 1007, *ante*.

1046. —— User for improper purposes—Carriage of "foreign" minerals.]—DAND *v.* KINGSCOTE, No. 1007, *ante*.

1047. —— —— —— —.]—MIDGLEY *v.* RICHARDSON, No. 1030, *ante*.

1048. —— —— —— —— —.]—Pltf. & deft. were tenants in common of a seam of coal & culm, about 18 inches in width under lands at B. belonging to pltf., & deft. held an express grant of the right to get his share of those minerals. Deft. also owned the minerals under adjacent lands, & in getting those minerals he had worked out the seam which was held under the tenancy in common, thereby forming galleries of some feet in height, by which he carried his "foreign" minerals & obtained ventilation to his own mines:—*Held:* deft. had no right to wayleave through the galleries formed along the line of the seam of coal & culm, & must account & pay compensation to pltf. as for a trespass, but pltf. could make no claim against deft. in respect of air leave.—POWELL *v.* VICKERMAN (1887), 3 T. L. R. 358.

Measure of damages.]—*See* Part V., Sect. 2, sub-sect. 5, A., *ante*.

SECT. 4.—RIGHTS AS TO WATER.

SUB-SECT. 1.—USE OF WATER.

As to natural rights of riparian proprietor.]—*See* EASEMENTS, Vol. XIX., pp. 145 *et seq.*; WATERS & WATERCOURSES.

1049. Who is a riparian owner—Lessee of mines under land adjoining a stream—Not in possession of surface adjoining stream.]—An allegation that pltf. was possessed of mines, lands & premises, & of right ought to have had & enjoy, & still of right ought to have & enjoy the water of a stream which had been used to flow alongside the said lands & premises, is not supported by proof that pltf. was a lessee of mines under land adjoining the stream, with a grant from the surface owner of the use of the water for colliery purposes.—INSOLE *v.* JAMES (1856), 1 H. & N. 243; 27 L. T. O. S. 223; 4 W. R. 680.

1050. —— Lessee of colliery distant from river—Being also lessee of intervening surface land.]—The site of colliery works a mile from a river but connected with it by a strip of land about a chain in width, is not a riparian tenement, which expression connotes a reasonable proximity to the river.

In 1924 pltf. demised to defts. for ninety-nine years the minerals under land coloured red, containing 357 acres more or less, & also the surface of the land coloured blue containing 5 acres 2 roods 12 poles up to the middle of the river Alyn.

By clause 8 defts. were given the right to construct & use a mineral railway upon the surface of the blue land to be used solely for the purpose of the colliery working the demised minerals, & clause 9 provided that defts. could take & use water from any stream or watercourse flowing through or alongside the land coloured red, & pump & store the same for the purposes of their colliery. Defts. used the mineral railway to carry building & other material necessary for the building of a miners' village near the colliery.

The blue land was a chain in width for the half a mile of its extent from the riverside, & the remainder of the site of the railway to the colliery was acquired by defts. partly from pltf. & partly from others.

Defts. carried water from the river to their colliery by watermain laid about 18 inches below the surface of the blue land & took 600,000 gallons of water each week from the river, while the plant permitted of the taking more than three times that amount. On the evidence it was decided that the river Alyn did not flow through or alongside the land coloured red. Pltf. was a lower riparian owner, & claimed that defts.' colliery was not a riparian element, & that they were not entitled, as owners of the surface of the blue land, to the rights of riparian owners, & if they were, their user of the water was not an authorised user. The water taken by deft. from the river was not restored but was converted into steam:—*Held:* (1) the demise of the blue land constituted the defts. riparian proprietors, but were not entitled to take & use the water except on or in connection with the riparian tenement, & the colliery works were not a riparian tenement, which expression connoted a reasonable proximity to the river; (2) the taking of the water for extraordinary purposes without returning it to the river, was an unauthorised user, & as it amounted to a complete diversion of part of the river, & a confiscation of

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PART XIII. SECT. 4, SUB-SECT. 1.

e. Liability of owner or lessee of mine.]—It is incumbent on persons mining on Crown lands under miner's rights, to use a stream, flowing past the ground on which they are mining, in such a way as not to injure the land or the water of those below them.—CAMPBELL *v.* AH CHONG (1870), 1 V. R. (Law) 25.—**AUS.**

f. Water rights—Jurisdiction of Gold Commissioner—To refuse water right not required for mining purposes.]—CENTRE STAR MINING CO. *v.* BRITISH COLUMBIA SOUTHERN RY. CO. (1901), 21 C. L. T. 491; 8 B. C. R. 214.—**CAN.**

g. —— —— *To refuse application for domestic purposes pending application for record.*]—*Re* WATER CLAUSES CONSOLIDATION ACT, 1897, WAR EAGLE CONSOLIDATED MINING & DEVELOPMENT CO., LTD. *v.* BRITISH COLUMBIA SOUTHERN RY. CO. (1901), 8 B. C. R. 374; 1 M. M. Cas. 422.—**CAN.**

h. —— ——.]—GRAVES *v.* MCDONNELL (Y. T.) (1905), 3 W. L. R. 329.—**CAN.**

k. —— —— *Whether judicial or administrative.*]—CARPENTER *v.* CALLIGAN (Y. T.) (1905), 2 W. L. R. 488.—**CAN.**

l. —— *Hydraulic lease—Confers no*

Sect. 4.—Rights as to water: Sub-sect. 1.]

the rights of pltf. as lower riparian owner, it was not necessary for pltf., in order to secure relief, to prove damage or the future possible acquisition of prescriptive rights by defts.—ATTWOOD *v.* LLAY MAIN COLLIERIES, [1926] Ch. 444; 95 L. J. Ch. 221; 134 L. T. 268; 70 Sol. Jo. 265.

1051. Acquisition of right to conduct water over land—By artificial stream—Prescription.]—(1) A right to the flow of water along an artificial cut over the soil of another cannot be acquired under the Prescription Act, 1831 (c. 71), unless the circumstances under which the cut was made show that it was intended to be of a permanent character. H. occupied clay works &, for the more convenient use of them, in 1830, under an agreement with G., with the consent of G.'s landlord, made a leat or artificial cut for the purpose of conducting water from a brook flowing over the land in G.'s occupation, to his works. Pltf. in 1835 succeeded H. in the occupation of the clay works, & continued for upwards of twenty years, without interruption, the enjoyment of the leat:—*Held:* notwithstanding pltf. had no notice of the agreement between H. & G., there was evidence from which the jury might find that pltf. had not enjoyed the stream for twenty years as of right.

(2) One who by lease or by licence from the owner of the soil has the right of digging & working clay, or minerals, thereunder, has such an interest in the soil as will entitle him to claim under the Prescription Act, 1831 (c. 71), a right to the flow of water over the surface, by a twenty years' user. The rights of tin-bounders according to the customary law of Cornwall to the use of water within their tin-bounds, for the purpose of streaming their tin, will not prevent the acquisition by another of a prescriptive right under the Prescription Act, 1831 (c. 71), to the enjoyment of the water by a twenty years' user; nor will this right be affected by an agreement with the tin-bounders for a money payment to abstain from fouling the water by streaming their tin therein.—GAVED *v.* MARTYN (1865), 19 C. B. N. S. 732; 34 L. J. C. P. 353; 13 L. T. 74; 11 Jur. N. S. 1017; 14 W. R. 62; 144 E. R. 974.

Annotations:—As to (1) **Reld.** Mason *v.* Shrewsbury & Hereford Ry. (1871), 25 L. T. 239. *As to* (2) **Distd.** Ivimey *v.* Stocker (1866), 1 Ch. App. 396. *Generally,* **Mentd.** Lyell *v.* Hothfield, [1914] 3 K. B. 911.

1052. ——————.]—(1) A mine had from before the time of living memory been worked by tinbounders, according to the custom of Cornwall, which enables any person to mark out a piece of waste ground, the owner of which does not choose to work the mines under it, & work them without the consent of the owner, yielding to the owner a share of the proceeds. The bounders had from before the time of living memory used for the purpose of their works the water of an artificial watercourse arising in the land of another person. The bounders abandoned the mine in 1856, since which the owners had been in possession. A bill by the owners to restrain the diversion of the watercourse by the owner of the land in which it rose was dismissed by the judge, on the ground that there was no privity of estate between the owner & the bounders, & that the owner, therefore, could not claim an easement by prescription on the ground of their enjoyment of it:—*Held:* an injunction ought to be granted, for that it ought to be presumed that a right to use the waters had been acquired by arrangement with the owner of the mine as well as with the bounders.

(2) The estate or interest of tin bounders is of an anomalous character. They have a mere chattel, passing to exors., not to heirs, & they lose all their interest if they cease to work the mine. Their title is not derived from the owner of the land, though they are bound to make him a *render* dependent on the quantity of ore raised (LORD CRANWORTH, C.).

(3) The owners of the minerals in St. Austell have no common interest with the owner of the minerals in Roche though from their contiguity the mines may pass under one common name (LORD CRANWORTH, C.).—IVIMEY *v.* STOCKER (1866), 1 Ch. App. 396; 35 L. J. Ch. 467; 14 L. T. 427; 12 Jur. N. S. 419; 14 W. R. 743, L. C. & L. JJ.

1053. ——————.]—Defts. in 1834 demised to pltfs. the coal under the C. estate for fifty years, with powers to sink pits, make soughs, etc., erect engines, & make drains, etc., for supplying such engines with water, & also to do certain other acts on the surface for the better draining & working the demised mines & any other mines of which pltfs. might become lessees under the lands of any other persons. In 1836 pltfs. took a lease for thirty-five years of the C. colliery from a neighbouring landowner. In 1846 pltfs. made a drain about a mile long, chiefly on the C. estate, by which they diverted a small natural stream on the C. estate & brought it down to the O. Colliery, where they made reservoirs for the water at considerable expense. They did not ask leave to make the drain, but defts.' agent saw the work going on & encouraged it. In 1872 pltfs. became owners in fee of the O. Colliery. In 1884, when the lease from defts. expired, defts. stopped the drain & diverted the water. Pltfs., claiming a right by prescription to the water, commenced this action to restrain them from doing so. The Vice-Chancellor of the County Palatine held that the watercourse was made under the powers of the lease & that the right to the water expired at the end of the lease, & he dismissed the action:—*Held:* this dismissal was right, for that if the making the drain was not authorised by the lease, as to which the ct. gave no opinion, it was made & enjoyed, either under the belief of both parties that it was authorised by the lease, or under a comity between landlord & tenant, & that there was no enjoyment as of right so as to give the tenant a right to the water after the lease had expired.

What is the right claimed? It is a right of a peculiar kind, to enjoy an artificial watercourse. . . . There may be two kinds of rights claimed; first of all a man may claim a right to continue the enjoyment upon his land of the discharge on to his land of an artificial flow of water from a watercourse made by somebody else above. That is a very difficult kind of right to establish. The mere discharge of water by an upper proprietor upon the land of a lower, may easily establish a

rights paramount to riparian rights.]—KLONDYKE GOVERNMENT CONCESSION *v.* MCDONALD (1906), 27 C. L. T. 157; 38 S. C. R. 79.—**CAN.**

m. *Consolidation of water records.*]—Where a mining co. holds distinct water records acquired from different owners, they cannot be consolidated.—*Re* WATER CLAUSES CONSOLIDATION ACT & ROSSLAND POWER CO., LTD. (1904), 2 M. M. Cas. 135; 10 B. C. R. 356.—**CAN.**

n. *Right to attack water records—Interested parties—Holders of records.*]—No one has a status to complain about the diversion or misuse of water by the holder of a water record unless he himself holds such a record under Water Clauses Consolidation Act.—SPRUCE CREEK POWER CO. *v.* MUIRHEAD (1904), 25 C. L. T. 23; 11 B. C. R. 68.—**CAN.**

o. ——————.]—BROWN *v.* SPRUCE CREEK POWER CO. (1905), 11 B. C. R. 243; 1 W. L. R. 143.—**CAN.**

p. *Water grant—Renewal—Right of*

right on the part of the upper proprietor to go on discharging, because so long as the discharge continues there is submission on the part of the lower proprietor to proceedings which indicate a claim of right on the part of the proprietor above, but it is difficult for the lower proprietor to establish a right to have the flow continued (BOWEN, L.J.).—CHAMBER COLLIERY CO. *v.* HOPWOOD (1886), 32 Ch. D. 549; 55 L. J. Ch. 859; 55 L. T. 449; 51 J. P. 164; 2 T. L. R. 507, C. A.

Annotations:—**Mentd.** Brinckman *v.* Matley (1904), 73 L. J. Ch. 160; A.-G. *v.* Horner (No. 2), [1913] 2 Ch. 140.

1054. Liability of owner or lessee of mines—Artificial watercourse produced by draining of mine—Whether prescriptive right to continued flow of watercourse may be acquired—By lower proprietors.]—User of a stream of water produced by the artificial draining of a mine, for twenty years or upwards gives no right to the party who has so used it, against the owners of the mine, or the persons who have constructed the watercourse, either at common law or under the Prescription Act, 1831 (c. 71), to have the stream continued in the same channel.

Accordingly, about the year 1700, certain persons had in part constructed a sough, or underground watercourse, called the Cromford Sough, for the purpose of draining an extensive mineral field, in the district of the wapentake of Wirksworth, in the county of Derby. By agreements with the owners of the mines, the sough was carried on & completed; & in 1738, the proprietors leased the sough for 999 years, for a pecuniary consideration. When completed, the mouth of the Cromford Sough was in the village of Cromford; & near to the mouth was a stream of water, called the Bonsall Brook, into which the water of the sough discharged itself, forming a junction with the brook. After the sough had been constructed, & a constant flow of water conducted from the mines by means of it, R. Arkwright, as lessee, through whom pltfs. claimed, in 1772 constructed extensive cotton mills below the junction of the sough water with the Bonsall Brook, which mills have existed ever since & been turned by the united waters of the Cromford Sough & the Bonsall Brook. In 1789, R. purchased the land on which the cotton mills stood, & the fee simple in the mills & the manor of Cromford, including the lands through which the Cromford Sough was made; & in 1836, A., the lessor of pltfs., became the purchaser of the reversion expectant on the determination of the lease for 999 years, & acquired a portion of the interest of those lessees by a conveyance from some of them. About the year 1771, another sough, called the Meer Brook Sough was commenced by a co. of proprietors, not connected with the Cromford Sough at a considerably lower level than the Cromford Sough, for the purpose of unwatering a further portion of same mineral field, which, from its lower position, was not relieved of water by the latter sough. Defts. represented those proprietors. In 1813 by agreement with the proprietors of the Cromford Sough, the Meer Brook Sough was extended; & the water being found to flow into it, floodgates were constructed at its end, by which means when closed the water was still thrown back upon, & discharged by, the Cromford Sough; but when opened, the water escaped through them; & was thereby prevented from flowing to pltfs.' mills. In 1836, the floodgates were entirely removed, in order still further to extend the Meer Brook Sough, by which means the water was prevented from flowing down the Cromford Sough, to pltfs.' mills. In an action by the owners of the mills to recover damages for this diversion of the water by defts.:—*Held:* pltfs. were not entitled to recover, because the Cromford Sough, being an artificial watercourse, made with the sole object of unwatering the mines, & enabling their owners to get at the ores in the mineral field, pltf. had acquired no right to the use of the water of it at common law for any longer period than the mine-owners chose to continue it in that course for their own purposes; & pltfs. had acquired no right to the water by virtue of the Prescription Act, 1831 (c. 71), as their enjoyment of it was not "without interruption" or "of right" as against defts., the owners of the lower level of the mineral field, within the meaning of that statute.—ARKWRIGHT *v.* GELL (1839), 5 M. & W. 203; 2 Horn & H. 17; 8 L. J. Ex. 201; 151 E. R. 87.

Annotations:—**Consd.** Magor *v.* Chadwick (1840), 11 Ad. & El. 571; Wood *v.* Waud (1849), 3 Exch. 748. **Apld.** N. E. Ry. *v.* Elliot (1860), 1 John. & H. 145. **Consd.** Gaved *v.* Martyn (1865), 19 C. B. N. S. 732. **Apld.** Burrows *v.* Lang, [1901] 2 Ch. 502. **Refd.** Greatrex *v.* Hayward (1853), 8 Exch. 291; Beeston *v.* Weate (1856), 5 E. & B. 986; Broadbent *v.* Ramsbotham (1856), 11 Exch. 602; Scots Mines Co. *v.* Leadhills Mines (1859), 34 L. T. O. S. 34; Mason *v.* Shrewsbury & Hereford Ry. (1871), L. R. 6 Q. B. 578; Angus *v.* Dalton (1877), 3 Q. B. D. 85; Whitmores (Edenbridge) *v.* Stanford, [1909] 1 Ch. 427; Schwann *v.* Cotton, [1916] 2 Ch. 459. **Mentd.** Sampson *v.* Hoddinott (1857), 1 C. B. N. S. 590; Solomon *v.* Vintners' Co. (1859), 4 H. & N. 585.

1055. —— —— —— ——.]—CHAMBER COLLIERY CO. *v.* HOPWOOD, No. 1053, *ante*.

1056. —— Draining of wells on contiguous land.]—The owner of land through which water flows in a subterraneous course, has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner, & lays his well dry. *Qu.:* if the well had been ancient, whether there would have been any difference.—ACTON *v.* BLUNDELL (1843), 12 M. & W. 324; 13 L. J. Ex. 289; 1 L. T. O. S. 207; 152 E. R. 1223, Ex. Ch.

Annotations:—**Consd.** Dickinson *v.* Grand Junction Canal Co. (1852), 7 Exch. 282. **Distd.** Ballacorkish Silver, Lead & Copper Mining Co. *v.* Harrison (1873), L. R. 5 P. C. 49. **Consd.** Jordeson *v.* Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217. **Refd.** South Shields Waterworks Co. *v.* Cookson (1845), 15 L. J. Ex. 315; Smith *v.* Kenrick (1849), 7 C. B. 515; Wood *v.* Waud (1849), 3 Exch. 748; Humphries *v.* Brogden (1850), 12 Q. B. 739; Chasemore *v.* Richards (1859), 7 H. L. Cas. 349; New River Co. *v.* Johnson (1860), 2 E. & E. 435; Baird *v.* Williamson (1863), 15 C. B. N. S. 376; R. *v.* Metropolitan Board of Works (1863), 3 B. & S. 710; Grand Junction Canal Co. *v.* Shugar (1871), 6 Ch. App. 483; West Cumberland Iron & Steel Co. *v.* Kenyon (1879), 40 L. T. 703; Ballard *v.* Tomlinson (1885), 29 Ch. D. 115; Bower *v.* Sandford (1889), 5 T. L. R. 570; Bradford Corpn. *v.* Pickles, [1895] 1 Ch. 145; Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822. **Mentd.** Fay *v.* Prentice (1845), 1 C. B. 828; Broadbent *v.* Ramsbotham (1856), 25 L. J. Ex. 115; *Re* Trufort, Trafford *v.* Blanc. (1887), 36 Ch. D. 600; Bradford Corpn. *v.* Ferrand, [1902] 2 Ch. 655.

1057. — — ——.] — BALLACORKISH SILVER, LEAD & COPPER MINING CO. *v.* HARRISON, No. 18, *ante*.

1058. —— —— **Prior grant by mine owner of land containing wells.**]—By lease, dated 1827, D.

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co-grantee to compensation for expenses in excess of share.]—GRAVES *v.* MCDONALD (Y. T.) (1905), 1 W. L. R. 325.—**CAN.**

q. —— *Application for renewal.*]—LIGHTNING CREEK MINING CO. *v.* HOPP (1914), 28 W. L. R. 110; 17 D. L. R. 641; 19 B. C. R. 586.—**CAN.**

r. *Right of lessees or locators to continuous flow of water.*]—GINACA & MOUROT *v.* MCKEE CONSOLIDATED HYDRAULIC, LTD. (1905), 11 B. C. R. 481.—**CAN.**

t. *Riparian rights—Curtailment by statute in interest of miners.*]—The common law rights of riparian proprietors are so far abridged by Goldfields Act, 1866, s. 6, as to give the holders of miners' rights the power to take, divert, & use the water of streams on private lands; but the

Sect. 4.—Rights as to water: Sub-sects. 1 & 2, A. (a).]

demised to W. a dwelling-house & fifteen closes of land, & granted all streams of water that might be found in four of those closes called the Clough, the Moorin Clough, the Brow, & the Marleds, excepting out of the demise all timber & other trees, etc., mines & minerals, etc., stone, gravel, sand & clay, etc., & all streams of water, except those above granted, then being or thereafter to be found in or upon the premises demised, with power for D. his heirs & assigns, & his & their servants & workmen, from time to time, to enter upon the premises, & to crop, fall, search for & make marketable all or any of the before-mentioned articles; to make any clay into bricks or tile on the premises, etc.; & to divert or alter the course of any river, brook, spring, or water." There was a plan annexed to the lease showing a stream of water on the north side of the demised premises & flowing through their whole extent from west to east. The Clough, the Moorin Clough, the Brow, & the Marleds, were situate on the banks of this stream. There was no other stream on the surface, but certain wells were in existence in those closes, & others were subsequently found:—*Held:* the wells & all water in the Clough, the Moorin Clough, the Brow, & the Marleds passed by the grant in question to W., & that neither D. nor his lessees could work the mines so as to cut off the springs in the closes in question.—WHITEHEAD *v.* PARKS (1858), 2 H. & N. 870; 27 L. J. Ex. 169; 157 E. R. 358.

Annotations:—**Consd.** Ballacorkish Silver, Lead, & Copper Mining Co. *v.* Harrison (1873), L. R. 5 P. C. 49; Goodhart *v.* Hyett (1883), 25 Ch. D. 182.

1059. —— Obstruction of watercourse—Subsidence.]—Pltf. was entitled, for the purposes of his mill, to a supply of water, by means of a stream running through & over the lands of the deft. Deft. in working the minerals lying under the bed of the stream, had caused a subsidence of the bed to the extent of four feet for some distance. In order to maintain the original level of the stream, deft. had constructed embankments on either side, & there was no actual diminution in the supply of water to pltf.'s mill. Upon bill for injunction, the ct. refused to make a hostile decree against deft., but by reason of the subsidence which had taken place in the bed of the stream, deft. was required to give an undertaking not to work the minerals in such a way as to obstruct or interfere with the flow & passage of the water to pltf.'s mill, staying further proceedings, giving no costs, but reserving liberty to pltf. to apply if occasion should require.—ELWELL *v.* CROWTHER (1862), 31 Beav. 163; 31 L. J. Ch. 763; 6 L. T. 596; 8 Jur. N. S. 1004; 10 W. R. 615; 54 E. R. 1100.

1060. —— Using water for purposes of steam.]—ATTWOOD *v.* LLAY MAIN COLLIERIES, No. 1050, *ante*.

1061. Remedy for infringement of rights—Obstruction of flow of water into mine—Order for inspection.]—ENNOR *v.* BARWELL (1860), 1 De G. F. & J. 529; 8 W. R. 300; 45 E. R. 466, L. JJ.

Annotations:—**Refd.** Bennett *v.* Griffiths (1861), 3 E. & E. 467; Lumb *v.* Beaumont (1884), 27 Ch. D. 356.

1062. —— Injunction—Effect of "standing by."]—Injunction against draining, preparatory to opening a coal mine, with prejudice to a canal, before establishing the right at law, refused upon laches for two years, permitting expenditure.—BIRMINGHAM CANAL CO. *v.* LLOYD (1812), 18 Ves. 515; 34 E. R. 413, L. C.

Annotations:—**Consd.** Ripon *v.* Hobart (1834), 3 My. & K. 169; G. W. Ry. *v.* Oxford Worcester & Wolverhampton Ry. (1853), 3 De G. M. & G. 341. **Refd.** Wheatley *v.* Westminster Brymbo Coal & Coke Co. (1869), 22 L. T. 7.

SUB-SECT. 2.—DISCHARGE OF WATER.

A. Liability as between Adjoining Mine Owners.

(a) Discharge Due to Natural Agency.

1063. In ordinary course of working—General rule.]—The owner of a mine at a higher level than an adjoining mine has a right to work the whole of his mine in the usual & proper manner for the purpose of getting out the minerals in any part of his mine; & he is not liable for any water which flows by gravitation into such adjoining mine from works so conducted. But he has no right by pumping or otherwise to be an active agent in sending water from his mine into the adjoining mine.

If this crut had been made for the purpose of turning water into pltfs.' mine which would not otherwise have arrived there . . . we consider that the action would lie (ERLE, C.J.).—BAIRD *v.* WILLIAMSON (1863), 15 C. B. N. S. 376; 3 New Rep. 86; 33 L. J. C. P. 191; 9 L. T. 412; 12 W. R. 150; 143 E. R. 831; *sub nom.* WILLIAMSON *v.* BAIRD, 10 Jur. N. S. 152.

Annotations:—**Apld.** Rylands *v.* Fletcher (1868), L. R. 3 H. L. 330. **Consd.** Crompton *v.* Lea (1874), L. R. 19 Eq. 115. **Refd.** Smith *v.* Fletcher (1874), L. R. 9 Exch. 64; Humphries *v.* Cousins (1877), 2 C. P. D. 239; A.-G. *v.* Tomline (1879), 12 Ch. D. 214; Young *v.* Bankier Distillery Co., [1893] A. C. 691.

1064. —— ——.]—The rule that a mine owner must protect himself against water flowing from a neighbouring mine in the ordinary course of mining operations has no application to a case where the consequence of a man's mining operations is the tapping of a river bed, & the precipitating of the water of the river into his own mine & thence into that of his neighbour. The bill alleged that the result of certain mining operations of defts. must inevitably be the tapping of a river bed, & the consequent flooding of the mines of defts. & pltf.; & it further alleged, in substance, that the operations in question were not legitimate mining operations, & could not result in any good to defts.; & it prayed for an injunction against defts.:—*Held:* the bill was sustainable.—CROMPTON *v.* LEA (1874), L. R. 19 Eq. 115; 44 L. J. Ch. 69; 31 L. T. 469; 23 W. R. 53.

Annotation:—**Refd.** Wilson *v.* Waddell (1876), 2 App. Cas. 95.

1065. —— ——.]—If, in consequence of a mine owner on the rise working out his minerals, water comes by natural gravitation into the mines of the owner on the deep, the latter mine owner cannot maintain any action for the loss which he thereby sustained. . . . A mine owner is exempt from liability, for water which in consequence of his works flows by gravitation into an adjoining mine, only if his works are carried on with skill & in the usual manner (COTTON, L.J.).—HURDMAN *v.* NORTH

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miners are not entitled to return the water into the stream in a polluted state.—BORTON *v.* HOWE (1875), 3 C. A. 5; 2 J. R. 97.—**N.Z.**

a. *Water licence—Priority of right—By priority of occupation.*]—ST. BATHAN'S CHANNEL CO. *v.* WATSON (1886), 5 N. Z. L. R. 184 (S. C.).—**N.Z.**

PART XIII. SECT. 4, SUB-SECT. 2.—A. (a).

1063 1. *In ordinary course of working—General rule.*]—A tenant of two adjacent fields of coal is not entitled to communicate the drain or level of the one to the other, but is bound to leave a barrier on march, to prevent the water of the superior field from flowing down on the inferior.—WEMYSS (EARL) *v.* HOPE'S TRUSTEES (1809), 15 Fac. Coll. 161.—**SCOT.**

EASTERN RY. CO. (1878), 3 C. P. D. 168; 47 L. J. Q. B. 368; 38 L. T. 339; 26 W. R. 489, C. A.

Annotations:—**Mentd.** Firth *v.* Bowling Iron Co. (1878), 3 C. P. D. 254; Whalley *v.* Lancashire & Yorkshire Ry. (1884), 13 Q. B. D. 131; Gill *v.* Edouin (1894), 71 L. T. 762; Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217; Maxey Drainage Board *v.* G. N. Ry. (1912), 106 L. T. 429; Gerrard *v.* Crowe, [1921] 1 A. C. 395; Ilford U. D. C. *v.* Beal & Judd, [1925] 1 K. B. 671.

1066. ——.]—Applts. would, no doubt, be entitled in mining to excavate & remove the strata of minerals in the lands leased to them to any depth practicable to which they might choose to go. If in doing so in the ordinary course of working they should happen to tap springs or a water waste from which the water by gravitation rose to the surface & flowed down to a lower proprietor's land, this must be submitted to; but the mine owner is not entitled by pumping to increase this servitude or burden on one unwilling to submit to it by pumping up water which might never rise to the surface, or which might only do so more gradually & slowly & in much smaller volume (LORD SHAND).—YOUNG (JOHN) & CO. *v.* BANKIER DISTILLERY CO., [1893] A. C. 691; 69 L. T. 838; 58 J. P. 100, H. L.

Annotation:—**Refd.** Stollmeyer *v.* Trinidad Lake Petroleum Co., [1918] A. C. 485.

1067. —— **Removal of supporting stratum of coal—Knowledge that removal would result in inundation of adjoining mine.**]—*Semble*, it is the right of each of the owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his own mine in the manner which he deems most convenient & beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine; so long as such prejudice does not arise from the negligent or malicious conduct of his neighbour.

Pltf. was possessed of a colliery, called A., & deft. of a colliery adjoining, called B., which was upon a higher level than A. Before deft. became possessed of colliery B., one Jones, who then held it, but between whom & deft. it was found, as a fact, that there was not any privity, either of contract or of estate, made three large holes, called thyrlings, in & through a vertical seam of coal, part of colliery A., & forming a barrier between the chambers in colliery A. & those in colliery B. At the time deft. first became the occupier of B. there was a large subterranean body of water therein, which communicated with, & was fed by, springs in the neighbourhood. This water was on a higher level than the chambers of B., & separated from them by a thick horizontal bar of coal which was part of colliery B. The chambers of B. were on a higher level than the thyrlings above mentioned, & the thyrlings were on a higher level than the chambers of A.; &, consequently, the effect of removing the horizontal bar of coal in B. necessarily was, that the water above mentioned would, of itself, flow into the chambers of B., & that a large portion thereof would also flow on of itself from the chambers of B., through the thyrlings, into the chambers of A. Deft., knowing that the thyrlings were then open, & that the effect of removing the horizontal bar of coal in B. would be as above stated, nevertheless did remove same, for the purpose of obtaining the coal, & so working his mine in the manner most advantageous to himself. In consequence of the removal of this horizontal bar of coal in B., the water flowed into the chambers of B., & thence, through the thyrlings, into the chambers of A., & inundated same:—*Held:* deft. was not responsible for the injury so occasioned.—SMITH *v.* KENRICK (1849), 7 C. B. 515; 18 L. J. C. P. 172; 12 L. T. O. S. 556; 13 Jur. 362; 137 E. R. 205.

Annotations:—**Distd.** Humphries *v.* Brogden (1850), 12 Q. B. 739. **Consd.** Scots Mines Co. *v.* Leadhills Mines Co. (1859), 34 L. T. O. S. 34. **Apld.** Baird *v.* Williamson (1863), 15 C. B. N. S. 376. **Distd.** Rylands *v.* Fletcher (1868), L. R. 3 H. L. 330. **Consd.** Crompton *v.* Lea (1874), L. R. 19 Eq. 115. **Refd.** Smith *v.* Fletcher (1874), L. R. 9 Exch. 64; West Cumberland Iron & Steel Co. *v.* Kenyon (1879), 11 Ch. D. 782; A.-G. *v.* Tomline (1880), 14 Ch. D. 58; Jordeson *v.* Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217; Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822; Greyvensteyn *v.* Hattingh, [1911] A. C. 355. **Mentd.** Chasemore *v.* Richards (1859), 7 H. L. Cas. 349; Hodgkinson *v.* Ennor (1863), 4 B. & S. 229; Humphries *v.* Cousins (1877), 2 C. P. D. 239; Angus *v.* Dalton (1878), 4 Q. B. D. 162; Whalley *v.* L. & Y. Ry. (1884), 13 Q. B. D. 131; Batcheller *v.* Tunbridge Wells Gas Co. (1901), 65 J. P. 680; Hoare *v.* McAlpine (1922), 92 L. J. Ch. 81.

1068. —— **Alteration in working resulting in increasing flow.**]—H. demised adjoining lead mines to the S. co. & to the L. co. the latter being in a higher level. The leases were substantially the same, & the lease to the S. co. contained a clause "reserving always to H. & his tenants the L. co., or other tenants of their lands, the use of all levels in the S. grounds, with power of sinking & driving within the whole grounds in so far as same can be done without incommoding or interrupting the S. co.'s own proper works." The L. co. having altered their mode of working within their own limits, whereby they caused an increased flow of water into the levels of the S. co. & other damage:—*Held:* the S. co. were not entitled to an injunction to restrain the L. co. from so altering their works within their own limits, for the latter co. were entitled to work in their own way, & any damage caused by the L. co. was *damnum absque injuria*; but if the alteration had been made by sinking & boring in the S. grounds it would have been otherwise.—SCOTS MINES CO. *v.* LEADHILLS MINES CO. (1859), 34 L. T. O. S. 31, H. L.

1069. —— **Damming up water.**]—Defts. working mines in two places, A. & B., B. being to the deep of A., towards which the water from A. would naturally flow in a proper course of working, & to save pumping, stopped up the only opening between A. & B., so as to dam up the water in A., which they abandoned. The water thus dammed up rose so high as to overflow by natural gravitation into pltf.'s mines, through openings made by predecessors of pltf.'s trespassing in deft.'s mines:—*Held:* pltfs. were not entitled to any relief, but inasmuch as defts. had in the first instance, & until restrained by injunction, used artificial means, pipes, to send the water to pltfs.' mines, the bill was dismissed without costs.—LOMAX *v.* STOTT (1870), 39 L. J. Ch. 834.

1070. —— **Working resulting in tapping of river bed.**]—CROMPTON *v.* LEA, No. 1064, *ante*.

1071. —— **Working resulting in cracking & subsidence of surface.**]—(1) The right to work mines is a right of property, which, when duly exercised, begets no responsibility.

(2) The owner of minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user (LORD BLACKBURN).

(3) Where mineral workings have caused a subsidence of the surface, & a consequent flow of rainfall into an adjacent lower coal-field, the injuries, being entirely from gravitation & percolation, are not a valid ground for any claim of damages.

(4) . . . Generally the owner of the surface made it matter of bargain for the benefit of the surface that when mines are worked out the surface should be restored. Where such a stipulation exists the owner or occupier of the surface has a right to complain if it be not restored, but that gives no claim to any one else (LORD BLACKBURN).—

Sect. 4.—Rights as to water: Sub-sect. 2, A. (a) & (b), & B.]

WILSON *v.* WADDELL (1876), 2 App. Cas. 95; 35 L. T. 639; 42 J. P. 116, H. L.

Annotations:—*As to* (1) **Refd.** Salt Union *v.* Brunner, Mond, [1906] 2 K. B. 822. *As to* (3) **Distd.** Fletcher *v.* Smith (1877), 2 App. Cas. 781. *Generally*, **Refd.** Hurdman *v.* N. E. Ry. (1878), 3 C. P. D. 168. **Mentd.** Prinsep *v.* Belgravia Estate (1895), 39 Sol. Jo. 381.

1072. —— ——.]—A mine owner will not be liable to the owner of an adjacent mine for injury occasioned to such adjacent mine, where such injury proceeds from natural causes, in themselves beyond his control, though his own acts may have conduced to produce the injury, if his acts have only been those of the proper & ordinary working of his own mine, without default or negligence. But where for his own convenience he does something, *e.g.*, divert the course of a stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow, so that, even if that overflow should be directly & mainly occasioned by an act of nature, his own conduct in not so forming the new & diverted course for the stream of form & of sufficient capacity to carry off an accidental overflow of water, even of an exceptional kind, will be matter for consideration in determining the question of his liability.—FLETCHER *v.* SMITH (1877), 2 App. Cas. 781; *sub nom.* SMITH *v.* MUSGRAVE, 47 L. J. Q. B. 4; *sub nom.* MUSGRAVE *v.* SMITH, 37 L. T. 367; 42 J. P. 260; 26 W. R. 83, H. L.; *affg.* S. C. *sub nom.* SMITH *v.* FLETCHER (1874), L. R. 9 Exch. 64, Ex. Ch.

Annotations:—**Apld.** Crompton *v.* Lea (1874), L. R. 19 Eq. 115. **Refd.** Wilson *v.* Waddell (1876), 2 App. Cas. 95. **Mentd.** West *v.* White (1877), 4 Ch. D. 631; A.-G. *v.* Tomline (1879), 12 Ch. D. 214; Sharp *v.* Wilson, Rotheray (1905), 93 L. T. 155; Greenock Corpn. *v.* Calc. Ry., Greenock Corpn. *v.* G. & S. W. Ry., [1917] A. C. 556.

1073. Working negligent or malicious.]—SMITH *v.* KENRICK, No. 1067, *ante*.

1074. ——.]—FLETCHER *v.* SMITH, No. 1072, *ante*.

(b) Discharge due to Agency of Owner.

1075. Piercing barriers—Trespass.]—A declaration stated pltfs. & defts. were owners of adjacent mines; defts. had trespassed on pltfs.' mine, & had carried away a quantity of coal; that water had arisen in defts.' mine, against which, but for the trespass of defts., the coal would have been a sufficient barrier; that thereupon it became & was the duty of defts. to prevent the water in their mine from flowing into pltfs.' mine; yet defts. neglected their said duty, whereby the water flowed into pltfs.' mine & prevented them from working the same:—*Held:* a good count in case.

There may, perhaps be a difference as regards the law between the barrier of a mine, & a fence above ground. If a wall is knocked down, the owner may maintain an action for the trespass; but he cannot by omitting to rebuild it, hold deft. always responsible for any consequential damage. But here, pltfs. say that the removal of the barrier is irreparable, &, therefore, the duty alleged in this declaration may well arise (POLLOCK, C.B.).—FIRMSTONE *v.* WHEELEY (1844), 2 Dow. & L. 203; 13 L. J. Ex. 361.

Annotations:—**Consd.** Clegg *v.* Dearden (1848), 12 Q. B. 576. **Distd.** Smith *v.* Kenrick (1849), 7 C. B. 515.

1076. —— ——.]—PLANT *v.* STOTT, No. 479, *ante*.

1077. —— —— **Consequential damage from inflow of water.**]—The owner of a coal mine excavated as far as the boundary, which he was by custom entitled to do, & continued the excavation wrongfully into the neighbouring mine, leaving an aperture in the coal of that mine, through which water passed into it & did damage:—*Held:* the party excavating was liable in trespass for breaking into the neighbouring mine, but not in an action on the case for omitting to close up the aperture on his neighbour's soil; though a continuing damage resulted from its being unclosed, & therefore, the facts being proved as above stated, deft. was entitled to the verdict. *Qu.:* whether, under such circumstances, a legal obligation attaches on the trespasser to use means on his own land for preventing the flow of water. But, if it does, & an action is brought for not using such means, the declaration must allege the duty specifically; & pltf. cannot recover on a count stating merely that deft. wrongfully made the aperture & omitted for an unreasonable time to close it, whereby, etc. Nor can he recover at all for damage occasioned by the flow of water in consequence of the aperture remaining unclosed, if an action on the case has already been brought for making the aperture & letting in the water, which action was referred to arbn., & pltf. being made party to the reference in respect of any injury to him by any of the matters alleged in the declaration in such action, has had damages awarded & paid to him for such injury: although the damage last complained of is subsequent to the award & payment.—CLEGG *v.* DEARDEN (1848), 12 Q. B. 576; 17 L. J. Q. B. 233; 11 L. T. O. S. 309; 12 Jur. 848; 116 E. R. 986.

Annotations:—**Refd.** Smith *v.* Kenrick (1849), 7 C. B. 515; Nicklin *v.* Williams (1854), 10 Exch. 259.

As to continuing damage generally, *see* DAMAGES, Vol. XVII., pp. 87–91.

1078. Sinking & boring.]—SCOTS MINES CO. *v.* LEADHILLS MINES CO., No. 1068, *ante*.

1079. Pumping.]—BAIRD *v.* WILLIAMSON, No. 1063, *ante*.

1080. ——.]—YOUNG (JOHN) & CO. *v.* BANKIER DISTILLERY CO., No. 1066, *ante*.

1081. ——.]—LOMAX *v.* STOTT, No. 1069, *ante*.

1082. Construction of artificial channels or pipes.]—BAIRD *v.* WILLIAMSON, No. 1063, *ante*.

1083. ——.]—PHILLIPS *v.* HOMFRAY, FOTHERGILL *v.* PHILLIPS (1871), 6 Ch. App. 770, L. C.

Annotations:—**Apld.** Whitham *v.* Westminster Brymbo Coal & Coke Co., [1896] 2 Ch. 538. **Refd.** Williams *v.* Raggett (1877), 46 L. J. Ch. 849.

1084. Conducting water through weak point in boundary.]—The barrier between two mines having been perforated, the owner of one of them artificially conducted his water so as to pass by the perforations into the other, that mode of removing it from his mine being most beneficial to himself, thereby causing irreparable damage to pltf.:—

PART XIII. SECT. 4, SUB-SECT. 2.—A. (b).

b. *Piercing barriers.*]—BARNES *v.* YUKON GOLD CO. (Y. T.) (1911), 18 W. L. R. 542.—CAN.

c. ——.]—Defts. who, in the absence of any custom of the mines justifying such working, by piercing a barrier left in a tunnel connecting a shaft outside a diamond mine with their claims within the mine, thereby threw in a concentrated flow a body of water on pltf.'s claims in the mine, which water would not have come on to such claims in ordinary course:—*Held:* guilty of negligence, & liable in damages for injury caused by such flow of water in stopping the working of pltf.'s claims.—VICTORIA DIAMOND MINING CO. *v.* DE BEER'S MINING CO. (1883), 1 Buch. A. C. 300.—S. AF.

d. *Diversion.*]—IRVING *v.* LEADHILLS MINING CO. (1856), 18 Dunl. (Ct. of Sess.) 833; 28 Sc. Jur. 382.—SCOT.

e. ——.]—*Held:* water which accumulates in a mine as the result of mining operations is the property of the mineral tenant, & he may convey it where he pleases, so that neighbouring tenants have no right to insist that the water when pumped to the surface shall be sent in its natural direction towards a river.—BLAIR *v.* HUNTER, FINLAY & CO. (1870), 9

Held: the ct. would, on an interlocutory application, grant a mandatory injunction, so as to keep things in the state in which they were *ante litem motam* until the hearing. *Semble*, also, it would be immaterial whether the perforation were the wrongful act of the injured owner or not.

It cannot be that you are entitled to hunt along your neighbour's boundary in order to find out a weak point in it, & to conduct all your water to that weak point, & then say, "If you had your boundary properly left here, there would have been no injury done to you" (WOOD, V.-C.).—WESTMINSTER BRYMBO COAL & COKE CO. *v.* CLAYTON (1867), 36 L. J. Ch. 476.

Annotation:—**Refd.** West Cumberland Iron & Steel Co. *v.* Kenyon (1879), 11 Ch. D. 782.

Damming up water.]—*See* No. 1069, *ante*.

1085. Diversion of water.]—FLETCHER *v.* SMITH, No. 1072, *ante*.

1086. —— Diversion not amounting to appropriation—Increase of burden on lower owner's mine.]—Defts., the owners of a mining property, sunk a shaft by which they tapped the water which had formerly found its way into certain old workings on their own ground, & had thence percolated into the pltfs.' mines. Defts. then made a borehole at the bottom of the shaft. It was admitted that the making it was not in due course of mining, but only for the purpose of getting rid of the water. The effect of the borehole was to let off the water into the above-mentioned old workings on defts.' ground, whence it percolated into pltfs.' works in same way in which it would have done if neither shaft nor borehole had ever been made:—*Held:* defts. had not by making the shaft so appropriated the water as to lay themselves under an obligation to keep it from coming upon pltfs.' land, & as the effect of defts.' operations was not to throw upon pltfs.' land any burden which it had not borne before, pltfs.' case failed.—WEST CUMBERLAND IRON & STEEL CO. *v.* KENYON (1879), 11 Ch. D. 782; 48 L. J. Ch. 793; 40 L. T. 703; 43 J. P. 731; 28 W. R. 23, C. A.

Annotation:—**Refd.** Prinsep *v.* Belgravia Estate (1895), 39 Sol. Jo. 381.

B. Liability of Surface Owners.

1087. Escape of water collected & retained on land—Negligent execution of drainage works.]—Defts., who were trustees of a turnpike road, converted an open ditch, which used effectually to carry off the rain water from the road, into a covered drain, placing therein catchpits & gratings to admit the water to such drain. The catchpits & gratings being insufficient in storms & heavy showers to admit the whole of the water, the overplus overflowed the road, & eventually infiltrated to pltf.'s colliery, causing considerable damage. He first complained to defts. in July, 1859, when they made some alterations; being again damaged, he complained a second time in December following, & then brought his action. It was objected that the action was not brought in time, inasmuch as more than three months had elapsed since the act first complained of was committed, the General Turnpike Act, 1822 (c. 126), s. 147, requiring the action to be brought within three months after "the fact committed":—*Held:* the action was maintainable, & was brought in time; for, although a party cannot be allowed to bring a fresh action because there has been a fresh damage, yet when there has been, as in the present case, not only a fresh damage, but a continuance of the wrongful act which caused it, that is a new cause of action, in respect of which the party injured may sue.—WHITEHOUSE *v.* FELLOWES (1861), 10 C. B. N. S. 765; 30 L. J. C. P. 305; 4 L. T. 177; 26 J. P. 40; 9 W. R. 557; 142 E. R. 654.

Annotations:—**Consd.** Greenwell *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165. **Refd.** Darley Main Colliery Co. *v.* Mitchell (1886), 11 App. Cas. 127; Hall *v.* Norfolk, [1900] 2 Ch. 493. **Mentd.** Holliday *v.* St. Leonard's, Shoreditch, Vestry (1861), 11 C. B. N. S. 192; Clothier *v.* Webster (1862), 12 C. B. N. S. 790; Brownlow *v.* Metropolitan Board of Works & Aird (1864), 16 C. B. N. S. 546; Coe *v.* Wise (1864), 5 B. & S. 440; Ohrby *v.* Ryde Comrs. (1864), 33 L. J. Q. B. 296; Mersey Dock Trustees *v.* Gibbs, Mersey Dock Trustees *v.* Penhallow (1866), L. R. 1 H. L. 93; Parsons *v.* St. Mathew, Bethnal Green (1867), L. R. 3 C. P. 56; Bathurst Borough *v.* Macpherson (1879), 4 App. Cas. 256; Colley *v.* L. & N. W. Ry. (1880), 5 Ex. D. 277; Taff Vale Ry. *v.* Amalgamated Soc. of Railway Servants, [1901] A. C. 426; Turner *v.* Mid. Ry. (1911), 104 L. T. 347; R. *v.* Marshland, Smeeth & Fen District Comrs., [1920] 1 K. B. 155.

1088. —— Offensive water from manufactory—Percolating into adjacent mine.]—Deft. allowed a noxious & offensive refuse water to flow from his manufactory into an old pit on his own land, but which percolated under ground into pltf.'s colliery. Deft. was restrained by perpetual injunction. On a bill to restrain a nuisance, a delay of six months in filing the bill, though important on an interlocutory application, held no bar to relief by injunction at the hearing of the cause.—TURNER *v.* MIRFIELD (1865), 34 Beav. 390; 55 E. R. 685.

1089. —— Without negligence or wilfulness.]—A. was the lessee of mines. B. was the owner of a mill standing on land adjoining that under which the mines were worked. B. desired to construct a reservoir, & employed competent persons, an engineer & a contractor, to construct it. A. had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, & which had also been out of use for years, & were apparently filled with marl & the earth of the surrounding land. No care was taken to block up these shafts, & shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages, & flooded A.'s mine:—*Held:* A. was entitled to recover damages from B. in respect of this injury.—RYLANDS *v.* FLETCHER (1868), L. R. 3 H. L. 330; 37 L. J. Ex. 161; 19 L. T. 220; 33 J. P. 70, H. L.; *affg.* S. C. *sub nom.* FLETCHER *v.* RYLANDS (1866), L. R. 1 Exch. 265, Ex. Ch.; *revsg.* (1865), 3 H. & C. 774.

Annotations:—**Apld.** Crompton *v.* Lea (1874), L. R. 19 Eq. 115. **Consd.** Cattle *v.* Stockton Waterworks (1875), L. R. 10 Q. B. 453; Wilson *v.* Waddell (1876), 2 App. Cas. 95. **Apld.** Powell *v.* Fall (1880), 5 Q. B. D. 597; Snow *v.* Whitehead (1884), 27 Ch. D. 588; Filburn *v.* People's Palace & Aquarium Co. (1890), 25 Q. B. D. 258. **Distd.** Greenwell *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165. **Apld.** Blake *v.* Woolf, [1898] 2 Q. B. 426; Batcheller *v.* Tunbridge Wells Gas Co. (1901), 84 L. T. 765; Charing Cross Electricity Supply Co. *v.* Hydraulic Power Co., [1914] 3 K. B. 772. **Refd.** R. *v.* Stephens (1866), L. R. 1 Q. B. 702; Woodall *v.* Hingley (1866), 14 L. T. 167; Richards *v.* Jenkins (1868), 18 L. T. 437; Dunn *v.* Birmingham Canal Navigation (1872), L. R. 8 Q. B. 42; Smith *v.* Fletcher (1874), L. R. 9 Exch. 64; Darley Main Colliery Co. *v.* Mitchell (1886), 11 App. Cas. 127; Evans *v.* M. S. & L. Ry. (1887), 36 Ch. D. 626; Holliday *v.* Wakefield Corpn., [1891] A. C. 81; Manchester Corpn. *v.* New Moss Colliery, [1906] 1 Ch. 278; Miles *v.* Forest Rock Granite Co. (Leicestershire) (1918), 34 T. L. R. 500;

Macph. (Ct. of Sess.) 204; 43 Sc. Jur. 169.—**SCOT.**

f. No right to trespass.]—Where a person cannot exercise a right to discharge water & *débris* from a gold-mining claim without trespassing on his neighbour's land he is bound to refrain from exercising that right, & he may be held liable although he is only one of a number of persons whose united acts are doing the injury.—MCMILLAN *v.* GREAT EXTENDED SLUICING CO. (REGISTERED) (1886), 4 N. Z. L. R. 377 (S. C.).—**N.Z.**

PART XIII. SECT. 4, SUB-SECT. 2.—B.

1087 i. *Escape of water collected & retained on land—Negligent execution of drainage works.*]—NEW HERIOT G. M. CO., LTD. *v.* UNION GOVERNMENT, [1916] App. D. 415.—**S. AF.**

Sect. 4.—Rights as to water: Sub-sect. 2, B.; sub-sect. 3. Sects. 5 & 6. Part XIV. Sect. 1: Sub-sect. 1, A. & B.]

A.-G. *v.* Cory, Kennard *v.* Cory, [1921] 1 A. C. 521. **Mentd.** Gordon *v.* St. James's, Westminster, Vestry (1865), 13 L. T. 511; Jones *v.* Festiniog Ry. (1868), L. R. 3 Q. B. 733; Saxby *v.* M. S. & L. Ry. (1869), 38 L. J. C. P. 153; The Thetis (1869), L. R. 2 A. & E. 365; Smith *v.* L. & S. W. Ry. (1870), L. R. 6 C. P. 14; Carstairs *v.* Taylor (1871), L. R. 6 Exch. 217; Wilson *v.* Newberry (1871), L. R. 7 Q. B. 31; Ross *v.* Fedden (1872), L. R. 7 Q. B. 661; Child *v.* Hearn (1874), L. R. 9 Exch. 176; Madras Ry. *v.* Zemindar of Carvetinagarum (1874), 30 L. T. 770; Nichols *v.* Marsland (1876), 2 Ex. D. 1; Humphries *v.* Cousins (1877), 2 C. P. D. 239; Crowhurst *v.* Amersham Burial Board (1878), 4 Ex. D. 5; Hurdman *v.* N. E. Ry. (1878), 3 C. P. D. 168; Nitro Phosphate & Odam's Chemical Manure Co. *v.* London & St. Katherine Docks Co. (1878), 27 W. R. 267; A.-G. *v.* Tomline (1879), 12 Ch. D. 214; Box *v.* Jubb (1879), 4 Ex. D. 76; Anderson *v.* Oppenheimer (1880), 5 Q. B. D. 602; Dixon *v.* Metropolitan Board of Works (1881), 7 Q. B. D. 418; Fleming *v.* Manchester Corpn. (1881), 44 L. T. 517; Tillett *v.* Ward (1882), 10 Q. B. D. 17; Gas Light & Coke Co. *v.* St. Mary Abbots, Kensington, Vestry (1884), Cab. & El. 368; Whalley *v.* L. & Y. Ry. (1884), 13 Q. B. D. 131; Snook *v.* Grand Junction Waterworks Co. (1886), 2 T. L. R. 308; Blake *v.* Land & House Property Corpn. (1887), 3 T. L. R. 667; Abelson *v.* Brockman (1889), 54 J. P. 119; Ruddiman *v.* Smith (1889), 60 L. T. 708; National Telephone Co. *v.* Baker, [1893] 2 Ch. 186; Bradford Corpn. *v.* Pickles (1894), 71 L. T. 793; Gill *v.* Edouin (1894), 71 L. T. 762; Green *v.* Chelsea Waterworks Co. (1894), 70 L. T. 547; Grosvenor & West End Railway & Terminus Hotel Co. *v.* Hamilton (1894), 71 L. T. 362; Ponting *v.* Noakes, [1894] 2 Q. B. 281; Price *v.* South Metropolitan Gas Co. (1895), 65 L. J. Q. B. 126; Prinsep *v.* Belgravia Estate (1895), 39 Sol. Jo. 381; Dixon *v.* G. W. Ry. (1896), 75 L. T. 245; St. Helens Corpn. *v.* United Alkali Co. (1901), Times, June 19; Canadian Pacific Ry. *v.* Roy, [1902] A. C. 220; Eastern & South African Telegraph Co. *v.* Cape Town Tram. Cos., [1902] A. C. 381; Ely Brewery Co. *v.* Pontypridd U. D. C. (1903), 68 J. P. 3; Ilford Gas Co. *v.* Ilford U. D. C., Jackson Third Party (1903), 67 J. P. 365; Smith *v.* Giddy, [1904] 2 K. B. 448; Chichester Corpn. *v.* Foster, [1906] 1 K. B. 167; Evans *v.* Liverpool Corpn., [1906] 1 K. B. 160; Foster *v.* Warblington U. C., [1906] 1 K. B. 648; Hobart *v.* Southend-on-Sea Corpn. (1906), 75 L. J. K. B. 305; Baker *v.* Snell, [1908] 2 K. B. 825; West *v.* Bristol Tram. Co., [1908] 2 K. B. 14; Whitmores (Edenbridge) *v.* Stanford, [1909] 1 Ch. 427; Wing *v.* London General Omnibus Co., [1909] 2 K. B. 652; Lowery *v.* Walker, [1910] 1 K. B. 173; Barker *v.* Herbert, [1911] 2 K. B. 633; Jones *v.* Lee (1911), 106 L. T. 123; Jones *v.* Llanrwst U. C., [1911] 1 Ch. 393; Remorquage à Hélice (Soc. Anon. de) *v.* Bennetts, [1911] 1 K. B. 243; Titterton *v.* Kingsbury Collieries (1911), 104 L. T. 569; Maxey Drainage Board *v.* G. N. Ry. (1912), 106 L. T. 429; Hanley *v.* Edinburgh Corpn. (1913), 77 J. P. 233; Rickards *v.* Lothian, [1913] A. C. 263; Goodbody *v.* Poplar B. C. (1914), 84 L. J. K. B. 1230; Heath's Garage *v.* Hodges, [1916] 2 K. B. 370; Greenock Corpn. *v.* Calc. Ry., Greenock Corpn. *v.* G. & S. W. Ry., [1917] A. C. 556; Holgate *v.* Bleazard, [1917] 1 K. B. 443; Cheater *v.* Cater, [1918] 1 K. B. 247; Mansel *v.* Webb (1918), 88 L. J. K. B. 323; De Silva *v.* Korossa (Ceylon) Rubber Co. (1919), 88 L. J. P. C. 54; Musgrove *v.* Pandelis, [1919] 2 K. B. 43; Quebec Railway Light, Heat & Power Co. *v.* Vandry, [1920] A. C. 662; Boynton *v.* Ancholme Drainage & Navigation Comrs., [1921] 2 K. B. 213; Jefferson *v.* Derbyshire Farmers, [1921] 2 K. B. 281; Rainham Chemical Works *v.* Belvedere Fish Guano Co., [1921] 2 A. C. 465; Postmaster General *v.* Liverpool Corpn. (1922), 92 L. J. K. B. 382; Hoare *v.* McAlpine, [1923] 1 Ch. 167; Manton *v.* Brocklebank, [1923] 2 K. B. 212; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539; Cockburn *v.* Smith, [1924] 2 K. B. 119; Edwards *v.* Birmingham Navigations, [1924] 1 K. B. 341; Gayler & Pope *v.* Davies, [1924] 2 K. B. 75; Performing Right Soc. *v.* Ciryl Theatrical Syndicate, [1924] 1 K. B. 1; Ilford U. C. *v.* Beal, [1925] 1 K. B. 671; Booth *v.* Thomas, [1926] Ch. 109; Hines *v.* Tousley, Newell Third Party (1926), 95 L. J. K. B. 773; Noble *v.* Harrison, [1926] 2 K. B. 332; Smith *v.* G. W. Ry. (1926), 135 L. T. 112.

1090. Flooding of mine due to opening of canal sluice—"Act of God."]—Pltfs., owners of collieries, sued defts., proprietors of a canal constructed under an Act of Parliament, for damages caused to their mines by water which overflowed from the canal into a brook, & thence into the mines. They also in the alternative claimed to be entitled to a *mandamus* for the summoning of a jury to assess compensation for same injury, as being one caused by the works which the canal co. were authorised to construct & maintain. It was found in the special case stated by an official referee that on the occasion of an extraordinary rainfall defts. opened a sluice, & discharged from the canal into a brook more water than the latter was able to carry off, the consequence being that the brook overflowed into pltfs.' mines. It was found further that if the sluice had not been so opened the canal bank would shortly have burst; that the adjacent country & pltfs.' mines would have been inundated; that the course which defts. adopted to avert such a catastrophe was a prudent one, & the only effectual one which could have been adopted in the emergency; that so far as pltfs.' mines were concerned, the opening of the sluice caused them to be flooded some hours sooner than they would otherwise have been, but that no additional damage was caused thereby to pltfs., the inundation being inevitable by reason of the excessive rainfall & consequent accumulation of water:—*Held:* (1) upon these findings, that even assuming defts.' act to have been a wrongful one, it was *injuria absque damno*, & therefore not a ground of action; (2) the compensation clauses of the Acts of Parliament did not apply to such a case.—THOMAS *v.* BIRMINGHAM CANAL CO. (1879), 49 L. J. Q. B. 851; 43 L. T. 435; 45 J. P. 21.

SUB-SECT. 3.—POLLUTION OF WATER.

See Rivers Pollution Prevention Act, 1876 (c. 75), & *generally*, WATERS & WATERCOURSES.

SECT. 5.—VENTILATION.

1091. Right to user of air course—Constructed through adjoining land.]—POWELL *v.* AIKEN, No. 461, *ante*.

1092. ——— ———.]—A bill alleged that pltf. was seised in equity of copyhold hereditaments known as the C. estate, forming part of the manor of B., & that he had let same upon a yearly tenancy; that deft. was the owner of a colliery called W., & also lessee of & worked the coal mines under the copyhold lands of the manor; that deft. had been working coal under an estate called H., which was not within the manor, & had brought the coals from that estate to the surface at W. by conveying same by an underground railway through the C. estate of pltf.'s; that he had also drained & ventilated the workings of the H. estate by roads or ways through the C. estate. The bill prayed for an injunction to restrain deft. from conveying the coal from the H. estate, & from making or allowing the road or way to remain through the C. estate, & for an account. A demurrer was allowed on the ground that pltf. showed no title to the place in which the wrong complained of was committed, & no possession of the subsoil of the C. estate. On appeal the demurrer was overruled.

The possession still remains in the copyholder subject to the property of the minerals being in the lord, & the easement of the lord in working the minerals (LORD CAMPBELL, C.).—BOWSER *v.* MACLEAN (1860), 2 De G. F. & J. 415; 30 L. J. Ch. 273; 3 L. T. 456; 6 Jur. N. S. 1220; 9 W. R. 112; 45 E. R. 682, L. C.

Annotations:—**Refd.** Proud *v.* Bates (1865), 6 New Rep. 92; Eardley *v.* Granville (1876), 3 Ch. D. 826; Batten Pooll *v.* Kennedy, [1907] 1 Ch. 256; Thomson *v.* St. Catharine's College, Cambridge, etc., [1919] A. C. 468. **Mentd.** Cochrane *v.* Willis (1864), 9 L. T. 792; Cooper *v.* Crabtree (1882), 20 Ch. D. 589.

1093. Remedies for wrongful construction of air course—Injunction—Mandatory injunction.]—POWELL *v.* AIKEN, No. 461, *ante*.

1094. —— ——.]—BOWSER *v.* MACLEAN, No. 1092, *ante*.

1095. Liability for passage of air into adjoining mine—Non-construction of barriers.]—JEGON *v.* VIVIAN, No. 701, *ante*.

1096. Liability in respect of air leave—For ventilation obtained by natural means.]—JEGON *v.* VIVIAN, No. 701, *ante*.

1097. ——.]—POWELL *v.* VICKERMAN, No. 1048, *ante*.

SECT. 6.—**NUISANCE.**

See, generally, NUISANCE.

Part XIV.—Statutory Regulation of Mines.

SECT. 1.—COAL MINES.

SUB-SECT. 1.—HOURS AND CONDITIONS OF LABOUR.

A. Hours of Labour.

See Coal Mines Regulation Act, 1908 (c. 57), ss. 1–7; Coal Mines Act, 1919 (c. 48), s. 1 (*a*); Coal Mines Act, 1926 (c. 17).

1098. Hours below ground—Contravention of statutory provisions—"Connivance"—Bonâ fide omission of entries in register.]—Applt. was manager of a coal mine in which several onsetters were below ground for periods longer than that provided by Coal Mines Regulation Act, 1908 (c. 57), on numerous dates extending over several months. No entry as to the cause was made in the register kept by applt. under Coal Mines Regulation Act, 1908 (c. 57), as applt. was unable to ascertain a definite reason for the men failing to reach the surface in proper time, but on some occasions he cautioned the men. Applt. had acted in good faith & he had not aided the men in avading the Coal Mines Regulation Act, 1908 (c. 57), or encouraged them to disobey it. A ct. of summary jurisdiction convicted applt. of connivance at the contravention of Coal Mines Regulation Act, 1908 (c. 57), but quarter sessions quashed the conviction:—*Held*: the order of quarter sessions must be affirmed.—GREGORY *v.* WALKER (1912), 77 J. P. 55; 29 T. L. R. 51, D. C.

1099. —— —— **Workmen working in shifts.**]—Resp. co. were the owners of a colliery, in which two workmen, working in shifts, were on certain dates below ground for twelve & a half hours, but some of the workmen in each of the shifts returned to the surface within a period of seven hours from the time when the last workman in each of such shifts left the surface. Resp. co. were summoned for conniving at a contravention of Coal Mines Regulation Act, 1908 (c. 57), s. 1, as amended by Coal Mines Act, 1919 (c. 28), s. 1, in that the two workmen were below ground, for the purpose of their work, & of going to & from their work, more than seven hours:—*Held*: as the excess of time over seven hours could not be attributed to the time permitted for lowering & raising the shifts, the mere fact that some of the workmen in the shifts returned to the surface within seven hours from the time when the last workman in the shift left the surface did not constitute a compliance with Coal Mines Act, 1919 (c. 28), & the justices ought to have convicted.—WING *v.* SKINNER & HOLFORD, LTD. (1922), 128 L. T. 365; 87 J. P. 33; 27 Cox, C. C. 360, D. C.

1100. Extension of hours—Liability of workman for non-compliance.]—Workmen in a coal mine were working under an agreement of service which provided that the hours of labour of workmen employed below ground shall be such as are authorised by Coal Mines Regulation Act of 1908 (c. 57). The manager duly gave notice that on two specified days the hours of working in the mine—namely, eight hours, would be extended by one hour on each day. The workmen on each day refused to work the extra hour, on the ground that such extra hour was not "authorised" by Coal Mines Regulation Act, 1908 (c. 57). Upon a summons by the employers against one of the workmen for breach of his contract in refusing to work the extra hours:—*Held*: the time having been properly extended in pursuance of Coal Mines Regulation Act, 1908 (c. 57), the extended time was to be substituted for the time as fixed by Coal Mines Regulation Act, 1908 (c. 57), & therefore the extra hours were authorised by Coal Mines Regulation Act, 1908 (c. 57), within the terms of the agreement, & the workman in refusing to work the extra hours had committed a breach of the agreement.—ROBINSON *v.* INSOLES, LTD. (1909), 102 L. T. 45; 71 J. P. 47, D. C.

B. Terms and Conditions of Service.

See Coal Mines Act, 1911 (c. 50), ss. 76, 77.

1101. Liability of miner—Leaving employment without notice—Justification by illegal stipulation as to fines.]—KEARNEY *v.* WHITEHAVEN COLLIERY CO., No 1109, *post*.

1102. Right of owner—Dismissal of miner—Improper filling of tubs.]—Coal Mines Regulation Act, 1887 (c. 58), s. 12, does not preclude an owner from dismissing a collier who, contrary to express instructions, continues to send up an undue proportion of dust.—CHELL *v.* HALL & BOARDMAN (1896), 12 T. L. R. 408, D. C.

1103. —— —— **Refusal to work.**]—Pltf. was employed as a putter by a colliery co., & his work consisted in drawing coal in tubs underground. The amount earned by him depended upon the number of tubs drawn by him, & his wages were paid fortnightly upon the Friday following the end of the fortnight, the total amount of work done each day by him being ascertained daily. On the day preceding pay day a pay note was handed to each worknan. On a certain occasion upon receipt of the pay notes a dispute arose between one of the putters & the co., & as a consequence upon the following day the putters, including pltf., declined to work, & laid the pit idle. They were then informed by the masters that they had broken their contract, & that all wages earned

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PART XIV. SECT. 1, SUB-SECT. 1.—A.

g. Hours below ground—Contravention of statutory provisions—Firemen.]—ROGER *v.* STEVENSON, [1913] S. C. (J.) 30.—SCOT.

h. —— ***Extension to meet danger—Must be abnormal danger.***]—"Danger" under Coal Mines Regulation Act, 1908, is limited to danger arising out of some abnormal occurrence.—THORNEYCROFT *v.* ARCHIBALD, [1913] S. C. (J.) 45.—SCOT.

Sect. 1.—*Coal mines: Sub-sect.* 1, *B.; sub-sect.* 2, *A. & B.*]

since the conclusion of the previous fortnight would be forfeited. On the Monday following the putters presented themselves prepared to work, but were told they would not be allowed to resume unless they signed on afresh. Subsequently, by arrangement they resumed work without prejudice on the following day. Pltf. sued defts. to recover the amount of the wages forfeited by defts. for the four days' work done by him after the conclusion of the fortnight in respect of which the disputed pay note was given, & also claimed damages for breach of contract on the ground that the refusal to allow him to work on the Monday was a breach by defts. of their contract with him, it being common knowledge that laying the pit idle for a day or two was a common practice, & did not amount to a repudiation of their contract by the putters:—*Held:* pltf. was not entitled to recover damages for breach of contract, as the masters were justified in dismissing him in consequence of his refusal to work; but as each day's wages became due daily, although they were not paid over to him until the expiration of a fortnight, he was entitled to recover the wages for the four days upon which he had worked before his dismissal.—PARKIN *v.* SOUTH HETTON COAL CO. (1907), 97 L. T. 98; 23 T. L. R. 408, D. C.; *affd.*, 98 L. T. 162, C. A.

Conditions of service—Royalties welfare levy.]—*See* Mining Industry Act, 1926 (c. 28), Part III.

SUB-SECT. 2.—PAYMENT OF WAGES.

A. In General.

See, generally, MASTER & SERVANT, pp. 82 *et seq.*, *ante*; WORK & LABOUR.

Place of payment.]—*See* Coal Mines Act, 1911 (c. 50), s. 96.

1104. Right to weekly statement of wages—Coal Mines Act, 1911 (c. 50), s. 96 (2)—Collier's boy employed under butty system.]—(1) Above sub-sect. imposes upon the mine owners a duty to deliver a statement with the detailed particulars therein prescribed to a boy employed in the mine who works under, & whose wages are handed to him by, a collier known as a butty who has received the amount from the mine owners.

(2) This duty can be enforced not only by proceedings before justices under above sect., sub-sect. 3, but by an action for a declaration at the instance of a boy so employed to whom such a statement as aforesaid has been refused by the mine owners.—SIMMONDS *v.* NEWPORT ABERCARN BLACK VEIN STEAM COAL CO., [1921] 1 K. B. 616; 90 L. J. K. B. 609; 124 L. T. 557; 85 J. P. 109; 37 T. L. R. 165, C. A.

Annotation:—Generally, **Mentd.** R. *v.* Poplar B. C. (No. 1), [1922] 1 K. B. 72.

1105. —— —— Remedies of miners.]—SIMMONDS *v.* NEWPORT ABERCARN BLACK VEIN STEAM COAL CO., No. 1104, *ante*.

1106. Right to wages during stoppage—Required to render workings safe.]—Pltfs., miners employed by defts. at their colliery, refused to work in the mine on the ground that it was unsafe owing to the condition of the shafts. By reason of the fall of part of the lining of one of the shafts it had become unsafe, & the other shaft being also unsafe, pltfs. refused to go down into the mine until sufficient work had been done to render the shafts safe. The dangerous condition of the shafts was not due to any negligence or breach of duty on the part of defts. The mine was closed by defts. in order to enable them to execute the necessary repairs, & pltfs. in consequence sustained a loss of wages. They claimed declarations that defts. were liable to pay them wages, or alternatively damages, in respect of their loss of wages while they were absent from work by reason of the mine being closed:—*Held:* (1) in order to give effect to the presumed intention of both parties to the contract of employment, it was necessary to imply a term that, in the events which happened, the mine owners should not be liable to pay wages or damages to their workmen during the time which was reasonably required to put the mine into a safe condition; (2) defts. were not liable to pay pltfs. damages for the breach of any duty imposed on them by Coal Mines Act, 1911 (c. 50), inasmuch as it was not reasonably practicable for defts. to prevent the shafts from getting into an unsafe condition, & they were therefore protected by Coal Mines Act, 1911 (c. 50), s. 102 (8).—BROWNING *v.* CRUMLIN VALLEY COLLIERIES, [1926] 1 K. B. 522; 95 L. J. K. B. 711; 134 L. T. 603; 90 J. P. 201; 42 T. L. R. 323; 24 L. G. R. 302.

B. Deductions.

See Coal Mines Regulation Act, 1887 (c. 58), s. 12.

1107. What deductions may be made—In respect of "mineral contracted to be gotten"—Slack.]—Persons were employed in a mine under a contract that coals should be paid for at 1*s.* 6*d.* per ton, & heading slack at 7*d.* per ton, no other slack to be paid for; all other slack to be deducted from the different places in proportion to their loading, & a premium of 2*d.* per ton on the coal to be paid to all those places whose boxes of coal did not contain an average of more than 112 lbs. of dust each per week.

The coal, including the slack gotten, was weighed close to the pit's mouth & was then sorted & carried 40 yards & shot on to a screen, more slack being caused by the operations: a note of the slack which passed through the screen was taken by a person employed only by the mine owners, & the weight of the slack was deducted from the weight at the pit's mouth. The wages of the miners were paid according to the weight of the coal after thus deducting the slack.

In an action by the miners to recover from their employers the difference between the wages so ascertained & the full wages if no such deduction had been made:—*Held:* the miners were entitled to recover; (1) (LORD HALSBURY, C., & LORDS HERSCHELL & MACNAGHTEN) Because by the

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PART XIV. SECT. 1, SUB-SECT. 2.—A.

k. *Payment by weight—Method of determining weight.*]—All the mineral must be weighed; it is an offence to weigh a limited number of skips & arrive at the gross amount by averaging.—DIXON *v.* ROGERS (1898), 19 N. S. W. L. R. 33; 14 N. S. W. W. N. 130.—**AUS.**

l. —— ——.]—BATES *v.* ROSS (1900), 21 N. S. W. L. R. (L.) 198; 17 N. S. W. W. N. 77.—**AUS.**

m. *Miner's lien—Work in respect of which lien can be maintained.*]—*Re* STEINBERGER (Y. T.) (1906), 5 W. L. R. 93.—**CAN.**

n. —— ——.]—Where the registered owner of a claim held it for a mining co. which worked it, & workmen who were employed by the co. registered liens for wages against the registered owner:—*Held:* as the workmen were neither employed by the registered owner on wages nor employed under him on contract, the liens were ineffective.—EDGAR *v.* MATAKITAKI GOLD-DREDGING CO., LTD. (1901), 21 N. Z. L. R. 126.—**N.Z.**

o. —— *Registration of lien.*]—*Re* WESTERBERG & FIELD (1907), 5 W. L. R. 443.—**CAN.**

p. —— *Time within which proceedings must be taken.*]—LUSHBAUGH *v.* CALLAGHAN (Y. T.) (1907), 6 W. L. R. 830.—**CAN.**

q. —— ——.]—DUGGAN *v.* CORBETT (1908), 7 W. L. R. 693.—**CAN.**

contract the amount of wages paid depended "on the amount of mineral gotten" within Mines Regulation Act, 1872 (c. 76), s. 17, but the miners were not paid "according to the weight of the mineral gotten," nor was "such mineral truly weighed accordingly," within that sect.; for "the mineral contracted to be gotten" was coal including slack, & slack was not "material other than mineral contracted to be gotten," & was therefore not one of the deductions allowed by that sect.; (2) (LORDS BRAMWELL & FITZGERALD) Because though the deductions were not in contravention of sect. 17, the weights were not ascertained in the manner required by sect. 18.—NETHERSEAL COLLIERY CO. *v.* BOURNE (1889), 14 App. Cas. 228; 59 L. J. Q. B. 66; 61 L. T. 125; 54 J. P. 84, H. L.; *affg.* S. C. *sub nom.* BOURNE *v.* NETHERSEAL COLLIERY CO. (1888), 20 Q. B. D. 606, C. A.

Annotations:—As to (1) **Consd.** Brace *v.* Abercarn Colliery Co., Huggins *v.* London & South Wales Colliery Co., [1891] 2 Q. B. 699; Kearney *v.* Whitehaven Colliery Co., [1893] 1 Q. B. 700. **Distd.** Humble *v.* Humphreys (1901), 85 L. T. 563; Coltness Iron Co. *v.* Dobbie, [1920] A. C. 916. *As to* (2) **Refd.** Kearney *v.* Whitehaven Colliery Co., [1893] 1 Q. B. 700.

1108. —— —— Small coal—Obtained by "screening" at pit's mouth.]—Pltfs. were employed in defts.' collieries to cut large coal at wages which depended on the weight gotten. The coal was cut as large coal, but a considerable amount of small coal was produced in the conveyance of the coal to the pit's mouth & "screening" it. The coal raised was screened at the pit's mouth, & defts. made deductions from pltfs.' wages in respect of the small coal found in it. Pltfs. sued defts. for the amounts so deducted:—*Held:* (1) the small coal was part of "the mineral contracted to be gotten" within Coal Mines Regulation Act, 1887 (c. 58), s. 12 (1), & the deductions were illegal, & pltfs. were therefore entitled to recover; (2) the sums allowed for the small coal were to be at the same rate as that paid for the large coal.—BRACE *v.* ABERCARN COLLIERY CO., HUGGINS *v.* LONDON & SOUTH WALES COLLIERY CO., [1891] 2 Q. B. 699; 60 L. J. Q. B. 706; 65 L. T. 694; 56 J. P. 20; 40 W. R. 3; 7 T. L. R. 634, C. A.

Annotations:—As to (1) **Distd.** Kearney *v.* Whitehaven Colliery Co. (1892), 8 T. L. R. 645 (*See* [1893] 1 Q. B. 700); Humble *v.* Humphreys (1901), 85 L. T. 563. **Consd.** Coltness Iron Co. *v.* Dobbie, [1920] A. C. 916.

1109. —— Agreement for average deduction—Validity.]—Applt. was employed by resps. at their colliery upon the terms that he should be paid wages according to the weight of coal gotten by him; that he should not leave his employment without giving fourteen days' notice, & that deductions should be made in respect of dirt sent up to the surface with the coal; & the following special mode of determining those deductions was agreed upon between resps. & the persons employed by them: About one tub in twenty sent up to the surface was selected at random for testing. The dirt in that tub was separated from the coal & weighed, & if the tub contained more than a certain weight of dirt, the man who sent it up was not paid anything in respect of the coal therein. The men sending up the other nineteen tubs were paid on the total weight of the contents of each tub as though it contained coal only:—*Held:* the proviso in Coal Mines Act, 1887 (c. 58), s. 12, was controlled by the first part of that sect., & did not authorise any agreement by which a person employed was not to be paid on the weight of the coal in a particular tub; the agreement with respect to the special mode of making deductions for dirt was therefore illegal, but the illegality in that respect did not vitiate the whole contract of employment so as to justify applt. in leaving without giving fourteen days' notice.

> The proviso . . . says that deduction shall be made in respect of stones or substances other than the mineral contracted to be gotten. Now, what are you to deduct from? From what is in the tub—not from the actual mineral in the tub, but from all that is in the tub . . . & the deduction must be from the weight in the tub, not from the men's wages. It is true that the amount of the wages depends upon the weight of the mineral contracted to be gotten; but I think that the wording of the first part of the sect. & of the proviso bring one to the conclusion that the deduction must be from weight, & must be a deduction in respect of things other than the actual minerals (LORD ESHER, M.R.).—KEARNEY *v.* WHITEHAVEN COLLIERY CO., [1893] 1 Q. B. 700; 62 L. J. M. C. 129; 68 L. T. 690; 57 J. P. 645; 41 W. R. 594; 9 T. L. R. 402; 4 R. 388, C. A.

Annotations:—**Distd.** Chell *v.* Hall & Boardman (1896), 12 T. L. R. 408; Humble *v.* Humphreys (1901), 85 L. T. 563. **Consd.** Coltness Iron Co. *v.* Dobbie, [1920] A. C. 916. "Some of the dicta as to the meaning of particular words in the 1887 Act may be open to question" (VISCOUNT FINLAY).

1110. —— —— ——.]—A miner who was paid by weight, & who worked in a seam in which coal was mixed with stones & dirt, sued the mineowners for a sum for unpaid wages representing the aggregate amount of deductions made for stones & dirt from the hutches sent up by him during a specified period, upon the ground that such deductions were illegal. It was a term of pursuer's employment that he should be paid for clean coal only. The weigher appointed by the mineowner made a deduction for stones & dirt of a fixed amount per hutch based upon an average arrived at by crow-picking sample hutches & deducting from the gross weight the weight of the stones & dirt therein contained, & this amount was well within the average weight of stones & dirt found in the hutches. The miners agreed with the mineowners that deductions should be made in accordance with Coal Mines Regulation Act, 1887 (c. 58), s. 12, but no special mode of determining the deductions was agreed upon. A checkweigher appointed by the miners objected to the system of averages adopted by the weigher & claimed that the amount of the deductions should be ascertained by crow-picking each hutch separately, which was admittedly impracticable, but the weigher continued his former practice:—*Held:* the deductions had not been determined in the manner prescribed by the sect., but that by the terms of the sect. pursuer was entitled to payment in respect only of "the mineral contracted to be gotten"—namely, coal—& that he had failed to establish his claim.—COLTNESS IRON CO. *v.* DOBBIE, [1920] A. C. 916; 89 L. J. P. C. 143; 123 L. T. 504; 84 J. P. 241; 36 T. L. R. 622; 64 Sol. Jo. 517, H. L.

1111. —— Agreement for non-payment where tubs contain more than agreed proportion of dirt—Validity.]—KEARNEY *v.* WHITEHAVEN COLLIERY CO., No. 1109, *ante*.

PART XIV. SECT. 1, SUB-SECT. 2.—B.

1109 1. *What deductions may be made—Agreement for average deduction—Validity.*]—RONALDSON *v.* MOWAT (1894), 21 R. (Ct. of Sess.) (J.) 55.—**SCOT.**

r. —— *Deduction for overfilling—Validity.*]—*Held:* the agreement for deductions was valid, overfilling being one mode of improper filling.—ATKINSON *v.* HASTIE (1894), 21 R. (Ct. of Sess.) (J.) 62; 31 Sc. L. R. 892; 2 S. L. T. 159.—**SCOT.**

Sect. 1.—*Coal mines: Sub-sect.* 2, *B. & C.* (*a*), (*b*), (*c*) *&* (*d*), *& D.* (*a*).]

1112. Improper deductions—Right to recovery.]—NETHERSEAL COLLIERY CO. *v.* BOURNE, No. 1107, *ante*.

—— **Right of miner to leave employment without notice.**]—*See* No. 1109, *ante*.

1113. Mode of deduction From weight—Not from wages.]—KEARNEY *v.* WHITEHAVEN COLLIERY CO., No. 1109, *ante*.

1114. —— —— **Of whole contents of tub—Not from weight of mineral contents.**]—KEARNEY *v.* WHITEHAVEN COLLIERY CO., No. 1109, *ante*.

1115. Agreement for weighing of coal without slack—Validity.]—JONES *v.* LLYNVI COLLIERY CO. (1886), cited in 19 Q. B. D., p. 360, D. C.

Annotation:—**Refd.** Netherseal Colliery Co. *v.* Bourne (1889), 14 App. Cas. 228.

1116. Payment other than by weight of minerals gotten.]—Orders exempting mines from 35 & 36 Vict. c. 76, s. 17, made by a Secretary of State before the passing of the Coal Mines Regulation Act, 1887 (c. 58), are specially preserved & kept in force by Coal Mines Regulation Act, 1887 (c. 58), ss. 79, 84, unless revoked or altered by a Secretary of State under Coal Mines Regulation Act, 1887 (c. 58), s. 72, & exempt the mines to which they were granted from Coal Mines Regulation Act, 1887 (c. 58), s. 12 (1).—DICKINSON *v.* HANDSLEY (1889), 60 L. T. 567; 53 J. P. 676; 5 T. L. R. 339, D. C.

Application of Truck Acts.] *See* FACTORIES, Vol. XXIV., pp. 934–941.

Inspection of weights & measures—Application of provisions of Weights & Measures Act, 1878 (c. 49).]—*See* Coal Mines Regulation Act, 1887 (c. 58), s. 15.

C. Checkweighers.

(*a*) *Appointment and Tenure of Office.*

1117. Appointment—Two seams in one mine.] In a mine not divided into parts under Coal Mines Regulation Act, 1887 (c. 58), s. 19, there were two seams of coal worked as one mine by separate gangs of miners paid according to the weight of mineral gotten by them:—*Held*: the two seams together constituted a "mine" within Coal Mines Regulation Act, 1887 (c. 58), s. 13, & consequently the miners working in one of the seams could not under Coal Mines Regulation Act, 1887 (c. 58), s. 13) appoint a checkweigher in respect of the mineral gotten from that seam.—THORPE *v.* DAVIES, [1908] 2 K. B. 750; 77 L. J. K. B. 939; 99 L. T. 362; 72 J. P. 418.

1118. Tenure of office—Effect of dismissal of miners by whom checkweigher appointed.]—Applt., who was a miner in resp.'s coal mine, was appointed checkweigher by the other miners under 35 & 36 Vict. c. 76, s. 18, & acted in that capacity, & was paid by the miners. Subsequently resps. dismissed all the miners & closed the mine. No notice was given to applt. by resps., or by or on behalf of the miners. On the mine being re-opened a short time afterwards, applt. claimed to be still checkweigher & to be entitled to perform the duties of that office, & brought an action against resps. for preventing his doing so:—*Held*: applt. had, on the dismissal of the miners, ceased to be checkweigher, & the action could not be maintained.—WHITEHEAD *v.* HOLDSWORTH (1878), 4 Ex. D. 13; 48 L. J. Q. B. 254; 39 L. T. 638; 43 J. P. 400; 27 W. R. 94, D. C.

Annotation:—**Folld.** Richards *v.* Duffryn Aberdare Colliery Co., [1923] 2 Ch. 520.

1119. —— ——.]—(1) A person duly appointed to be a checkweigher by the other miners under the Coal Mines Regulation Acts, 1887 to 1905, ceases to be a checkweigher on the expiry of notices determining the contracts of all the individual miners.

(2) Threats made during a *bonâ fide* stoppage of a mine, after all the contracts with the workmen had been determined & before the mine reopened, not to reopen the mine if the old checkweigher was continued in that position is not an offence under Coal Mines (Check Weigher) Act, 1894 (c. 52), s. 1, which applies only to acts done while the mine is a going concern.—RICHARDS *v.* DUFFRYN ABERDARE COLLIERY CO., [1923] 2 Ch. 520; 93 L. J. Ch. 58; 130 L. T. 181; 39 T. L. R. 634; 68 Sol. Jo. 13.

(*b*) *Remuneration.*

See Coal Mines (Weighing of Minerals) Act, 1905 (c. 9), s. 2.

1120. Who may be liable to contribute—Miner temporarily paid by the day.]—Pltf., a checkweigher at a mine, duly appointed under Coal Mines Regulation Act, 1887 (c. 58), s. 13, by a majority of the persons employed in the mine who were paid according to the weight of mineral gotten by them, sued deft., a miner who was being temporarily paid by the day, to recover the proportion of his wages as a checkweigher alleged to be due from deft. In addition to weighing the coal sent up by the miners, who were paid according to the amount of coal gotten, pltf. also weighed the coal sent up by deft., & these services were of benefit to deft. inasmuch as, when the coal sent up by him reached such a quantity that if paid by the amount gotten he would receive more than he was being paid by the day, he might enter into a new arrangement with the proprietors of the mine. Pltf. declined to pay deft., on the ground that, being paid by the day, he was not liable to contribute to the checkweigher's wages. Coal Mines Regulation Act, 1887 (c. 58), s. 14, provides that a checkweigher appointed by a majority of the persons employed at a mine who are paid according to the amount of mineral gotten by them may recover from any person for the time being employed at such mine & so paid, his proportion of the checkweigher's wages:—*Held*: deft., being paid by the day & not by the weight of coal gotten by him, was not liable, under the statute, to contribute to pltf.'s wages, nor, in the above circumstances, was he liable under any contract to do so.—OXTON *v.* WILLIAMS (1910), 101 L. T. 957; 26 T. L. R. 242, D. C.

(*c*) *Limits on Powers.*

1121. Interference with checkweigher—Liability of mine owner for threat made during stoppage—Application of Coal Mines (Check Weigher) Act,

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1116 i. *Payment other than by weight of minerals gotten.*]—HUMBLE *v.* HUMPHREYS, [1902] A. C. 207, P. C.—**AUS.**

PART XIV. SECT. 1, SUB-SECT. 2.—C. (a).

t. *Appointment.*]—The appointment of a check-weigher must be *in præsenti*. —*Ex p.* MORGAN (1889), 10 N. S. W. L. R. 109; 5 N. S. W. W. N. 128. —**AUS.**

a. ——.]—*Re* MCBAIN (1906), 2 E. L. R. 160.—**CAN.**

b. ——.]—ADDIE & SONS' COLLIERIES, LTD. *v.* SULLIVAN, [1916] S. C. 770.—**SCOT.**

c. *Facilities to be afforded checkweigher—Shelter from weather—Artificial heat.*]—*Held*: the fact that the owners of a colliery provided no means for the artificial heating of the checkweigher's weigh-house did not constitute a failure to provide him with a shelter from the weather.—DALMELLINGTON IRON CO., LTD. *v.* MACKENNA, [1912] S. C. (J.) 63; 49 Sc. L. R. 763; [1912] 2 S. L. T. 39; 6 Adam, 629.—**SCOT.**

1894 (c. 52), s. 1.]—RICHARDS *v.* DUFFRYN ABERDARE COLLIERY CO., No. 1119, *ante*.

1122. Interference by checkweigher with workmen—Whether action lies by workmen—Construction of Coal Mines Regulation Act, 1887 (c. 58), s. 13 (3).]—(1) Where there is an existing arrangement between the recognised trade unions & the employers' association that non-unionists shall not be employed in the mines of a district, & at one of these mines officials of a recognised trade union, in pursuance of the settled policy of their union, advise or instruct a workman charged with giving out safety lamps not to let miners who are members of an unregistered union have their lamps, or when they obtain from some of these miners the lamps issued to them without employing violence or threats of violence, their action, if taken for the purpose of preserving peace in the mine by preventing non-unionists from working there, is done in contemplation of a trade dispute within Trade Disputes Act, 1906 (c. 47), s. 3, & does not constitute a breach of Conspiracy & Protection of Property Act, 1875 (c. 86), s. 7.

(2) The provision in above sub-sect. that "a checkweigher shall not be authorised in any way . . . to interfere . . . with any of the workmen or with the management of the mine; . . ." is intended solely for the protection of the management; & workmen with whom there has been such interference cannot ground a civil action upon this breach of above sub-sect.—FOWLER *v.* KIBBLE, [1922] 1 Ch. 487; 91 L. J. Ch. 353; 126 L. T. 566; 38 T. L. R. 271; 66 Sol. Jo. 267, C. A.

(d) Removal.

See Coal Mines Regulation Act, 1887 (c. 58), s. 13 (4), (5).

1123. Grounds for—Intimidation of workmen.]—Applt., a checkweigher, stationed by the persons employed in resp.'s mine to take an account of the weighing of the mineral gotten by them, under 35 & 36 Vict. c. 76, s. 18, had been convicted & imprisoned for intimidating one of the workmen with a view to compel him to abstain from working as a waggon rider in resp.'s employment. Resp. applied to justices for a summary order for applt.'s removal, under 35 & 36 Vict. c. 76, s. 18, & the justices, although it did not so appear on the face of the conviction, admitted evidence to show, & found as a fact, that the said intimidation took place on resp.'s premises, where applt. had no right to be, except in his capacity of checkweigher. It did not appear that this intimidation caused any impediment or interruption of the working of the mine, but the justices made the order of removal:—*Held:* applt. had misconducted himself within 35 & 36 Vict. c. 76, s. 18, & the justices were justified in making the order.—PRENTICE *v.* HALL (1877), 37 L. T. 605; 26 W. R. 237; 42 J. P. Jo. 4, D. C.

Annotation:—**Consd.** Sykes *v.* Barraclough, [1904] 2 K. B. 675.

1124. —— Interference with workmen—Whether limited to acts done in virtue of office—Or to acts done in mine.]—Interference with the workmen within Coal Mines Regulation Act, 1887 (c. 58), s. 13, is not limited to acts done by a checkweigher by virtue of or in connection with his office, or to acts done at the mine.—SYKES *v.* BARRACLOUGH, [1904] 2 K. B. 675; 73 L. J. K. B. 920; 91 L. T. 560; 68 J. P. 561; 53 W. R. 205; 20 T. L. R. 680; 48 Sol. Jo. 642, D. C.

Annotation:—**Reld.** Date *v.* Gas Coal Collieries, [1915] 2 K. B. 454.

1125. —— ——.]—Justices having made an order under Coal Mines Regulation Act, 1887 (c. 58), s. 13, for the removal of a checkweigher added the words: "And from henceforth he shall cease to perform the duties of checkweigher on behalf of the persons employed in the said mine as aforesaid":—*Held:* the order was good.

Semble: a checkweigher removed under Coal Mines Regulation Act, 1887 (c. 76), s. 13, cannot immediately be reappointed.

The word henceforth means from the date of the order, & does not mean henceforth & for ever. I do not think that we are called upon to decide whether removal means permanent removal, but, if we had to decide that point, there are good grounds for thinking that it does mean some sort of permanent removal, because of the words 'stationing of another checkweigher in his place" (DARLING, J.).—R. *v.* LLEWELLYN, *Ex p.* SQUIRE (1906), 96 L. T. 32; 71 J. P. 51, D. C.

1126. —— Interference with management of mine—Communicating terms of union resolution as to hours of work.]—*Ex p.* WHITE (1897), 13 T. L. R. 580, C. A.

1127. Effect of—Whether eligible for immediate re-appointment.]—R. *v.* LLEWELLYN, *Ex p.* SQUIRE, No. 1125, *ante*.

D. Minimum Wages.

(a) In General.

See Coal Mines (Minimum Wage) Act, 1912 (c. 2).

1128. Validity of prior agreement for higher rate of wage—During temporary cessation of work due to emergency.]—By an agreement made prior to 1912 between defts. & their workmen it was agreed that if a fatal accident occurred in defts.' mine before 12 o'clock, the day wagemen in the district in which the accident happened, if they came out, should be paid a full day's wage:—*Held:* in the case of a workman who was getting a higher wage than the minimum rate, this agreement was not superseded by a rule made under Coal Mines (Minimum Wage) Act, 1912 (c. 2), which provided that, in the event of any interruption of work during a shift due to an emergency over which the management had no control, the workman should only be paid such a proportion of the minimum rate as the time he worked bore to the total number of hours of the shift.—MACKINNON *v.* NORTH'S NAVIGATION COLLIERIES (1889), LTD. (1913), 29 T. L. R. 615.

1129. Jurisdiction of domestic tribunal—Dispute as to deductions—Miner in receipt of wages exceeding minimum rate.]—(1) A county ct. judge whose decision was affirmed by the Div. Ct. held that the provisions of Coal Mines (Minimum Wage) Act, 1912 (c. 2), are applicable, notwithstanding that a workman may be receiving an amount for wages in excess of the minimum rate settled under Coal Mines (Minimum Wage) Act, 1912 (c. 2), & that the powers of the domestic tribunal to decide a dispute as to the regularity & efficiency of a miner's work are not thereby ousted:—*Held:* the county ct. judge had in fact found, & there was evidence on which he could find, that the workman's wages were based on the statutory minimum rate, & were not the subject of a common law contract.

(2) Where a miner is suing for his minimum wage, & a dispute under Coal Mines (Minimum Wage) Act, 1912 (c. 2), is before the domestic tribunal, the proper course is for the ct. to adjourn the trial in order that the dispute may be decided.—FAIRBANKS *v.* FLORENCE COAL & IRON CO., LTD., [1915] 2 K. B. 714; 84 L. J. K. B. 1115; 112 L. T. 1013, C. A.

1130. Employer not paymaster of miner—Mine

Sect. 1.—*Coal mines: Sub-sect.* 2, *D.* (*a*), (*b*) & (*c*).]

worked on "sett" system.]—Pltf. was a filler employed at defts.' colliery. In that colliery the coal was worked by colliers in "setts." Each "sett" consisted of two or more colliers, & to each "sett" one or more fillers were attached. The fillers' duty was to load the tubs with the coal when gotten by the colliers, & the tubs were then sent to the surface, where the weight of the coal sent up was credited to the "sett." The colliers were paid by defts. at the end of each week according to the weight of the coal credited to the "sett," one of the colliers, called the contractor, receiving payment of the amount due to the "sett." A filler was paid a daily wage, which had been for some years before the passing of Coal Mines (Minimum Wage) Act, 1912 (c. 2), 5*s.* 11*d.* less 2*d.* for subscriptions, & he was paid his remuneration each week by the contractor of the "sett" out of the money received by him from defts. The filler was engaged by the colliery manager; he as well as the colliers signed a document headed "Terms of Employment," under which he agreed to be bound by the regulations of the colliery; he was sent by an official of the colliery to work with a "sett," & if the "sett" were dissatisfied with him it asked the management to remove him; & his dismissal rested with the management. There was evidence that, apart from an arrangement made in 1908 between colliery owners & colliers as to "hard or difficult places," no allowance was made by defts. when paying the contractor of the "sett" in respect of the fillers' wages, that the fillers looked to the contractor for payment, & that if the amount paid by defts. to the contractor was not sufficient to pay all, the contractor was still bound to pay the filler his full wages. After the passing of Coal Mines (Minimum Wage) Act, 1912 (c. 2), the minimum rate of wages for a filler was fixed at 4*s.* 10*d.* a day. For the week ending June 19, 1912, the contractor paid pltf. at the rate of 4*s.* 10*d.* a day, & pltf. brought an action in the county ct. against defts. to recover the balance of the wages, namely, the difference between 4*s.* 10*d.* & 5*s.* 11*d.* a day. The county ct. judge found that there was a custom to pay a filler 5*s.* 9*d.* per day clear, that the collier had always paid it out of his tonnage wages, except in case of payment under the hard & difficult place agreement, but that there was no privity of contract between the defts. & the filler. He accordingly gave judgment for defts. The Div. Ct. held that the evidence was conclusive that defts. were the employers of pltf. & bound to pay him his wages, & they gave judgment for pltf.:—*Held:* (1) there was evidence upon which the county ct. judge was entitled to find that apart from Coal Mines (Minimum Wage) Act, 1912 (c. 2), there was no privity of contract under which pltf. could claim wages from defts.

With regard to Coal Mines (Minimum Wage) Act, 1912 (c. 2):—*Held:* (2) (VAUGHAN WILLIAMS, L.J.) the effect of the Act was to render defts. as colliery owners liable to pay pltf. his wages; (3) (BUCKLEY & KENNEDY, L.JJ.) the Act did not make any alteration in the person liable to pay the wages, & did not create a contract to pay wages where none existed independently of the Act, & defts. were not liable to pltf.—RICHARDS *v.* WREXHAM & ACTON COLLIERIES, LTD., DAVIES *v.* SAME, [1914] 2 K. B. 497; 83 L. J. K. B. 687; 110 L. T. 402; 30 T. L. R. 228, C. A.

Annotations:—As to (1) **Apld.** Higginson *v.* Blackwell Colliery Co., Pitchford *v.* Same (1914), 84 L. J. K. B. 1189. **Distd.** Churm *v.* Dalton Main Collieries, [1916] 1 A. C. 612. **Consd.** Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K. B. 616. *As to* (2) **Refd.** Higginson *v.* Blackwell Colliery Co., Pitchford *v.* Same (1914), 84 L. J. K. B. 1189. *As to* (3) **Folld.** Higginson *v.* Blackwell Colliery Co., Pitchford *v.* Same (1914), 84 L. J. K. B. 1189. **Overd.** Hooley *v.* Butterley Co., [1916] 2 A. C. 63. *Generally*, **Mentd.** Hill *v.* Beckett (1914), 84 L. J. K. B. 458.

1131. —— Mine worked on "stall" system.]—Defts. were the owners of a colliery in which the colliers worked in gangs, each gang working in a separate "stall" & consisting of one or more "stallmen" or "contractors" to whom the stall was assigned by defts., & usually also of several "daymen" who assisted the stallmen. Pltf. was employed at the mine as a dayman, &, like the other employees, he had entered upon his employment by signing a form of contract which provided that he would serve defts. (*inter alia*) on the terms of the contract rules in force at the colliery. Pltf. worked in a stall for several days, & the amount of his wages & of other wages earned in the stall was paid by defts. to one of the stallmen, who absconded without paying pltf. Pltf. brought an action against defts. in the county ct. claiming his wages for these days at the minimum rate fixed for the district. The evidence went to show that the practice at the colliery was that defts. paid to a stallman on the fortnightly pay day the net aggregate amount due for the work done in the stall, & that out of that amount the stallman paid to each dayman whatever wage, not less than the minimum wage, the latter, in the opinion of the stallman, was worth. The county ct. judge, having regard to the terms of contract, & of the contract rules, & to the evidence, held that the contract between pltfs. & defts. did not impose any obligation on defts., to pay pltf. his wages; &, further, that if it did impose any such obligation on defts., they were to be discharged therefrom on paying the stallman; & he gave judgment for defts. The Div. Ct. affirmed the judgment of the county ct. judge. Pltf. appealed:—*Held:* (1) there was evidence to support the conclusions of the county ct. judge as to the nature of the contract between pltf. & defts.; &, (2) as there was no already existing contract between pltf. & defts. as to the payment of wages, Coal Mines (Minimum Wage) Act, 1912 (c. 2), s. 1 (1), did not create such a contract.—HIGGINSON *v.* BLACKWELL COLLIERY CO., PITCHFORD *v.* SAME (1914), 84 L. J. K. B. 1189; 112 L. T. 442; 31 T. L. R. 95, C. A.

Annotations:—As to (1) **Consd.** Hooley *v.* Butterley Colliery Co. (1915), 84 L. J. K. B. 1969; Churm *v.* Dalton Main Collieries, [1916] 1 A. C. 612. *As to* (2) **Consd.** Hooley *v.* Butterley Colliery Co. (1915), 84 L. J. K. B. 1969; Churm *v.* Dalton Main Collieries, [1916] 1 A. C. 612. *Generally*, **Mentd.** Hill *v.* Beckett (1914), 84 L. J. K. B. 458.

1132. —— ——.]— A colliery co. usually assigned two workmen, a collier & a filler, to each underground working place or stall, but occasionally a double or treble set of men, composed of an equal number of colliers & fillers, worked together in one "stall." The men were paid upon a tonnage rate in accordance with the coal gotten. A weekly pay-note was made out to the number of the "stall" & the money was paid to the collier, or, in case of double or treble sets, to one of the colliers. The division of the pay between the collier & the filler was a matter of private bargain between them. On entering the service of the colliery co. all the workmen, whether colliers or fillers, were bound to sign three documents, one of which contained the bye-laws of the co. By bye-law 2, "All persons employed . . . shall receive wages & payment according to the current rate of wages for the time being at the colliery." By bye-law 13, "All persons working under or for or paid by contractors or other persons shall be deemed to be the servants of the

owners of the colliery to the extent only that they shall be bound to obey these bye-laws & the other rules of the colliery, but the owners of the colliery shall not be bound to see to the payment of or be liable for the wages due to such persons after they have paid the contractor or other persons for whom such persons work." A filler worked with a collier in a stall under an arrangement whereby the collier first took for himself for each shift 1*s.* & the balance was equally divided in accordance with the number of shifts worked by each of the two men. In a certain week the balance coming to the filler under this arrangement was less than the minimum wages to which he was entitled under Coal Mines (Minimum Wage) Act, 1912 (c. 2). The filler claimed a minimum wage from the colliery co. The co., who for all purposes other than the payment of wages were the employers of the filler, pleaded that they were not his employers for the purposes of Coal Mines (Minimum Wage) Act, 1912 (c. 2):—*Held:* assuming without deciding that the "contract of employment" mentioned in Coal Mines (Minimum Wage) Act, 1912 (c. 2), s. 1 (1), meant a contract of employment at wages, an obligation was imposed on the colliery co. to pay wages to the filler by bye-law 2, & was not taken away by bye-law 13, & the co. were the employers of the filler within Coal Mines (Minimum Wage) Act, 1912 (c. 2), & were liable to pay him a minimum wage.

For the purposes of Coal Mines (Minimum Wage) Act, 1912 (c. 2), s. 1 (1), it is not necessary that the employer should be also the paymaster of the workman.—CHURM *v.* DALTON MAIN COLLIERIES, LTD., [1916] 1 A. C. 612; 85 L. J. K. B. 578; 114 L. T. 528; 32 T. L. R. 275, H. L.; *revsg.* (1915), cited 85 L. J. K. B. at p. 579, C. A.

Annotations:—**Consd.** Hooley *v.* Butterley Colliery Co. (1915), 84 L. J. K. B. 1969. **Apld.** Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K. B. 616.

1133. —— ——.]—Pltf., who was employed underground as a holer by a colliery co., on entering the service of the co. signed an agreement whereby he agreed to serve the co. on the terms of certain contract rules & empowered the co. to make certain specified deductions from wages. By rule 2 of the contract rules coal was to be paid for by weight, & by rule 3, "all persons working under or for stallmen or contractors shall be deemed to be servants of the co. to the extent only that they shall be bound to obey these contract rules & the other rules & regulations of the colliery." The colliery was worked on the butty system. Weekly pay checks were made out to the number of the stall showing the net total amount earned in the stall calculated upon a tonnage rate in accordance with the coal gotten, & the money was received by the stallmen or buttyman, who handed to the holders & fillers employed in the stall wages regulated by the work done by each in accordance with the recognised rates of wages for the colliery & kept the balance for himself. Owing to hard holing the wages received from the stallman by pltf., who was usually paid by piece work, were during a period of four months less than the minimum wage to which he was entitled under Coal Mines (Minimum Wage) Act, 1912 (c. 2). In answer to an action in the county ct. by pltf. against the co. for payment of the balance required to make up the minimum wage the co. maintained that they were not the employers of pltf. within Coal Mines (Minimum Wage) Act, 1912 (c. 2), & that their liability was absolved by payment to the stall of an aggregate amount sufficient to provide a minimum wage all round. The county ct. judge gave judgment for pltf.:—*Held:* (1) there was an employment of pltf. by the co. at wages, & rule 3 did not apply to a person who was under an independent contract of service already the servant of the co.; (2) overruling *Richards* v. *Wrexham & Acton Collieries, Ltd.*, *Davies* v. *Same*, No. 1130, *ante*, for the purposes of Coal Mines (Minimum Wage) Act, 1912 (c. 2), s. 1 (1), it was not necessary that the employer should be also the paymaster of the employee; (3) payment by the co. to the stall of a sum sufficient to provide a minimum wage to each of the workmen under a different method of distribution was not a discharge of their obligation under Coal Mines (Minimum Wage) Act, 1902 (c. 2).—HOOLEY *v.* BUTTERLEY CO., LTD., [1916] 2 A. C. 63; 85 L. J. K. B. 1050; 114 L. T. 858; 32 T. L. R. 375, H. L.; *revsg.* (1915), 84 L. J. K. B. 1969, C. A.

Annotations:—*As to* (1) **Consd.** Churm *v.* Dalton Main Collieries, [1916] 1 A. C. 612. **Apld.** Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K. B. 616.

(b) Payment.

See Coal Mines (Minimum Wage) Act, 1912 (c. 2), s. 2.

1134. Obligation of employer—Mine worked on "stall" system.]—HIGGINSON *v.* BLACKWELL COLLIERY CO., PITCHFORD *v.* SAME, No. 1131, *ante*.

1135. —— ——.]—HOOLEY *v.* BUTTERLEY CO., LTD., No. 1133, *ante*.

(c) Recovery.

See Coal Mines (Minimum Wage) Act, 1912 (c. 2), s. 1.

1136. Action by miner—Condition precedent to action—Production of certificate of right to minimum wage.]—By rule 4 of the rules for the district of Derbyshire, exclusive of South Derbyshire, made under Coal Mines (Minimum Wage) Act, 1912 (c. 2), for the purpose of ascertaining what sum is due to a workman for any pay-week in respect of his right to wages at the minimum rate regard shall be had to the amount of his actual earnings during the period consisting of the pay-week in question & as few preceding pay-weeks as shall be necessary to make up a period during which the colliery has worked not less than ten full days, provided that the period shall in no case be longer than four pay-weeks in all. By rule 7, if any question shall arise whether any workman in the district is a workman to whom the minimum rate of wages is applicable, the question shall be decided, in the last resort, by the district board, &, failing a settlement by them, by the independent chairman, & a certificate of the decision shall be signed by the chairman & vice-chairman of the board or by the independent chairman, as the case may be, & such decision shall in every case be final & binding. By reason of a strike of miners work at deft.'s colliery in the early part of 1912 ceased for about six weeks. On Apr. 10, work was resumed, but for the pay-week ending on Apr. 16, the colliery worked only one day, & for the pay-week ending on Apr. 23, the colliery worked only five & a half days. Pltf., who was a miner employed at the colliery, claimed to be entitled to wages at the minimum rate settled under Coal Mines (Minimum Wage) Act, 1912 (c. 2), for the pay-week ending on Apr. 23. Defts. disputed his claim, & the question came before the district board & finally before the independent chairman, who gave a certificate that by reason of rule 4, pltf. was excluded from the operation of Coal Mines (Minimum Wage) Act, 1912 (c. 2), s. 1, & was not a workman to whom the minimum rate

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of wages was applicable in respect of the pay-week in question. Pltf. thereupon brought an action in the county ct. to recover the difference between the minimum rate of wages & the amount actually earned by him for that week:—*Held:* it was a condition precedent to pltf.'s right to sue that he should have obtained a certificate that he was a workman to whom the minimum rate of wages was applicable; rule 4 was not *ultra vires;* & therefore the action was not maintainable.—RANDLE *v.* CLAY CROSS CO., LTD., [1913] 3 K. B. 795; 83 L. J. K. B. 167; 109 L. T. 522; 29 T. L. R. 621, D. C.

Annotations:—**Overd.** Barwell *v.* Abercarn Black Vein Steam Coal Co., [1915] 2 K. B. 256. **Refd.** Fairbanks *v.* Florence Coal & Iron Co., [1914] 2 K. B. 461.

1137. —— —— ——.]—(1) Pltf., who was a miner employed at defts.' colliery, brought an action in the county ct. under Coal Mines (Minimum Wage) Act, 1912 (c. 2), s. 1, to recover the difference between the minimum rate of wages settled under Coal Mines (Minimum Wage) Act, 1912 (c. 2), & the amount actually earned by him during a certain period. Defts. delivered a special defence that the dispute between the parties, not stating what it was, had been referred to an umpire in pursuance of the district rules, & the umpire had certified in writing that pltf. was not entitled to the sum claimed. At the trial pltf. gave evidence that he was a miner employed at the colliery during the period in question, & upon his counsel admitting that the dispute, not stating what it was, had been properly submitted to the umpire under the district rules & that he could not put in the certificate of the umpire, the county ct. judge, upon the authority of *Randle* v. *Clay Cross Co., Ltd.*, No. 1136, *ante*, gave judgment for defts.:—*Held:* the production of the certificate by pltf. was not a condition precedent to his right to sue, & the action must be remitted to the county ct. for further hearing.

Randle v. *Clay Cross Co., Ltd.*, No. 1136, *ante*, overd. upon this point.

(2) If a dispute, referred to the domestic tribunal under Coal Mines (Minimum Wage) Act, 1912 (c. 2), is still *sub judice*, the county ct. judge should adjourn the action until the dispute is determined.—BARWELL *v.* ABERCARN BLACK VEIN STEAM COAL CO., LTD., [1915] 2 K. B. 256: *sub nom.* BARWELL *v.* NEWPORT ABERCARN BLACK VEIN STEAM COAL CO., LTD., 84 L. J. K. B. 1105; 112 L. T. 806; 31 T. L. R. 136; 59 Sol. Jo. 233, C. A.

Annotation:—*As to* (2) **Folld.** Fairbanks *v.* Florence Coal & Iron Co., [1915] 2 K. B. 714.

1138. —— **Jurisdiction of county court—Arbitration proceedings not concluded.**]—BARWELL *v.* ABERCARN BLACK VEIN STEAM COAL CO., LTD., No. 1137, *ante*.

1139. —— —— ——.] — FAIRBANKS *v.* FLORENCE COAL & IRON CO., LTD., No. 1129, *ante*.

(*d*) *Variation.*

See Coal Mines (Minimum Wage) Act, 1912 (c. 2), s. 2.

1140. Colliers working in "hard or difficult places."]—By the rules regulating the management of a colliery the minimum standard of wages for colliers working in hard or difficult places was fixed at 6*s.* a day. Pltfs., who were colliers engaged at the particular colliery, had worked at a place in the mine which was a hard or difficult one within the meaning of the rules. In an action by pltfs. to recover their wages, the county ct. judge awarded them the difference between what they actually earned & what they would have earned if the place had been a normal one, & he fixed the latter sum at 5*s.* per day:—*Held:* the County Ct. judge was wrong, & pltfs. were entitled to be paid at the rate of 6*s.* per day.—JONES *v.* PHŒNIX COLLIERY CO. (1912), 28 T. L. R. 374, D. C.

1141. Award of joint district board—Right of appeal.]—Where a joint district board under Coal Mines (Minimum Wage) Act, 1912 (c. 2), s. 2, make an award settling the minimum rates of wages in their district, & the award is expressed in ambiguous terms, although there is no right of appeal from the award, the High Ct. has jurisdiction under Ord. 35, r. 5, to determine what it means, & declare the rights of the parties under it accordingly.—LOFTHOUSE COLLIERY, LTD. *v.* OGDEN, [1913] 3 K. B. 120; 82 L. J. K. B. 910; 107 L. T. 827; 29 T. L. R. 179; 57 Sol. Jo. 186.

Annotation:—**N.F.** Guaranty Trust Co. of New York *v.* Hannay, [1915] 2 K. B. 536.

1142. —— **Jurisdiction of High Court—Where award ambiguously worded.**]—LOFTHOUSE COLLIERY, LTD. *v.* OGDEN, No. 1141, *ante*.

1143. Powers of joint district board—General district rules—Inclusion of method for ascertaining rate of actual daily earnings—Validity.]—The purposes for which a joint district board are empowered under Coal Mines (Minimum Wage) Act, 1912 (c. 2), to make general district rules do not include the provision of a method for ascertaining the rate of the actual daily earnings of the workmen. Therefore, a rule which provided that "in ascertaining whether the minimum wage has been earned by any workman on piece work the total earnings during two consecutive weeks shall be divided by the number of shifts & parts of shifts he has worked during such two weeks" was held to be *ultra vires* & void.

A joint district board made a rule that if a workman from circumstances over which he alleged he had no control was unable to perform such an amount of work as would entitle him to a sum equal to the daily minimum rate he must forthwith give notice thereof to the official in charge of the district, & in default of such notice should forfeit his right to wages at the minimum rate for that pay:—*Held:* the rule was authorised by Coal Mines (Minimum Wage) Act, 1912 (c. 12), s. 1 (2).—DAVIES *v.* GLAMORGAN COAL CO., LTD., [1914] 1 K. B. 674; 83 L. J. K. B. 831; 110 L. T. 224; 30 T. L. R. 161; 58 Sol. Jo. 184, C. A.; *varying*, [1913] 3 K. B. 222.

Annotations:—**Consd.** Randle *v.* Clay Cross Co., [1913] 3 K. B. 795. **Refd.** Barwell *v.* Abercarn Black Vein Steam Coal Co., [1915] 2 K. B. 256.

1144. —— —— **Provision for notice by workman—Where circumstances prevent his earning minimum daily rate.**]—DAVIES *v.* GLAMORGAN COAL CO., LTD., No. 1143, *ante*.

1145. Rights of applicants before joint district board—Presentment of case in person.]—(1) Where an application is made by any workmen or employers under Coal Mines (Minimum Wage) Act, 1912 (c. 2), s. 3 (2), that the existing minimum rate of wages may be varied, the appcts. have a right to present their case, in support of the variation to the joint district board independently, & not merely through the medium of their representatives upon the board.

(2) Whether they are entitled for that purpose to appear before the board & be heard orally, or whether they can only submit their case & arguments in writing, is a question of procedure which it is for the board itself to determine.—R. *v.*

AMPHLETT (JUDGE), [1915] 2 K. B. 223; 84 L. J. K. B. 884; 112 L. T. 1077; 31 T. L. R. 229, D. C.

1146. —— Oral or written presentment of case—Discretion of joint district board.]—R. *v.* AMPHLETT (JUDGE), No. 1145, *ante*.

SUB-SECT. 3.—DIVISION OF MINES INTO PARTS.

See Coal Mines Act, 1911 (c. 50), s. 25.

SUB-SECT. 4.—PLANS.

See Coal Mines Act, 1911 (c. 50), s. 20.

SUB-SECT. 5.—ABANDONED MINES.

A. Fencing.

See Coal Mines Act, 1911 (c. 50), s. 26.

Liability of owner.]—*See* No. 1153, *post*.

Fencing of metalliferous mines.]—*See* Nos. 1215–1220, *post*.

B. Plans of Abandoned Mines.

See, now, Coal Mines Act, 1911 (c. 50), ss. 21–23.

1147. Non-compliance with regulation—Notice to comply—Sufficiency.]—Resp. was charged, as owner of a mine, for failing to comply with Coal Mines Regulation Act, 1887 (c. 58), s. 38, as amended by the Coal Mines Regulation Act, 1896 (c. 43), s. 4, in not sending to a Secretary of State, within three months after abandonment of a seam in the mine, a plan as prescribed by the Acts.

By Coal Mines Regulation Act, 1887 (c. 58), s. 38 (5), the information may be laid at any time within six months after abandonment, or after service on the owner of a notice to comply with the requirements of the sect. whichever last happens. On Jan. 25, 1900, after the abandonment, the appellant wrote to resp.: "I beg to point out to you that no plan of the abandoned workings in the seven feet coal seam has yet been forwarded, as required by Coal Mines Regulation Act, 1887 (c. 58), s. 38. Will you please give the matter your early attention." On May 25 applt. again wrote, requiring resp. to comply with Coal Mines Regulation Act, 1887 (c. 58). The information was laid on July 27, 1900. The justices dismissed the information:—*Held:* Coal Mines Regulation Act, 1887 (c. 58), s. 38 (5), was a clause of limitation, the letter of Jan. 25 was a good notice, & six months after service of the notice having expired before proceedings were taken, the information was out of time, & the decision of the justices was right.

As to sect. 59 [of Coal Mines Regulation Act, 1887 (c. 58)] the whole sect., or the second part of it, at any rate, applies only to a case where a person is guilty of an offence against the Act, for which a penalty is not provided. In this case a penalty is expressly prescribed, & I think we cannot regard this section as applying here (BRUCE, J.).—STOKES *v.* HILL, [1901] 1 K. B. 493; 70 L. J. K. B. 331; 84 L. T. 122; 65 J. P. 280; 49 W. R. 375; 17 T. L. R. 221; 45 Sol. Jo. 240; 19 Cox, C. C. 629, D. C.

As to legal proceedings.]—*See* Sub-sect. 10, *post*.

SUB-SECT. 6.—MANAGEMENT.

See, generally, Coal Mines Act, 1911 (c. 50), ss. 2–13, 28, 101; Police, Factories (Miscellaneous Provisions) Act, 1916 (c. 31), s. 10; Statutory Rules & Orders, 1917, No. 120.

1148. Liability of mine owner — Failure of manager to exercise daily supervision of mine.]—A colliery owner was summoned for having worked a mine without its being under the control of a duly certified manager. Proof was offered that the manager had lived at a distance from the mine & had only visited it at intervals. The justices dismissed the information on the ground that the owner was only bound under Coal Mines Regulation Act, 1872 (c. 76), s. 26, to appoint a duly certified manager & give notice thereof to the inspector of mines:—*Held:* the justices had been bound to hear the evidence, as, if the owner had acquiesced in the failure of the manager to exercise daily supervision in the mine, he would be liable to a penalty under the Act.—EVANS *v.* SMALL (1885), 2 T. L. R. 139, D. C.

Annotation:—**Refd.** David *v.* Britannic Merthyr Coal Co. (1909), 78 L. J. K. B. 659.

SUB-SECT. 7.—RETURNS.

See Coal Mines Act, 1911 (c. 50), ss. 17–24; Workmen's Compensation Act, 1923 (c. 42), s. 28 (3).

SUB-SECT. 8.—INSPECTORS AND COURTS OF INQUIRY.

See Coal Mines Act, 1911 (c. 50), ss. 82, 83, 97–101, 116, 117.

1149. Notice by inspector of causes of danger—Must be danger capable of remedy by occupier of mine.]—Applts. were owners of a colliery in which was a perpendicular pit shaft at the same level as, & communicating with, a similar shaft in an adjoining colliery, which did not belong to them. Notice was given applts. by the district inspector of mines that an accumulation of water existed near to & in connection with their mining works, which was dangerous & tended to the bodily injury of the workmen employed therein, & requiring them "forthwith to remedy the matter." This accumulation of water was in the pit shaft of the adjoining colliery, & applts. had no power to interfere with the water in it, but it was shown that after the receipt of the notice they did not remove the men at work in their own pit shaft

PART XIV. SECT. 1, SUB-SECT. 5.—A.

d. Liability to public generally.]—The duty of fencing disused mining shafts imposed by Mining Act, 1905, r. 8, Sched. I., is absolute & a right of action for its breach enures even to a trespasser.—CORNISH *v.* NIKE MINING CO. (1915), 11 Tas. L. R. 143.—**AUS.**

e. ——.]—A mining co. left unfenced a disused shaft, 60 feet deep & 5 feet in diameter, situated 82 feet from a public veldt road. A person strayed from the road in the dark &, falling into the shaft, received severe injuries:—*Held:* a reasonably careful man would have foreseen that under the circumstances an accident was likely to have happened, & the co. was liable for the damages sustained.—FLEMING *v.* RIETFONTEIN DEEP GOLD MINING CO., LTD., [1905] T. S. 111.—**S. AF.**

PART XIV. SECT. 1, SUB-SECT. 6.

f. Liability of manager—For breach of mine regulations.]—CURTHOYS *v.* KILBRIDE (1876), 2 V. L. R. (L.) 265.—**AUS.**

g. Employment of under-managers—Adjacent workings amounting to separate mines—Necessity for separate under-managers.]—MOORE & CO. *v.* MACMILLAN, [1921] S. C. (J.) 9.—**SCOT.**

PART XIV. SECT. 1, SUB-SECT. 8.

h. Report of committee appointed by miners' union.]—A report of a committee appointed by a meeting of a miners' union to inspect a mine is not equivalent to the report of a committee appointed by the persons employed in a mine to make such inspection.—LEADBEATER *v.* CROW'S NEST PASS COAL CO., 2 M. M. Cas. 145.—**CAN.**

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& colliery. Applts. having been convicted under 35 & 36 Vict. c. 76, for failing to comply with the above notice:—*Held:* (1) the conviction was wrong, for 35 & 36 Vict. c. 76, s. 46 only enabled the inspector to give notice in cases where the danger specified in the notice was one which could actually be remedied by the occupier of the mine, & not in cases where the source of danger was beyond their control; & the only remedy under such circumstances was that given by 35 & 36 Vict. c. 76, s. 51; (2) the authority to an inspector under 35 & 36 Vict. c. 76, s. 46, to require a remedy for a danger, did not extend to a withdrawal of workmen, which is expressly provided for under 35 & 36 Vict. c. 76, s. 51 (6).—R. *v.* SPON LANE COLLIERY CO. (1878), 3 Q. B. D. 673; 39 L. T. 13; 27 W. R. 46; *sub nom.* SPON LANE COLLIERY CO., LTD. *v.* BAKER, 48 L. J. M. C. 25; 42 J. P. 693, D. C.

1150. —— Objection by owner—Determination by arbitration — Powers of arbitrator.] — The arbitrators or umpire appointed to determine a matter in dispute between the Secretary of State & a mine-owner, under 35 & 36 Vict. c. 76, s. 46, in regard to any matter, thing, or practice in the mine found by the inspector to be dangerous, & required by him to be remedied, have or has no jurisdiction to prescribe the remedy by his award, but only to award that the matter or practice specified by the inspector is dangerous & ought to be remedied.—*Re* SECRETARY OF STATE FOR HOME DEPARTMENT & FLETCHER (1887), 18 Q. B. D. 339; 56 L. J. Q. B. 177; 51 J. P. 707; 35 W. R. 282; 3 T. L. R. 287, 293, C. A.

1151. Inquiry by Board of Trade—Explosion of steam pipe within mine—Effect of Boiler Explosions Acts.]—A boiler for generating steam was situate above-ground at a colliery, & a pipe conducted the steam down the shaft & along the working to a pumping engine in the mine. A valve in this pipe, in the mine & near the pumping engine, blew off. The Board of Trade ordered that an inquiry should be held by two comrs. under Boiler Explosions Act, 1882 (c. 22), into the causes & circumstances attending the explosion. On an application for a prohibition to the comrs. so appointed to prohibit them from proceeding with the inquiry:—*Held:* (1) the repeal by Boiler Explosions Act, 1890 (c. 35), s. 2, of part of Boiler Explosions Act, 1882 (c. 22), s. 4, gave the Board of Trade jurisdiction to order such an inquiry; (2) the pipe in which the explosion occurred was a "boiler" within the interpretation clause of Boiler Explosions Act, 1882 (c. 22).—R. *v.* BOILER EXPLOSIONS ACT, 1882, COMRS., [1891] 1 Q. B. 703; 60 L. J. Q. B. 544; 64 L. T. 674; 55 J. P. 616; 39 W. R. 440; 7 T. L. R. 371, C. A.

1152. Authority of inspector—Whether extends to withdrawal of workmen.]—R. *v.* SPON LANE COLLIERY CO., No. 1149, *ante*.

SUB-SECT. 9.—PROVISIONS AS TO SAFETY.

A. Liability for Non-Compliance.

See, now, Coal Mines Act, 1911 (c. 50), s. 102, &, *generally,* MASTER & SERVANT, pp. 301-304, *ante*.

1153. Owner or agent—Meaning of "owner"—Lessee of abandoned mine.]—In 1860 applt. proposed in writing to take from the landlord certain coal mines for fourteen years, from Michaelmas of that year, at a certain rent, a lease to be granted & accepted with provisions contained in a then existing lease of other mines. The landlord accepted this proposal in writing, but no lease was executed. One of the provisions mentioned was, that when & so soon as the pits, shafts, roads, etc., should be discontinued or become useless, the lessee would fill up or remove the same, unless the lessor should signify his wish that same should be kept open or continued. In 1871 applt. discontinued working these mines. In Dec. 1875, he was convicted by justices under the Coal Mines Regulation Act, 1872 (c. 70), s. 41, upon a charge of not causing the tops of the shafts of those mines to be kept securely fenced for the prevention of accidents on Nov. 29 previously:—*Held:* upon a case stated applt. was not at the date charged an owner of the shafts within the interpretation of that term in sect. 72.—STOTT *v.* DICKINSON (1876), 34 L. T. 391; 40 J. P. 613.

1154. —— Separate liability—One of several co-owners.]—On the hearing of an information against one of several owners of a mine, under 18 & 19 Vict. c. 108, s. 4, charging deft. with not having provided the boiler with a proper steam gauge, after evidence had been taken in support of the complaint, it was objected that the information ought to have been laid against all the owners of the mine. The justices held the objection good, & dismissed the complaint:—*Held:* the objection being untenable, & being a preliminary one in the nature of a plea in abatement, the justices had declined jurisdiction, & therefore this ct. made a rule absolute, calling on them to hear & adjudicate upon the case, under Justices Protection Act, 1847 (c. 44), s. 5.—R. *v.* BROWN (1857), 7 E. & B. 757; 26 L. J. M. C. 183; 29 L. T. O. S. 160; 22 J. P. 54; 3 Jur. N. S. 745; 5 W. R. 625; 119 E. R. 1427.

Annotations:—**Mentd.** Buccleuch *v.* Metropolitan Board of Works (1870), L. R. 5 Exch. 221; R. *v.* Essex JJ. (1883), 49 L. T. 177.

1155. —— —— Colliery company & manager.]—Two informations were laid against a colliery co. under the Coal Mines Act, 1911 (c. 50), one of which charged that they had failed to see that a certain mine belonging to them was provided with sufficient refuge holes contrary to s. 44 (1) of the Act; & the other of which charged that they had failed to see that sufficient bore holes were kept in the mine contrary to s. 68 of the Act. Two separate informations were also laid against the co.'s manager, who was one of their directors, charging him with the same offences. The four informations were heard together by the justices, & at the hearing the manager admitted full responsibility, but the co. did not prove the facts necessary to exempt them from liability under either the latter part of s. 75 or s. 102, of the Act. The justices found that the alleged contraventions of the Act had taken place, & therefore that under s. 75 & s. 101 (2) offences had been committed against the Act, & they did not find that the offences were trivial or committed in extenuating circumstances. The justices convicted the manager on the separate informations against him & imposed upon him a penalty & costs; but, considering that penalty adequate, & having regard to the fact that the manager took all responsibility, they dismissed the informations against the co. On a case stated by the justices:—*Held:* the justices should have convicted the co. as well as the manager, & that the case must go back to them with a direction to do so.—WING *v.* DENT MAIN COLLIERY CO., LTD., [1924] 2 K. B. 389; 93 L. J. K. B. 1085; 131 L. T. 143; 88 J. P. 109; 40 T. L. R. 618; 68 Sol. Jo. 793; 27 Cox, C. C. 642, D. C.

Annotation:—**Reld.** Charlton *v.* Jacob (1925), 94 L. J. K. B. 855.

1156. —— Certificated manager in charge.]—The Coal Mines Regulation Act, 1872 (c. 76), s. 51, after providing general rules to be observed in every mine to which the Act applies, enacts that in the event of any contravention of, or non-compliance with, any of the general rules by any person whomsoever being proved, the owner, agent, & manager shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means by publishing, & to the best of his power enforcing, the said rules as regulations for the working of the mine to prevent such contravention or non-compliance. An information was preferred under this sect. against the part owner of a coal mine, in which one of the general rules regulating the employment of machines had not been complied with. The evidence was that the general rules were put up in various parts of the mine, & that deft. occasionally visited the mine, but resided at a distance, & took no part in the management, which was under the exclusive control of the certified manager, who was also part owner. Deft. was not examined as a witness, as he might have been under s. 63 (4), but it was admitted that he had not personally taken any means to enforce the rules. The justices found as a fact that deft. had taken all reasonable means by publishing, & to the best of his power enforcing, the rules as regulations for the working of the mine to prevent such non-compliance, & dismissed the information:—*Held:* there was evidence from which the justices might properly come to that conclusion.—BAKER *v.* CARTER (1878), 3 Ex. D. 132; 47 L. J. M. C. 87; 26 W. R. 497.

Annotations:—**Folld.** Bell *v.* Bruce (1891), 55 J. P. 535. **Consd.** Stokes *v.* Checkland (1893), 68 L. T. 457; Stokes *v.* Mitcheson, [1902] 1 K. B. 857.

1157. —— ——.]—The agent of a mine subject to the Coal Mines Regulation Act, 1872 (c. 76), may be convicted for breach of the regulations prescribed by ss. 51, 52 of the Act, although the mine is under the control of a duly certified manager.—WYNNE *v.* FORRESTER (1880), 5 C. P. D. 361; 48 L. J. M. C. 140; 40 L. T. 524; 43 J. P. 686; 27 W. R. 820.

Annotations:—**Distd.** Stokes *v.* Checkland (1893), 68 L. T. 457. **Refd.** Stokes *v.* Mitcheson, [1902] 1 K. B. 857.

1158. —— —— & rules posted.]—B. was owner of a coal mine & took no active part, while a certificated manager, who had full charge, was convicted of permitting dangerous working near accumulated water. The rules had been duly posted up:—*Held:* the justices were not wrong in dismissing summons against B. for the same offence, on the ground that B. had taken all reasonable means to prevent non-compliance.—BELL *v.* BRUCE (1891), 55 J. P. 535, D. C.

1159. —— —— Mine under control of certificated manager & under-manager.]—Coal Mines Regulation Act, 1887 (c. 58), after providing by s. 49 general rules to be observed in mines, enacts by s. 50, that, in the event of any contravention or of non-compliance with the rules in the case of any mine to which the Act applies by any person whomsoever, the owner, agent, & manager shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means, by publishing, & to the best of his power enforcing, the rules as regulations for the working of the mine, to prevent such contravention or non-compliance. An information was preferred under s. 49, against the agents of a coal mine, in which one of the general rules relating to the ventilation of the mine had not been complied with. Deft. had appointed a duly qualified manager & under manager, & the non-compliance with the rules, which affected only one heading of the mine & was of a temporary character was due to their negligence. There was no evidence of personal negligence by deft., & deft. was not called as a witness. The justices found that deft. had taken the proper steps to enforce the rules by appointing a duly qualified manager & under manager, whose duty it was to carry out the rules, & that the violation of the rules was in no way caused by deft. omitting to enforce the rules, & they dismissed the information:—*Held:* there was evidence from which the justices might properly come to that conclusion.—STOKES *v.* MITCHESON, [1902] 1 K. B. 857; 71 L. J. K. B. 677; 86 L. T. 767; 66 J. P. 615; 50 W. R. 553; 18 T. L. R. 543; 20 Cox, C. C. 254, D. C.

See, now, Coal Mines Act, 1911 (c. 50), s. 102 (1) (*a*).

1160. —— Meaning of "agent"—Includes managing director of colliery company.]—STOKES *v.* MELLOR (1875), 39 J. P. Jo. 788.

1161. —— —— ——.]—A limited co. were the owners of a coal mine of which resp. was the managing director; but resp. did not interfere with the actual management of the mine underground, which was left in the hands of a duly certificated manager, under the Coal Mines Regulation Act, 1887 (c. 58), who was the manager of the colliery, & was in charge thereof. Resp., as managing director, occasionally visited the mine, but he had in no way interfered with the manager in his duties, though he had authorised all necessary expenditure for the safety & conduct of the mine, & had duly published at the mine the rules under the Coal Mines Regulation Act, 1887 (c. 58), & the abstract of the Act itself. An offence having been committed by the use of naked lights in the mine on a day when resp. was not at the mine:—*Held:* (1) resp. as managing director, was "agent," of the mine within the meaning of the Act, & was legally responsible as such; but (2) he had, by publishing & to the best of his power enforcing the rules as regulations for the working of the mine, taken all reasonable means within s. 50 of the Act to prevent such contravention of the rules, & was therefore not liable to be convicted for the offence.—STOKES *v.* CHECKLAND (1893), 68 L. T. 457; 57 J. P. 232; 9 T. L. R. 235; 37 Sol. Jo. 251; 17 Cox, C. C. 631; 5 R. 240, D. C.

Annotation:—*As to* (2) **Consd.** Stokes *v.* Mitcheson, [1902] 1 K. B. 857.

1162. —— What amounts to taking part in management of mine—Question of fact.]—Coal Mines Act, 1911 (c. 50), s. 102 (1), is intended to afford an additional protection to that given by s. 75 to the owner or agent of a mine. If they have not been "in the habit of taking" part in the management of the mine, & have not taken part in its management in regard to the particular matter in question, protection is not limited to the case under s. 75 which makes exemption depend on having taken means to prevent contravention of, or non-compliance with, the provisions of Part II. of the Act. The question of the habit of management in the particular instance is one of fact for the justices. Informations were preferred respectively against the fireman of a mine for having failed to inspect the mine immediately before the commencement of work conformably with s. 64 of the Coal Mines Act, 1911 (c. 50), & against the agent & owners for failing to enforce the regulations providing for such inspection in accordance with ss. 64 & 75 of the Act. The justices convicted the fireman of an offence under s. 64, but dismissed the informations against

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the agents & owners:—*Held:* the decision of the justices was right.—ATKINSON *v.* JEFFREYS & LANCASTER & CO., LTD. (1915), 84 L. J. K. B. 1739; 113 L. T. 492; 79 J. P. 373, D. C.

1163. —— —— Owners consulted by manager as to best means of satisfying statutory requirements.]—The owners of a mine to which Coal Mines Regulation Act, 1911 (c. 50), s. 31 (3), applied instructed their manager to apply to the inspector of the division for an extension of time in which to comply with the requirements of that sect., & the inspector allowed the extension. The manager consulted the owners as to the scheme to be adopted for the purpose of satisfying those requirements. Save as aforesaid the owners took no part in the management of the mine. On the expiry of the time as so extended the scheme which had been adopted was uncompleted, & the mine was still without adequate means for reversing the air current. The owners having been summoned under s. 101 (2):—*Held:* they had taken part in the management of the mine in respect of the matters in question & could not claim the protection of s. 102 (1), & were consequently guilty of the offence charged.—ATKINSON *v.* LEWIS MERTHYR CONSOLIDATED COLLIERIES, LTD., [1916] 1 K. B. 363; 85 L. J. K. B. 684; 114 L. T. 657; 80 J. P. 184; 25 Cox, C. C. 346, D. C.

1164. —— Whether liability absolute—Negligence of competent employee.]—By the Mines Regulation Act, 1860 (c. 151), s. 10, it was provided that certain general rules should be observed in every coal mine by the owner & agent thereof; & among those rules was one providing that, whenever safety lamps were required to be used, they should be first examined & safely locked by a person or persons duly authorised for that purpose. Sect. 22 of the Act imposed a penalty on the owner or agent if, through the default of such owner or agent, any of the general rules, the provisions of which ought to be observed by them, were neglected or wilfully violated. The owner of a mine appointed a competent person to examine & lock the safety lamps required for use in the mine, but such person delivered out certain safety lamps to miners for use in the mine unlocked:—*Held:* in the absence of any personal default on the part of the owner, he was not liable to a penalty in respect of the act of the person so employed by him.—DICKENSON *v.* FLETCHER (1873), L. R. 9 C. P. 1; 43 L. J. M. C. 25; 29 L. T. 540; 38 J. P. 88.

1165. —— —— —— —.]—WATKINS *v.* NAVAL COLLIERY CO. (1897), LTD., No. 1173, *post.*

1166. —— —— Failure to appoint competent officials.]—The husband of pursuer was killed by an outbreak of poisonous gas while working in the employment of defenders, a limited co., in a coal mine of which they were owners. In an action for damages at common law & alternatively under the Employers' Liability Act, 1880 (c. 42), the sheriff-substitute found that defenders were liable inasmuch as they had failed to appoint officials competent for the working of the mine, & he assessed the damages at £400. On appeal the ct. of sessions held that defenders were not liable at common law, having used reasonable care in appointing managers of the necessary qualifications & experience; that although there had been a breach of the special rules applicable to the mine under Coal Mines Regulation Act, 1887 (c. 58), s. 49, these rules prescribed the duties of the managers & firemen & imposed no duties directly on the owners of the mine; but that defenders were liable under the Employers' Liability Act, 1880 (c. 42), in respect of the negligence of their servants & their failure to comply with the rules in question, & the ct. awarded as damages £282:—*Held:* there was a duty on defenders as owners of the mine to appoint & keep in charge persons competent to deal with the dangers arising in the mine; they had not discharged this duty, & were therefore liable at common law for the sum awarded by the sheriff-substitute.—BUTLER (OR BLACK) *v.* FIFE COAL CO., LTD., [1912] A. C. 149; 81 L. J. P. C. 97; 106 L. T. 161; 28 T. L. R. 150; 5 B. W. C. C. 217, H. L.

Annotations:—**Reld.** Harrison *v.* Wythemoor Colliery Co., [1922] 2 K. B. 674; Nimmo *v.* Connell, [1924] A. C. 595. **Mentd.** Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13; Lennard's Carrying Co. *v.* Asiatic Petroleum Co. (1915), 84 L. J. K. B. 1281; Abbott *v.* Isham (1920), 37 T. L. R. 7; Hemmings *v.* Stoke Poges Golf Club, [1920] 1 K. B. 720; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539; Anglo-Newfoundland Development Co. *v.* Pacific Steam Navigation Co., [1924] A. C. 406.

1167. —— Burden of proof of non-liability.]—The agent of a coal mine was summoned under Coal Mines Regulation Act, 1887 (c. 58), ss. 49 (r. 1), 50, for not causing an adequate amount of ventilation to be constantly produced in the mine. The mine was a "fiery" one, & exceptional care as to ventilation was required.

A manager & an undermanager had been duly appointed, & the general rules contained in Coal Mines Regulation Act, 1887 (c. 58), s. 49, had been duly published. It was proved that on Sept. 19, 1907, in consequence of the want of ventilation, the stythe & fire damp had not been diluted & rendered harmless so as to cause the parts where men were working & passing to be in a fit state for such purposes. There was no direct evidence of what the cause of the want of adequate ventilation was, except at one place where a brattice was defective, which brattice had been badly put up, & in consequence it did not cause the air to go to the working face of the coal there. For some seven or eight months prior to Sept. 19, 1907, the manager had from ill health been unable to discharge his duties as manager & to go down the mine. In consequence of the manager's illness, the agent had been conferring up to the previous July two or three times a week with the undermanager, & from that July, twice a week with a man engaged as assistant to the manager, but he did not peruse the overmen's daily reports, & he had not been down the mine between the previous July 3 & Sept. 19. It was admitted that the deputy overmen's reports to the undermanager for Sept. 19 stated that the ventilation was good, & that it was the duty of the overmen to see to the putting up of brattices. The justices found as a fact that in view of all the circumstances, & in particular having regard to the fact of the abnormal dangers attending the working of this mine & of the inability of the manager to go down the mine to overlook, the agent had not taken all reasonable means by enforcing to the best of his power Coal Mine's Regulation Act, 1877 (c. 58), s. 49 (r. 1), as a regulation for the working of the mine to prevent non-compliance therewith:—*Held:* the *onus* of proof being cast on the agent by Coal Mine's Regulation Act, 1877 (c. 58), s. 50, there was evidence which justified the justices in coming to the conclusion that the agent had not discharged the *onus* cast upon him.—ANDERSON *v.* ATKINSON (1908), 99 L. T. 22; 72 J. P. 359, D. C.

1168. —— ——.]—An explosion in a mine was caused by a blasting operation conducted in breach of the rules of the Coal Mines Regulation Acts.

In an action against the mine owners to recover damages for injury to a miner by the explosion the judge held that the burden of proving that the owners had neglected their duty to enforce the statutory rules lay on pltf., &, as the pltf. had failed to produce evidence on that point, defts. obtained a verdict & judgment:—*Held:* upon the question whether the mine authorities had done their duty in taking proper care of the safety of the miners the burden of proof did not lie upon pltf.—BRITANNIC MERTHYR COAL CO., LTD. *v.* DAVID, [1910] A. C. 74; 79 L. J. K. B. 153; 101 L. T. 833; 26 T. L. R. 164; 54 Sol. Jo. 151, H. L.; *affg.* S. C. *sub nom.* DAVID *v.* BRITANNIC MERTHYR COAL CO., [1909] 2 K. B. 146, C. A.

Annotations:—**Consd.** Butler (or Black) *v.* Fife Coal Co., [1912] A. C. 149; Watkins *v.* Naval Colliery Co. (1897), Ltd., [1912] A. C. 693. **Refd.** Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1920] 3 K. B. 131. **Mentd.** Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858; Gibson *v.* Dunkerley (1910), 102 L. T. 587; Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 2 K. B. 832.

1169. ——— ——— What must be proved.]—Informations were preferred against the agent of a coal mine, & against the co. that owned the colliery for an offence under Coal Mines Act, 1911 (c. 50), s. 41 (2), in respect of a defective airway, & by consent were heard together. The agent proved that as soon as the defect in the airway was pointed out to him by the manager of the mine, he at once informed the co., who agreed to proceed immediately with the driving of a new airway. The justices convicted the co. & acquitted the agent:—*Held:* the justices were wrong in acquitting the agent, as he had not satisfied the burden imposed on him by Coal Mines Act, 1911 (c. 50), s. 102, of proving (*a*) that he was not in the habit of taking & did not in respect of the matters in question take any part in the management of the mine; (*b* that he had made all the financial & other provisions necessary to enable the manager to carry out his duties; & (*c*) that the offence was committed without his knowledge, consent or connivance. The conditions (*a*), (*b*) & (*c*) were cumulative & not alternative.—CHARLTON *v.* JACOB (1925), 94 L. J. K. B. 855; 134 L. T. 19; 89 J. P. 174; 41 T. L. R. 680; 23 L. G. R. 619; 28 Cox, C. C. 73, D. C.

1170. —— Civil & criminal liability.]—(1) Coal Mines Regulation Act, 1887 (c. 58), s. 49, creates a statutory duty in the owner of a coal mine to observe, not some only, but all of the rules therein contained; & this is a statutory duty in the owner personally for the benefit of the workmen & not only in those employed by the owner in the working of the coal mine.

(2) Coal Mines Regulation Act, 1887 (c. 58), s. 50, creates in the owner of a coal mine not a criminal liability only, with the result that he is rendered liable to a penalty, but also it extends to create in him liability in a civil action.

(3) A statutory obligation being thus imposed upon the owner of a coal mine for the benefit of the workmen, the doctrine of common employment can have no application.—DAVID *v.* BRITANNIC MERTHYR COAL CO., [1909] 2 K. B. 146; 78 L. J. K. B. 659; 100 L. T. 678; 25 T. L. R. 431; 53 Sol. Jo. 398, C. A.; *on appeal, sub nom.* BRITANNIC MERTHYR COAL CO., LTD. *v.* DAVID, [1910] A. C. 74, H. L.

Annotations:—*As to* (1) **Apld.** Butler (or Black) *v.* Fife Coal Co., [1912] A. C. 149. **Consd.** Watkins *v.* Naval Colliery Co. (1897), Ltd., [1912] A. C. 693. *As to* (2) **Consd.** Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1920] 3 K. B. 131. *As to* (3) **Consd.** Butler (or Black) *v.* Fife Coal Co., [1912] A. C. 149. **Refd.** Jones *v.* Canadian Pacific Ry. (1913), 83 L. J. P. C. 13. *Generally,* **Mentd.** Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858; Gibson *v.* Dunkerley (1910), 102 L. T. 587; Phillips *v.* Britannia Hygienic Laundry Co., [1923] 1 K. B. 539.

1171. —— Application of doctrine of common employment.]—DAVID *v.* BRITANNIC MERTHYR COAL CO., No. 1170, *ante.*

1172. —— ——.]—BUTLER (OR BLACK) *v.* FIFE COAL CO., LTD., No. 1166, *ante.*

1173. —— ——.]—The manager of resp. colliery increased from twenty to twenty-six the number of men authorised to be lowered or raised in a cage at a time. The brake power on the winding engine was adequate for twenty, but not for twenty-six men. Applt.'s husband was killed in consequence of the breakdown of the winding engine by the snapping of the spanner bar which was defective, & the insufficiency of the brake, with the result that a cage fell:—*Held:* resps. had been guilty of a breach of an absolute statutory obligation imposed by Coal Mines Regulation Act, 1887 (c. 58), s. 16, for which they were liable, & no question of negligence or of the doctrine of common employment was relevant.—WATKINS *v.* NAVAL COLLIERY CO. (1897), LTD., [1912] A. C. 693; 81 L. J. K. B. 1056; 107 L. T. 321; 28 T. L. R. 569; 56 Sol. Jo. 719, H. L.

Annotations:—**Refd.** Simmonds *v.* Newport Abercarn Black Vein Steam Coal Co., [1920] 3 K. B. 131. **Mentd.** Pursell *v.* Clement Talbot (1914), 111 L. T. 827; Lennard's Carrying Co. *v.* Asiatic Petroleum Co. (1915), 84 L. J. K. B. 1281.

Liability of manager—Provision of ventilation.]—*See* Sub-sect. 9, B. (*a*), *post.*

—— **Unauthorised introduction of explosives by workman.**]—*See* Sub-sect. 9, B. (*f*), *post.*

—— **Prevention of coal dust.**]—*See* Sub-sect. 9, B. (*g*), *post.*

—— **Misuse of winding apparatus.**]—*See* No. 1183, *post.*

Liability of working miners.]—*See* No. 1221, *post.*

Homicide by neglect of duty.]—*See* CRIMINAL LAW, Vol. XV., p. 798, Nos. 8624–8627.

B. General Rules as to Safety.

(*a*) *Ventilation.*

See, now, Coal Mines Act, 1911 (c. 50), ss. 29–31.

1174. Provision of ventilation—Must be continuous—Suspension of actual work during week-end.]—18 & 19 Vict. c. 108. s. 4, requires certain rules to be observed, in every coal mine & colliery, by the owner & agent thereof. By rule 1, "an adequate amount of ventilation" is to "be constantly produced at all collieries" in order "that the working places of the pits & levels of such collieries" may "under ordinary circumstances be in a fit state for working." Sect. 11 imposes a penalty upon the owner & agent "if" "any" "colliery be worked," & the aforesaid rules are neglected or wilfully violated:—*Held:* the agent of a colliery which was actually worked only on week days, incurred a penalty under sect. 11 for a breach of rule 1, by neglecting to keep up adequate ventilation in the colliery during the suspension of actual work there between Saturday night & Monday morning; for, notwithstanding such suspension, the colliery was "worked" during that time within the meaning of that sect.—KNOWLES *v.* DICKINSON (1860), 2 E. & E. 705; 29 L. J. M. C. 135; 2 L. T. 174; 24 J. P. 581; 6 Jur. N. S. 678; 8 W. R. 411; 121 E. R. 265.

1175. ——Duty of management—According to resources available.]—By Coal Mines Regulation Act, 1872 (c. 76), s. 51, it is provided that, in the event of any contravention of the general rules set out in that sect., the owner, agent, & manager shall be each guilty of an offence, unless

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he proves that he has taken all reasonable means to prevent such contravention. The first of all such general rules provide that an adequate amount of ventilation shall be constantly produced in every mine to render harmless noxious gases, so that the working places of the shaft of such mine, & the travelling roads to & from such working places, shall be in a fit state for working & passing therein. Resp., who was a certified manager of a colliery mine, at a salary of £1 per week, was charged with an offence under sect. 51, r. 1. It was proved the mine was improperly ventilated, & resp. might have improved the ventilation with the resources at his disposal, but the requisite provision for the proper ventilation of the mine would have involved an outlay of £200:—*Held:* the finding of the justices, that resp. had omitted to employ the resources at his disposal for the improvement of the ventilation of the mine, disclosed an offence under sect. 51, for which he was liable to be convicted.—HALL *v.* HOPWOOD (1879), 49 L. J. M. C. 17; 41 L. T. 797; 44 J. P. 250, D. C.

Annotations:—**Refd.** Atkinson *v.* Morgan (1915), 84 L. J. K. B. 1431. **Mentd.** Watkins *v.* Naval Colliery Co., [1911] 2 K. B. 162.

1176. —— —— Competent staff of firemen employed.]—(1) The manager of a coal mine is responsible for adequate & constant ventilation under Coal Mines Act, 1911 (c. 50), s. 29 (1); & he is not relieved from responsibility by sect. 75, because a competent staff of firemen has been appointed.

Where by a fall in the roof in a level a cavity was formed, & to repair it timbering was used which prevented the air current reaching it & sufficiently diluting inflammable & noxious gases, the manager was held responsible for not producing adequate & constant ventilation in accordance with sect. 29, although work was not at the time being carried on in the mine.

(2) The "shafts, roads, levels, stable, & workings of the mine" include portions of the mine contiguous thereto although not coming strictly within any of those denominations.—ATKINSON *v.* MORGAN, [1915] 3 K. B. 23; 84 L. J. K. B. 1431; 113 L. T. 488; 79 J. P. 378, D. C.

1177. Extent of ventilation—So much of mine as will render workings & travelling roads safe.]—By 23 & 24 Vict. c. 151, s. 10, r. 1, of the general rules to be observed in every colliery or coal mine & ironstone mine, by the owner or agent thereof, "an adequate amount of ventilation shall be constantly produced in all coal mines, etc., to dilute & render harmless noxious gases to such an extent that the working places & the travelling roads to or from such working places shall, under ordinary circumstances, be in a fit state for working & passing therein":—*Held:* it was not sufficient compliance with this rule to cause ventilation to pass along the working places & travelling roads, but so much of the mine must be kept so ventilated as to render the working places & travelling roads safe.—BROUGH *v.* HOMFRAY (1868), L. R. 3 Q. B. 771; 9 B. & S. 492; 37 L. J. M. C. 177; 32 J. P. 804; 16 W. R. 1123.

Annotation:—**Expld.** Atkinson *v.* Morgan, [1915] 3 K. B. 23.

1178. —— "Shafts, roads, levels, stables & workings"—Includes other contiguous portions of mine—Cavity in roof over travelling road.]—ATKINSON *v.* MORGAN, No. 1176, *ante*.

Liability of owner or agent generally.]—*See* Sub-sect. 9, A., *ante*.

(*b*) *Safety Lamps.*

See Coal Mines Act, 1911 (c. 50), ss. 32–35.

1179. Possession of matches—Whether search of person condition precedent to prosecution.]—Coal Mines Act, 1911 (c. 50), s. 35 (1), is an absolute prohibition against a person having in his possession, in a mine where safety lamps are required to be used, any lucifer match or any of the other articles mentioned. A person, therefore, who infringes this provision is guilty of an offence under the Act, & in proceedings in respect thereof it is not necessary to show that the accused had been searched under sect. 35 (2) before he commenced work or that he had been searched by the person duly appointed to make searches.—JONES *v.* LEWIS, [1917] 2 K. B. 117; 86 L. J. K. B. 782; 117 L. T. 127; 81 J. P. 131, D. C.

Liability of owner or agent generally.]—*See* Sub-sect. 9, A., *ante*.

(*c*) *Shafts and Winding.*

See Coal Mines Act, 1911 (c. 50), ss. 29, 36–41, 57.

1180. Liability of owners—Raising & lowering of miners—Miner ascending on his own business.]—The master who lets the workman down his mine is bound to bring him up safely, even though he come up on his own business, & not for that of his master.—BRYDON *v.* STEWART (1855), 2 Macq. 30, H. L.

Annotations:—**Dbtd.** Groves *v.* Fuller (1888), 4 T. L. R. 474. **Distd.** Holness *v.* Mackay & Davis, [1899] 2 Q. B. 319. **Consd.** Taylor *v.* Jones (1907), 1 B. W. C. C. 3. **Mentd.** Bartonshill Coal Co. *v.* Reid (1858), 31 L. T. O. S. 255; Waller *v.* S. E. Ry. (1863), 32 L. J. Ex. 205; Brown *v.* Accrington Co-op. Cotton-Spinning Manufacturing Co. (1865), 13 L. T. 94; Hall *v.* Johnson (1865), 34 L. J. Ex. 222; Fowler *v.* Lock (1872), L. R. 7 C. P. 272; Douglas *v.* United Mineral Mining Co. (1900), 2 W. C. C. 15; Riley *v.* Holland, [1911] 1 K. B. 1029; Cole *v.* De Trafford, [1918] 2 K. B. 523.

1181. —— Provision of adequate winding machinery.]—WATKINS *v.* NAVAL COLLIERY CO. (1897), LTD., No. 1173, *ante*.

1182. —— Prevention of shafts from becoming unsafe.]—BROWNING *v.* CRUMLIN VALLEY COLLIERIES, No. 1106, *ante*.

1183. Liability of manager—Excessive number of men using winding machinery.]—By a special rule for the regulation of coal mines under 23 & 24 Vict. c. 151, the banksman is directed to "take care that the persons descending or ascending the pit shall in no case exceed the number of eight men & boys." A breach of these rules is by sect. 22 punishable on summary conviction by fine & imprisonment.

A., the chartermaster of a pit (who by the rules is declared to be "the responsible manager of the pit under his charge"), was close to the pit, & was cognisant that more than eight men were being lowered down at one time, & had power to prevent the banksman, who was his servant, from so doing, & did not interfere:—*Held:* A. was properly convicted of a breach of the regulations, as

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PART XIV. SECT. 1, SUB-SECT. 9.—B. (a).

1176*l*. *Provision of ventilation—Absolute duty of management—Competent staff of firemen employed.*]—COWIE *v.* BERRY CONSOLS EXTENDED GOLD MINING CO., NO LIABILITY NO. 3 (1898), 24 V. L. R. 319.—**AUS.**

k. *Extent of ventilation.*]—BROUGHALL *v.* WATSON (1906), 3 C. L. R. 750.—**AUS.**

l. *Proceedings against owners for providing insufficient ventilation—What amounts to sufficient notice.*]—YEUDALL *v.* BAIRD & CO., LTD., [1925] S. C. (J.) 62.—**SCOT.**

PART XIV. SECT. 1, SUB-SECT. 9.—B. (c).

m. *Liability of master—Violation of rules by servant.*]—*Held:* the master was not liable in damages for the death of a servant resulting from the servant using, in direct violation of rules, the cage instead of the ladders to ascend

being a person "aiding, abetting, or procuring the commission of the offence," within Summary Jurisdiction Act, 1848 (c. 43), s. 5.—HOWELLS *v.* WYNNE (1863), 15 C. B. N. S. 3; 32 L. J. M. C. 241; 9 Jur. N. S. 1041; 143 E. R. 682.

As to liability of owner or agent generally, *see* Sub-sect. 9, A., *ante*.

1184. Use of winding machinery by workmen.]—There is nothing in Coal Mines Regulation Act, 1887 (c. 58), which gives a miner a right to use the winding-up machinery whenever he pleases.—HERD *v.* WEARDALE STEEL, COAL & COKE CO., LTD., [1915] A. C. 67; 84 L. J. K. B. 121; 111 L. T. 660; 30 T. L. R. 620, H. L.

(*d*) *Fencing.*

See Coal Mines Act, 1911 (c. 50), s. 37.

(*e*) *Travelling Roads and Haulage.*

See Coal Mines Act, 1911 (c. 50), ss. 42–48.

1185. Walking on haulage road while haulage in motion—Provision as to gradient—Not applicable to road as a whole.]—Men working in a colliery on the morning of Dec. 13, 1921, were knocked off work by the stallman & came down the "jig" to the "jig" bottom, & walked along to the main haulage road, & congregated about the bottom of the incline, & the haulage cable was still working at the rate of two & a half miles an hour, although the signal to stop it for the end of the night shift was almost due, & some loaded tubs which were being hauled up the incline broke loose & crashed into the group of men, killing two & injuring others, & one of the injured men & the widow of a man who had been killed claimed compensation under the Workmen's Compensation Act, 1906 (c. 58):—*Held:* although the haulage road was very steep in parts, yet as the gradient where the men standing when the accident occurred was, for about thirty yards from the bottom of the incline, only one in fifteen, the men were not there in breach of Coal Mines Act, 1911 (c. 50), s. 43 (1), & appcts. were entitled to compensation.—RUCK *v.* STOCKINGFORD COLLIERY CO., LTD., MOORE *v.* STOCKINGFORD COLLIERY CO., LTD. (1922), 92 L. J. K. B. 221; 128 L. T. 353; 67 Sol. Jo. 96; 15 B. W. C. C. 219, C. A.

Annotation:—**Distd.** Hawkridge *v.* Howden Clough Collieries Co. (1923), 92 L. J. K. B. 642.

1186. —— Provision as to safety space of two feet—Applies to whole length of track.]—Appct., a boy of eighteen, was employed as a miner in resp.'s colliery. On Apr. 29, 1922, after working on a night shift, he was walking along a haulage road while the haulage rope was in motion. He slipped & fell, & his ankle was caught between the haulage rope & the wall, & he was injured. The employers denied liability on the ground that they had forbidden workmen to use that road, & that appct. had acted contrary to Coal Mines Act, 1911 (c. 50), s. 43 (1), which prohibits workmen from walking along a haulage road while the haulage rope is in motion except "(*a*) where there is provided on one side of the road a clear space of at least two feet in width between the tubs & that side of the road. . . ." The county ct. judge found that the employers had not enforced the prohibition, that there was not a clear space of two feet between the haulage rope & the side of the road along the whole length of the haulage road, though there was such a space where the accident occurred, that appct. must be deemed to know the law & had acted in breach of the statutory prohibition, & was not, therefore, entitled to compensation as the accident did not arise out of the employment:—*Held:* the requirement as to space applied to the whole length of the haulage road, the award must be upheld on the true construction of the statutory regulations, & there was no misdirection.—HAWKRIDGE *v.* HOWDEN CLOUGH COLLIERIES CO., LTD. (1923), 92 L. J. K. B. 642; 128 L. T. 786; 67 Sol. Jo. 401; 16 B. W. C. C. 55, C. A.

1187. Liability of workmen riding on tub—Colliery prohibition not strictly enforced.]—A workman, employed as a "repairer" in a colliery, met with an accident while riding on a tub conveying timber for the purposes of his work. It was part of his duty to detach the tub at the end of its journey from the haulage rope, but the county ct. judge found that the purpose for which he rode on the tub was to hold the timber in position. There was evidence that the employers had prohibited any riding on tubs, but such prohibition had not been strictly enforced. Coal Mines Act, 1911 (c. 50), s. 43 (2), prohibited riding on tubs unless for the purpose of detaching or attaching tubs. The county ct. judge held that the statutory prohibition applied, & that the workman not being a "rider," he had not discharged the onus of showing that he came within the scope of the exception contained in Coal Mines Act, 1911 (c. 50), s. 43 (2) (*a*):—*Held:* (1) since it was part of the workman's ordinary duty as a repairer to detach & attach tubs, the exception contained in Coal Mines Act, 1911 (c. 50), s. 43 (2), applied, & thus there was no statutory prohibition; (2) the employers were not entitled to rely on the colliery prohibition against riding because such prohibition had not been strictly enforced. The workman was therefore entitled to an award.—WILLIAMS *v.* CLEEVES WESTERN VALLEYS ANTHRACITE COLLIERIES, LTD. (1924), 131 L. T. 231; 17 B. W. C. C. 97, C. A.

Annotation:—*As to* (1) & (2) **Refd.** Morgan *v.* Evans, [1926] 2 K. B. 74.

1188. —— Tub not forming one of a set or train.]—The words in Coal Mines Act, 1911

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from a mine, although the ladders did not in some particulars conform to the requirements of the Mines Act.—ANDERSON *v.* MIKADO MINING CO. (1902), 22 C. L. T. 175; 3 O. L. R. 581; 1 O. W. R. 276.—**CAN.**

n. *Regulations for working of machinery—Employment of competent engine-man.*]—SOUTAR *v.* CLARK (1904), 7 F. (Ct. of Sess.) (J.) 1.—**SCOT.**

PART XIV. SECT. 1, SUB-SECT. 9.—B. (d).

o. *Coal pit insufficiently fenced—Liability to public generally.*]—*Held:* the proprietor of lands, in which a coal pit not sufficiently fenced was situate, was liable to the father of an unmarried woman who accidentally fell into the pit & was killed.—HISLOP *v.* DURHAM (1842), 4 Dunl. (Ct. of Sess.) 1168.—**SCOT.**

p. ——.]—SIMPSON *v.* MOORE (1874), 3 Couper, 26.—**SCOT.**

q. —— ——.]—SINNERTON *v.* MERRY & CUNNINGHAME (1886), 13 R. (Ct. of Sess.) 1012.—**SCOT.**

r. *Fence dispensed with during operations—Special precautions taken—Whether breach of statutory rules.*]—At the mouth of a pit which was being sunk to a greater depth there was no fencing, except that there was a movable wooden block upon the rail leading to the pit mouth, which it was the duty of the pitheadman not to remove unless he was satisfied that the covering table was on the pit mouth:—*Held:* this arrangement was not in breach of the statutory rules.—M'GILL *v.* BOWMAN & CO. (1890), 18 R. (Ct. of Sess.) 206.—**SCOT.**

PART XIV. SECT. 1, SUB-SECT. 9.—B. (e).

t. *Walking on haulage road while haulage in motion—Haulage started at prohibited time—Liability of employer.*]—BOOKER *v.* WELLINGTON COLLIERY CO., LTD. (1902), 9 B. C. R. 265.—**CAN.**

a. *Provision of refuge holes—Mouths of cross roads.*]—The mouths of the cross roads which lead off the main level of a mine, & which are within fifty yards of each other, may be considered as manholes or places of refuge.—HUGHES *v.* CLYDE COAL CO. (1891), 19 R. (Ct. of Sess.) 343.—**SCOT.**

b. *Regulations for safety of mechanical*

Sect. 1.—*Coal mines: Sub-sect.* 9, *B.* (*e*), (*f*), (*g*), (*h*), (*j*), (*k*) & (*l*).]

(c. 50), s. 43 (2), "Where the haulage is worked by gravity, or mechanical power no person shall be allowed to ride on sets or trains of tubs," amount to a prohibition on every person from so riding, & not merely to a prohibition on the management of the colliery from allowing riding. To ride on a single tram is as much within the mischief of Coal Mines Act, 1911 (c. 50), s. 43, as to ride on a tram forming one of a set. Hence a man who rides on a single tram is guilty of an offence under Coal Mines Act, 1911 (c. 50), s. 43 (2).—MORGAN *v.* EVANS, [1926] 2 K. B. 74; 95 L. J. K. B. 706; 134 L. T. 219; 90 J. P. 20; 24 L. G. R. 48, D. C.

Provision of refuge holes—Separate liability of colliery company & manager.]—*See* No. 1155, *ante*.

(*f*) *Support of Roofs and Sides.*

See, now, Coal Mines Act, 1911 (c. 50), ss. 49–52.

1189. Necessity for props—Question of fact—For decision by court.]—Coal Mines Regulation Act, 1887 (c. 58), s. 49, Rule 22, provides for the use of sprags or holding props in mines to support the top coal whilst the bottom coal is being worked. Upon their true construction, the words of that rule, "where they are required," mean where they are "necessary," & not where the workmen think them necessary. Whether they be necessary or not is a question of fact to be decided by the justices in each case.—GIBBON *v.* PHILLIPS (1894), 64 L. J. M. C. 42, D. C.

(*g*) *Explosives.*

See Coal Mines Act, 1911 (c. 50), s. 61; MASTER & SERVANT, pp. 301–304, *ante*.

1190. Prohibitory order by Secretary of State—Notice of order—Whether condition precedent to validity.]—Upon the hearing of a summons against the manager of a mine for contravention of an order purporting to be made by a Secretary of State under Coal Mines Regulation Act, 1896 (c. 43), s. 6, a Queen's printer's copy of the order was put in evidence; but no evidence was given of any notice by the Secretary of State of the making of the order or of any direction by him as to the manner in which notice of the order should be given:—*Held:* (1) the provisions as to the giving of notice were directory only, & were not conditions precedent to the coming into operation of the order, & the order of the Secretary of State was therefore valid and binding; (2) a manager of a mine may be guilty of an offence under Coal Mines Regulation Act, 1887 (c. 58), s. 50, where the explosive improperly used was brought into the mine by one of the workmen without his knowledge or authority.—JONES *v.* ROBSON, [1901] 1 K. B. 673; 70 L. J. K. B. 419; 84 L. T. 230; 65 J. P. 278; 19 Cox, C. C. 651, D. C.

1191. Price of explosives charged by workmen—"Actual net cost to the owner"—Includes cost of carriage to & from owner's magazine.]—Coal Mines Act, 1911 (c. 50), s. 61 (2), provides that no explosives shall be taken into or used in any mine except explosives provided by the owner, & the price, if any, charged by the owner to the workman for any explosives so provided shall not exceed the actual net cost to the owner:—*Held:* the "actual net cost to the owner" includes not only the cost of carriage to the owner's magazine, but also the cost of distribution from the magazine to the workman.—EVANS *v.* GWENDRAETH ANTHRACITE COLLIERY CO., LTD., [1914] 3 K. B. 23; 83 L. J. K. B. 1312; 110 L. T. 959; 30 T. L. R. 376, C. A.

1192. ——— ———.]—The Explosives in Coal Mines Order of Sept. 1, 1913, Rule 3 (*a*), which provides that "if a shot misses fire the person firing the shot shall not approach or allow any one to approach the shothole" until after a given interval, applies only to the person who actually fires the shot.

Accordingly, where a father, who was engaged along with his two sons in a blasting operation, loaded & stemmed the shothole & inserted the fuse, to which a light was applied by one of his sons, &, believing that the fuse had not been effectually lighted, approached the shothole within the prohibited period for the purpose of lighting the fuse afresh, & the shot exploded & injured him:—*Held:* in approaching the shothole he had not violated any statutory regulation & was not acting outside the scope of his employment, & he was therefore entitled to compensation.—COLTNESS IRON CO. *v.* BAILLIE, [1922] 1 A. C. 170; 91 L. J. P. C. 75; 126 L. T. 611; 38 T. L. R. 267; 66 Sol. Jo. 249; 15 B. W. C. C. 25, H. L.

Annotation:—**Distd.** Morgan *v.* Evans, [1926] 2 K. B. 74.

1193. ——— ——— **What amounts to shot missing fire.**]—A shot misses fire within the Explosives in Coal Mines Order of September 1, 1913, Rule 3 (*a*), if a naked light is applied to the fuse & the shot does not explode at the usual time, & the regulation applies where the man who applies the light to the fuse *bonâ fide* believes that he has not succeeded in igniting it. If therefore he approaches the shothole within the prohibited time, & the shot explodes & injures him, he commits a breach of the regulation & the injury does not arise out of his employment.—COSTELLO *v.* ADDIE (R.) & SONS COLLIERIES, LTD., [1922] 1 A. C. 164; 91 L. J. P. C. 72; 126 L. T. 609; 38 T. L. R. 266; 66 Sol. Jo. 248; 15 B. W. C. C. 19, H. L.

Annotation:—**Refd.** Coltness Iron Co. *v.* Baillie (1922), 91 L. J. P. C. 75.

1194. ——— ——— **Right of owners to make regulation supplementary to statutory regulation.**]—By the Explosives in Coal Mines Order of Sept. 1, 1913, made under Coal Mines Act, 1911 (c. 50), "If a shot misses fire . . . the person firing the shot shall not approach, or allow any one to approach the shot hole" until a specified interval of time has elapsed.

By a notice put up in the resps.' colliery the

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haulage—Whether applicable to haulage by gravity.]—SOUTAR *v.* REID, [1913] S. C. (J.) 84.—**SCOT.**

c. *Electric cable installed in mechanical haulage road—Unprotected by metallic covering.*]—SHOTTS IRON CO., LTD. *v.* THOMSON, [1915] S. C. (J.) 29.—**SCOT.**

PART XIV. SECT. 1, SUB-SECT. 9.—B. (f).

d. *Liability of mine-owner.*]—BITT *v.* DALMENY OIL CO., LTD. (1905), 7 F. (Ct. of Sess.) 787; 42 Sc. L. R. 638; 13 S. L. T. 165.—**SCOT.**

e. ———.]—*Held:* an action of damages against a limited co. owning a mine, in respect of the death of a miner due to a fall of the roof of a roadway caused by a faulty girder, was relevant.—RODGER *v.* FIFE COAL CO., LTD., [1923] S. C. 108.—**SCOT.**

PART XIV. SECT. 1, SUB-SECT. 9.—B. (g).

f. *Regulation forbidding approach to shot-hole within certain time—Breach by workman.*]—SLOAN *v.* SHOTTS IRON CO., LTD. (1922), 15 B. W. C. C. 300.—**SCOT.**

g. ——— ———.]—A shot-firer, who had applied a naked light to the fuse of a shot, &, on the shot failing to explode, had returned to the shot-hole within the prohibited interval, was charged with a contravention of Explosives in Coal Mines Order, 1913, par. 3:—*Held:* the fact that he had acted in the honest, but mistaken, belief that the shot had not missed fire, because, as he thought, it had not been successfully lighted, did not justify his acquittal of the contravention charged.—TENNANT *v.* GILMOUR, [1923] S. C. (J.) 19.—**SCOT.**

h. *Control of detonators—Necessity*

words were added " & no person shall in such circumstances, on any pretext, return to the place " before the expiration of the prescribed interval of time. Applt. who was employed in the mine, was aware of this notice &, in breach of the prohibition, went to the place where an attempt had been made to fire a shot before the expiration of the prescribed time, & the shot exploded, & he was seriously injured:—*Held:* the employers might make a regulation of their own in addition to the statutory regulation, & it was binding upon their workmen.—M'INTOSH *v.* ARDEN COAL CO. (1924), 93 L. J. P. C. 264; 131 L. T. 321, H. L.; *affg.* S. C. *sub nom.* ARDEN COAL CO., LTD. *v.* M'INTOSH (1923), 16 B. W. C. C. 320.

1195. Unauthorised introduction of explosives by workman — Liability of manager.] — JONES *v.* ROBSON, No. 1190, *ante.*

(*h*) *Prevention of Coal Dust.*

See Coal Mines Act, 1911 (c. 50), s. 62.

1196. Liability of manager—Systematic clearance impracticable—Coal Mines Act, 1911 (c. 50), s. 102 (3).]—On an information against the manager of a certain mine for an offence against Coal Mines Act, 1911 (c. 50), s. 62 (3), the justices found that the roof & sides of the roads in the mine had not been systematically cleared for some months; that it was not practicable to carry out the provision of Coal Mines Act, 1911 (c. 50), s. 62 (3), in the particular mine; & that the manager had done all that was reasonably practicable in the circumstances to prevent coal dust accumulating:—*Held:* these findings brought the case within Coal Mines Act, 1911 (c. 50), s. 102 (3), & the manager was not liable to a penalty.—ATKINSON *v.* SHAW, [1915] 2 K. B. 768; 84 L. J. K. B. 1748; 113 L. T. 485; 79 J. P. 376; 31 T. L. R. 421, D. C.

Annotation:—**Distd.** Charlton *v.* Jacob (1925), 94 L. J. K. B. 855.

(*j*) *Inspections.*

See Coal Mines Act, 1911 (c. 50), ss. 16, 63–66.

1197. Record of report of inspection—Daily examination of guides & conductors.]—By Coal Mines Regulation Act, 1887 (c. 58), s. 49, r. 5, a competent person appointed for the purpose, shall, once at least in every twenty-four hours, examine the state of the external parts of the machinery, the state of the guides & conductors in the shafts, etc., in mines & shall once at least in every week, examine the state of the shafts by which persons ascend or descend; & shall make a true report of the result of such examination, & every such report shall be recorded in a book to be kept for the purpose:—*Held:* this rule required a report to be recorded of the examination directed to be made once in every twenty-four hours, as well as of that directed to be made once in every week.—SCOTT *v.* BOULD, [1895] 1 Q. B. 9; 64 L. J. M. C. 16; 71 L. T. 577; 59 J. P. 390; 18 Cox, C. C. 52; 15 R. 134, D. C.

1198. —— Weekly examination of shafts.]—SCOTT *v.* BOULD, No. 1197, *ante.*

1199. Inspection on behalf of workmen—Coal Mines Act, 1911 (c. 50), s. 16 (1)—Who may inspect—Check weigher.]—By above sub-sect., the workmen employed in a mine may appoint two of their number or any two persons, not being mining engineers, who are or have been practical working miners with not less than five years' experience of underground work, to make periodical inspections of the mine:—*Held:* a person who holds the appointment of check weigher at a mine is not thereby disqualified from being appointed to make, & from making, inspections of the mine under above sect.—DATE *v.* GAS COAL COLLIERIES, LTD., [1915] 2 K. B. 454; 84 L. J. K. B. 1529; 113 L. T. 205; 31 T. L. R. 341, C. A.

Liability of owner or agent for failure to enforce regulations.]—*See* No. 1162, *ante.*

Inspectors & courts of inquiry.] — *See* Sub-sect. 8, *ante.*

(*k*) *Withdrawal of Workmen.*

See, now, Coal Mines Act, 1911 (c. 50), s. 67.

1200. Liability of owners — Readmission of workmen for purpose of combating fire—In absence of report as to safety of mine.]—Fire having broken out in a coal mine all the men were withdrawn. They were readmitted, not for the purpose of inquiring into or removing a danger from gas, but solely for the purpose of dealing with the danger from fire, although no report had been made that the mine was not dangerous. As a result of their operations for that purpose, which interfered with the ventilation, inflammable gas accumulated to a greater percentage than two & a half. The men, nevertheless, were not withdrawn; an explosion occurred, & men were killed:—*Held:* Coal Mines Act, 1911 (c. 50), s. 67, applied, although the men were not engaged in their normal occupation of getting coal, & were engaged in dealing with a danger within the meaning of the sect.—namely, that caused by fire & that the men, on the above percentage of gas having been found, ought to have been withdrawn.—WING *v.* PICKERING, [1925] 2 K. B. 777; 94 L. J. K. B. 895; 133 L. T. 820; 89 J. P. 169; 41 T. L. R. 683; 69 Sol. Jo. 796; 23 L. G. R. 604; 28 Cox, C. C. 52, D. C.

(*l*) *Water and Bore Holes.*

See Coal Mines Act, 1911 (c. 50), s. 68.

1201. Danger from collection of water in adjoining mine — Liability of owner.] — R. *v.* BAKER (1878), 42 J. P. Jo. 404.

1202. Examination of disused workings for water —Sufficiency of examination Visual or physical examination.]—(1) The provision in Coal Mines Act, 1911 (c. 50), s. 68, that where a working has approached within forty yards of " disused workings, not being workings which have been examined & found to be free from accumulations of water or other liquid matter," certain precautions in relation to the provision of boreholes shall be observed, means that it must be found as a matter of fact, & not merely as a probability, that the disused workings have been examined & found to be free from such accumulations. If the workings cannot be so examined, the precautions prescribed by the sect. must be observed.

(2) The examinations contemplated by Coal Mines Act, 1911 (c. 50), s. 68, is a visual or physical examination.

(3) An examination by scientific tests is not such an examination as will dispense with the observance of the precautions.—ABBOTT *v.* BROMLEY, [1924] 2 K. B. 684; 94 L. J. K. B. 423; 131 L. T. 149; 88 J. P. 98; 40 T. L. R. 690; 22 L. G. R. 538, D. C.

Annotation:—*As to* (1) **Folld.** Charlton *v.* Tanner (1925), 134 L. T. 441.

Sect. 1.—*Coal mines: Sub-sect.* 9, *B.* (*l*), (*m*), (*n*) & (*o*), & *C.*; *sub-sect.* 10. *Sect.* 2: *Sub-sects.* 1, 2 & 3.]

1203. —— —— Scientific tests.]—ABBOTT *v.* BROMLEY, No. 1202, *ante.*

1204. —— —— "Substantial" examination "as far as possible."]—The examination of disused workings in a coal mine which is required in order that the precautions specified in Coal Mines Act, 1911 (c. 50), s. 68, may be dispensed with must be an examination of the whole disused working, & must result in the working being found as a matter of fact, not inference, to be free from accumulations of water or other liquid matter. It is not sufficient that the working should be examined "substantially" & "as far as is possible" if there is in fact an appreciable part which it has not been possible to examine.—CHARLTON *v.* TANNER (1925), 134 L. T. 441; 90 J. P. 28; 42 T. L. R. 155; 24 L. G. R. 131; 28 Cox, C. C. 129, D. C.

1205. —— Impossibility of examination—Necessity for observance of prescribed precaution.]—ABBOTT *v.* BROMLEY, No. 1202, *ante.*

Provision of bore-holes—Separate liability of colliery company & manager.]—*See* No. 1155, *ante.*

(*m*) *Rescue and Ambulances.*

See Coal Mines Act, 1911 (c. 50), s. 85.

Liability for non-observance of regulation—Manager.]—*See* No. 1212, *post.*

Proceedings in respect of accidents—Limitation.]—*See* No. 1212, *post.*

(*n*) *Workmen Working Alone.*

See Coal Mines Act, 1911 (c. 50), s. 73.

(*o*) *Wilful Damage.*

See Coal Mines Act, 1911 (c. 50), s. 72.

C. Special Regulations as to Safety.

See Coal Mines Act, 1911 (c. 50), s. 87.

1206. Interpretation of rules.]—By 35 & 36 Vict. c. 76, s. 52, power is given to frame special rules for the conduct & guidance of the persons acting in the management of a coal mine or employed in or about the same. By a special rule in force in the H. mine no person "employed in or about the works" was to ascend the pit contrary to the direction of the hooker-on. In the H. mine the workmen had power to dismiss themselves at a moment's notice. Resps. were workmen employed in the H. mine, & being dissatisfied with their working place discharged themselves. They asked the hooker-on to allow them to ascend the pit, but he refused to do so until the ordinary time came for workmen to quit the mine; resps. however ascended contrary to his direction:—*Held:* resps. had been guilty of a breach of the special rule above-mentioned.

It is a principle to be observed as to the interpretation of statutes that where a strictly literal construction leads to a manifest absurdity, a construction may be adopted which will carry out what may be reasonably supposed to have been the intention of the legislature (GROVE, J.).—HIGHAM *v.* WRIGHT (1877), 2 C. P. D. 397; 46 L. J. M. C. 223; 37 L. T. 187; 41 J. P. 679, D. C.

1207. Liability of workmen for breach—Delivery of copy of rules—As condition precedent to conviction.]—It is enacted by 23 & 24 Vict. c. 151, s. 11, that special rules shall be established in every mine within the Act, & by 23 & 24 Vict. c. 151, s. 22, a penalty is imposed upon workpeople employed in such mines who neglect or wilfully violate any of such special rules. By rule 11 of the special rules in force in the present case, every chartermaster, underlooker, manager, or other person, upon employing any workman, was to deliver to him a copy of such rules; & by rule 34 it was provided that "every workman is engaged subject to these rules, & shall observe the same & abide by the consequences of neglecting them, & shall receive a copy thereof from the manager, chartermaster, or other person who may engage him." Upon an information under 23 & 24 Vict. c. 151, s. 22, against applt. for disobeying the orders of resp., who was the chartermaster under whose control applt. was, contrary to the rules, there was no evidence that a copy of the said rules had been given to applt.; & it was contended that the delivery of a copy of such rules was a condition precedent to resp.'s right to enforce them. The justices having convicted applt.:—*Held:* they were warranted by law in so doing.—HIGGINSON *v.* HAPLEY (1869), 19 L. T. 690; 33 J. P. 598.

1208. —— Implied acquiescence of manager—Acquiescence in breach by another person.]—A special rule of a coal mine provided that the engine-tender shall not allow any person to be in the enginehouse for any purpose, & shall not leave his engine in charge of any other person without authority of the manager, & shall be in attendance during the whole time that any person belonging to the shift on which he is working is below ground in the mine. H., the engineman, was in charge, & a boy, who oiled the boilers outside was inside with leave of the manager, & such boy was caught by the flywheel of the engine & killed:—*Held:* H. was properly convicted for neglecting to observe the special rule, & it was no defence that the manager allowed another person to be inside the house.—HAYWOOD *v.* BAKER (1876), 41 J. P. 533, D. C.

1209. —— Breach after voluntary discharge from employment—At moment's notice.]—HIGHAM *v.* WRIGHT, No. 1206, *ante.*

1210. —— Disobedience to lawful commands of manager enforcing rules.]—A number of trammers in a mine, whose duty was to convey tubs when filled with coal to the "straight road," & bring back the empty tubs, their pay varying with the number of tubs conveyed by them, after being at work for some hours stopped work, & asked to be drawn out of the mine. They were ordered by the undermanager to return to work, but they refused to do so, saying that they had not a sufficiency of tubs, & owing to their stopping work certain miners were also compelled to leave work. One of the trammers having been summoned under one of the special rules & convicted:—*Held:* the conviction under the special rule was right.—COLBECK *v.* WHITWHAM (1912), 107 L. T. 22; 76 J. P. 291; 23 Cox, C. C. 50, D. C.

——.]—*See, also,* No. 1221, *post.*

SUB-SECT. 10.—LEGAL PROCEEDINGS.

1211. Provision for continuing penalty after notice by inspector—Not applicable to offences for

PART XIV. SECT. 1, SUB-SECT. 9.—C. l. *Whether mine owners bound to observe special regulations.*]—NIMMO *v.* CLARK & WILSON (1872), 10 Macph. (Ct. of Sess.) 477.—SCOT.

PART XIV. SECT. 1, SUB-SECT. 10. m. *Where consent of Secretary of State required before prosecution—Whether evidence of consent necessary.*]—Prosecutions for offences under Coal Mines Act, 1911, must in certain circumstances be with the consent of the Secretary of State:—*Held:* evidence of the consent is unnecessary, the statement of the Lord Advocate, or

which express penalty provided.]—STOKES *v.* HILL, No. 1147, *ante*.

1212. Proceedings in respect of accidents—Limitation of time.]—By Coal Mines Act, 1914 (c. 22), s. 2, summary proceedings against any person for non-compliance with any of the provisions of the regulations made under Coal Mines Act, 1911 (c. 50), may be commenced at any time within three months after the making of a report on an accident in the mine or the conclusion of an inquest held in consequence of an accident therein:—*Held:* this provision was an extension of & not in substitution for Summary Jurisdiction Act, 1848 (c. 43), s. 11, which provides that such proceedings shall be commenced within six months from the commission of the offence, &, consequently, informations preferred more than three months after the conclusion of the inquest on the above-mentioned employee, but less than six months after the commission of the offences charged, were not out of time.—FELTON *v.* HEAL, [1920] 3 K. B. 1; 90 L. J. K. B. 85; 123 L. T. 394; 84 J. P. 157; 36 T. L. R. 522, D. C.

1213. Costs—Actions under Mines (Working Facilities & Support) Act, 1923 (c. 20)—Discretion of court.]—The Mines (Working Facilities & Support) Act, 1923 (c. 20), leaves the ct. an unfettered discretion as to costs. Appcts. will only have costs in rare cases.—*Re* NEW HUCKNALL COLLIERY CO., LTD. (1925), 41 T. L. R. 383.

Right of inspector to institute proceedings through agent.]—*See* No. 1224, *post*.

SECT. 2.—METALLIFEROUS MINES.

SUB-SECT. 1.—IN GENERAL.

See Metalliferous Mines Regulation Acts, 1872 (c. 77), & 1875 (c. 39); State Mines (Gunpowder) Act, 1882 (c. 3).

1214. Whether slate quarry a mine within Metalliferous Mines Regulation Act, 1872 (c. 77).]—SIMS *v.* EVANS, No. 1227, *post*.

SUB-SECT. 2.—MANAGEMENT.

See, Metalliferous Mines Regulation Acts, 1872 (c. 77) & 1875 (c. 39); Notice of Accidents Act, 1906 (c. 53), ss. 1, 2, 5; Mines, Accidents (Rescue & Aid) Act, 1910 (c. 15); Workmen's Compensation Act, 1923 (c. 42), ss. 28, 29.

SUB-SECT. 3.—NEW AND ABANDONED MINES.

See Metalliferous Mines Regulation Act, 1872 (c. 77), ss. 12–14, 41.

Notice of opening & abandonment of mines.]—*See* Metalliferous Mines Regulation Act, 1872 (c. 77), s. 12.

Fencing of abandoned mine—Liability for.]—*See* Metalliferous Mines Regulation Act, 1872 (c. 77), s. 13.

1215. —— —— "Person interested in the minerals of the mine"—Lessor.]—Resps., who were owners in fee of mines & minerals, demised a lead mine, part of the estate, for a term of years, subject to a rent or royalties, such royalties to be paid upon the place where the ore should have been gotten or weighed, & before it should be taken away; the lease also reserving to resps. powers of distress & re-entry if the royalties should be in arrear. The lessees ceased working the mine, & left & allowed it to remain insufficiently fenced:—*Held:* although the lease was still in force & undetermined, resps. were guilty of an offence under Metalliferous Mines Regulation Act, 1872 (c. 77), s. 13, as "persons interested in the minerals of the mine."—EVANS *v.* MOSTYN (LADY) (1877), 2 C. P. D. 547; 47 L. J. M. C. 25; 36 L. T. 856; 41 J. P. 775.

Annotation:—**Reld.** Devonshire *v.* Stokes (1897), 61 J. P. 406.

1216. —— —— —— Owner—Effect of local usage.]—The owner in fee simple of lands in a district where lead mining is subject to & regulated by Derbyshire Mining Customs & Mineral Courts Act, 1852 (c. clxiii), s. 9, under which any one is entitled to mine for lead ore upon paying certain royalties, being, as owner in fee simple, entitled under that Act to royalties on calc-spar & calk taken out of any lead mine on his land, is a "person interested in the minerals" according to Metalliferous Mines Regulation Act, 1872 (c. 77), s. 13, & is, therefore, liable to fence & keep fenced the shafts & side entrances of an abandoned lead mine on his land, although he is not entitled to any duties or royalties on the lead ore in any case, or on the calc-spar & calk until gotten from the mine.—STOKES *v.* ARKWRIGHT (1897), 66 L. J. Q. B. 845; 77 L. T. 400; 61 J. P. 775; 14 T. L. R. 6, D. C.

1217. —— —— —— —— ——.]—DEVONSHIRE (DUKE) *v.* STOKES, No. 1265, *post*.

1218. —— —— "Owner" or "person interested in the minerals of the mine"—Lessee collecting royalties for benefit of lessor.]—Applt. was lessee of a lead mine & of all the duties arising therefrom, under a lease from the Duchy of Lancaster, by which he had to pay to the duchy, by way of rent, all he might annually receive in respect of the mine, with an additional yearly rent of 5*s*. The mine was demised to him subject to a custom by which all the subjects of the realm have a right to search there for veins of lead ore, upon paying certain duties, & applt. had no pecuniary interest in the mine or in the minerals thereof:—*Held:* applt. was neither owner of the mine nor a person interested in its minerals within Metalliferous Mines Regulation Act, 1872 (c. 77), s. 13, &, therefore, upon the mine being abandoned, he was not liable to cause the top of its shaft to be fenced as required by that sect.

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of his representative, that it has been obtained being sufficient.—STEVENSON *v.* ROGER, [1915] S. C. (J.) 24.—**SCOT.**

PART XIV. SECT. 2, SUB-SECT. 1.

n. *Hours of labour.*]—R. *v.* CANADIAN CONSOLIDATED MINES, LTD. (1906), 4 W. L. R. 101.—**CAN.**

o. ——.]—MCGREGOR *v.* CANADIAN CONSOLIDATED MINES, LTD. (No. 2) (1907), 12 B. C. R. 373; 2 M. M. Cas. 428.—**CAN.**

p. *Miner's lien—Registration—Priorities.*]—DRABESON *v.* THOMPSON (Y. T.) (1907), 6 W. L. R. 587.—**CAN.**

q. —— *Property in respect of which lien attaches.*]—The lien upon a mine as provided in Mechanics' Lien Act, 1897, c. 132, s. 8, is a lien on the mine itself & not on any fund arising from the sale of ore extracted from the mine.—LAW *v.* MUMFORD (1909), 14 B. C. R. 233.—**CAN.**

r. —— ——.]—LAREAU *v.* OLSEN (Y. T.) (1909), 12 W. L. R. 462.—**CAN.**

s. —— ——.]—Plff. had been given by deft. two separate time checks for work done on two mining claims:—*Held:* the grouping of the claims will not make a lien attach to more than one claim.—MCLEAN *v.* MCDONALD (Y. T.) (1909), 11 W. L. R. 389.—**CAN.**

a. —— ——.]—GUSTAFSON *v.* ENNIS, BURR *v.* ENNIS (Y. T.) (1911), 18 W. L. R. 6.—**CAN.**

b. —— *Who may claim.*]—BAXTER *v.* SENKLER (Y. T.) (1909), 12 W. L. R. 463.—**CAN.**

c. —— ——.]—ROAL *v.* RODENKERCH, RODENKERCH *v.* RODENKERCH, RECORD *v.* RODENKERCH (Y. T.) (1909), 11 W. L. R. 447.—**CAN.**

Sect. 2.—Metalliferous mines: Sub-sects. 3, 4 & 5. Part XV. Sects. 1 & 2.]

He [applt.] is a lessee [from the Crown] of the mine, but a lessee who merely receives a royalty, rent or fine from the mine, & that does not make him owner in the sense in which it is sought to make him. It is said that he has the right of working it, but he has that right only in common with all other subjects of the realm; & the 14 & 15 Vict. (c. 94) shows that & that it is a right not by statute, but by immemorial custom (LORD COLERIDGE, C.J.).—ARKWRIGHT *v.* EVANS (1880), 49 L. J. M. C. 82, D. C.

Annotation:—**Refd.** Devonshire *v.* Stokes (1897), 61 J. P. 406.

1219. —— —— User of abandoned mine as public well.]—The shaft of an abandoned mine contained water, & was used as & was in fact a public well, which under Public Health Act, 1875 (c. 55), s. 64, was vested in defts., the local authority:—*Held:* defts. were not the owners of the mine or of the shaft within Metalliferous Mines Regulation Act, 1872 (c. 77), s. 13, & were, therefore, not liable in an action for damage sustained through the top of the shaft not having been fenced.—KNUCKEY *v.* REDRUTH RURAL COUNCIL, [1904] 1 K. B. 382; 73 L. J. K. B. 265; 90 L. T. 226; 68 J. P. 172; 52 W. R. 558; 20 T. L. R. 164; 48 Sol. Jo. 193; 2 L. G. R. 456, D. C.

1220. —— Sufficiency of.]—To comply with Metalliferous Mines Regulation Act, 1872 (c. 77), s. 13, the fence to a side entrance to a disused mine must be constructed & maintained immediately adjacent to such side entrance, whether the mine be situated on enclosed ground or not.—FOSTER *v.* OWEN (1892), 62 L. J. M. C. 7; 67 L. T. 712; 57 J. P. 87; 41 W. R. 240; 9 T. L. R. 22; 5 R. 50, D. C.

Annotation:—**Refd.** Knuckey *v.* Redruth R. D. C. (1904), 90 L. T. 226.

SUB-SECT. 4.—GENERAL PROVISIONS FOR SAFETY.

See Metalliferous Mines Regulation Act, 1872 (c. 77), ss. 23–31; State Mines (Gunpowder) Act, 1882 (c. 3), s. 2.

1221. Provision of overhead covers—Breach by miners.]—By Metalliferous Mines Regulation Act, 1872 (c. 77), s. 23 (11), a sufficient cover overhead shall be used when lowering or raising persons in every working shaft, with certain exceptions. By the last clause of sect. 23 every person who contravenes or does not comply with any of the general rules in this sect. shall be guilty of an offence against this Act. By sect. 31, every person employed in or about a mine, other than an owner or agent, who is guilty of any act or omission which, in the case of an owner or agent, would be an offence against this Act shall be guilty of an offence against this Act, & is rendered liable to a penalty.

S. & others were working miners in the D. mine. The D. mine had two shafts, in one of which was a man engine, with a proper cover, used to lower miners from & raise them to the surface of the mine. In the other was a "skip" or open box, without a cover, used for raising ores & refuse. S. & certain other miners, who were then at the bottom of the mine, while the man engine & "skip" were both at work, got into the "skip," & were raised to the surface of the mine:—*Held:* they were guilty of an offence against Metalliferous Mines Regulation Act, 1872 (c. 77).—FRECHEVILLE *v.* SOUDEN (1883), 48 L. T. 612; 47 J. P. 613, D. C.

1222. Case of explosives—"Case or canister"—Whether linen or calico bag sufficient.]—By Metalliferous Mines Act, 1872 (c. 77), s. 22 (2), "Gunpowder or other explosive or inflammable substance shall not be taken into the mine except in a case or canister containing not more than 4 pounds":—*Held:* the word "case" as used in the sect. must be taken to mean something solid & substantial in the nature of a canister, & that a bag of linen or calico was not such a "case."—FOSTER *v.* DIPHWYS CASSON SLATE CO. (1887), 18 Q. B. D. 428; 56 L. J. M. C. 21; 51 J. P. 470; *sub nom.* LE NEVE FOSTER *v.* DIPHWYS CASSON SLATE CO., 3 T. L. R. 301, D. C.

1223. Provision of "guides" — "Working shaft"—Shaft in course of construction.]—By Metalliferous Mines Regulation Act, 1872 (c. 77), s. 23 (10), "Every working shaft in which persons are raised" shall, under certain specified circumstances, be provided with guides, & persons contravening the provisions of the sect. are made liable to a penalty.

The shaft of a lead mine was completed, & a tunnel driven from the bottom of it for the purpose of arriving at the ore, but no ore had been gotten. The men employed in the mine were drawn up the shaft in a bucket unprovided with guides:—*Held:* the shaft was a "working shaft" within Metalliferous Mines Regulation Act, 1872 (c. 77), s. 23 (10), & therefore the owners of the mine were liable to be convicted of an offence against that sect.—FOSTER *v.* NORTH HENDRE MINING CO., LTD., [1891] 1 Q. B. 71; 60 L. J. M. C. 6; 63 L. T. 458; 55 J. P. 103; 17 Cox, C. C. 216.

Necessity for continuous ventilation.]—*Compare* No. 1174, *ante.*

SUB-SECT. 5.—LEGAL PROCEEDINGS.

See Metalliferous Mines Regulation Act, 1872 (c. 77), ss. 31–38; Metalliferous Mines (Isle of Man) Act, 1891 (c. 47).

1224. By whom information may be laid—By authorised agent in name of inspector—Decision

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PART XIV. SECT. 2, SUB-SECT. 4.

d. Liability of owner—Duty to take reasonable precautions.]—Inspection of Metalliferous Mines Act, s. 25, was not intended to impose unreasonable burdens upon the mine owner, & therefore he is only required to use reasonable precaution against accidents to miners.—MCDONALD *v.* CANADIAN PACIFIC EXPLORATION CO., LTD. (1899), 7 B. C. R. 39; 1 M. M. Cas. 379.—**CAN.**

e. —— ——.]—HOSKING *v.* LE ROI, NO. 2, LTD. (B. C.) (1903), 34 S. C. R. 244.—**CAN.**

f. —— *Appointment of unqualified fireman.*]—SIMISTER *v.* MORGAN, 2 M. M. Cas. 281.—**CAN.**

g. Liability of overseer.]—In the absence of a mine manager certain coloured labourers worked in a shaft without wearing the required hats. The overseer was not aware of the fact. The hats had been supplied, & had not been worn on account of the labourers' own neglect:—*Held:* the said overseer had not been guilty of a breach of the regulation.—MILLS *v.* R., [1907] T. S. 43.—**S. AF.**

h. ——.]—A mine captain who had large authority & powers of supervision was convicted on a charge of failing, in his capacity as a mine overseer, to make provision for an effective contrivance to prevent trucks running away as required by Mines, Works & Machinery Regulations, 1913, s. 43 (1) (*c*):—*Held:* in the circumstances he was a mine overseer within s. 160 (1), (3), of the Regulations.—R. *v.* ATKINSON, [1919] T. P. D. 60.—**S. AF.**

PART XIV. SECT. 2, SUB-SECT. 5.

k. Appeal from mining court—Whether by case stated.]—KINNEY *v.* HARRIS (1897), 5 B. C. R. 229.—**CAN.**

l. Action against master—Jurisdiction of county court.]—An action for

to prosecute taken by inspector.]—An information against the owner or agent of a mine for an offence under Metalliferous Mines Regulation Act, 1872 (c. 77), which can be prosecuted before a ct. of summary jurisdiction may, if the inspector of mines of the district has determined to prosecute, be laid in his name by an agent duly authorised by him in that behalf.—FOSTER *v.* FYFE, [1896] 2 Q. B. 104; 65 L. J. M. C. 184; 74 L. T. 784; 60 J. P. 423; 18 Cox, C. C. 364; *sub nom.* LE NEVE FOSTER *v.* FYFE, 44 W. R. 524; 12 T. L. R. 433; 40 Sol. Jo. 546, D. C.

——.]—*See* Summary Jurisdiction Act, 1884 (c. 43), s. 4; & MAGISTRATES, Vol. XXXIII., p. 324, Nos. 389 *et seq.*

Actions against master under Employers' Liability Act, 1880 (c. 42).]—*See* MASTER & SERVANT, pp. 220–237, *ante*.

Part XV.—Quarries.

SECT. 1.—IN GENERAL.

See Quarries Act, 1894 (c. 42); Metalliferous Mines (Isle of Man) Act, 1891 (c. 47); Notice of Accidents Act, 1906 (c. 53); Checkweighing in Various Industries Act, 1919 (c. 51); Workmen's Compensation Act, 1923 (c. 42), s. 29.

Statutory definition.]—*See* Quarries Act, 1894 (c. 42), s. 1.

1225. —— Application of—Slag heap containing mineral refuse.]—A heap of slag, *i.e.* the refuse from blast furnaces produced in the manufacture of pig-iron, & consisting of a mixture of lime, fuel & iron, piled up upon the unbroken natural surface of the soil, although over 20 feet deep, is not a quarry under Quarries Act, 1894 (c. 42).—SCOTT *v.* MIDLAND RY. CO. (1897), 61 J. P. 358; 13 T. L. R. 398; 41 Sol. Jo. 509, D. C.

1226. —— —— Gravel & sand pit.]—SCOTT *v.* MIDLAND RY. CO., No. 74, *ante*.

"Quarry" distinguished from "mine."]—*See* Nos. 23–27, *ante*.

1227. Slate quarry—Underground—Whether metalliferous mine.]—A slate quarry, partly worked by underground borings, starting from levels in the side of the mountain, is a metalliferous mine within Metalliferous Mines Regulation Act, 1872 (c. 77).—SIMS *v.* EVANS (1875), 40 J. P. 199; *sub nom.* SIM *v.* EVANS, 23 W. R. 730.

Annotation:—**Consd.** Jones *v.* Cwmorthin Slate Co. (1879), 49 L. J. Q. B. 110.

—— **Whether factory.**]—*See* FACTORIES, Vol. XXIV., p. 899, No. 12.

SECT. 2.—FENCING.

See Quarry (Fencing) Act, 1887 (c. 19); NEGLIGENCE.

1228. Liability at common law—As against public generally.]—An owner of land is not under any legal obligation to fence an excavation therein, unless it is made so near to a public road or way as to constitute a public nuisance.—HOUNSELL *v.* SMYTH (1860), 7 C. B. N. S. 731; 29 L. J. C. P. 203; 1 L. T. 440; 6 Jur. N. S. 897; 8 W. R. 277; 141 E. R. 1003.

Annotations:—**Apld.** Binks *v.* South Yorkshire Ry. & River Dun Co. (1862), 3 B. & S. 244; Bolch *v.* Smith (1862), 7 H. & N. 736. **Distd.** *Re* Williams *v.* Groucott (1863), 4 B. & S. 149. **Refd.** Gallagher *v.* Humphery (1862), 27 J. P. 5; Crane *v.* South Suburban Gas Co., [1916] 1 K. B. 33. **Mentd.** Pickard *v.* Smith (1861), 4 L. T. 470; Witherley *v.* Regents Canal Co. (1862), 12 C. B. N. S. 2; Robbins *v.* Jones (1863), 33 L. J. C. P. 1; R. *v.* Dant (1865), Le. & Ca. 567; Indermaur *v.* Dames (1866), L. R. 1 C. P. 274; Lowery *v.* Walker, [1910] 1 K. B. 173; Latham *v.* Johnson, [1913] 1 K. B. 398.

1229. —— —— Quarry adjoining highway.]—HOUNSELL *v.* SMYTH, No. 1228, *ante*.

1230. —— —— ——.]—Deft. owned & occupied land, being a worked-out quarry, immediately adjoining a public highway vested in an urban district council & repairable by the inhabitants at large. A prior owner of the land had, in 1865, made the excavation in order to quarry for limestone & until then the surfaces of the road & the land had been on same level. The excavation being a source of danger & obstruction to persons using the road, the excavator, to protect them & the road, built alongside the road a wall, the bottom of which rested on a ledge of limestone left ungotten for the purpose & served as a retaining wall for the subsoil of the road & as a fence wall above its surface. In Feb. 1913, part of the wall collapsed & fell into the quarry, & in consequence a considerable part of the subsoil of the road & of its surface fell in also, the road thus becoming impassable, a source of danger to persons attempting to use it, & a nuisance, liable under Quarry (Fencing) Act, 1887 (c. 19), s. 3, to be dealt with summarily under Public Health Act, 1875 (c. 55):—*Held:* (1) there was also a common law obligation on the possessor of the excavation to keep it fenced off whether it was made before or after his possession began, & whether he was or was not liable to his landlord, if any; (2) in an action by the A.-G. at the

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damages for personal injuries received by an employee in a metalliferous mine may be brought for any amount in the county ct.—BEAMISH *v.* WHITEWATER MINES, LTD. (1900), 7 B. C. R. 261; 1 M. M. Cas. 405.—**CAN.**

PART XV. SECT. 1.

m. *Right to take stone—Whether lease or sale.*]—An agreement by which the owners of a quarry gives a party the right to extract stone from it during a fixed period, at places to be indicated by them, & in consideration of a sum to be paid according to measurement of the stone, is not a lease of a portion of the quarry but a sale of the stone to be extracted.—HENDERSHOT *v.* LIONAIS (1905), Q. R. 27 S. C. 292.—**CAN.**

n. *Lease of land containing quarry—Necessity for registration.*]—Under Land Titles Act, a lease of Dominion lands containing quarriable stone, not being in the form of letters patent, but issued by the Deputy Minister of the Interior, in accordance with regulations of the Governor in Council, ought to be registered.—*Re* LAND TITLES ACT (No. 2) (1913), 21 W. L. R. 385; 4 W. W. R. 677; 11 D. L. R. 673; 6 Alta. L. R. 111.—**CAN.**

o. *Co-sharers—Right to account.*]—B. took a lease of a hill from certain co-sharers of an estate & worked a quarry. A., the other co-sharer, brought a suit against B. claiming an account of all the stones quarried & carried away by him:—*Held:* that inasmuch as there was an actual ouster or destruction of the common property by working a quarry, which was the proper & legitimate use of the hill, A. was not entitled to an account in the absence of any proof that B. had received more than his just share.—MAHESH NARAIN *v.* NOWBAT PATHAK (1905), 1 L. R. 32 Calc. 837.—**IND.**

p. *Effect of non-user.*]—Non-user for twenty-one years does not deprive the tenants or farmers of the Isle of Man of the right to dig for, & raise, limestone & other stones in the quarry of a tenant provided the stones, etc., are for the use of the party obtaining them, or to be employed by him for the improvement of his own or neighbour's estate.—CHRISTIAN *v.* GIBSON (1841), 3 Moo. P. C. C. 351.—**I. of M.**

q. *Special rules as to safety—Whether binding on subsequent tenant.*]—Special rules established in a quarry during one tenancy do not apply to a subsequent tenant, who comes into the occupancy after an interval during which the quarry has been untenanted & unworked.—GORDON *v.* ANDERSON, [1910] S. C. (J.) 26; 47 Sc. L. R. 156; [1909] 2 S. L. T. 461; 6 Adam, 161.—**SCOT.**

Sect. 2.—*Fencing. Sect.* 3. *Part XVI. Sect.* 1: *Sub-sect.* 1.]

relation of the council, a mandatory order must be made on deft. to abate the nuisance by restoring the road to its condition prior to the subsidence & by rebuilding the wall or providing some other reasonable fence between the road & the quarry.—A.-G. *v.* ROE, [1915] 1 Ch. 235; 84 L. J. Ch. 322; 112 L. T. 581; 79 J. P. 263; 13 L. G. R. 335.

Annotation:—As to (1) **Refd.** Sack *v.* Jones, [1925] Ch. 235.

1231. —— As against neighbours & persons lawfully upon the premises.]—HAWKEN *v.* SHEARER (1887), 56 L. J. Q. B. 284; 3 T. L. R. 557, D. C.

1232. Liability of local authority—When owner of quarry unknown—User by all owners & occupiers in township.]—HUGHES *v* WAVERTREE LOCAL BOARD (1894), 58 J. P. Jo. 196, D. C.

1233. "Owner" or "occupier"—Quarries Act, 1894 (c. 42), ss. 24, 41—Whether licence included.]—Persons, having merely a revocable licence to take flint & chalk from a quarry on paying the full value of the material removed, are not occupiers of the quarry so as to be "owners" within Metalliferous Mines Regulation Act, 1872 (c. 77), s. 41, & so as to be liable to fence the quarry, if dangerous, in accordance with the special rules under ss. 24 to 30 of that Act.—FOSTER *v.* NEWHAVEN HARBOUR TRUSTEES (1897), 61 J. P. 629; 13 T. L. R. 292; *sub nom.* LE NEVE FOSTER *v.* NEWHAVEN HARBOUR TRUSTEES, 41 Sol. Jo. 368, D. C.

Excavations adjoining highways.]—*See* BOUNDARIES, Vol. VII., pp. 283–286.

Excavations not adjoining highways.] — *See* BOUNDARIES, Vol. VII., pp. 288–289.

SECT. 3.—BLASTING.

See, generally, NEGLIGENCE.

1234. Liability of owner—Negligent blasting—Criminal liability.]—Negligently blasting stone in a quarry, & thereby projecting large pieces of stone so as to endanger the safety of persons in houses & on the highways adjoining the quarry, is a misdemeanour indictable at common law.—R. *v.* MUTTERS (1864), Le. & Ca. 491; 34 L. J. M. C. 22; 11 L. T. 387; 28 J. P. 804; 13 W. R. 100; 10 Cox, C. C. 6; 169 E. R. 1485, C. C. R.

1235. —— Apart from negligence—Damage off premises.]—The duty of the owner of a quarry who brings explosives on to his premises & explodes them there is to keep all the results of the explosion on his own land, & if they escape from his land & cause damage he is liable, whether he has been guilty of negligence or not.—MILES *v.* FOREST ROCK GRANITE CO., LTD. (1918), 34 T. L. R. 500; 62 Sol. Jo. 634, C. A.

—— To workman under Workmen's Compensation Acts.]—*See* MASTER & SERVANT, pp. 301–304, *ante.*

Part XVI.—Local Rights and Customs.

SECT. 1.—CORNWALL AND DEVON.

SUB-SECT. 1.—TIN-BOUNDING IN CORNWALL.

Cost-book companies & mining companies in the Stannaries.]—*See* COMPANIES, Vol. X., pp. 1098 *et seq.*

1236. Rights of Crown.]—The King has not the pre-emption of tin in Cornwall by any prerogative; but as an ancient right & inheritance due to him as well of tin in the land of the subject as in his proper demesnes, etc.—STANNARIES' CASE (1606), 12 Co. Rep. 9; 77 E. R. 1292.

1237. Ownership of tin mines—In owner of soil.]—(1) Declaration, in case, stated that pltf. was possessed of & entitled to a tenement to wit the right to dig & take to his own use, tin & tin ore in certain lands; & alleged a disturbance by deft. Plea, denying the possession & title *modo et formâ.* At the trial, pltf. claimed under the following custom which the jury found to exist in fact; any person may enter on the waste land of another in Cornwall & mark out by four corner boundaries a certain area; a written description of the plot of land so marked with metes & bounds & the name of the person for whose use the proceeding is taken is recorded in an immemorial local ct. called the Stannary Ct., & proclaimed at three successive cts. held at stated intervals; if no objection is successfully made by any other person, the ct. awards a writ to the bailiff of the ct. to deliver possession of the said "bounds or tin works" to the bounder who thereupon has the exclusive right to search for, dig & take for his own use all tin & tin ore within the described limits, paying to the landowner a certain customary proportion of the ore raised under the name of toll tin. The right descends to exors. & may be preserved for an indefinite time, either by actually working & paying toll, or by annually renewing the four boundary marks on a certain day:—*Held:* the custom to preserve the right by the mere ceremony of an annual renewal without working is unreasonable & bad in law, & pltf., who had ceased to work or pay toll for eighteen years, could not recover in the above action, even as against a stranger; &, although the alleged custom involved a claim of a profit *in alieno solo* it would have been a good one; if *bonâ fide* working had been found to be obligatory under it.

(2) Nothing has been alleged in the present case to bring this mine within the description of a Royal Mine; & we think it would be wrong to encourage the slightest doubt that, apart from all question of bounding, the ownership of a tin or copper mine in Cornwall is in the owner of the freehold of the soil, *ratione soli*, by the common law of England, applicable to it as to any other mineral district in any other part of England. Upon this ownership, however, the custom of bounding has been engrafted; &, up to the extent to which both sides are agreed to admit it in fact, there can be no doubt that it is most reasonable,

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PART XV. SECT. 2.

1231 i. *Liability at common law—As against neighbours & persons lawfully upon the premises.*]—Pltf. was owner & occupier of the surface of certain lands on which there was an unfenced quarry, the mining rights in which were leased to the predecessor in title of defts. These rights passed by will to defts., who paid the rent reserved by the lease, but did not work the mine, & left it in the unfenced condition in which they found it. One of pltf.'s bullocks fell into the quarry & was killed:—*Held:* pltf. was entitled to recover damages from defts. for the loss of his bullock, there being a continuing liability on the part of defts. to keep the quarry so as not to be a danger & a nuisance to their neighbour.—M'MORROW *v.* LAYDEN, [1919] 2 I. R. 398.—IR.

fulfilling every requisite of a good custom. In substance it is this: The mine is parcel of the soil; the ownership is in the owner of the soil; but it is a parcel which to discover & bring to the surface may ordinarily require capital, skill, enterprise & combination; which, while in the bowels of the earth, is wholly useless to the owner as well as to the public; & the bringing of which into the market is eminently for the benefit of the public. If, therefore, the owner of the soil cannot or will not do this for himself, he shall not be allowed to lock it up from the public; & therefore in such case, unless when by inclosure he may seem to have devoted the land to other important purposes inconsistent with mining operations, such as agriculture or building, any tinner, *i.e.* any man employing himself in tin mining, may secure to himself the right to dig the mines under the land, rendering a certain portion of the produce to the owner of the soil (LORD DENMAN, C.J.).

(3) It is well known that the stannary customs, as the name imports, were confined to tin only; copper mining is of comparatively modern introduction into Cornwall; it is now discovered that the two metals are frequently found within the limits of the same work; but we apprehend that it never has been contended that the bounder, merely as such, working a tin mine & extracting copper from it with the tin, has any right to the copper (LORD DENMAN, C.J.).

(4) Nothing we have said compels the bounder to strictly continuous working; such reasonable time for consideration, preparation, & due selection of places and planes, must always be allowed as the nature of the undertaking reasonably requires; &, when he has once *bonâ fide* worked, his ceasing to work for a time will be therefore open to explanation, so as to prevent a forfeiture (LORD DENMAN, C.J.).—ROGERS *v.* BRENTON (1847), 10 Q. B. 26; 17 L. J. Q. B. 34; 9 L. T. O. S. 352; 12 Jur. 263; 116 E. R. 10.

Annotations:—As to (1) **Consd.** A.-G. *v.* Mathias (1858), 4 K. & J. 579. **Refd.** Constable *v.* Nicholson (1863), 14 C. B. N. S. 230. *As to* (2) **Refd.** Ivimey *v.* Stocker (1865), 34 L. J. Ch. 633. *Generally*, **Refd.** Hilton *v.* Granville (1844), 5 Q. B. 701; Lloyd *v.* Jones (1848), 6 C. B. 81; Mills *v.* Colchester Corp. (1864), 17 C. B. N. S. 635.

1238. Tin-bounding—Custom applies to waste land only.]—ROGERS *v.* BRENTON, No. 1237, *ante*.

1239. —— ——.]—IVIMEY *v.* STOCKER, No. 1255, *post*.

1240. —— How customary rights acquired.]—ROGERS *v.* BRENTON, No. 1237, *ante*.

1241. —— ——.]—IVIMEY *v.* STOCKER, No. 1255, *post*.

1242. Nature of interest acquired by tin-bounders—Whether mere easement.]—(1) A tin-bound is a mere easement, for which an ejectment cannot be brought.

(2) A consent-rule, in an ejectment for lands & mines, by which the party appeared to defend for "a certain tin-bound, etc.," was held insufficient, on the ground that ejectment will not lie for a tin-bound. The defence should be for the mine which deft. is working under the tin-bound.

(3) If you are in possession of one mine within the bounds, which you are working, that is surely a sufficient possession of all the mines within the bounds (LORD ABINGER, C.B.).—DOE d. FALMOUTH (EARL) *v.* ALDERSON (1836), 1 M. & W. 210; 1 Gale, 441; Tyr. & Gr. 543; 5 L. J. Ex. 153; 150 E. R. 411; *subsequent proceedings* (1837), Smirke's Report, 39, n.

Annotations:—As to (1) **Refd.** Vice *v.* Thomas (1842), 4 Y. & C. Ex. 538. *As to* (2) **Consd.** Rogers *v.* Brenton (1847), 10 Q. B. 26. *Generally*, **Mentd.** Holmes *v.* Powell (1856), 8 De G. M. & G. 572.

1243. —— ——.]—*Semble:* the interest of an owner of tin bounds in Cornwall is not a mere easement or incorporeal hereditament, but may be the subject of an action of ejectment, even where he is not in actual possession at the time of the wrongful entry of deft.—VICE *v.* THOMAS (1842), 4 Y. & C. Ex. 538; 2 Coop. *temp.* Cott. 122; Smirke's Report, 1; 160 E. R. 1120; *subsequent proceedings*, *sub nom.* THOMAS *v.* VICE (1843), 1 L. T. O. S. 312.

Annotations:—**Consd.** Rogers *v.* Brenton (1847), 10 Q. B. 26. **Refd.** Gaved *v.* Martyn (1865), 19 C. B. N. S. 732. **Mentd.** Haigh *v.* Jaggar (1845), 2 Coll. 231; Talbot *v.* Hope Scott (1858), 4 K. & J. 96.

1244. —— **Chattel real.**]—IVIMEY *v.* STOCKER, No. 1052, *ante*.

1245. —— **Rights in regard to water.**]—The privilege of washing away sand, stone & rubble, dislodged in the necessary working a tin mine, & of having same sent down a natural stream running through pltf.'s land, may be the subject of a grant, & may be pleaded as a prescriptive right, under Prescription Act, 1832 (c. 71), to a declaration charging defts. with throwing such stone, sand & rubble into the stream, & thereby filling up its bed within pltf.'s land, & causing the water to flow over it. Such privilege may also be well pleaded as a local custom.—CARLYON *v.* LOVERING (1857), 1 H. & N. 784; 26 L. J. Ex. 251; 28 L. T. O. S. 356; 5 W. R. 347; 156 E. R. 1417.

Annotations:—**Refd.** Rogers *v.* Taylor (1857), 26 L. J. Ex. 203; Gaved *v.* Martyn (1865), 19 C. B. N. S. 732. **Mentd.** O'Brien *v.* Enright (1867), 15 W. R. 637.

1246. ——.]—IVIMEY *v.* STOCKER, No. 1052, *ante*.

1247. —— ——.]—GAVED *v.* MARTYN, No. 1051, *ante*.

1248. —— **Where copper & tin extracted from same mine—No right to copper.**]—ROGERS *v.* BRENTON, No. 1237, *ante*.

1249. Forfeiture of customary acquired rights—Effect of non-working.]—ROGERS *v.* BRENTON, No. 1237, *ante*.

1250. Toll-tin.]—TRELAWNY *v.* WILLIAMS (1704), 2 Vern. 483; 23 E. R. 910.

1251. ——.]—CREASE *v.* BARRETT (1835), 1 Cr. M. & R. 919; 5 Tyr. 458; 4 L. J. Ex. 297; 149 E. R. 1353.

Annotations:—**Mentd.** De Rutzen *v.* Farr (1835), 4 Ad. & El. 53; Doe d. Tatham *v.* Wright (1836), 1 Har. & W. 729; Evans *v.* Taylor (1838), 7 Ad. & El. 617; Ward *v.* Suffield (1839), 5 Bing. N. C. 381; Mortimer *v.* M'Callan (1840), 6 M. & W. 58; Gerish *v.* Chartier (1845), 1 C. B. 13; Hughes *v.* Hughes (1846), 15 M. & W. 701; Doe d. Welsh *v.* Langfield (1847), 16 M. & W. 497; Beaufort *v.* Smith (1849), 4 Exch. 450; Hardcastle *v.* Dennison (1851), 10 C. B. N. S. 606; Quilter *v.* Jorss (1863), 14 C. B. N. S. 747; Carmarthen & Cardigan Ry. *v.* Manchester & Milford Ry. (1873), L. R. 8 C. P. 685; Mors-Le-Blanch *v.* Wilson (1873), L. R. 8 C. P. 227; Evans *v.* Merthyr Tydvil U. D. C. (1898), 79 L. T. 578; R. *v.* Norfolk County Council (1910), 26 T. L. R. 269.

1252. ——.]—R. *v.* CREASE (1840), 11 Ad. & El. 677; 3 Per. & Dav. 134; 9 L. J. M. C. 38; 4 J. P. 139; 113 E. R. 571.

Annotation:—**Refd.** Crease *v.* Sawle (1842), 11 L. J. M. C. 62.

1253. ——.]—CREASE *v.* SAWLE (1842), 2 Q. B. 862; 2 Gal. & Dav. 812; 11 L. J. M. C. 62; 114 E. R. 334, Ex. Ch.

Annotations:—**Refd.** Crawshay *v.* Morgan (1869), L. R. 4 Q. B. 581; Roads *v.* Trumpington Overseers (1870), 40 L. J. M. C. 35; Morgan *v.* Crawshay (1871), L. R. 5 H. L. 304. **Mentd.** Mersey Docks & Harbour Board *v.* Cameron, Jones *v.* Mersey Docks & Harbour Board (1865), 20 C. B. N. S. 56; Kittow *v.* Liskeard Union Assmt. Com. (1874), 31 L. T. 601; Coomber *v.* Berks JJ. (1883), 9 App. Cas. 61; Manchester Overseers *v.* Headlam (1888), 21 Q. B. D. 96; Westminster Corpn. *v.* Army & Navy Auxiliary Co-op. Supply, [1902] 2 K. B. 125.

1254. ——.]—ROGERS *v.* BRENTON, No. 1237, *ante*.

Sect. 1.—*Cornwall and Devon: Sub-sects.* 1, 2 & 3. *Sect.* 2: *Sub-sects.* 1, 2, 3, 4 & 5.]

1255. ——.]—This, at least, is the custom throughout Cornwall, that any one may go upon any waste land, to whomsoever it may belong, even if it belongs to the Duchy of Cornwall, & pitch bounds (as it is called), that is, he selects a certain piece of land, say, an acre, or half an acre, which he marks out by digging up a turf or two at each of the four corners, & having thus pitched the bounds, his right is this, that if the lord or owner of the soil or other person to whom the minerals belong, does not within a year work the minerals on that piece of land, then the bounder . . . has a right himself, as against the owner, to work the mines; paying always a certain toll to the lord or owners (KINDERSLEY, V.C.).—IVIMEY *v.* STOCKER (1865), 2 Drew. & Sm. 537; 34 L. J. Ch. 633; 12 L. T. 521; 11 Jur. N. S. 775; 13 W. R. 828; 62 E. R. 724; *on appeal* (1866), 1 Ch. App. 396, L. C. & L. JJ.

SUB-SECT. 2.—TIN-BOUNDING IN DEVON.

1256. Nature of interest acquired by stanners—Rights in regard to water.]—The stanners of Devonshire are not entitled by custom to divert water from streams into their mines, & for that purpose to dig trenches over other people's lands.—BASTARD *v.* SMITH (1838), 2 Mood. & R. 129, N. P.

Annotations:—**Mentd.** Davenport *v.* Davenport (1849), 7 Hare, 217; East Lancashire Ry. *v.* Tattersley (1849), 8 Hare, 72.

SUB-SECT. 3.—STANNARIES COURT.

See COURTS, Vol. XVI., p. 203, Nos. 1116–1123; COMPANIES, Vol. X., p. 1109, Nos. 7797, 7798.

SECT. 2.—DERBYSHIRE LEAD MINES AND MINERAL CUSTOMS.

SUB-SECT. 1.—IN GENERAL.

See High Peak Mining Customs & Mineral Courts Act, 1851 (c. 94), & Derbyshire Mining Customs & Mineral Courts Act, 1852 (c. clxiii.).

1257. Application of statutes & custom—Strictly construed.]—Pltfs. were the owners of land in the district of K. F. which land was contiguous to the district of the wapentake of W. These two districts, though distinct, & governed by different Acts of Parliament, form part of the High Peak of D. Defts. sunk a draft & commenced mining operations in pltfs.' land in the district of K. F. but subsequently extended them to the adjoining district of W. By the custom of the districts, the right to dig & search for lead ore is conceded to all persons, who may use a specified portion of the above-lying surface for the purpose of dressing the ore & placing the spoil or refuse, which spoil, when not used by the miners, becomes the property of the surface owner. Defts. having sunk a shaft originally in the land of pltfs., carried on their operations into another district & under the surface of another landowner, & claimed to use pltfs.' land for the purpose of dressing the ore, & for depositing the refuse got from under the surface in the other district, & belonging to the other landowner:—*Held:* as the two districts of K. F. & of W. were quite distinct & governed by separate Acts of Parliament, it was not competent for the miner sinking his shaft in one district to use the surface land in that district to dress the ore & place the spoil or refuse got from another district into which he had extended his operations.

The rights thus conferred on the miner are, as regards the landowner, of a very onerous character . . . & must in my opinion be construed strictly (COCKBURN, C.J.).—WAKE *v.* REDFEARN (1880), 43 L. T. 123; 44 J. P. 681.

Barmote Courts of High Peak—Jurisdiction.]—*See* COURTS, Vol. XVI., p. 198, No. 1034.

1258. Barmaster—Disqualification for office.]—The King granted by a lease the lot & cope, & all his mineral rights in the soke of Wirksworth, to A., & by same instrument granted to him the office of barmaster within same, the duties of which cannot be discharged by the farmer of the dues:—*Held:* as he was incapable of holding that office, the grant of it was invalid.—ARKWRIGHT *v.* CANTRELL (1837), 7 Ad. & El. 565; 2 Nev. & P. K. B. 582; Will. Woll. & Dav. 686; 7 L. J. Q. B. 63; 2 Jur. 11; 112 E. R. 583.

Proof of custom—Admissibility of evidence—Custom of other manors.]—*See* COPYHOLDS, Vol. XIII., p. 29, Nos. 265, 266.

SUB-SECT. 2.—RIGHTS OF MINING.

See High Peak Mining Customs & Mineral Courts Act, 1851 (c. 94); Derbyshire Mining Customs & Mineral Courts Act, 1852 (c. clxiii).

1259. Right to work mines—Founded on custom & common to all subjects of realm.]—(1) If [the landowner] should himself desire to work any vein of lead within his own land, [he] had no greater or better right than that which was open under the custom to all the Queen's subjects; & if he worked the mines at all he could only do so upon the customary terms & on payment of the customary royalties (LORD SELBORNE, C.).

(2) When any new vein was found, the "first finder" was to have measured & set out to him, by the barmaster, in the presence of two grand jurors, "two meers in length of the vein," & a third "meer," it is not necessary to state its dimensions, was at the same time to be allotted to the Crown lessees, or, if there were none, to the Queen. If neither the Crown lessees nor the Queen chose to work this third "meer," the "first finder" was to be entitled either to purchase it from the Crown on certain terms, or to work through it, reserving the ore found there, less expenses, for the Crown (LORD SELBORNE, C.).

(3) Under the 4th [custom scheduled to High Peak Mining Customs & Mineral Courts Act, 1851 (c. xciv)] they [the miners] were to have set out for their use by the barmaster, without any compensation to the occupiers or landowner, ways from the mine to the nearest highway, & also to the nearest running stream, spring, or natural pond, such ways, & also the water of such stream, etc., to be used by them for mining purposes only. . . . Two more only of the scheduled customs require to be mentioned. The nineteenth provides that, if the barmaster "finds any mine or vein neglected & not wrought, & not hindered by water or for want of air," he may, "if required so to do by any person or persons," give notice that "the mine will be forfeited at the expiration of three weeks if not duly & reasonably worked to the satisfaction of the barmaster & grand jury, & no other sufficient reason assigned to them"; & that if at the expiration of that time, the mine or vein is not so worked, the barmaster may then

"give such mine or vein to any person or persons willing to work the same" (LORD SELBORNE, C.). —WAKE *v.* HALL (1880), 7 Q. B. D. 295; 50 L. J. Q. B. 545; 44 L. T. 42; 45 J. P. 340, C. A.; *on appeal* (1883), 8 App. Cas. 195, H. L.

Annotations:—Generally, **Reld.** A.-G. to the Prince of Wales *v.* Collom, [1916] 2 K. B. 193. **Mentd.** Goodman *v.* Saltash Corpn. (1882), 48 L. T. 239; Topham *v.* Greenside Glazed & Firebrick Co. (1887), 58 L. T. 274; Ward *v.* Dudley (1887), 57 L. T. 20; Gough *v.* Wood, [1894] 1 Q. B. 713; Mears *v.* Callender, [1901] 2 Ch. 388; Reynolds *v.* Ashby, [1904] A. C. 466.

1260. —— —— Landowner.]—WAKE *v.* HALL, No. 1259, *ante.*

1261. —— —— Lessee from Crown.]—ARKWRIGHT *v.* EVANS, No. 1218, *ante.*

1262. — Excepted places — Garden.] To trespass for breaking & entering a close of pltf. called a garden, deft. pleaded an immemorial custom to search for minerals in the district within which the *locus in quo* was situate, "the scites of houses, etc., gardens, & highways excepted," & it being proved that the *locus in quo* was planted with shrubs within the last six years, & with potatoes just before the trespass:—*Held:* it was a garden within the meaning of the exception.—GILBERT *v.* TOMISON (1824), 4 Dow. & Ry. K. B. 222.

1263. Relation between landowner & miner—User of surface.]—WAKE *v.* REDFEARN, No. 1257, *ante.*

1264. —— Nature of miner's interest Ownership—With no right in perpetuity.]—(1) Miners working under customs established by High Peak Mining Customs & Minerals Courts Act, 1851 (c. xciv) lawfully erected machinery & buildings accessory thereto on surface land, of which the miners were entitled to the exclusive use for mining purposes, but the freehold of which belonged to others. The buildings were attached so as to be part of the soil, & so that they could not be removed without some disturbance, which would not amount to a destruction of the soil. The buildings were from the first intended to be accessory to the mining, & there was nothing to show that the property in them was intended to be irrevocably annexed to the soil: *Held:* the maxim "*quicquid plantatur solo solo cedit*," was not applicable, & the miners were entitled to pull down & remove the buildings while their interest in the mine continued, & were not liable to the surface owners for so doing.

(2) In the Act of 1851 [High Peak Mining Customs & Minerals Courts Act (c. 91)] & in the scheduled customs which are therewith incorporated & are therefore of statutory authority, the interest of the miner is expressly described & recognised as that of ownership. He has not an absolute right in perpetuity, but his right remains that of an owner until he gives up possession of the mine or is dispossessed by competent authority (LORD WATSON).

(3) I cannot doubt for a moment but that the custom would authorise the miner to use all modern appliances & that he was not confined to the use of such as existed at the time of the presumed grant of these mining rights (LORD FITZGERALD).—WAKE *v.* HALL (1883), 8 App. Cas. 195; 52 L. J. Q. B. 494; 48 L. T. 834; 47 J. P. 548; 31 W. R. 585, H. L.

Annotations:—As to (1) **Apld.** Ward *v.* Dudley (1887), 57 L. T. 20. *Generally,* **Reld.** A.-G. to the Prince of Wales *v.* Collom, [1916] 2 K. B. 193. **Mentd.** Goodman *v.* Saltash Corpn. (1882), 48 L. T. 239; Topham *v.* Greenside Glazed & Firebrick Co. (1887), 58 L. T. 274; Gough *v.* Wood, [1894] 1 Q. B. 713; Mears *v.* Callender, [1901] 2 Ch. 388; Reynolds *v.* Ashby, [1904] A. C. 466.

1265. —— —— Effect of abandonment of working.]—By Metalliferous Mines Regulations Act, 1872 (c. 77), s. 13, the owner & person interested in the minerals of a mine shall fence an abandoned mine, but by sub-sect. 2 of same section, where the abandonment has occurred before the passing of the Act, it need only be done under certain conditions or on notice from an inspector, on the ground that it is specially dangerous.

Applt. was the lord of the manor of H. & freeholder of the soil of a mine, which had not been worked for over thirty years, & the workers of which or their representatives could not be traced. Notice was served on him to fence on the ground that the entrance was specially dangerous. By Derbyshire Mining Act, 1852, applt. was entitled to dues of lot & cope & a third meer, & this Act further only gave the worker the right to mine, & conferred no title on the soil. Applt. having failed to comply with the terms of the notice was summoned & convicted:—*Held:* applt. was a person interested in the minerals, & on abandonment the mine reverted to him as owner, &, therefore, being liable to fence, he was rightly convicted. —DEVONSHIRE (DUKE) *v.* STOKES (1897), 76 L. T. 424; 61 J. P. 406; 13 T. L. R. 376; 41 Sol. Jo. 510, D. C.

1266. — —.]—STOKES *v.* ARKWRIGHT, No. 1216, *ante.*

1267. Measurement & setting out of "meers"—Functions of barmaster.]—WAKE *v.* HALL, No. 1259, *ante.*

Evidence of customs.]—*See* COPYHOLDS, Vol. XIII., p. 29, Nos. 258–262.

SUB-SECT. 3. FORFEITURE AND TRESPASS.

See High Peak Mining Customs & Mineral Courts Act, 1851 (c. 94), sched. I. (12), (19), (20); Derbyshire Mining Customs & Mineral Courts Act, 1852 (c. clxiii), sched. I. (12), (19), (20), (21).

1268. Forfeiture for abandonment—Power of barmaster.]—WAKE *v.* HALL, No. 1259, *ante.*

SUB-SECT. 4.—INCIDENTAL RIGHTS OF MINERS.

Rights of way & water.] *See* High Peak Mining Customs & Mineral Courts Act, 1851 (c. 94), sched. I. (1); Derbyshire Mining Customs & Mineral Courts Act, 1852 (c. clxiii), sched. I. (4).

1269. —.]—WAKE *v.* HALL, No. 1259, *ante.*

User of surface.] *See* High Peak Mining Customs & Mineral Courts Act, 1851 (c. 94), sched. I. (5); Derbyshire Mining Customs & Mineral Courts Act, 1852 (c. clxiii), sched. I. (5).

1270. —— Deposit of spoil.]—WAKE *v.* REDFEARN, No. 1257, *ante.*

1271. Use of modern appliances.]—WAKE *v.* HALL, No. 1261, *ante.*

1272. Erection & removal of buildings.]—WAKE *v.* HALL, No. 1261, *ante.*

SUB-SECT. 5.—MINERAL DUTIES.

See High Peak Mining Customs & Mineral Courts Act, 1851 (c. 94), sched. I. (9); Derbyshire Mining Customs & Mineral Courts Act, 1852 (c. clxiii), sched. I. (9).

1273. — Recovery of.]—DEVONSHIRE (DUKE) *v.* STOKES (1897), 76 L. T. 424; 61 J. P. 406; 13 T. L. R. 376; 41 Sol. Jo. 510, D. C.

1274. "Lot" & "cope"—How calculated.]—DEVONSHIRE (DUKE) *v.* STOKES (1897), 76 L. T. 424; 61 J. P. 406; 13 T. L. R. 376; 41 Sol. Jo. 510, D. C.

Sect. 2.—Derbyshire lead mines and mineral customs: Sub-sect. 6. Sect. 3: Sub-sects. 1 & 2.]

SUB-SECT. 6.—MISCELLANEOUS RIGHTS AND DUTIES.

1275. Tithe ore—Payable by special custom.]—BROWN *v.* VERMUDEN (1676), 1 Cas. in Ch. 272; 22 E. R. 797, L. C.

1276. —— —— Not of right.]—Tithe-ore is not due of common right, but by particular custom only (*per* CUR.).—BUXTON *v.* HUTCHINSON (1688), 2 Vern. 46; 23 E. R. 640.

1277. Whether custom exists—Matlock.]—Plff. a rector of Matlock claimed with certain exceptions the tithe of lead ore dug within the parish. An issue directed. The issue amended & new trial ordered. Verdict for defts.—CHAPPEL *v.* WARD (1671), 1 Wood, 113.

1278. Nature of custom — Hartington.] — The rector of Hartington, in the county of Derby, is entitled to the tenth dish of all lead ore dug in the said parish, in lieu of the tithes thereof.—PINDAR *v.* JACKSON (1693), 1 Wood, 315.

1279. —— Manor of Stoney Middleton.]—The vicar of H. in Derbyshire is entitled to 9*d.* a load of nine dishes of all lead ore got from the mines called Pastyre Grove & Bennison's Grove in the Manor of Stoney Middleton in the parish.—BURTON *v.* SPENCER (1733), 2 Wood, 336.

Duty to fence—Mine in course of working.]—*See* High Peak Mining Customs & Mineral Courts Act, 1851 (c. 94), sched. I. (5); Derbyshire Mining Customs & Mineral Courts Act, 1852 (c. clxiii), sched. I. (5).

— — — Abandoned mine.]—*See* Part XIV., Sect. 2, sub-sect. 3, *ante*.

SECT. 3.—GLOUCESTERSHIRE.

SUB-SECT. 1.—GALES.

1280. Meaning of gale.]—The word "gale" is used in many senses, sometimes as the grant itself of a right to mine, sometimes as the licence conferred by the grant, & more frequently as the corporeal property affected by the grant, having a site & capable of being defined by metes and bounds (KEKEWICH, J.).—GREAT WESTERN (FOREST OF DEAN) COLLIERIES CO., LTD. *v.* TRAFALGAR COLLIERY CO., LTD. (1887), 3 T. L. R. 724.

Grant of gales—Limited to free miners.]—*See* Dean Forest (Mines) Act, 1838 (c. 43), s. 23.

1281. —— —— Devisees of free miners.]—JAMES *v.* R., No. 1283, *post*.

1282. —— Time for application—When gale empty.]—According to the Acts & rules regulating the working of mines in the Forest of Dean, a gale or lease is not forfeited by not being worked, unless & until the Crown claims the forfeiture. The Crown is under no obligation to claim the forfeiture. An application for a gale will not be valid, unless the gale is at the time empty. A gale is forfeited & becomes empty when notice that the Crown claims the forfeiture has been given to the galee, & an officer has been ordered to take possession, though possession is not immediately taken. The free miner who applies first after that notice has been given is entitled to the gale.—JAMES *v.* YOUNG (1884), 27 Ch. D. 652; 53 L. J. Ch. 793; 51 L. T. 75; 32 W. R. 981.

1283. — — Priority of application.]—In 1868, D., a free miner of the Forest of Dean, duly applied to have a particular gale granted to him, pursuant to Dean Forest (Mines) Act, 1838 (c. 43), s. 60. The gaveller acceded to his application, & issued a notice that a grant would be made to D. on a day named. Prior to this day rival claimants to the gale started up, & subsequently other claims were made. D. died before any grant was actually made to him. On a petition of right by the devisees of D., claiming the gale for which he had applied:—*Held:* (1) D. had acquired no transmissible interest in the gale, the grant not having been completed in his lifetime; (2) the heir or devisee of a free miner of the Forest of Dean had no *locus standi* to compel the gaveller to make a grant.—JAMES *v.* R. (1877), 5 Ch. D. 153; 46 L. J. Ch. 516; 36 L. T. 903; 25 W. R. 615, C. A.

Annotation:—*As to* (2) **Consd.** James *v.* Young (1884), 27 Ch. D. 652.

1284. —— ——.]—JAMES *v.* YOUNG, No. 1282, *ante*.

—— Limited to three at any one time.]—*See* Dean Forest (Mines) Act, 1838 (c. 43), s. 61.

1285. —— —— Effect of one being "exhausted" —Meaning of "exhausted."]—Where a free miner in the Forest of Dean has had three gales or allotments granted to him, & has surrendered one of such gales on the ground that there was not sufficient coal to make the gale worth working, he will be entitled to another gale equally as if the coal in one of the three gales had been exhausted within Dean Forest (Mines) Act, 1838 (c. 43), s. 61.—ELLWAY *v.* DAVIS (1873), L. R. 16 Eq. 294; 43 L. J. Ch. 75; 21 W. R. 806.

Annotations:—**Refd.** James *v.* R. (1874), 22 W. R. 466; Davis *v.* Adams, Davis *v.* Howard, James *v.* R. (1876), 24 W. R. 944; James *v.* R. (1877), 5 Ch. D. 153.

1286. —— —— ——.]—A free miner can, under Dean Forest (Mines) Act, 1838 (c. 43), s. 61, hold only three gales; but where a free miner has had three gales, & has surrendered one of them on the ground that it contained an insufficient amount of coal to be profitably worked, he having a right to surrender exhausted gales, the surrender is valid, & the free miner is no longer the holder of three gales, so that he can apply to have another gale granted to him.—JAMES *v.* R. (1877), 5 Ch. D. 153; 46 L. J. Ch. 516; 36 L. T. 903; 25 W. R. 615, C. A.

Annotation:—**Refd.** James *v.* Young (1884), 27 Ch. D. 652.

1287. Interest of galee—In nature of real estate.]—The interest of the galee in the mines is not a mere license to work them, but of the nature of real estate, & so capable of occupation (LORD CHELMSFORD).—MORGAN *v.* CRAWSHAY (1871), L. R. 5 H. L. 304; 40 L. J. M. C. 202; 24 L. T. 889; 35 J. P. 596; 23 W. R. 554, H. L.; *affg.* S. C. *sub nom.* CRAWSHAY *v.* MORGAN (1869), L. R. 4 Q. B. 581, Ex. Ch.

Annotations:—**Mentd.** Guest *v.* East Dean Overseers (1872), 41 L. J. M. C. 129; R. *v.* Oxford (Bp.) (1879), 4 Q. B. D. 525; Thursby *v.* Briercliffe with Extwistle (1894), 71 L. T. 849; Winstanley *v.* North Manchester Overseers, [1910] A. C. 7; Associated Newspapers *v.* London City Corpn., [1916] 2 A. C. 429; Bourne *v.* Keane, [1919] A. C. 815.

1288. —— Actual grant delayed by conflicting claims—Interest transmissible by will.]—A free miner of the Forest of Dean applied for an unoccupied gale. The gaveller acceded to the application, duly entered it in his book, & gave notice of his intention to make the grant upon a certain day. Conflicting claims being set up, the actual grant of the gale was delayed, &, in the meantime, the free miner died. The devisees under his will then presented their petition of right praying that the gale might be granted to them in right of their testator:—*Held:* Dean Forest (Mines) Act, 1838 (c. 43), s. 38, applied only to the state of things at the passing of the Act, & the free miner had acquired a title transmissible by will.—

JAMES *v.* R. (1874), L. R. 17 Eq. 502 ; 43 L. J. Ch. 754 ; 30 L. T. 84 ; 22 W. R. 466.

Annotations :—**Consd.** James *v.* Young (1884), 27 Ch. D. 652. **Reld.** *Re* Brain (1874), L. R. 18 Eq. 389 ; Davis *v.* Adams, Davis *v.* Howard, James *v.* R. (1876), 24 W. R. 944.

1289. —— Implied reservation of rights to Crown —Working of underlying seams.] — GOOLD *v.* GREAT WESTERN DEEP COAL CO., GREAT WESTERN DEEP COAL CO. *v.* GOOLD, No. 994, *ante*.

1290. Rights as between adjoining galees—Action for damages—Not barred by statutory remedy.]—Dean Forest (Mines) Act, 1838 (c. 43), & the rules made under it, regulate the use of adjoining mines in the Forest of Dean. By sect. 29, compliance with the rules may be enforced by injunction of the Ct. of Exch., or otherwise in such manner as that ct. shall on application think fit. Pltfs. & defts. were holders of adjoining mines, & the former brought an action for injury sustained by them through the stopping of the engines in deft.'s mine contrary to one of the rules :—*Held :* the specific remedy provided by sect. 29 for enforcing the rules did not exclude the right of action for injuries caused by a breach of them.—ROSS *v.* RUGGE-PRICE (1876), 1 Ex. D. 269 ; 45 L. J. Q. B. 777 ; 34 L. T. 535 ; 24 W. R. 786.

Annotations :—**Folld.** Brain *v.* Thomas (1881), 50 L. J. Q. B. 662. **Mentd.** Pulsford *v.* Devenish, [1903] 2 Ch. 625.

1291. —— — · · —.]—Dean Forest (Mines) Act, 1838 (c. 43), & the rules made under it, regulate the use of adjoining gales in the Forest of Dean. By sect. 29 compliance with the rules may be enforced " by or on behalf of Her Majesty, her heirs or successors, or by any other person or persons, by injunction of Her Majesty's Ct. of Exch. or otherwise, in such manner as the said ct. shall, on application, think fit." Pltfs. brought an action for damages against defts., as owners of adjoining gales in the Forest of Dean, for injury sustained by pltfs. through the stopping of the engines in defts.' gale contrary to one of the rules. Some of defts. were mtgors. in possession of & working the gale. The other defts. were mtgees. who had never been in possession of or worked it : —*Held :* (1) with respect to defts. who were mtgors., the specific remedy given by sect. 29, for enforcing compliance with the rules, did not exclude pltfs.' right to recover damages for injuries caused to them by an antecedent breach of the rules ; (2) the mtgees. were not liable in the action.—BRAIN *v.* THOMAS (1881), 50 L. J. Q. B. 662, C. A.

Annotation :—*Generally*, **Mentd.** Fraser *v.* Fear (1912), 107 L. T. 423.

1292. Rights of owners of inclosed land—Compensation for subsidence of surface—Jurisdiction of deputy gaveller.]—By Dean Forest (Mines) Act, 1838 (c. 43), s. 68, it is enacted that every free miner & other person who is or may be entitled to any gale, pit, level or work within any enclosed land of the Hundred of St. Briavels, shall be, & he is hereby required to pay to the owners of any such enclosed lands full & fair compensation for any surface damage by the opening or sinking of any gale, pit, level or work therein or thereon, which compensation shall be ascertained by the gaveller or deputy gaveller. Pltf. being the owner of a house standing on an open common within the Hundred, but adjoining on one side a yard of pltf. enclosed by a wall, deft., a free miner, in working his gale, got the coal from under the house, in consequence of which a subsidence took place, the foundation of the house sank & the walls cracked :—*Held :* (1) deft. was liable to an action for causing a subsidence of the surface ; but (2) the damage so done to pltf.'s house was not "surface damage" within sect. 68, & (3) the deputy gaveller had no jurisdiction to award compensation.—ALLAWAY *v.* WAGSTAFF (1859), 4 H. & N. 681 ; 29 L. J. Ex. 51 ; 33 L. T. O. S. 273 ; 157 E. R. 1008.

—— **Surface damage.**]—*See* Dean Forest (Mines) Act, 1838 (c. 43), s. 68, & Dean Forest (Amendment) Act, 1861 (c. 40), s. 16.

Forfeiture of gales.]—*See* Dean Forest (Mines) Act, 1838 (c. 43), s. 20.

1293. —— Relief by court—Limitation of time.] —The gaveller of the Forest of Dean granted a gale or colliery to J. B., a free miner, he paying for all coal brought out 2*d.* per ton, & so working the colliery as to gain 24,000 tons a year : Provided that if the coal gotten should not amount to that quantity, a minimum rent of £200 should be paid : Provided also, & the grant was made upon the further condition, that the gale should be worked in manner therein mentioned. The gale not being worked, the galee paid the minimum rent for several years ; but upon arrears of rent becoming due, the gaveller declared the gale forfeited, & entered into possession thereof. Ten months after the declaration of forfeiture the galee tendered the arrears of rent, which were refused :—*Held :* (1) The grant was properly made upon conditions, one of which was the payment of rent ; (2) upon breach of that condition by non-payment there had been a legal forfeiture & a right of the Crown to re-enter ; & (3) the arrears not having been tendered, nor any proceedings taken within six months, there was no power in the ct. to relieve against the forfeiture.—*Re* BRAIN (1874), L. R. 18 Eq. 389 ; 44 L. J. Ch. 103 ; 38 J. P. 773 ; *sub nom. Ex p.* BRAIN, 31 L. T. 17 ; 22 W. R. 867.

Annotations :—*Generally*, **Reld.** A.-G. of Victoria *v.* Eltershank (1875), L. R. 6 P. C. 354 ; Davis *v.* Adams, Davis *v.* Howard, James *v.* R. (1876), 24 W. R. 944.

1294. —— Whether re-entry by Crown necessary.]—Where a gale is forfeited for non-user, under the provisions of the Forest of Dean Acts, the forfeiture is complete on service of the notice of forfeiture without actual re-entry on the part of the Crown.—*Ex p.* YOUNG & GRINDELL (1880), 50 L. J. Ch. 221 ; 43 L. T. 725.

Annotation :—**Folld.** James *v.* Young (1884), 27 Ch. D. 652.

1295. —— —— .]—JAMES *v.* YOUNG, No. 1282, *ante*.

—— **Petition of right against.**]—*See* CROWN PRACTICE, Vol. XVI., p. 238, Nos. 334, 335.

Injunction against granting gales.]—*See* INJUNCTION, Vol. XXVIII., p. 531, No. 1388.

SUB-SECT. 2.—RENTS AND ROYALTIES.

See Dean Forest (Mines) Act, 1838 (c. 43) ; Dean Forest (Amendment) Act, 1861 (c. 40) ; & Dean Forest (Mines) Act, 1871 (c. 85).

1296. Rights of Crown.]— (1) Comrs. appointed under an Act of Parliament, to set out the metes & bounds of mines & quarries in the Forest of Dean, & to fix the rent to be paid for same :—*Held :* under the terms of the Act, to have no power to compel a miner to pay, in money, for by-gone workings, or to exclude him from the award if he refused to make such payment.

The right to relief in respect of past working of the mine, allowing the award to stand, is purely a legal question ; but it is a question in which perhaps the aid of this ct. is necessary as to the account which may be taken (WIGRAM V.-C.).

(2) Comrs. appointed by an Act of Parliament to determine the respective rights of the Crown & the customary miners on Crown lands, had made

Sect. 3.—*Gloucestershire: Sub-sect.* 2.]

an award, giving a benefit to a miner, but had required such miner to submit to terms which they had no power to impose, & which the miner did not afterwards fulfil:—*Held:* after the time limited by the Act for making the award had expired, ct. would not set aside the award at the suit of the Crown, as it could not then restore the miner to his rights under the Act.

It seems, I think, clear that the recognised right of the Crown was . . . to take a fifth share of the produce of the mines. It does not, however, appear to have been customary for the Crown to exercise this strict right, but the right of the Crown was usually satisfied by some composition agreed upon between the officers of the Crown & the miner, & this composition appears in some cases to have been almost nominal (WIGRAM, V.-C.).—A.-G. *v.* JACKSON (1846), 5 Hare, 355; 67 E. R. 950.

1297. —— Duty of forester to account.]—Defts. claimed, as woodwards or foresters of the Crown, a right to grant to certain free miners gales or licences for working stone quarries in uninclosed lands, part of the Forest of Dean, the soil whereof was in the Crown, to exact gale fees or rents in respect thereof, & to apply same to their own use without accounting to the Crown:—*Held:* (1) independently of the considerations that the alleged right, had it existed, would have been extinguished by Dean Forest Mines Act, 1838 (c. 43), & the evidence failed to establish the exercise of any such right in point of fact, no such right could exist in point of law; for, with regard to the free miners it was a claim to subvert the soil & carry away the substratum without stint or limit, which could not be established (*a*) by custom, for it was a *profit à prendre*, which cannot be claimed *in alieno solo*; nor (*b*) by prescription, for prescription to be good must be both reasonable & certain, & this was neither; nor (*c*) by presuming a lost grant for prescription presupposes a grant, & if such a grant cannot be presumed before, *à fortiori* it cannot after the period of legal memory; & a claim which cannot lawfully be made upon one of these foundations cannot be substantiated by a user, however long, & is not saved by any statute of limitations; (2) with regard to defts. besides the foregoing objections, they could not show a valid prescription exempting them, as officers of the Crown, from accounting for the proceeds of the Crown's soil which they had sold.—A.-G. *v.* MATHIAS (1858), 4 K. & J. 579; 27 L. J. Ch. 761; 31 L. T. O. S. 367; 4 Jur. N. S. 628; 6 W. R. 780; 70 E. R. 241.

Annotations:—As to (1) **Reld.** Johnson *v.* Barnes (1872), L. R. 7 C. P. 592; De la Warr *v.* Miles (1881), 17 Ch. D. 535; Saltash Corpn. *v.* Goodman (1881), 29 W. R. 639; Smith *v.* Andrews, [1891] 2 Ch. 678; Hough *v.* Clark & Hall (1907), 23 T. L. R. 682.

1298. Recovery of galeage rents—Past workings.]—A.-G. *v.* JACKSON, No. 1296, *ante*.

1299. —— Action for account.]—A.-G. *v.* JACKSON, No. 1296, *ante*.

1300. —— Action by gaveller—Miner neglecting to work.]—The comrs. appointed under Dean Forest Mines Act, 1838 (c. 43), for regulating the working of the mines & quarries in the Forest of Dean, by their award directed that a tonnage duty of 2*d.* per ton should be payable by each free miner, so that there should be wrought & gained by him annually no less than 1,200 tons, but that if a less quantity than 1,200 tons were got, then the free miner should pay the sum of £10 annually:—*Held:* they had power to make such an award, & an action of debt would lie by the gaveller against a free miner for the galeage rent so due in respect of a mine out of which the free miner had neglected to get anything within the year.—SEYMOUR (LORD) *v.* MORRELL (1851), 17 L. T. O. S. 139.

Enforcement of award by Crown.]—*See* ARBITRATION, Vol. II., p. 584, No. 2184.

1301. Money payment in lieu of royalties—Mine then freehold.]—Where by virtue of a custom certain persons called free miners were at liberty to apply to the gaveller of the hundred of St. Briavels to allot them a particular spot of land for a coal pit; & when the spot was agreed upon, the gaveller cut a turf, & having cut a stick, so many notches were cut in it as there were to be partners in the intended work, & also one for the King & one for the gaveller; that the stick was fastened down with pegs on the spot where the turf had been pared off, & the turf laid down again, after which that spot was considered appropriated; when coal was found a money payment was made to the King in lieu of his share of the coal:—*Held:* a share in a coal pit so appropriated was freehold.—DOE d. THOMSON *v.* PEARCE (1812), Peake, Add. Cas 242; 170 E. R. 258.

MINISTERS.

See ECCLESIASTICAL LAW.

MINISTRY AND CABINET.

See CONSTITUTIONAL LAW.

MINORS.

See CRIMINAL LAW AND PROCEDURE; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; INFANTS AND CHILDREN; SETTLEMENTS.

MINT.

See CONSTITUTIONAL LAW.

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MISPRISION OF FELONY.

See CRIMINAL LAW AND PROCEDURE.

MISPRISION OF TREASON.

See CRIMINAL LAW AND PROCEDURE.

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